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DISTRICT IV

August 15, 2016

To:

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You are hereby notified that the Court has entered the following opinion and order:

2015AP1917 State of Wisconsin ex rel. Gerald J. Vanderhoef v. Brian Hayes (L.C. # 2014CV1334)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Gerald Vanderhoef appeals *pro se* an order dismissing his writ of certiorari brought to review revocation of his extended supervision. After reviewing the record and briefs, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm for the reasons discussed below.

Vanderhoef was convicted of felony operating while under the influence of a controlled substance in 2010. His extended supervision was revoked in February 2014, following three days of hearings before the administrative law judge. Vanderhoef administratively appealed the

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

revocation to the Administrator of the Division of Hearings and Appeals (DHA), Respondent Brian Hayes. On March 6, 2014, Hayes sustained the administrative law judge's decision and revocation order, concluding that two of the allegations underlying the request for revocation were supported by the requisite substantial evidence. These allegations provided: (1) that Vanderhoef had operated a motor vehicle while under the influence of a mind altering substance in violation of his amended judgment of conviction, and (2) that Vanderhoef was in possession of drug paraphernalia, specifically a crack cocaine pipe, in violation of the judgment of conviction and rules of community supervision Vanderhoef signed in 2008.[2]

This matter arose when the investigating officer called to the scene of a motor vehicle accident arrived and found Vanderhoef in the middle of the intersection throwing his arms in the air. Vanderhoef's vehicle was in a cornfield, some fifty yards off of the roadway. The officer saw no other occupants in the vehicle. When the officer approached Vanderhoef, Vanderhoef instructed the officer to shoot him and said he wanted to die. Vanderhoef also advised the officer that he had a gun. Vanderhoef refused to cooperate, and the officer began to suspect that he was under the influence of a chemical substance. The officer tasered Vanderhoef, and he was taken into custody. The officer searched Vanderhoef's vehicle and found a crack cocaine pipe. Vanderhoef tested positive for cocaine.

[2] Vanderhoef did not sign rules of supervision related to his current period of extended supervision.

On April 21, 2014, Vanderhoef submitted a Petition for Writ of Certiorari to the Dane County Clerk of Court. However, the petition was not *filed* until May 1, 2014. In a reply brief to the circuit court, Vanderhoef's counsel offered:

> The source of the discrepancy between the filing date indicated in the CCAP Record and the undersigned's filing of the petition with the Dane County Clerk of Courts on April 21, 2014, is not clear to the Petitioner. The Petitioner respectfully asserts that the proceedings in the [] case commenced when the undersigned personally presented copies of the petition to the clerk, who accepted them for filing and indicated to the undersigned, who was prepared to write a check on the spot, that he would be contacted later by the Clerk's office regarding payment.

However, an attorney's unsworn factual assertion in his brief is not evidence. *See* ***State ex rel. Shimkus v. Sondalle***, 2000 WI App 262, ¶14, 240 Wis. 2d 310, 622 N.W.2d 763. Further, WIS. STAT. §801.02(6) directs that the fees payable at the commencement of an action shall be paid at the time of filing. *See also* ***State ex rel. Shimkus v. Sondalle***, 2000 WI App 238, ¶9, 239 Wis. 2d 327, 620 N.W.2d 409 ("In Wisconsin … civil actions are not commenced until the applicable filing fee is paid…").

The Division's decision was issued March 6, 2014. The Notice of Appeal Rights appended to the decision clearly informed Vanderhoef that judicial review by writ of certiorari was available to him and must be *commenced* within forty-five days of the decision to be reviewed, citing WIS. STAT. § 893.735. While Vanderhoef delivered the petition to the clerk on the forty-sixth day (a Monday), the action was not *commenced* until May 1, 2014. Thus, we agree with the circuit court that Vanderhoef's action was untimely. Assuming without deciding that it is appropriate to apply equitable tolling principles on the basis that counsel's failure to properly file the petition for the writ of certiorari was beyond Vanderhoef's control, ***State ex rel. Griffin v. Smith***, 2004 WI 36, ¶¶32-37, 270 Wis. 2d 235, 677 N.W.2d 259, we review the merits.

