

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 30, 2003**

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. 02-0813  
STATE OF WISCONSIN**

**Cir. Ct. No. 01-CV-1580**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN EX REL. SCOTT RUBADEAU,**

**PETITIONER-APPELLANT,**

**v.**

**DAVID H. SCHWARZ, DIVISION OF HEARINGS AND  
APPEALS, AND JON LITSCHER, DEPARTMENT OF  
CORRECTIONS,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Racine County:  
EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Scott Rubadeau has appealed pro se from a trial court order denying a petition for a writ of certiorari and affirming a decision of

the administrator of the Division of Hearings and Appeals (the Division) revoking Rubadeau's probation. We affirm the trial court's order.

¶2 Rubadeau was convicted of possession of a controlled substance and placed on probation in January 2000. In March 2001, probation revocation proceedings were initiated against him.

¶3 The notice of violation served on Rubadeau listed four alleged violations of his rules of probation. A copy of the notice of violation signed by Rubadeau on March 27, 2001, is in the record. The second alleged violation states that "[o]n or about 3-19-01 the aforesaid did have access to an AR-15 assault rifle. This behavior is in violation of probation rule #12 signed by the aforesaid on 3-27-00." In material part, probation rule #12 prohibited Rubadeau from purchasing, possessing, owning or carrying any firearm or weapon. The words "have access to" in the alleged violation were handwritten over the crossed-out, typed words "have in his possession."

¶4 Following a revocation hearing on May 16, 2001, the administrative law judge (ALJ) found that Rubadeau committed all four of the violations alleged in the notice of violation. In regard to the second violation, the ALJ relied on evidence indicating that on March 19, 2001, Rubadeau's probation agent and a police officer conducted a search of Rubadeau's parents' home, which was the approved residence for Rubadeau. The evidence indicated that during a search of Rubadeau's bedroom, an empty ammunition clip for an AR-15 assault rifle was discovered. The evidence further indicated that during a search of the basement of the home, the searchers found several gun cases, including one with Rubadeau's name on it which contained an AR-15 assault rifle and two more magazines

identical to the clip recovered from Rubadeau's bedroom. The searchers also recovered a hunting rifle from one of the cases.

¶5 The ALJ noted that in his written statement and his testimony, Rubadeau contended that he had given the rifles to his father two years ago, but conceded that the firearms were kept in the basement unlocked where he had access to them. The ALJ found that Rubadeau's "possession of the AR-15 clip and access to the AR-15 within his dominion and control" constituted a violation of his probation rules prohibiting his possession of firearms.

¶6 The administrator of the Division upheld the ALJ's decision, finding that the evidence established that Rubadeau possessed weapons, including a hunting rifle and an assault rifle. The administrator noted that Rubadeau owned the weapons before he was placed on probation, that they were kept in the basement of the residence he shared with his parents, and that he had unrestricted access to them. The administrator concluded that Rubadeau's claim that the rifles were given to his father did not alter his access to the weapons or his opportunity to exercise dominion and control over them. The administrator stated that "the fact that nothing was done to limit Mr. Rubadeau's access to those firearms" caused him to conclude that Rubadeau's actions in giving them to his father were simply an attempted sham to avoid his obligations under the probation rules.

¶7 On certiorari review, the trial court upheld the revocation. On review of a probation revocation decision, this court defers to the Division's determinations. *Von Arx v. Schwarz*, 185 Wis. 2d 645, 655, 517 N.W.2d 540 (Ct. App. 1994). Our scope of review is limited to the following issues: (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.*

¶8 Rubadeau's initial argument is that the trial court failed to provide an adequate explanation of its reasons for affirming the Division's decision. He asks this court to remand the matter to the trial court with instructions to append an opinion to its decision.

¶9 Rubadeau's request is denied. On appeal from a judgment or order entered on certiorari, we review the agency's decision, and our scope of review is identical to that of the trial court. *State ex rel. Staples v. DHSS*, 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987). Because we decide the matter independently of the trial court's decision, remand for further explication of the trial court's reasoning is unnecessary. *See id.*

¶10 Rubadeau's next contention is that he was denied due process when the words "have in his possession" were changed to "have access to" an AR-15 assault rifle. He contends that he was not notified of this change until the date of the final revocation hearing, and that he was therefore unable to prepare to rebut the charge.

¶11 It is unclear from the record when the handwritten alteration to the notice of violation was made, and when Rubadeau was notified of the change. However, even assuming arguendo that Rubadeau was unaware of the alteration until the date of the hearing, any objection to the alteration was waived.

