

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 26, 2011

A. John Voelker
Acting 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. 2009AP3058

Cir. Ct. No. 2008CV16973

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. ADAM HOWARD,

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:
DENNIS P. MORONEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Adam Howard, *pro se*, appeals an order of the circuit court affirming a Division of Hearings and Appeals decision sustaining revocation of his parole. We conclude that the Division's decision was appropriate and we affirm the circuit court.

¶2 Howard was convicted of armed robbery, as party to a crime, and second-degree murder in 1987. He was given an indeterminate sentence of thirty years and released to parole supervision on November 28, 2006. In 2008, the Department of Corrections' Division of Community Corrections sought to revoke his parole based on two allegations: that, while working at Summerfest, Howard intentionally touched Zenither Turner's left breast without her consent and falsely represented himself as a United States marshal.

¶3 Following a hearing at which Howard and Turner testified, the administrative law judge concluded Turner's testimony was credible and that her explanation of events was more reasonable, and that the Department had proven the allegations against Howard. The administrative law judge ordered Howard's parole revoked and ordered him imprisoned for three years and three months. Howard appealed to the Division, which sustained the administrative law judge's decision. Howard then petitioned the circuit court for *certiorari* review; the writ was granted and the circuit court affirmed the Division. Howard appeals. Additional facts will be set forth below as necessary.

¶4 On appeal, Howard makes five arguments: (1) his right to cross-examine a witness was compromised; (2) the circuit court failed to address Howard's claim that not all evidence had been made available to him; (3) the circuit court failed to address whether substantial evidence supports the administrative law judge's decisions; (4) substantial evidence did not support a particular factual finding of the administrative law judge; and (5) the record does not support the administrative law judge's determination that Turner was credible.

¶5 According to the administrative law judge's decision, Turner and Howard were working security at the Summerfest grounds. Turner asked Howard

why he was in plain clothes; he responded that he was a United States marshal. As he was describing his marshal duties, he reached out and touched or poked Turner's breast. Believing it might have been an accident, or that he was reaching for her identification, she called him on the contact. He apologized and said, "It's been awhile." Turner reported the incident to a co-worker, who reported the incident to a supervisor, who called police.

¶6 Howard's first two claims of error relate to the co-worker and supervisor. He claims his right to cross-examine these "witnesses" was violated. He also contends he was "not made aware of any co-workers prior to hearing," and suspects that statements or testimony were taken that were not shared with him. Neither the co-worker nor the supervisor were called to testify, and Howard cites no authority for the proposition that he has a right to examine uncalled witnesses. His attorney had documents prior to the hearing, including a list of staff on duty at the time of the incident. That Howard did not personally see the information does not mean it was not disclosed. There is nothing in the record to support a claim of surreptitious testimony: the administrative law judge's decision on its face is based on Turner's and Howard's testimony, not statements of others.

¶7 We now turn to Howard's remaining arguments. When we review a *certiorari* matter, we review the merits independently of the circuit court. *See State ex rel. Ortega v. McCaughtry*, 221 Wis. 2d 376, 385-86, 585 N.W.2d 640 (Ct. App. 1998). In other words, we review the agency's decision, not the circuit court's decision. Therefore, we need not address Howard's third argument, that the circuit court failed to address the sufficiency of the evidence.

¶8 Our review on *certiorari* is limited to four questions: Whether the tribunal acted within its jurisdiction; whether it acted according to law; whether its

action was arbitrary and represented its will and not its judgment; and whether the evidence was such that the tribunal might reasonably make the decision it did. *See Van Ermer v. DHSS*, 84 Wis. 2d 57, 63, 267 N.W.2d 17 (1978); *State ex rel. Warren v. Schwarz*, 211 Wis. 2d 710, 717, 566 N.W.2d 173 (Ct. App. 1997).

¶9 The only prong at issue here is the sufficiency of the evidence. In the *certiorari* context, we ask whether substantial evidence supports the agency's decision. *State ex. rel Washington v. Schwarz*, 2000 WI App 235, ¶17, 239 Wis. 2d 443, 620 N.W.2d 414. Because parole revocation is the result of a civil proceeding, *see id.*, ¶16, the evidentiary burden is low, *see id.*, ¶17. The substantial evidence burden asks only whether reasonable minds could arrive at the same conclusion. *Ortega*, 221 Wis. 2d at 386. It is the administrative law judge's role, not ours, to make determinations on the credibility and weight of evidence. *See Washington*, 239 Wis. 2d 443, ¶26.

¶10 Here, the administrative law judge's determination is premised on her acceptance of Turner's testimony over Howard's testimony. Howard's last two arguments—that substantial evidence does not support Turner's claims and that the record does not support a finding that Turner was credible—are evaluated under this standard.

¶11 Howard assails Turner's particular claim that, when she confronted him for touching her, he said, "it's been awhile," because Turner did not report this statement to police. Instead, she simply testified at the revocation hearing that it had occurred. The administrative law judge acknowledged Howard's challenge to this claim, but noted in her decision that Turner had testified she did not remember Howard's words when she spoke to police. The administrative law

judge accepted this explanation, finding it plausible given the stress of the situation. We do not disturb that credibility decision.

¶12 Howard’s general complaint about Turner’s credibility is premised on discrepancies between Turner’s statement to police and her testimony at the revocation and a lack of substantiation of her testimony, which he calls conjecture. Turner’s testimony was not conjecture; she was testifying about events she personally observed. Further, while corroborating evidence may in certain circumstances bolster a witness’s credibility, it does not follow that uncorroborated testimony is patently unreliable or inherently incredible. In addition, the factfinder in its role is free to disregard portions of testimony it finds incredible and accept only what it finds believable. *See Nabbefeld v. State*, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978) (A factfinder, “even where a single witness is inconsistent and testifies to diametrically opposed facts, may choose to believe one assertion and disbelieve the other.”). Ultimately, the administrative law judge concluded that Turner’s explanation of events was far more plausible than Howard’s explanation, which was simply that he did not touch Turner but if he did, it was accidental. We discern no error in the decisions of the administrative law judge, the Division, or the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