When reviewing decisions in certiorari proceedings, we use the same standard of review as does the circuit court, and conduct an independent review. ***State ex rel. Town of Norway Sanitary Dist. No. 1 v. Racine Cty. Drainage Bd. Of Comm'rs***, 220 Wis. 2d 595, 605, 583 N.W.2d 437 (1998). We review the agency's decision, not the circuit court's decision, *see* ***Bratcher v. Housing Auth. Of the City of Milwaukee***, 2010 WI App 97, ¶10, 327 Wis. 2d 183, 787 N.W.2d 418, and accord the agency's decision the presumption of validity. *See* ***Edward Kraemer & Sons, Inc. v. Sauk Cty. Bd. of Adjustment***, 183 Wis. 2d 1, 8, 515 N.W.2d 256 (1994). Our review is confined to: (1) whether the agency kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its actions were arbitrary, oppressive or unreasonable and represented its will rather than its judgment; and (4) whether the evidence supported the decision. ***Ottman v. Town of Primrose***, 2011 WI 18, ¶35, 332 Wis. 2d 3, 796 N.W.2d 411. Vanderhoef challenges only the third and fourth considerations.[3]

We apply a substantial evidence test when reviewing agency decisions, which requires us to determine whether reasonable minds could come to the same conclusion as did the agency. ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 386, 585 N.W.2d 640 (Ct. App. 1998). Vanderhoef's primary evidentiary arguments center upon the absence of witnesses testifying at the revocation hearing that they saw Vanderhoef operate the vehicle and witnesses' conflicting testimony regarding the clothing they believed the driver to be wearing, challenging the Division's conclusion that Vanderhoef operated a motor vehicle while under the influence. We

[3] Vanderhoef raises a plethora of other issues, none of which he appears to have raised before the Division or the circuit court and none of which are adequately developed. Therefore, we will not consider them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992); ***Shannon & Riordan v. Bd. Of Zoning Appeals of Milwaukee***, 153 Wis. 2d 713, 731, 451 N.W.2d 479 (Ct. App. 1989).

need not consider the issue because we conclude that the Division's finding that Vanderhoef was in possession of drug paraphernalia was adequate to support revocation.[4]

Vanderhoef's only challenge to the paraphernalia finding is that a copy of the vehicle registration was not in the record, and apparently that the Division unreasonably relied on the Wisconsin Motor Vehicle Accident Report for its conclusion that Vanderhoef owned the vehicle involved in the accident which contained the crack cocaine pipe. He does not, however, dispute that he owns the vehicle. We are satisfied that the Division reasonably relied on the accident report which includes the vehicle plate number, as well as identification and insurance information naming Vanderhoef as owner and insured, for purposes of determining that Vanderhoef owned the vehicle near which he was found. Notably, the investigating officer also testified she was aware that the vehicle in question was registered to Vanderhoef. Further, the toxicology report confirming that Vanderhoef's blood tested positive for cocaine supports the reasonable inference that the crack cocaine pipe was not simply in Vanderhoef's vehicle (which could still constitute possession[5]), but that it in fact belonged to him.

Vanderhoef does not dispute that the judgment of conviction prohibited him from possessing drug paraphernalia; he simply disputes the evidence. On certiorari review, the only question is whether the evidence supports the decision the agency made, not whether the evidence could support an alternate decision the agency did not make. ***State ex rel. Gendrich v. Litscher***, 2001 WI App 163, ¶12, 246 Wis. 2d 814, 632 N.W.2d 878. Further, ***State ex rel.***

[4] We need not address all issues raised when one is dispositive. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

Rodriguez v. DHSS, 133 Wis. 2d 47, 53, 393 N.W.2d 105 (Ct. App. 1986), holds that the violation of the criminal laws, even in the absence of the probationer having signed rules of supervision, is sufficient to support revocation. We conclude, as did the Division, that ***Rodriguez*** alone provides an adequate legal basis for the conclusion that Vanderhoef violated the terms of his extended supervision.

We are satisfied that the Division's decision and order revoking Vanderhoef's extended supervision was not arbitrary or an exercise of will rather than judgment. The Division undertook a careful review of the evidence and considered the requisite factors of community standards, appropriate alternatives to revocation, depreciation of the seriousness of the offense, and Vanderhoef's poor risk level on supervision. Thus, the Division properly exercised its discretion, and, thereby, its judgment. *See* ***State ex rel. Plotkin v. DHSS***, 63 Wis. 2d 535, 544-545, 217 N.W.2d 641 (1974).

Upon the foregoing reasons,

IT IS ORDERED that the order dismissing the writ of certiorari is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

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[5] For a discussion of constructive possession, *see* ***State v. Kueny***, 2006 WI App 197, ¶9, 296 Wis. 2d 658, 724 N.W.2d 399.