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DISTRICT II

September 13, 2017

To:

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

2016AP2213

Samuel F. Petrusch v. Brian Hayes, Administrator, Division of
Hearings and Appeals (L.C. #2016CV205)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Samuel F. Petrusch appeals from a circuit court order affirming, on certiorari review, a decision of the Division of Hearings and Appeals (the Division) revoking his extended supervision. 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.

On October 31, 2006, Petrusch was convicted of second-degree sexual assault of a child and sentenced to three years' initial confinement and ten years' extended supervision. Petrusch was prohibited from unsupervised contact with children and from using the internet. Prior to the revocation at issue in this case, Petrusch was twice revoked, in 2009 and 2012, for having unauthorized contact with children and for viewing or attempting to obtain nude photos of children. On June 9, 2015, Petrusch was released to extended supervision for the third time.

On September 17, 2015, Petrusch's supervising agent filed a notice of violation and recommended revoking Petrusch's extended supervision. The agent cited three violations: (1) Petrusch possessed an unapproved cell phone, (2) Petrusch "actively searched for and looked at Child Pornography via the internet on the cell phone," and (3) Petrusch lied to his agent. A revocation hearing was held before an Administrative Law Judge (ALJ). Petrusch's agent testified as to the alleged violations. The ALJ found that the department failed to prove allegation one by a preponderance of the evidence as there was "no written rule prohibiting him from possessing a cell phone," but that Petrusch "acted as described" under violations two and three as Petrusch admitted to these violations. The ALJ concluded that the violations did not warrant revocation of Petrusch's extended supervision.

The department appealed to the Division. The Division reversed the decision of the ALJ on the grounds that Petrusch's viewing of, and lying about viewing, child pornography is an

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

“exceedingly serious criminal violation,” especially in light of Petrusch’s 2006 conviction for sexual assault of a child and his twice being revoked from extended supervision for trying to obtain nude photos of children. The Division imposed four years and six months of reconfinement. Petrusch challenges the Division’s decision by writ of certiorari.

On certiorari review, “we review the division’s decision, not that of the trial court.” *State ex rel. Warren v. Schwarz*, 211 Wis. 2d 710, 717, 566 N.W.2d 173 (Ct. App. 1997). Certiorari review of revocation of extended supervision “is limited to four inquiries: (1) whether the [Division] stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will, not its judgment; and (4) whether the evidence was such that it might reasonably make the decision that it did.” *Id.*; *see also Van Ermen v. DHSS*, 84 Wis. 2d 57, 63, 267 N.W.2d 17 (1978).

Petrusch argues that the Division’s decision to revoke was a decision that was “arbitrary and unreasonable, and represented its will, and not its judgment.” Petrusch also makes a cursory argument that his due process rights were violated as he did not have a “meaningful revocation hearing” as evidence was not “appropriately considered,” that the Division relied on “unfounded documentary evidence,” and that he was denied discovery.

Petrusch bears the burden of showing that the decision to revoke was arbitrary, unreasonable, and represented its will and not its judgment. *See State ex rel. Gendrich v. Litscher*, 2001 WI App 163, ¶4, 246 Wis. 2d 814, 632 N.W.2d 878. “It is the province of the [Division] to weigh the evidence in a revocation case. A certiorari court may not substitute its view of the evidence for that of the [Division].” *Van Ermen*, 84 Wis. 2d at 64. If Petrusch does not meet his burden then we will not interfere with the decision as we may not substitute our

view of the evidence for that of the division. *State ex rel. Greer v. Wiedenhoeft*, 2014 WI 19, ¶37, 353 Wis. 2d 307, 845 N.W.2d 373.

Petrusch argues that the decision was arbitrary, unreasonable, and represented its will and not its judgment as he was entitled to have a cell phone, that hearsay evidence of alleged violations was improperly allowed, that his autism was not properly considered, and that he is “amenable” to community supervision. We disagree that Petrusch’s claims, even if true, are sufficient to overcome the evidence found by both the ALJ and the Division that Petrusch admitted to actively searching for and viewing child pornography and admitted that he provided false information to his agent about his viewing of child pornography. Given that possession/viewing of child pornography is a crime and that Petrusch had on two prior occasions been revoked from supervision for attempting to obtain nude photos of children, Petrusch fails to meet his burden to show that his revocation was an arbitrary or unreasonable act on the part of the Division, or one which represented its will and not its judgment.

Petrusch’s argument that his due process rights were violated raises the issue of whether the Division acted according to law, which is a question of law that we review de novo without deference to the conclusions of the Division or the circuit court. *State ex rel. Tate v. Schwarz*, 2002 WI 127, ¶16, 257 Wis. 2d 40, 654 N.W.2d 438. In a revocation setting, due process requires that there be “an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee’s behavior.” *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972). Petrusch was entitled to “written notice of the claimed violations of probation; disclosure to the probationer of the evidence against him; the opportunity to be heard in person and to present witnesses and documentary evidence; the right to confront and cross-examine adverse witnesses;

a neutral and detached hearing body; and a written statement by the fact finder as to the evidence relied on and reasons for revocation.” *Greer*, 353 Wis. 2d 307, ¶163.

Petrusch was present with counsel at the fact-finding hearing on November 30, 2015, and he was provided with the department’s revocation file. The ALJ excluded phone data and photos from evidence after Petrusch objected. Petrusch was not denied the right to present or challenge evidence. Both the ALJ and the Division relied on Petrusch’s admission that he searched, obtained, and viewed child pornography and then lied to his agent that he did so. Petrusch’s due process rights were not violated.

The decision of the Division is summarily affirmed.

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.

Diane M. Fremgen
Clerk of Court of Appeals