

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 24, 2012**

Diane M. Fremgen  
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. 2011AP2200**

**Cir. Ct. No. 2011CV161**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN EX REL. JAMES ORZEL,**

**PETITIONER-APPELLANT,**

**v.**

**DAVID H. SCHWARZ, ADMINISTRATOR OF THE DIVISION OF  
HEARINGS AND APPEALS,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Marinette County:  
TIM A. DUKET, Judge. *Affirmed.*

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

¶1 PER CURIAM. James Orzel appeals an order affirming the revocation of his probation on certiorari review. Orzel argues his probation was improperly revoked based on a mistake of fact. Because the record as a whole supports the revocation, we affirm the order.

## BACKGROUND

¶2 Orzel was convicted of party to the crime of possession with intent to deliver between five and fifteen grams of cocaine. On April 2, 2009, the court withheld sentence and imposed three years' probation. Orzel's probation agent, Becky DeWitt, initiated probation revocation proceedings in December 2010. After a revocation hearing, an administrative law judge found Orzel violated the conditions of his probation. The administrator for the division of hearings and appeals affirmed the ALJ's decision, and Orzel petitioned for a writ of certiorari in the circuit court. The court denied the petition and this appeal follows.

## DISCUSSION

¶3 Under WIS. STAT. § 973.10(1) (2009-10),<sup>1</sup> a probationer is in the legal custody of the Department of Corrections and enjoys only "conditional" liberty. *State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 502, 513, 563 N.W.2d 883 (1997). A probation revocation proceeding has two components: (1) a factual determination of whether the probationer violated one or more conditions of probation; and (2) if one or more violations occurred, a determination of whether the interests of community safety and of the probationer's rehabilitation are best served by continued liberty or by incarceration. *Id.* at 513-14.

¶4 On certiorari review of an administrative decision revoking probation, we review the decision of the division of hearings and appeals, not that of the circuit court. *State ex rel. Warren v. Schwarz*, 211 Wis. 2d 710, 717, 566 N.W.2d 173 (Ct. App. 1997). Our review of the division's decision is limited to

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version.

four inquires: (1) whether it stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will, not its judgment; and (4) whether the evidence was such that it might reasonably make the decision that it did. *Id.*

We may not substitute our judgment for that of the division; we inquire only whether substantial evidence supports the division's decision. If substantial evidence supports the division's determination, it must be affirmed even though the evidence may support a contrary determination. Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion.

*Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994) (internal quotations omitted).

¶5 Here, Orzel argues the decision to revoke his probation cannot stand because it was based on an unsupported finding of fact contrary to WIS. STAT. § 227.57(6). As the State properly notes, however, probation revocation proceedings are not subject to the procedural requirements or review provisions of WIS. STAT. ch. 227. See WIS. STAT. § 227.03(4); *Vanderbeke*, 210 Wis. 2d at 522; *State ex rel. Hanson v. DHSS*, 64 Wis. 2d 367, 377, 219 N.W.2d 267.

¶6 Orzel alternatively claims the division erroneously exercised its discretion when it considered a fact not supported by the record. Orzel correctly asserts there was no testimony to support the ALJ's finding that Orzel "had been involved in intensive outpatient treatment during the current term of probation." This erroneous finding notwithstanding, there is substantial evidence in the record to support the revocation decision.

¶7 The evidence showed that Orzel violated conditions of his probation by engaging in criminal activity closely related to the drug offense that underlies

his probation. He tested positive for THC and admitted using THC, opiates, benzodiazepine and heroin. Orzel was also found in possession of drug paraphernalia and a small amount of heroin. At the revocation hearing, agent DeWitt testified that she recommended revocation because Orzel's violations indicated an increase in the dangerousness of the level of drugs he was using. DeWitt further testified that despite her direction, Orzel, who was in need of drug and alcohol treatment, failed to avail himself of community-based treatment while on probation.

¶8 Orzel nevertheless argues that the ALJ's erroneous finding prevented proper consideration of alternatives to revocation, such as intensive outpatient treatment. Although alternatives to revocation should be considered in every case, *see State ex rel. Plotkin v. DHSS*, 63 Wis. 2d 535, 544-45, 217 N.W.2d 641 (1974), "[t]his does not mean that revocation cannot occur unless alternatives are tried," *Warren*, 211 Wis. 2d at 725. Moreover, if an ALJ fails to formally consider alternatives to revocation in an adequate matter, this court "may examine the record *ab initio* to see if it supports" the revocation decision. *Van Ermen v. DHSS*, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978).

¶9 DeWitt's revocation summary outlined the alternatives considered, noting:

Warnings with rule modifications were used but not effective. Community based program has been attempted but offender has been resistive to attendance. [Electronic Monitoring Program] was deemed not appropriate at this time. Court modifications with additional jail time [were] not utilized as Mr. Orzel has already consumed a year of conditional jail time.

On the basis of this record, the division properly revoked Orzel's probation. His escalated drug use, together with the failure to get community-based treatment,

support the conclusion that Orzel's treatment needs are best served in a confined setting.

*By the Court.*—Order affirmed.

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

