COURT OF APPEALS
DECISION
DATED AND FILED

February 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1223 **Cir. Ct. No. 01 CV 5099**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN EX REL.
ROBERT KOSZEWSKI,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ, DIVISION OF
HEARINGS & APPEALS,

RESPONDENT-RESPONDENT.

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

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Robert Koszewski appeals from an order of the circuit court affirming the decision by the Division of Hearings & Appeals to revoke his probation. Koszewski claims: (1) the department engaged in arbitrary and capricious conduct, demonstrating its will and not its judgment; (2) the

Administrative Law Judge (ALJ) and division administrator erroneously considered results of a polygraph exam; (3) the ALJ improperly denied Koszewski's pre-hearing motions; and (4) the evidence was insufficient to justify revocation. Because we resolve each claim in favor of upholding the order, we affirm.

BACKGROUND

¶2 On July 6, 1992, Koszewski entered an ***Alford***[1] plea to one count of first-degree sexual assault. He was sentenced to ten years in prison. A year later, the sentence was modified to ten years in prison, imposed and stayed, and ten years probation. In October 2000, the Department of Corrections initiated probation revocation proceedings. A hearing was conducted to address the DOC's contention that Koszewski had violated his probation. On March 16, 2001, an ALJ concluded that Koszewski had violated his probation by buying and possessing alcohol, possessing a pornographic magazine, and being terminated from a sexual offender treatment program because he continued to deny that he sexually assaulted the victim. The ALJ, however, did not recommend revocation; instead, he concluded that appropriate alternatives were available to respond to the probation violations.

¶3 The division administrator, however, reversed the ALJ's decision on revocation and concluded that Koszewski's probation should be revoked. Koszewski filed a petition for a writ of certiorari with the circuit court. The circuit

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

court issued an order affirming the division's revocation decision. Koszewski now appeals.

DISCUSSION

A. Arbitrary and Capricious/Sufficiency of the Evidence.

¶4 Koszewski contends that the division acted arbitrarily and capriciously and that the decision to revoke his probation represented the will of the division, rather than reasoned judgment. He also contends the evidence was insufficient to support the revocation decision. We disagree with both contentions.

¶5 When reviewing probation revocation decisions, this court must defer to the administrative tribunal's determinations. ***Von Arx v. Schwarz***, 185 Wis. 2d 645, 655, 517 N.W.2d 540 (Ct. App. 1994). The judiciary's scope of review is limited to the following questions: (1) whether the agency kept within its jurisdiction; (2) whether the agency acted according to law; (3) whether the agency's actions were arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the agency might reasonably make the order or determination in question. ***Van Ermen v. DHSS***, 84 Wis. 2d 57, 63, 267 N.W.2d 17 (1978). A reviewing court on certiorari does not weigh the evidence presented to the tribunal. ***Id.*** at 64.

¶6 Our inquiry is limited to whether any reasonable view of the evidence supports the tribunal's decision. *See* ***State ex rel. Jones v. Franklin***, 151 Wis. 2d 419, 425, 444 N.W.2d 738 (Ct. App. 1989). Moreover, an agency's decision is not arbitrary and capricious and represents its judgment if it represents a proper exercise of discretion. ***Van Ermen***, 84 Wis. 2d at 64-65. We will

conclude that the agency properly exercised its discretion as long as it considered the proper facts, applied the pertinent law and reached a reasonable conclusion. ***Id.*** at 65.

¶7 Reviewing the record, we cannot conclude that the administrator's decision was arbitrary and capricious. The decision provides the pertinent facts, applicable law and a reasonable analysis for imposing revocation over other alternatives. The administrator noted that Koszewski had problems complying with the probation requirements in the past, that he refused to admit his conduct and, as a result, he was essentially an untreated sex offender at risk of re-offending. The administrator explained that the proposed alternative treatment was insufficient because it consists of additional sex offender classes, which Koszewski repeatedly failed previously. Accordingly, because treatment while on probation was no longer a possibility, the only proper choice for Koszewski's probation violations was revocation.

¶8 The decision provides a reasonable analysis of the facts and circumstances and, therefore, cannot be considered an arbitrary or capricious act. Koszewski points to a question and answer during the revocation hearing, wherein his counsel asked the probation agent about how the revocation decision is made. Counsel asked whether the choice to revoke or not revoke is at the "whim" of the supervisor. The agent responded affirmatively. Later, when faced with a similar question and the same terminology, the agent clarified the answer by stating that the decisions are not "arbitrary" or made on a "whim," but rather, are made at the "discretion" of the department. It is clear from the record that discretion was in fact properly exercised when the administrator determined that Koszewski's probation should be revoked.

¶9 In the related sufficiency-of-the-evidence issue, we also conclude that substantial credible evidence supports the revocation. Koszewski argues that the evidence is insufficient and discusses all the evidence proffered in his favor. It is not our function to weigh the evidence in Koszewski's favor versus the evidence presented by the DOC. Rather, our job is to review the record to determine whether substantial evidence supports the division's decision that revocation is appropriate.

