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110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
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**DISTRICT I**

February 16, 2017

To:

Hon. Christopher R. Foley  
Milwaukee County Courthouse  
901 N. 9th Street  
Milwaukee, WI 53233

John Barrett, Clerk  
Milwaukee County Courthouse  
901 N. 9th Street, Room G-8  
Milwaukee, WI 53233

Maura F.J. Whelan  
Asst. Attorney General  
P. O. Box 7857  
Madison, WI 53707-7857

Green Bay Correctional Institution  
Business Office  
P.O. Box 19033  
Green Bay, WI 54307-9033

Special Litigation & Appeals Unit  
P.O. Box 7857  
Madison, WI 53707-7857

James L. Vessell #316143  
Green Bay Corr. Inst.  
P.O. Box 19033  
Green Bay, WI 54307-9033

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

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2015AP2378

State of Wisconsin ex rel. James L. Vessell v. Brian Hayes  
(L.C. #2014CV010782)

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

James L. Vessell, *pro se*, appeals an order of the circuit court affirming the decision to revoke his probation. He argues on appeal that the administrator for the Division of Hearings and Appeals, Brian Hayes (collectively DHA), erred in a number of ways. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition and affirm. *See* WIS. STAT. RULE 809.21(1) (2015-16).<sup>1</sup>

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

### ***Background***

The Department of Corrections (DOC) initiated revocation of Vessell's supervision based on allegations of multiple rule violations, including a violation of his 8:00 p.m. curfew and for being in the presence of and having access to firearms.

The relevant underlying facts are as follows. Police stopped a car at approximately 10:30 p.m. in connection with a shooting that had taken place the day before. Vessell's friend Hilton Myers owned and operated the car. Two loaded firearms were found in the car within Vessell's reach.

During the revocation hearing, Vessell testified that Myers picked him up to drive him home. When Myers arrived, a man Vessell did not know was sitting in the front passenger seat. When the other man got out of the car, Vessell "jumped out the back and jumped into the front." Thirty seconds later, "[t]he police hit their lights and they did a U-turn right behind us." Myers pulled over.

Vessell's probation agent testified that the man Vessell did not know was identified as Terry Nequann. Nequann gave a statement to police in which he tried to take responsibility for the guns in the car; however, he was unable to correctly identify the weapons. The probation agent testified: "Basically [he] said he was guessing and wasn't sure."

In a police report, Officer Chad Boyack described the moments leading up to and following the stop of Myers' car as follows:

While conducting a U-Turn we observed the front passenger [... VESSELL ...] of the vehicle lift his body while turning his head in the direction of our marked black and white [Milwaukee Police Department] squad car. VESSELL bent over and down towards the passenger floorboard/glove compartment area of the vehicle.

At 10:28PM the vehicle was stopped.... After having MYERS and VESSELL step out of the vehicle I searched the passenger compartment where VESSELL was moving his body and while opening the glove compartment I observed a silver over black "Smith & Wesson" .40 caliber semi-automatic handgun.... I checked the center console directly between VESSELL and MYERS and located a loaded "Taurus" black steel .357 magnum 7-shot revolver.

Vessell explained the movements described by Officer Boyack as follows:

[W]hen I jumped into the front of the car, I asked Myers for a cigarette. He gave me a cigarette. So I had pushed the cigarette lighter in.

....

So ... when the police I guess ... was looking at the car and saw me reaching to grab the cigarette lighter.

....

But ... when the police came to the car, he asked me why was I leaning, I told him I was going to light a cigarette and he saw that I had a freshly li[t] cigarette and he said alright.

The police took the men out of the car, searched it, and discovered the two guns. Before this, Vessell said, he "didn't know the guns even existed in the car."

Following the revocation hearing, an administrative law judge (ALJ) revoked Vessell's supervision. The ALJ concluded that Vessell had conceded the curfew violation and found substantial evidence to support the allegation that Vessell was in the presence of and had access to two firearms.

After an unsuccessful administrative appeal, Vessell sought certiorari review in the circuit court. The circuit court affirmed, and Vessell once again appeals.

### *Discussion*

When we review a certiorari matter, we consider the merits independent 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.

Our review is limited to whether: (1) the agency stayed within its jurisdiction; (2) the agency acted according to law; (3) the agency's action was arbitrary, oppressive, or unreasonable; and (4) the agency might reasonably make the decision it did based on the evidence. *See State ex rel. Riesch v. Schwarz*, 2005 WI 11, ¶13, 278 Wis. 2d 24, 692 N.W.2d 219. This inquiry includes consideration of whether due process was afforded. *See State ex rel. Curtis v. Litscher*, 2002 WI App 172, ¶15, 256 Wis. 2d 787, 650 N.W.2d 43.

In our review, we defer to the determinations of DHA. *See Von Arx v. Schwarz*, 185 Wis. 2d 645, 655, 517 N.W.2d 540 (Ct. App. 1994). A certiorari court may not substitute its view of the evidence for that of DHA. *See id.* at 656. "On appeal challenging a revocation decision, ... the [appellant] bears the burden of proving that the decision was arbitrary and capricious." *See id.* at 655.

Vessell raises a series of issues on appeal. They can be summed up as follows: (1) whether the ALJ and DHA relied on inadmissible hearsay during the revocation proceedings by allowing police reports to be used as evidence in lieu of testimony from the investigating officers; (2) whether the ALJ and DHA presumed the police reports were categorically reliable; (3) whether Vessell's right to cross-examine adverse witnesses was violated during the revocation hearing; and (4) whether proof of possession was required to show that he violated

the rule of his supervision that prohibited him from having access to firearms.<sup>2</sup> We will address each of these arguments in turn.

**(1) Vessell forfeited his hearsay objection.**

Vessell acknowledges that hearsay is admissible during revocation proceedings. However, he argues that a revocation decision cannot be based *solely* on unsubstantiated hearsay. *See State ex rel. Thompson v. Riveland*, 109 Wis. 2d 580, 583, 326 N.W.2d 768 (1982) (“A probation violation may not be proved entirely by ‘unreliable hearsay.’”). According to Vessell, the ALJ and DHA both relied on his movement at the time of the stop as being consistent with his placing a gun into the glove compartment. He points out that there was no DNA evidence to support this conclusion and asserts that it “rest[ed] entirely on speculation.”

Vessell forfeited any possible hearsay objection. He does not direct us to anywhere in the transcript of the revocation hearing where he made such an objection. Instead, Vessell claims he made a hearsay objection in his appeal to the DHA. Even if we were to construe Vessell’s administrative appeal document as presenting a hearsay objection despite the fact that the word “hearsay” was never used, this claim would have been untimely given that there was no objection at the revocation hearing. *See Saenz v. Murphy*, 162 Wis. 2d 54, 63, 469 N.W.2d 611 (1991), *overruled on other grounds by State ex rel. Anderson-El v. Cooke*, 2000 WI 40, ¶¶29-31, 234 Wis. 2d 626, 610 N.W.2d 821 (explaining that an exception to the forfeiture rule existed where the case presented the combination of both an issue of law and the DOC’s failure to

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<sup>2</sup> Initially on appeal, Vessell argued that he withdrew his previously entered stipulation to a curfew violation. However, in his reply brief, Vessell concedes that he stipulated to the curfew violation and advises that we need not address this issue further.

follow its own regulations); *see also Santiago v. Ware*, 205 Wis. 2d 295, 324-25, 556 N.W.2d 356 (Ct. App. 1996).

**(2) Neither the ALJ nor DHA presumed the police reports were categorically reliable.**

Vessell argues that the ALJ and DHA presumed the police reports were categorically reliable. He argues that they both used the movements of Vessell as set forth in those reports to speculate that he hid something in the glove compartment. Vessell's argument fails.

First, "[p]olice reports regarding the allegation" are explicitly recognized as a category of evidence to be considered at a revocation hearing. *See* WIS. ADMIN. CODE § HA 2.05(1)(d)5. (May 2010). Second, neither the ALJ nor the DHA presumed that the police reports were categorically reliable. Rather, the record reveals that the police reports were relied on in conjunction with the testimony of the witnesses.

Vessell continues to emphasize the fact that no one testified to seeing him put a gun in the glove compartment and inquires: "How then can [the] ALJ and [DHA] presume that's what Vessell did without ... evidence to back up the[ir] claim." In making this argument, Vessell seemingly overlooks that "[t]he evidentiary test on certiorari review is the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion that the ALJ reached." *See George v. Schwarz*, 2001 WI App 72, ¶10, 242 Wis. 2d 450, 626 N.W.2d 57. We will not substitute our view of the credibility of the witnesses or the weight of the evidence for that of the administrative factfinder. *See State ex rel. Washington v. Schwarz*, 2000 WI App 235, ¶26, 239 Wis. 2d 443, 620 N.W.2d 414.

Here, neither the ALJ nor DHA found Vessell's testimony that he did not know there were guns in the car to be credible. Reasonable minds could arrive at this conclusion.

**(3) Vessell’s claim that he was denied the right to cross-examine adverse witnesses fails.**

Vessell argues that he was not able to cross-examine the police officers who stopped and arrested him. He contends that “[t]he denial of cross-examining adverse witnesses for no good reason” violated *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), and the Wisconsin Administrative Code.

First, the police officers were not witnesses at Vessell’s hearing. There is no administrative code provision that affords Vessell a right to question people who are not witnesses. *See generally* WIS. ADMIN. CODE § HA 2.05(3)(c), (e) (May 2010) (setting forth the offender’s rights at a revocation hearing, which include “[t]he right to be heard and to present witnesses” and “[t]he right to question witnesses”). Second, Vessell forfeited this argument when he did not object to the officers’ absence at either the hearing or during the administrative appeal.

At the beginning of the revocation hearing, Vessell’s probation agent confirmed for the ALJ that she was expecting Officer Boyack to testify. When Officer Boyack did not appear for the hearing, the agent sought an adjournment. The agent explained that she anticipated Officer Boyack would testify to the way Vessell moved his body while in the car, which concerned the officers, along with Vessell’s proximity to the weapons. As summed up by the ALJ, the agent wanted Officer Boyack to testify in order “to breathe life” into the police report.

Vessell’s counsel responded that this information was in the police reports. Moreover, Vessell was willing to stipulate that Officer Boyack’s live testimony would repeat what he wrote in the police report—i.e., that he saw Vessell moving in a way he considered suspicious. Vessell’s strategy was to convince the ALJ that Officer Boyack misinterpreted his movements.

He objected to an adjournment and his attorney advised the ALJ that Vessell wanted to get the revocation matter resolved.

The ALJ held part of the revocation hearing on July 31, 2014, and then adjourned the proceedings to August 27, 2014. When Officer Boyack again failed to appear, the agent conceded that the hearing should go forward without him. Vessell did not object.

By not raising a timely objection, Vessell forfeited his cross-examination argument.<sup>3</sup> See *Saenz*, 162 Wis. 2d at 63, *overruled on other grounds by Anderson-El*, 234 Wis. 2d 626, ¶¶29-31.

**(4) Proof that Vessell possessed the firearms in the vehicle was not required.**

Vessell additionally contends the claim that he had “access” to firearms should be rejected because there was no evidence to prove that he had knowledge of the firearms much less that he possessed one or both guns. He submits that there was no evidence of his fingerprints on the gun and claims that DHA’s decision was based on proximity, movement, and speculation.

While he was on extended supervision, Vessell agreed to adhere to the following restriction: “You shall have no ammunition, nor any object that resembles a firearm, no

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<sup>3</sup> In his reply, Vessell submits that he preserved this issue “by objecting through his administrative appeal to his due process right to confront a witness at the revocation hearing.” (Some uppercasing omitted.) This court does not see anything in his administrative appeal document that would appear to amount to a confrontation objection, and Vessell has not provided any sort of citation—to the record or otherwise—to support his position.

He further contends: “Thus since the [police] reports were used in deciding to revoke Vessell’s probation without other corroborating evidence Vessell preserved his right to cross-examination by objecting to the use of [f]urtive movement testimony.” Again this contention is unsupported by citation. These arguments, to the extent they qualify as such, are undeveloped. Consequently, we decline to address them further. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).



handcuffs or other bondage materials, whether owned by you or another person, in your residence or vehicle, or *anywhere within your access.*” (Emphasis added.) The ALJ and DHA found that there was substantial evidence that Vessell had two firearms within his “access.”

As aptly summed up in DHA’s response brief:

There is no question that, sitting in the passenger seat of Myers’ vehicle, he had *access* to the handgun in the glove compartment and the console between the two front seats. There is also substantial evidence that he handled at least one of the guns and concealed it. The police report described Vessell making furtive movements when he saw the police nearby, which strongly supported the inference that he was hiding one of the guns. Vessell’s counter-evidence backfired, because the ALJ found his and Myers’ testimony “not [...] truthful or reliable.” On review, [DHA] found the story of the third man’s claim of responsibility not to be “credible.”

(Emphasis in brief; record citations omitted.) Vessell’s rules of supervision did not simply limit his ability to “possess” firearms; consequently, we reject this argument.

Upon the foregoing reasons,

IT IS ORDERED that the circuit court’s order is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*