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DISTRICT I

March 15, 2017

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

2016AP862 State of Wisconsin ex rel. Jacob Paulson v. Brian Hayes, Administrator (L.C. # 2015CV4721)

Before Kessler, Brash and Dugan, JJ.

Jacob Paulson, *pro se*, appeals from an order of the circuit court that affirmed the Division of Hearings and Appeals' decision upholding an administrative law judge's (ALJ) revocation of Paulson's probation. 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] The order is summarily affirmed.

In 2011, in Milwaukee County Circuit Court case No. 2010CF391, Paulson was convicted of two counts of second-degree sexual assault of a child, charges based in part on

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

Paulson fondling the breasts of two fourteen-year-old girls. The circuit court imposed and stayed consecutive sentences totaling eleven years' confinement and placed Paulson on five years of probation. After a period of confinement as a condition of probation, Paulson was released to community supervision on May 6, 2012.

Paulson had a series of minor infractions, some of which led to short periods in custody, but revocation had not previously been sought. On January 16, 2015, Paulson admitted having contact with two minor girls, neither of whom he had been approved to see. Paulson also admitted having a *Playboy* magazine at his home, which he did not disclose to his agent, contrary to the rules of his probation. The Department of Corrections decided to take Paulson into custody for these violations.

Once Paulson was in custody, the Department discovered that he had an iPhone, which had not been authorized by his probation agent, although Paulson claimed his prior agent knew about the phone and was okay with it. Paulson provided the passcode but denied that the agent would find anything prohibited on the phone. When his agent searched the phone, she discovered a dating application was installed. She also determined that between January 3 and January 13, 2015, Paulson had conducted multiple Google searches for teens and girls, and had visited multiple pornography sites. The phone with internet access, the dating application, and the sexually explicit material were all contrary to the rules of Paulson's supervision.

Based on the January 2015 violations, Paulson's agent filed a revocation summary report, alleging four rules violations and recommending probation revocation. The alleged violations were that Paulson: (1) possessed and/or viewed sexually explicit material without agent approval; (2) possessed a smart phone and accessed the internet without agent approval;

(3) accessed a social networking site; and (4) failed to provided true, accurate, and complete information to Department staff. The agent noted these were "technical violations," but very serious and concerning, given that they showed Paulson continuing to engage in "negative and deceptive behaviors" despite prior disciplinary measures. The agent also listed all of the alternatives to revocation that she had considered, and the reasons for rejecting each one.

A probation revocation hearing was held on March 12, 2015. Paulson stipulated to the rules violations. Ultimately, the ALJ ordered probation revocation, rejecting alternatives. The ALJ found that while the defense did a good job of showing that Paulson had the "potential to learn to adjust his behavior" in response to discipline by the Department, there was "no hiding the fact that the offender, more than three years into his probation, acquired and used a smart phone to access the internet; to access a social networking site; and to view sexually explicit material … until his smart phone was discovered and searched." Paulson had close supervision and sexual offender treatment during supervision, but still "made conscious decisions to seek out these sites, view them, and then lie about doing so to his supervising agent." Based on this deception, the ALJ determined that Paulson was "a poor risk for the proposed institutional alterative to revocation," that "it would not be in the best interests of the public, or the offender's rehabilitation, for [Paulson] to escape the imposed and stayed consequences," and that additional correctional treatment could "best be provided in a confined setting." Thus, the ALJ concluded "it would unduly depreciate the seriousness of the violations if probation were not revoked" and "there are no alternatives to revocation that would not unduly depreciate the seriousness of the violations."

Paulson appealed the ALJ's revocation decision to the Division. The Division sustained the decision on April 15, 2015. It noted that Paulson had been caught in possession of an

unapproved internet-capable phone that he was using for social networking and searching for pornography depicting teenagers. Paulson then "compounded the severity of these violations by lying to his agent about them … [and] committed them despite receiving ongoing sexual offender treatment during probation." The Division agreed with the ALJ's "underlying decision that no alternative to revocation is appropriate because anything short of revocation would unduly depreciate the seriousness of the violations and fail to provide adequate community protection," as the nature of Paulson's violations "significantly elevated his risk of re-offense."

Paulson sought certiorari review from the circuit court, arguing revocation of his probation was arbitrary and capricious and that he should have been given an alternative to revocation. The circuit court affirmed the Division's decision. Paulson appeals, repeating the arguments he made to the circuit court.

An appeal of a probation revocation decision is by writ of certiorari to the circuit court. *See* ***State ex rel. Washington v. Schwarz***, 2000 WI App 235, ¶16, 239 Wis. 2d 443, 620 N.W.2d 414. Such review is not *de novo*. *See* ***id.*** On appeal to this court, we apply the same standard as the circuit court, and we review the Division's decision, not the circuit court's. *See* ***id.***; *see also* ***State ex rel. Greer v. Wiedenhoeft***, 2014 WI 19, ¶34, 353 Wis. 2d 307, 845 N.W.2d 373. Certiorari review of a probation revocation decision is limited to four inquiries: (1) whether the Division kept within its jurisdiction; (2) whether the Division acted according to law; (3) whether the decision was "arbitrary, oppressive or unreasonable" and represented the Division's will and not its judgment; and (4) whether the evidence was such that the decision in question might reasonably be made. *See* ***State ex rel. Tate v. Schwarz***, 2002 WI 127, ¶15, 257 Wis. 2d 40, 654 N.W.2d 438. Paulson's challenges center around the last two questions.

The decision to revoke probation is committed to the discretion of the Division. *See* ***State ex rel. Lyons v. Dep't of Health and Soc. Servs.***, 105 Wis. 2d 146, 151, 312 N.W.2d 868 (Ct. App. 1981). "A proper exercise of discretion contemplates a reasoning process based on the facts of record 'and a conclusion based on a logical rationale founded upon proper legal standards.'" ***Von Arx v. Schwarz***, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994) (citation omitted). "An agency's decision is not arbitrary and capricious and represents its judgment if it represents a proper exercise of discretion." ***Id.*** On appeal, "the probationer bears the burden of proving that the [revocation] decision was arbitrary and capricious." ***Id.*** at 655.

Revocation followed by imprisonment is appropriate if it is found, on the basis of the original offenses and intervening conduct, that confinement is necessary to protect the public from further criminal activity by the offender, the offender needs correctional treatment which can be most effectively provided if he is confined, or it would unduly depreciate the seriousness of the violations if probation were not revoked. *See* ***State ex rel. Plotkin v. Dep't of Health and Soc. Servs.***, 63 Wis. 2d 535, 544, 217 N.W.2d 641 (1974).

If the Division determines that revocation is necessary to protect the public and that it would unduly depreciate the seriousness of the offenses if revocation were not ordered, "these findings of ultimate fact may not be questioned on review so long as they are supported by substantial evidence." ***Lyons***, 105 Wis. 2d at 151. "'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***, 185 Wis. 2d at 656 (citation omitted).

Paulson's primary complaint relative to the Division's decision to revoke his probation and the sufficiency of the evidence to support that decision is that he believes he should have

been given an alternative to revocation. Paulson would have us consider other facts of record that are more favorable to him than those relied upon by the ALJ and the Division. However, we do not reweigh the evidence, nor may we substitute our judgment for that of the Division. *See* ***Greer***, 353 Wis. 2d 307, ¶37; ***Von Arx***, 185 Wis. 2d at 656. We are satisfied that the revocation decision was neither arbitrary nor capricious and was supported by substantial evidence, which we have already detailed herein.

Therefore,

IT IS ORDERED that the order is summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals