

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 19, 2002**

Cornelia G. Clark  
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. 02-0812  
STATE OF WISCONSIN**

**Cir. Ct. No. 00-CF-105**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN EX REL. JOSEPH J. SAVAGE,**

**PETITIONER-APPELLANT,**

**v.**

**DAVID H. SCHWARZ, ADMINISTRATOR, DEPARTMENT OF  
CORRECTIONS, PROBATION AND PAROLE,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for St. Croix County:  
SCOTT R. NEEDHAM, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Joseph Savage appeals an order affirming his probation revocation and quashing his writ of certiorari. The Department of Corrections began proceedings to revoke Savage's probation after he violated several conditions. At Savage's revocation hearing, the administrative law judge

(ALJ) found Savage had violated conditions of his probation, but determined a program to which Savage had already been accepted was a viable alternative to revocation. The alternative program, however, was in Minnesota and the ALJ concluded he did not have the authority to transfer Savage to an out of state program. The ALJ determined there was no other appropriate alternative to revocation and revoked Savage's probation. Savage appealed to the Division of Hearings and Appeals, which upheld the ALJ's decision, but determined the Minnesota program was not a viable alternative to Savage's revocation. Savage filed for certiorari review, and the trial court affirmed the division's decision.

¶2 On appeal, Savage argues the division's decision is arbitrary, oppressive and unreasonable because it did not explain why the Minnesota program was not a reasonable alternative to revocation. He further contends the evidence does not support the division's decision that there were no reasonable alternatives to revocation. We determine the division's decision was not arbitrary, oppressive or unreasonable and therefore affirm the judgment.

## **BACKGROUND**

¶3 Savage was convicted of attempted burglary in July 2000. He was sentenced to five years' incarceration and two and one-half years' extended supervision. The court stayed this sentence and placed Savage on probation for seven years. His probation conditions included 120 days in jail. In addition, the court required him to complete and follow the recommendations from an Alcohol and Other Drug Assessment (AODA) and a "male issues" assessment.

¶4 Savage failed to report to jail or to his probation agent. He also did not complete his treatment requirements. He was arrested in Duluth, Minnesota, in February 2001 for a hit-and-run violation and was turned over to the Wisconsin

Department of Corrections. At the time of his arrest, Savage was facing a criminal charge in St. Croix County and was under investigation for possession of methamphetamine in Duluth.

¶5 The DOC moved to revoke Savage's probation, alleging five condition violations. At his revocation hearing, Savage admitted to three of the violations, specifically that he failed to report to jail, failed to report to his probation agent, and that he had used methamphetamine. In addition, the ALJ determined Savage had failed to attend his "male-issues" group.

¶6 At the hearing, Savage asked to be placed in the Minnesota Teen Challenge Program for treatment of his drug addiction. The ALJ said Savage was a good candidate for the program and determined the program would provide Savage with the necessary supervision and treatment. However, the ALJ concluded he did not have the authority to send Savage to the program because it was in Minnesota and required the approval of that state's authorities. Because he found no other alternative to revocation, the ALJ revoked Savage's probation.

¶7 Savage appealed to the Division of Hearings and Appeals, arguing the ALJ had incorrectly concluded he had no authority to place Savage in the Minnesota program. The division affirmed, concluding even if Savage could be placed in the program, it was not a viable alternative to revocation. The division administrator ruled:

I am not convinced that the Minnesota Teen Challenge Program is a viable alternative to the revocation of Mr. Savage's Wisconsin probation. This is true even if I conclude that he is eligible for admission to the program and that the requisite approval can be obtained from both Wisconsin and Minnesota authorities. His violations are significant and raise substantial questions about his commitment to supervision and the appropriateness of continued community supervision. They suggest that he

does not take supervision seriously and give me little reason to believe that he would cooperate with supervision in the future or that he would comply with any rules promulgated by a treatment program. In the final analysis, I find that he is simply not a good risk for continued community supervision. I also believe that a continuation of his supervision, even under the terms and conditions proposed on this appeal, would unduly depreciate the seriousness of these violations and make a mockery of the probation process. As a result, I agree with the ultimate conclusion that the violations justify revocation of his probation and I sustain the underlying order.

¶8 Savage filed a writ of certiorari with the trial court, which affirmed the division's decision. He now appeals.

### DISCUSSION

¶9 In a review of a decision to revoke probation, we defer to the decision of the Division of Hearings and Appeals, applying the same standard as the circuit court. *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶10, 250 Wis. 2d 214, 640 N.W.2d 527. Our review is limited to the following questions: (1) whether the division kept within its jurisdiction; (2) whether the division acted according to law; (3) whether the division's actions were arbitrary, oppressive or unreasonable and represented its will rather than its judgment; and (4) whether the evidence was such that the division might reasonably make the decision in question. *Id.* We may not substitute our judgment for that of the division; we inquire only whether substantial evidence supports the division's decision. *Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994). If substantial evidence supports the division's determination, it must be affirmed even though the evidence may support a contrary determination. *Id.* "Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion." *Id.*

¶10 Savage argues the division erroneously exercised its discretion and that the result was arbitrary, oppressive and unreasonable. Specifically, he contends the division offered no explanation why the Minnesota Teen Challenge Program was not a feasible alternative to revocation. He correctly notes that in the exercise of its discretion, the division must at least consider the feasibility and availability of alternatives to revocation, and these alternatives cannot be rejected without some logical explanation. *See State ex rel. Warren v. Schwarz*, 211 Wis. 2d 710, 726, 566 N.W.2d 173 (Ct. App. 1997), *aff'd*, 219 Wis. 2d 615, 579 N.W.2d 698 (1998).

¶11 Savage contends the division's decision fails to explain its rejection of the Minnesota Teen Challenge Program and instead was improperly explained by reasons favoring revocation. *See Van Ermen v. H&SS Dept.*, 84 Wis. 2d 57, 64-65, 267 N.W.2d 17 (1978). He further argues that an ab initio review of the record, which we are allowed to conduct if we determine the division erroneously exercised its discretion, would reveal no basis to support the division's conclusion there was no viable alternative to revocation. *See State ex rel. Macemon v. Christie*, 216 Wis. 2d 337, 340-41, 576 N.W.2d 84 (Ct. App. 1998). We disagree.

¶12 The division's decision was reasonable and supported by substantial evidence. The district administrator assumed Savage was eligible for the program and there were no jurisdictional barriers to his entry. He disagreed, however, with the ALJ's determination that Savage was a good candidate for the program, and concluded it was not a viable alternative to revocation for Savage. The administrator rejected the program because he determined that Savage's repeated probation violations called into question his commitment and ability to cooperate with community supervision and its applicable rules, something that would be necessary in the program. In addition, the administrator found Savage's behavior

made him a poor risk for continued community supervision. These findings are reasonable in light of the record.

¶13 Further, the division's decision is supported by substantial evidence. The record reveals Savage has serious drug problems, a lengthy criminal record, and that by his own admission committed several probation violations and has failed to comply with previous opportunities for community supervision. While we acknowledge the record also presents evidence that Savage is committed to receiving treatment in the Minnesota Teen Challenge Program, we must defer to the division's characterization of the evidence. *See Von Arx*, 185 Wis. 2d at 656. The division administrator could reasonably conclude the program was not a viable alternative to Savage's probation revocation. Because we conclude the division's decision was reasonable and supported by the evidence, we need not conduct an ab initio review of the record. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

*By the Court.*—Order affirmed.

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

