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March 1, 2017

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

2016AP394

State of Wisconsin ex rel. Craig T. Bates v. Brian Hayes
(L.C. # 2015CV1400)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Craig T. Bates appeals pro se from a circuit court order denying his petition for a writ of certiorari challenging the revocation of his extended supervision. Bates argues that the circuit court erred by failing to grant his motions for default judgment and in affirming the revocation decision of the Division of Hearings and Appeals. Based upon our review of the briefs and

record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We affirm.

While on extended supervision, the State filed new criminal charges against Bates in connection with a May 14, 2014 controlled drug buy. Bates informed his supervising agent of the charges. The Department of Corrections issued a warrant and Bates was told to immediately report to jail. Bates sent his agent a series of emails attempting to avoid custody and turned himself in six days later. The department pursued revocation. Following a hearing, the administrative law judge (ALJ) entered a decision revoking Bates's extended supervision, finding that the department established two of the four violations alleged. Specifically, the ALJ determined the department established that "[o]n May 14, 2014, Craig Bates participated in selling heroin by being the driver of the delivery vehicle," and that "[o]n February 17, 2015, Craig Bates failed to turn himself in to the Racine County Jail as directed by his agent."² Bates filed an administrative appeal and the division sustained the ALJ's decision.

Thereafter, Bates filed a petition for writ of certiorari in the circuit court. The circuit court issued a writ, ordering return of the record. Bates moved for default judgment alleging he did not receive a copy of the certified record. In the meantime, the circuit court provided a scheduling order and Bates learned that the record was returned. Bates filed his opening brief in advance of the scheduling order's deadline. When the division did not immediately file a response brief, Bates filed his reply brief and another motion for default judgment, this time on

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

² Through his attorney, Bates stipulated to the violation alleging that he failed to turn himself in.

grounds that the division's response brief was untimely. The division filed its response brief along with a cover letter explaining that it had not received Bates's brief until recently, when a copy was forwarded by the court. The circuit court affirmed the division's decision on the merits and did not address Bates's default judgment motions. Bates appeals.

Bates contends that the circuit court erred in implicitly denying his motions for default judgment. *See State ex rel. Treat v. Puckett*, 2002 WI App 58, ¶24 n.14, 252 Wis. 2d 404, 643 N.W.2d 515 (when the circuit court does not rule on a motion, the motion is implicitly denied). With regard to Bates's motion seeking to default the division for filing an untimely response brief, the division argues that the circuit court's denial should be reviewed for an erroneous exercise of discretion. *See Alexander v. Riegert*, 141 Wis. 2d 294, 298, 414 N.W.2d 636 (1987) (the circuit court's decision to modify a scheduling order is reviewed for an erroneous exercise of discretion). We agree with the division and conclude that the circuit court did not erroneously exercise its discretion in declining to default the division for filing its response brief after the date in the scheduling order.³ Moreover, Bates did not file a reply brief and therefore has not responded to the division's argument on this issue. Unrefuted arguments are deemed admitted. *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

³ Though Bates suggests that the division's late response brief "severely prejudiced [his] case causing a manifest injustice," he fails to identify how he was harmed by filing his reply brief before receiving the division's response brief. To the extent Bates asserts that the nonsequential filing of circuit court briefs prejudiced his case, we decline to further address his argument because it is undeveloped and lacks both factual and legal support. *See State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

To the extent Bates also challenges the circuit court's failure to grant his motion for default judgment based on the timing of the division's return of the record, we reject his claim. Default judgment is unavailable when a court reviews an agency decision on certiorari. *Treat*, 252 Wis. 2d 404, ¶26. Default judgment may be rendered under WIS. STAT. § 806.02 only "if no issue of law or fact has been joined and if the time for joining issue has expired." WIS. STAT. § 806.02(1). In certiorari proceedings, however, "there is no answer or opposing pleading that 'joins' issues of fact or law." *Treat*, 252 Wis. 2d 404, ¶26 (citation omitted). Instead, in response to the petition, the court issues a writ ordering the respondent to return the record. *Id.* The return to a writ of certiorari is merely a certification of the record of the proceeding sought to be reviewed. Unlike an answer, it does not consist of denials and affirmative defenses. *Id.*

Bates also contends that the circuit court applied an improper legal standard in determining that the division's decision was supported by the evidence. On certiorari review of an administrative decision revoking supervision, we review the decision of the division, 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), *aff'd*, 219 Wis. 2d 615, 579 N.W.2d 698. Our review of the division's decision is limited to four inquires: (1) whether it stayed within its jurisdiction, (2) whether it acted according to law, (3) whether its action was arbitrary, and (4) whether the evidence was such that the division could reasonably arrive at its decision. *Id.* In determining the sufficiency of the evidence, our review is limited to whether there is substantial evidence supporting the division's decision. *State ex rel. Washington v. Schwarz*, 2000 WI App 235, ¶17, 239 Wis. 2d 443, 620 N.W.2d 414. "If substantial evidence supports the division's determination, it must be affirmed even though the evidence may [also] support a contrary determination." *Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994).

We conclude that there is substantial evidence supporting the division's revocation decision. Bates stipulated to the violation that he failed to turn himself in as directed by his agent.⁴ As to the drug-buy allegation, the ALJ relied on the testimony of the investigating officer who provided a detailed account of the May 14, 2014 transaction. The ALJ further noted that Bates's own testimony corroborated the police reports and the officer's testimony. We defer to the division's credibility findings and its determination concerning the weight of the evidence. *George v. Schwarz*, 2001 WI App 72, ¶10, 242 Wis. 2d 450, 626 N.W.2d 57. Based on the evidence presented at the revocation hearing, the decision to revoke Bates's supervision was reasonable. *See id.* (we determine only whether reasonable minds could arrive at the conclusion reached by the division).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

⁴ Bates does not deny that he stipulated to the allegation but now claims that his behavior did not constitute a rules violation. In accepting the stipulation, the ALJ found that Bates's failure to turn himself in constituted a rules violation as alleged by the department. Specifically, the department alleged and Bates by his stipulation agreed that he acted in violation of Rule ST-1, which required Bates to "[a]void all conduct which is in violation of federal or state statute, municipal or county ordinances, tribal law or which is not in the best interest of the public welfare or your rehabilitation." Bates's failure to turn himself in when there was a warrant for his arrest and his agent had ordered him to do so was at the very least "not in the best interest of the public welfare or [Bates's] rehabilitation."