¶10 The record reflects that Koszewski was alleged to have violated his probation in four ways: (1) by purchasing beer; (2) by possessing beer; (3) by possessing a sexually explicit magazine; and (4) by failing to complete sexual offender treatment. The record demonstrates that Koszewski admitted that he committed the first three violations. Moreover, he does not refute the fact that he was terminated from the sexual offender treatment program because he continued to deny the offense. Accordingly, the record contains substantial evidence to support the conclusion that Koszewski violated his probation. Moreover, the administrator reasoned that based on the repeated violations and failure to comply with treatment, Koszewski posed a risk to the public. Therefore, the evidence sustains the division's decision to revoke Koszewski's probation.

B. Polygraph Exam.

¶11 Koszewski next alleges that the ALJ and the administrator improperly considered the results of a polygraph exam. We disagree. The DOC asked Koszewski to submit to a polygraph exam in an attempt to address his continued denial issues. Koszewski did so, but did not cooperate fully with the examiner and used counter measures so that the results of the test would not be reliable.

¶12 The record does not include any polygraph test results. Rather, it includes Koszewski's written statement confessing that he did not cooperate with the polygraph test. In Wisconsin, the *results* of polygraph tests may not be used in criminal proceedings for public policy reasons. ***State v. Ramey***, 121 Wis. 2d 177, 180-81, 359 N.W.2d 402 (Ct. App. 1984). This rule applies to probation revocation proceedings as well. ***Id.*** at 181. There is no law, however, prohibiting the admission of a defendant's lack of cooperation in taking a polygraph test. Accordingly, his claim on the improper use of polygraph results is without merit.

C. Pre-Hearing Motions.

¶13 Koszewski's last contention is that the ALJ erroneously denied his pre-hearing motions. Before the hearing, Koszewski filed a motion seeking to dismiss the revocation action on three grounds: (1) the notice of violation failed to set forth a revocable offense regarding the failure to complete sexual offender treatment; (2) the revocation proceedings were untimely; and (3) the revocation proceedings violated Koszewski's double jeopardy rights. The ALJ denied the motion. We, too, conclude that the motion to dismiss was non-meritorious.

¶14 The fourth allegation in the notice of violation alleged that Koszewski violated probation rule number one, prohibiting conduct "which is not in the best interest of public welfare or your rehabilitation." Rule number thirty required him to participate in a sexual offender treatment, specifically the Genesis Behavioral Program. He contends that because his termination was from Henger Enterprises, not Genesis, the fourth allegation failed to set forth a revocable offense. We are not convinced.

¶15 When Koszewski was placed on probation, the state had a contract with Genesis; however, when the state lost funding, Koszewski could no longer

participate in treatment at Genesis. Subsequently, Koszewski agreed to participate in the Henger treatment program. It is from this program that he was terminated after eight weeks because he continued to deny that he committed the offense. The change in contractors does not alleviate Koszewski's obligation to complete the 180-day sexual offender treatment program. Regardless of what company was providing it, Koszewski was obligated to complete the program. His failure to do so violates rules one and thirty because his failure does not work in the best interest of the public welfare or his treatment goals. Accordingly, the motion to dismiss on this ground was properly denied.

¶16 The next ground asserted in the motion to dismiss was that the revocation proceedings were untimely. Koszewski contends that Henger terminated him from the program after eight weeks and that, as a result, the termination was involuntary. He argues that by initiating revocation proceedings following this termination, he was not afforded sufficient time to complete the required 180-day treatment program. The ALJ concluded that compliance with the program was Koszewski's responsibility. His termination was a result of his failure to comply with the program's requirements with respect to admitting his conduct. Therefore, the ALJ denied Koszewski's motion to dismiss based on timing.

¶17 We are not persuaded by Koszewski's argument on this ground. The notice of violation alleged that Koszewski's termination from the program was due to his failure to comply. The termination was the result of Koszewski's own actions—his failure to admit his conduct so that the treatment could be continued. Accordingly, the notice of violation was based upon a revocable offense and was not premature. Therefore, denying his motion to dismiss on this ground was not erroneous.

¶18 Finally, Koszewski contends that the revocation proceedings should have been dismissed because the proceedings subjected him to double jeopardy, and were barred by collateral estoppel and res judicata. Koszewski argues that in 1999, the DOC initiated revocation proceedings for the same conduct involved in the instant revocation proceeding. He notes that he spent four months in jail in connection with the 1999 proceedings before the DOC dropped the revocation action. Koszewski points out that the DOC felt that he had served sufficient punishment for the claimed violations at that time. Now, he argues that the instant revocation proceedings resulted in him being punished a second time for the same conduct in violation of double jeopardy, collateral estoppel and res judicata. *See* ***Crowall v. Heritage Mut. Ins. Co.***, 118 Wis. 2d 120, 122, 346 N.W.2d 327 (Ct. App. 1984).

¶19 We are not convinced. As noted by the ALJ, jeopardy never attached to the 1999 charges because the case never proceeded to a hearing. Moreover, the violations at issue in the present case are not the same as the violations at issue in 1999. The allegations here address conduct that occurred after 1999—conduct that occurred in 2000. Accordingly, the motion to dismiss on this ground was properly denied.

By the Court.—Order affirmed.

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