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June 23, 2017

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

2016AP1930 Ontario A. Davis v. Brian Hayes (L.C. #2015CV7969)

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

Ontario Davis, pro se, appeals orders denying his petition for certiorari review of a parole revocation and denying his motion for reconsideration. Davis challenges the revocation decision of the Division of Hearings and Appeals ("the division") on a variety of grounds, including inadequate notice and reliance on unreliable hearsay. Davis also argues that the Administrative Law Judge ("ALJ") acted arbitrarily and was not neutral and detached. 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 for the reasons discussed below.

Davis was convicted of second-degree reckless homicide while armed (PTAC) and first-degree recklessly endangering safety while armed, and sentenced to prison. After being released to parole supervision, he was taken back into custody when officers found Davis in an apartment where illegal drugs and firearms were located and also found a loaded firearm in Davis's car. Based on these events, Davis's parole agent issued a revocation report, listing five grounds for revocation. The first ground for revocation was Davis's possession of a firearm.

Following a hearing, the ALJ revoked Davis's parole and ordered that he be incarcerated for three years. The division sustained the decision on the first ground for revocation, that Davis possessed a loaded firearm. On Davis's petition for certiorari review, the circuit court affirmed the division's decision and denied Davis's motion for reconsideration.

Our review in a certiorari action is limited to the record created before the administrative agency. ***State ex rel. Whiting v. Kolb***, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). We will consider only whether (1) the division stayed within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) the evidence was such that the division might reasonably make the order or determination in question. ***Id.***

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

We see no error in the revocation decision based on Davis's possession of a firearm. *See* ***State ex rel. Plotkin v. DHSS***, 63 Wis. 2d 535, 544, 217 N.W.2d 641 (1974) (revocation followed by imprisonment is appropriate if "confinement is necessary to protect the public from further criminal activity by the offender"). The division determined that possession of a firearm was an "extremely serious violation," given Davis's underlying crimes. It further determined that such possession "poses a grave threat to the safety of others in the community," and that "[r]evocation and confinement as ordered are necessary to protect the community from further violent crime." This is a proper basis for sustaining the revocation. *See* ***id.***

Davis argues that the division improperly overlooked his claims of ALJ error regarding the second, third, and fourth grounds for revocation. However, Davis does not identify any error regarding the first ground for revocation, that Davis possessed a firearm.[2] To the contrary, Davis did not contest this ground for revocation at the hearing. He also admits that "the allegation that he was in possession of a firearm, alone, was enough to warrant revocation." Because Davis has not challenged the basis for the division's decision, he has not shown any reasonable possibility that his claims of ALJ error might have contributed to the outcome. *See* ***State ex rel. Simpson v. Schwarz***, 2002 WI App 7, ¶16, 250 Wis. 2d 214, 640 N.W.2d 527 (WI App 2001) (errors are harmless if there is no reasonable possibility that the error might have contributed to the

[2] In his reply brief, Davis argues for the first time that the fact that he was acquitted of being a felon in possession of a firearm is newly discovered evidence requiring reversal of the revocation decision. We generally do not address issues raised for the first time in the reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661. Separately, an acquittal on charges underlying the revocation has no bearing on the proof before the administrative body, where a lower standard of proof applies. *See* ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 384-88, 260 N.W.2d 727 (1978); *see also* ***State v. Verstoppen***, 185 Wis. 2d 728, 739, 519 N.W.2d 653 (Ct. App. 1994) (rejecting defendant's argument for sentence modification due to his acquittal on the charge underlying his parole revocation).

outcome). Therefore, assuming without deciding that Davis identified errors by the ALJ, these would be, at best, harmless error. *See* ***id.***

Separately, Davis argues that his term of confinement should be reduced. He contends that "we can only assume that each violation carried similar weight and/or factored evenly into the imposition of the ALJ's sentence." This argument again misses the mark, because the division sustained the revocation and the confinement based on his possession of a firearm alone. As stated above, the division determined that "revocation *and confinement as ordered* are necessary to protect the community from further violent crime." (Emphasis added.) In making this determination, the division rejected Davis's argument that his confinement should be reduced from thirty-six months to nineteen months. Davis has not pointed to any error in the division's final decision as to his term of confinement.

Finally, Davis argues that the ALJ acted arbitrarily and was not neutral and detached. However, he did not make these arguments in his administrative appeal, and they are forfeited. *See* ***Shannon & Riordan v. Board of Zoning Appeals***, 153 Wis. 2d 713, 731, 451 N.W.2d 479 (Ct. App. 1989). Davis agrees that this is the general forfeiture rule but argues that we should invoke a recognized exception under which a reviewing court decides to overlook forfeiture, at least in part, because the issue presented involves only questions of law. *See* ***Cords v. State***, 62 Wis. 2d 42, 54, 214 N.W.2d 405 (1974). In ***Cords***, our supreme court considered an argument regarding statutory interpretation that was raised for the first time on appeal. ***Id.*** In doing so, the Court reasoned that in that case, "the issues involved are purely questions of law involving statutory construction and since this 'theory' may be advanced again," it made sense in that case to reach the merits. ***Id.***

Here, however, Davis's claims that the ALJ acted arbitrarily and was not neutral and detached center on several newly raised challenges to the ALJ's findings regarding credibility and disputed facts, as well as to the ALJ's handling of Davis's questions regarding a sentencing recommendation by the Department of Corrections. These arguments are all specific to Davis's administrative hearing and are therefore best resolved by the division in the first instance. *See* ***Bunker v. LIRC***, 2002 WI App 216, ¶15, 257 Wis. 2d 255, 650 N.W.2d 864 (requiring parties to make objections to evidence or procedure to the administrative agency allows the agency to correct its errors). Thus, we see good reason not to depart from the ordinary forfeiture rule.

Upon the foregoing reasons,

IT IS ORDERED that the orders are 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. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals