COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2650 **Cir. Ct. No. 2010CV643**

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

STATE OF WISCONSIN EX REL. SAMUEL F. JOHNSON,

PETITIONER-RESPONDENT,

V.

DAVID H. SCHWARZ, ADMINISTRATOR OF THE DIVISION OF HEARINGS & APPEALS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. The Administrator of the Division of Hearings and Appeals, David Schwartz, appeals an order reversing the revocation and

reconfinement of Samuel Johnson. The dispositive issue is whether there was substantial evidence to support the agency's decision. We conclude there was and, therefore, reverse the circuit court order returning Johnson to supervision.

BACKGROUND

¶2 In February 2006, Johnson was sentenced to six years' initial confinement and seven years' extended supervision following his convictions for third-degree sexual assault, second-degree reckless endangerment, false imprisonment and bail jumping. Johnson was released to extended supervision on April 14, 2009. In December 2009, the Department of Corrections commenced revocation proceedings, alleging that Johnson violated his supervisory rules by: (1) leaving Marathon County without prior permission of his agent; (2) operating a motor vehicle without a valid driver's license; (3) consuming alcoholic beverages; (4) violating his curfew; and (5) physically assaulting his girlfriend, Amy Ford.

¶3 After a revocation hearing, an administrative law judge revoked Johnson's supervision and ordered him reconfined for a total of four years, two months and thirteen days—effectively sixty percent of his remaining extended supervision. Administrator Schwarz upheld the decision. On certiorari review, the circuit court reversed the revocation and reconfinement decision and returned Johnson to supervision. This appeal follows.

DISCUSSION

¶4 In an appeal from a circuit court's order affirming or reversing an administrative agency's decision, we review the decision of the agency, not that of the circuit court. ***Mineral Point Unified Sch. Dist. v. WERC***, 2002 WI App 48, ¶12, 251 Wis. 2d 325, 641 N.W.2d 701. "Judicial review on certiorari is limited to

whether the agency's decision was within its jurisdiction, the agency acted according to law, its decision was arbitrary or oppressive and the evidence of record substantiates the decision." ***State ex rel. Staples v. DHSS***, 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987). Consistent with this standard, the agency argues its decision should have been affirmed because it acted within its jurisdiction, and its decision was reasonable, made according to law and supported by the evidence. In his respondent's brief, Johnson disputes only the claim that sufficient evidence supported the revocation and reconfinement. Therefore, we will limit our review to whether there was substantial evidence to support the agency's decision. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted deemed admitted).

¶5 We may not substitute our judgment for that of the agency. ***Van Arx v. Schwarz***, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994). If substantial evidence supports the agency'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.*** It is more than "a mere scintilla" of evidence and more than "conjecture and speculation." ***Gehin v. Wisconsin Group Ins. Bd.***, 2005 WI 16, ¶48, 278 Wis. 2d 111, 692 N.W.2d 572.

¶6 At the revocation hearing, the ALJ considered a police report describing the officer's November 23, 2009 dispatch to a "disorderly conduct complaint" in Merrill. The officer found Ford, then twenty-seven weeks pregnant, crying with her face in her hands. When asked what happened, Ford indicated she had picked Johnson up at his Wausau apartment and drove him to her apartment in Merrill. Johnson indicated he wanted to get more beer, but because he appeared

intoxicated, Ford offered to drive him. According to Ford, Johnson "snapped" and after cell phones were thrown at each other, Johnson pushed Ford onto the couch, got on top of her and hit her in the face approximately six to seven times with a closed fist. Ford further claimed that after hitting her in the face, Johnson kneed her in the stomach before getting off of her. Johnson then grabbed the car keys and left. The officer observed that Ford's nose and right eye were swollen and starting to bruise. Ford indicated she had a bloody nose before the police arrived, and she complained of severe pain in her back and stomach.

¶7 At the hearing, Johnson admitted violating his curfew, consuming alcoholic beverages and operating a motor vehicle without a driver's license. Johnson claimed, however, that he had "blanket permission" from his agent to travel to Lincoln County. Johnson's agent testified that Johnson regularly called to advise her when he was traveling to Lincoln County and she had not given approval for Johnson to leave Marathon County on the date in question. Further, Johnson's written rules did not reflect permission to travel to Lincoln County at will. Noting that Johnson's testimony was self-serving and contrary to the evidence, the ALJ found that Johnson had violated the supervisory rule prohibiting him from leaving Marathon County without his agent's prior permission.

¶8 With respect to the physical assault allegation, Johnson testified that he had not intentionally battered Ford but, rather, unintentionally struck her in the face with his hand, as a reflexive reaction when Ford unexpectedly jumped on his back. The responding officers testified consistent with the written reports about their contact with Ford, and photos of Ford's injuries were submitted into evidence. Although Ford did not testify, the ALJ considered a statement she gave to police on November 23, as well as a statement she gave to an agent on a later date. The ALJ noted that Ford's statements were "detailed, plausible, internally

consistent and consistent with each other." The ALJ further acknowledged that Ford's failure to appear at the hearing was likely due to "the undisputed fact that she remains in a relationship with Johnson, has visited him five to six times in jail … and is pregnant with his child."

¶9 With respect to Johnson's testimony, the ALJ noted Johnson had given inconsistent statements, initially telling police that nothing happened. The ALJ concluded: "It is implausible that any person involved in an argument loud enough to attract neighbors' attention, leading to someone physically jumping onto his back and involving a physical injury with bleeding would … find that so routine it was not worth mentioning." The ALJ consequently found that Johnson had violated his supervisory rules by assaulting Ford. Ultimately, the ALJ concluded that Johnson's "violations" warranted revocation of his extended supervision. Noting that Johnson acted in a criminal and physically violent manner and refused to take responsibility for his actions, the ALJ concluded there was no alternative to revocation that would address Johnson's threat to public safety.

¶10 Claiming that his revocation and reconfinement were "expressly founded" upon the assault, Johnson argues the evidence did not support the agency's decision. Even assuming Johnson's premise is correct, we conclude the evidence was sufficient to establish that Johnson assaulted Ford. While acknowledging that uncorroborated hearsay evidence is admissible at administrative hearings, Johnson contends it is not sufficient to satisfy the "substantial evidence" standard when the hearsay facts are disputed by firsthand testimony. Johnson correctly notes that uncorroborated hearsay evidence does not by itself constitute substantial evidence. ***Gehin***, 278 Wis. 2d 111, ¶¶48, 81. Here,

however, the hearsay evidence was corroborated by photographs of Ford's facial injuries and testimony of the officers who viewed those injuries.

¶11 Further, the ALJ rejected Johnson's claim that he reflexively hit Ford in the face. *See* WIS. ADMIN. CODE § HA 2.05(6)(b) (Sept. 2001) (fact-finder is authorized to weigh credibility of witnesses at revocation hearing). Citing ***State v. Kreuser***, 91 Wis. 2d 242, 280 N.W.2d 270 (1979), ***Stewart v. State***, 83 Wis. 2d 185, 265 N.W.2d 489 (1978) and ***State v. Nichelson***, 220 Wis. 2d 214, 582 N.W.2d 460 (Ct. App. 1998), Johnson argues that the negative inference from this credibility determination cannot serve to corroborate the hearsay evidence. The cited cases provide that under the "beyond a reasonable doubt" or "by clear and convincing evidence" standards of proof, "a negative inference is sufficient only if there is independent support in the evidence." ***Nichelson***, 220 Wis. 2d at 224. These cases are distinguishable, however, because the agency's burden of proof at a revocation hearing is by a preponderance of the evidence—a low burden of proof. ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 388, 269 N.W.2d 727 (1978); WIS. ADMIN. CODE § HA 2.05(6)(f) (Sept. 2001). Even were we to apply the holding of these cases to the present facts, there is independent support for the negative inference.

¶12 Ultimately, Ford's hearsay statements to police, corroborated by officer testimony and photos of her facial injuries, as well as the negative inference arising from the ALJ's rejection of Johnson's account, constitute substantial evidence to support the revocation and reconfinement decision. Therefore, we reverse the circuit court's order and remand for reinstatement of the agency's decision.

By the Court.—Order reversed and cause remanded with directions.

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