

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 22, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2963

Cir. Ct. No. 2008CV712

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. STEVEN KOTECKI,

PETITIONER-APPELLANT,

v.

**DAVID H. SCHWARZ, ADMINISTRATOR,
DIVISION OF HEARINGS AND APPEALS,**

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
THOMAS R. COOPER, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Steven Kotecki appeals from an order affirming the Administrator of the Division of Hearings & Appeals (“Division”) order affirming the revocation decision of the Administrative Law Judge (“ALJ”) revoking Kotecki’s probation. The issues are whether Kotecki was denied due

process of law because his witnesses were precluded from testifying, and whether there was substantial evidence supporting the violation resulting in Kotecki's revocation. We conclude that the ALJ's refusal to allow testimony from Kotecki's witnesses who supported alibis for alleged violations that were dismissed, was reasonable and thus not a denial of Kotecki's due process rights, and that the violation found by the ALJ was supported by substantial evidence. Therefore, we affirm.

¶2 Kotecki was convicted of bail-jumping. The circuit court withheld sentence and imposed a three-year term of probation. The Department of Corrections ("Department") moved to revoke Kotecki's probation for violating the condition that prohibited him from driving past the residence of his former wife and the Koteckis' son, Patrick.¹ Although the ALJ revoked Kotecki's probation, the Division reversed based on alibi testimony that Kotecki was elsewhere when Patrick claimed Kotecki was allegedly driving past the residence. The Department again moved to revoke Kotecki's probation alleging eight violations. After dismissing seven of the alleged violations, the ALJ found that Kotecki had once violated the condition of probation that prohibited him from driving past his former wife's residence on 4453 South Howell Avenue. The ALJ revoked Kotecki's probation and the Division affirmed the revocation decision. Kotecki sought judicial review; the circuit court affirmed the Division's decision. Kotecki appeals.

¹ To avoid confusion because they share the same surname, we refer to appellant Steven Kotecki as Kotecki, and his son Patrick, the principal witness who testified against him, as Patrick.

¶3 One of the conditions of probation prohibited Kotecki from having any contact with his former wife, Linda. Specifically, Kotecki was prohibited from driving past her residence at 4453 South Howell Avenue; Kotecki was prohibited from driving on South Howell Avenue between Van Norman Street and Martin Avenue. This is the condition that Kotecki was alleged to have violated previously, and the violation on which the current revocation is based. The previous allegations and the current violation were supported principally by Patrick's testimony that he saw Kotecki and/or Kotecki's vehicle drive past the residence on Howell Avenue. The previous allegations resulted initially in revocation; however, that revocation decision was reversed by the Division based on alibi witnesses that placed Kotecki elsewhere, notwithstanding Patrick's testimony that he saw Kotecki's vehicle drive past the house, although he never claimed to have seen Kotecki's face.

¶4 The current allegations were similar. The Department alleged eight violations: one for driving past the Howell Avenue residence, one for a continuing course of conduct relating to contacting Linda, two for stalking, and four for driving past Linda's subsequent residence no longer on Howell Avenue. Patrick was the principal witness against Kotecki for many of these alleged violations. The ALJ dismissed the continuing contact charge and the charges that Kotecki drove past Linda's subsequent residence: the latter because that specific address was not listed as precluded in the conditions of his probation. The ALJ also dismissed the stalking allegations as the conduct presented did not constitute stalking. The only alleged violation on which Kotecki's probation was revoked was his driving past Linda's house at the South Howell address on June 29, 2007. Patrick was the witness who testified in support of that allegation.

¶5 Judicial review of revocation decisions by certiorari is limited to:

(1) Whether the board kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.

Van Ermen v. DHSS, 84 Wis. 2d 57, 63, 267 N.W.2d 17 (1978). An appellate court's scope of review in certiorari proceedings is the same as that of the circuit court. See *State ex rel. Palleon v. Musolf*, 117 Wis. 2d 469, 473, 345 N.W.2d 73 (Ct. App. 1984), *aff'd*, 120 Wis. 2d 545, 356 N.W.2d 487 (1984).

We may not substitute our judgment for that of the division; we inquire only whether substantial evidence supports the division's decision. If substantial evidence supports the division's determination, it must be affirmed even though the evidence may support a contrary determination. "Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion."

Von Arx v. Schwarz, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994) (citations omitted). We review the evidence to ensure that the decision was not arbitrary and capricious. See *State ex rel. Solie v. Schmidt*, 73 Wis. 2d 76, 79-80, 242 N.W.2d 244 (1976). We review the agency decision, not the decision of the circuit court. See *Kozich v. Employe Trust Funds Bd.*, 203 Wis. 2d 363, 368-69, 553 N.W.2d 830 (Ct. App. 1996).

¶6 Kotecki's first challenge is that he was denied due process of law because his witnesses were not allowed to testify. A probationer has the right to present defense witnesses and evidence, however, a probationer is not entitled to the full panoply of rights afforded the accused in a criminal prosecution. See *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

¶7 Kotecki had witnesses who were prepared to offer alibi testimony about several of the allegations; none of these alleged alibi witnesses however, were offering testimony about the remaining allegation that proceeded to a decision; the other allegations were dismissed before Kotecki began to present his defense. The ALJ was concerned about timing in that six cases were scheduled for hearing that day and Kotecki's case was taking longer than expected. After dismissing all but one of the allegations, the ALJ told the parties that the additional witnesses, Kotecki's six alibi witnesses, would not be allowed to testify. The record is not clear on the reason for precluding these witnesses from testifying because Kotecki did not raise this objection at the hearing. The record supports the ALJ's ruling to release the witnesses before they testified because: (1) the allegations on which they were offering alibi testimony had been dismissed; (2) none of these witnesses had alibi testimony directly on the June 29, 2007 allegation that was being presented; and (3) the ALJ was pressed for time as there were other cases scheduled for hearings that day.

¶8 Here, the only allegation that was fully heard was that involving the drive-by incident on June 29, 2007. None of Kotecki's proposed witnesses had any direct testimony to offer on that incident; Kotecki sought to present these witnesses to impeach Patrick's credibility in that they offered testimony that contradicted his on other alleged violations. Kotecki sought to show that Patrick's credibility was suspect on those allegations, thus, Patrick's credibility could be impeached on the current allegation.

¶9 We decline to reverse the ALJ's decision instructing Kotecki to release his prospective witnesses. First, the proposed witnesses did not have testimony regarding the alleged violation; their testimony would have been offered simply to impeach Patrick's testimony on other allegations that had been

dismissed. Consequently, those witnesses could have been precluded from testifying on relevance grounds. *See* WIS. STAT. § 904.03 (2007-08).² Second, the ALJ's consideration of administrative concerns, such as managing and scheduling was properly within her purview when those rulings do not impair a party's right, as demonstrated by the former reason. We consequently deny Kotecki's request for a remand to allow these peripheral witnesses to testify in an attempt to impeach Patrick on other matters.

¶10 Kotecki's second challenge is that the evidence was insufficient and one-sided in favor of the Department. "Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion." *Von Arx*, 185 Wis. 2d at 656. Stated otherwise, substantial evidence is evidence on which "reasonable minds could arrive at the same conclusion as the agency." *RURAL v. Public Serv. Comm'n*, 2000 WI 129, ¶20, 239 Wis. 2d 660, 619 N.W.2d 888.

¶11 Patrick testified that on June 29, 2007, he saw his dad drive past the house where he (Patrick) and his mother (Linda) lived on South Howell. Patrick was walking down that street and saw his dad's minivan driving southbound on South Howell. Patrick testified that he was waving and yelling at the minivan to "let [Kotecki] know that I saw him." Patrick then telephoned his mother on his cell phone and watched the van turn left. Eventually, Patrick testified that he saw the van:

yield[] at a yield sign and then it swerved over to the left side of the street and this man, who is my dad, decided that

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

he had ... when he had his window rolled down, yelled something at me, smiling as he would drive by on the wrong side of the street.

Patrick testified that he saw his dad from a distance of about six to eight feet, and that he saw his dad's Honda Odyssey with the license plate URV-135. On cross-examination, Patrick admitted that he could not prove the precise time he telephoned his mother to tell her that he had allegedly seen Kotecki, and that he had memorized Kotecki's license plate, demonstrating that he may have been lying about actually seeing the license plate. He also admitted that he was running toward his dad's car, which Kotecki mentioned in closing argument as questionable conduct for someone who was allegedly afraid of Kotecki, as Patrick had implied in unrelated testimony.

¶12 Kotecki testified, denying that he had driven by the residence as alleged. He also claimed that Patrick's two-month delay in reporting this alleged violation hampered his ability to find an alibi witness.³ Nevertheless, Patrick's testimony constitutes substantial evidence required to support the revocation decision.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

³ Patrick did not report this alleged violation until over thirty days after it had allegedly occurred. Kotecki was not notified of this alleged violation until two months after it occurred.