¶12 The record reveals that at the commencement of the revocation hearing, the ALJ pointed out that his copy of the notice of violation contained

some handwritten changes, including having the words “in his possession” crossed off of the second alleged violation, and the words “access to” written in. The ALJ then asked Rubadeau’s counsel if those changes were on his copy, and he replied that they were. Rubadeau’s counsel never objected to the change, nor did he claim that he was surprised or ask for a continuance to better prepare to address the charge as altered. Because no objection was made to the alteration at the hearing, and because a determination of when Rubadeau became aware of the alteration would require factual determinations, any issue related to the alteration is waived. *See Saenz v. Murphy*, 162 Wis. 2d 54, 63, 469 N.W.2d 611 (1991), *overruled on other grounds by State ex rel. Anderson-El v. Cooke*, 2000 WI 40, ¶¶29-31, 234 Wis. 2d 626, 610 N.W.2d 821 (explaining that an exception to the waiver rule exists for issues that present only a question of law). *See also Santiago v. Ware*, 205 Wis. 2d 295, 324-25, 556 N.W.2d 356 (Ct. App. 1996). We therefore will not address Rubadeau’s challenge to the amended notice of violation any further.<sup>1</sup>

¶13 Rubadeau also argues that even if he had access to the rifles in his parents’ basement, this did not constitute possession of a weapon in violation of his rules of probation. He contends that the Division’s determination that he

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<sup>1</sup> In his reply brief, Rubadeau contends that in his appeal to the Division and his petition for a writ of certiorari, his attorney asserted that due process was violated by the alteration in the wording of the charge. This court has examined the petition for a writ of certiorari and counsel’s arguments on appeal to the Division and in the circuit court. Counsel did not challenge the propriety of the alteration or the timeliness of notice of the alteration in his brief to the Division. In addition, we do not construe counsel’s circuit court brief as claiming that Rubadeau’s due process right to notice of the charges was violated when the charge was altered. Counsel’s primary arguments were that “access to” a weapon did not constitute possession of a weapon in violation of Rubadeau’s rules of probation, and that any construction of the probation rules to prohibit mere access to a weapon constituted an ex post facto change in the rules of probation. In any event, because no objection to the alteration of the wording of the charge was made at the time of the revocation hearing, the issue was waived.

violated probation rule #12 by having access to the rifles thus constituted an ex post facto change to his rules of probation. We disagree.

¶14 As set forth above, Rubadeau's probation rules prohibited him from possessing a firearm. In upholding the ALJ's decision, the Division administrator found that Rubadeau possessed weapons, including the assault rifle and hunting rifle, in violation of this rule.

¶15 The State has the burden of establishing an alleged probation violation by a preponderance of the evidence at the revocation hearing. *Von Arx*, 185 Wis. 2d at 655. However, on an appeal challenging the revocation decision, the probationer bears the burden of proving that the decision was arbitrary and capricious. *Id.* A decision is not arbitrary or capricious if it represents a proper exercise of discretion. *Id.* at 656. Discretion is properly exercised if the decision maker engages in a reasoning process based on the facts of record and reaches a conclusion based on a logical rationale and founded on proper legal standards. *Id.* This court may not substitute its judgment for the Division's decision to revoke a probationer, and must uphold that decision if it is supported by substantial evidence, even if the evidence would also support a contrary determination. *Id.* Substantial evidence is evidence that is relevant, credible, probative, and of a quantity that a reasonable fact finder would consider sufficient to support a conclusion. *Id.*

¶16 Substantial evidence supports the Division's finding that Rubadeau possessed firearms in violation of probation rule #12. As set forth above, both an assault rifle and a hunting rifle were found in the basement of Rubadeau's residence. The assault rifle was in an unlocked case which had Rubadeau's name on it. Ammunition clips found with the assault rifle were identical to an

ammunition clip found in Rubadeau's bedroom. Although Rubadeau testified that he had given the assault rifle to his father, he acknowledged that he knew the rifles were in the basement, that they were in plain view and not locked up, and that he had access to them. Combined with the evidence that the rifles were in a common area of the house, no basis exists to disturb the finding that Rubadeau had unrestricted access to the weapons and the opportunity to exercise dominion and control over them.<sup>2</sup> The Division reasonably found that this constituted possession of a firearm in violation of Rubadeau's rules of probation.

¶17 As a final matter, we note that in his reply brief Rubadeau argues that the Division failed to adequately consider mitigating factors and alternatives to revocation before revoking him. This issue was not raised in his brief-in-chief. Issues raised for the first time in a reply brief need not be addressed by this court. *Estate of Bilsie*, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981).

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

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<sup>2</sup> In his reply brief, Rubadeau contends that his father removed the firing pin from the assault rifle and that it was impossible to use the rifle without it. This evidence is not in the record and will not be considered by this court.

