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May 31, 2017

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

2016AP1783 State of Wisconsin ex rel. Ronald Schroeder v. Brian Hayes, Administrator, Division of Hearings and Appeals (L.C. #2015CV1847)

Before Neubauer, C.J., Reilly, P.J., and Gundum, J.

Ronald Schroeder appeals pro se from a circuit court order affirming, on certiorari review, a decision of the Division of Hearings and Appeals (the Division) denying his request for a new revocation hearing based on newly discovered evidence. 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 summarily affirm.

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

The background facts were recently summarized in ***State ex rel. Schroeder v. Hayes***, No. 2015AP1720, unpublished slip op. ¶¶2-9 (WI App Feb. 8, 2017). We need only note that Schroeder's extended supervision was revoked for rule violations, and he was ordered reconfined for three years, seven months, and six days. In that case, we upheld the Division's decision revoking Schroeder's extended supervision. ***Id.***, ¶19.

In this appeal, Schroeder is challenging the Division's decision denying his request for a new revocation hearing based on newly discovered evidence. Where an appeal is taken from a circuit court's order affirming or reversing a decision of an administrative agency, we review the agency's decision, not the circuit court's. *See* ***Mineral Point Unified Sch. Dist. v. WERC***, 2002 WI App 48, ¶12, 251 Wis. 2d 325, 641 N.W.2d 701. Our review of a revocation determination on certiorari review is confined to considering: (1) whether the Division's decision was within its jurisdiction; (2) whether the Division acted in accordance with the law; (3) whether its actions were "arbitrary, oppressive or unreasonable and represented its will rather than its judgment"; and (4) whether the evidence presented was such that the Division might reasonably make the decision. ***State ex rel. Simpson v. Schwarz***, 2002 WI App 7, ¶10, 250 Wis. 2d 214, 640 N.W.2d 527 (2001).

The basis of Schroeder's entire claim in this case is the results of a self-administered Minnesota Sex Offender Screening Tool (MnSOST-R), which Schroeder claims is newly discovered evidence that he has a low recidivism risk. Schroeder's arguments to this court appear to be twofold: (1) Schroeder argues that the Division's decision denying a new revocation hearing was unreasonable and a violation of the Fourteenth Amendment's due process

clause[2] and (2) the Division's failure to state "who's at risk from what 'criminal conduct'" of Schroeder is "erroneous" and "unreasonable."

To determine whether a claim that newly discovered evidence entitles Schroeder to a new revocation hearing, we must apply the five-prong test required by ***State ex rel. Booker v. Schwarz***, 2004 WI App 50, ¶¶12, 14, 270 Wis. 2d 745, 678 N.W.2d 361:

> (1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial.

Id. (quoting ***State v. Bembenek***, 140 Wis. 2d 248, 252, 409 N.W.2d 432 (Ct. App. 1987)).

We agree with the Division that the MnSOST-R does not entitle Schroeder to a new revocation hearing under these factors. Schroeder's MnSOST-R results are neither material to Schroeder's revocation nor do they create a reasonable probability that a different result would be reached at a new revocation hearing. Schroeder claims that the Division "groundlessly states that Schroeder posed an elevated risk of further criminal activity in the community," but he neglects to acknowledge that his recidivism risk had a cursory impact on revocation of his extended supervision. Schroeder's extended supervision was revoked as a result of rule violations. Although the Division's decision mentions the need "to protect the community from

[2] Schroeder's due process arguments are undeveloped and supported only by general statements. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). As Schroeder received a revocation hearing, appellate review of the Division's decision, and review of his motion for a new revocation hearing based on newly discovered evidence, we see no due process violation. To the extent we have not addressed any other argument raised by Schroeder on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

further criminal conduct by Mr. Schroeder," the bulk of the Division's reasoning relates to the need "to avoid undue depreciation of the seriousness of the proven violations," Schroeder's "demonstrated … rejection of the requirements of community supervision," and his "conduct showing his contempt for the court ordered conditions of supervision and the rules governing his conduct in the community."

In referencing the need for community protection, the Division makes no mention of Schroeder's recidivism risk; instead, the Division explained, "Mr. Schroeder needs to be held to account for his violations and the community needs protection from the heightened risk to community safety *his failure to adhere to supervision requirements create*." Schroeder does not deny that he violated his supervision requirements.[3] The results of the self-administered and self-calculated MnSOST-R are irrelevant to the type of rule violations that led to Schroeder's extended supervision being revoked, and the Division's decision denying a new revocation hearing was reasonable under the circumstances.

As to Schroeder's second argument, he focuses solely on the Division's mention of Schroeder's "elevated risk of further criminal activity" and that the Division refused to tell him "who was at risk from what specific 'criminal conduct,'" which is an "unreasonable determination of the facts." Schroeder has provided us with no statute or case law, and we have found none, requiring the Division to provide the details Schroeder seeks. Instead, our supreme court has found that revocation is appropriate where, based on the original offense and the subsequent conduct of the offender, a court or administrative body finds: (1) "confinement is

[3] We rejected Schroeder's specific challenges to his revocation in ***State ex rel. Schroeder v. Hayes***, No. 2015AP1720, unpublished slip op. (WI App Feb. 8, 2017).

necessary to protect the public from further criminal activity by the offender," (2) "the offender is in need of correctional treatment which can most effectively be provided if he is confined," and (3) "it would unduly depreciate the seriousness of the violation if probation were not revoked." ***State ex rel. Plotkin v. DHSS***, 63 Wis. 2d 535, 544, 217 N.W.2d 641 (1974). The Division's written decision explained its reasons for reconfinement, and the decision addressed each of these factors. We see no error.

Schroeder committed a serious offense that not only violated the laws of this state, but also violated a person's trust, and he seeks to trivialize the significance of his crime and his rule violations before this court. Our review of the record satisfies us that the Division acted in accordance with the law and made a reasonable decision based on the evidence presented.

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

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. § 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals