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October 4, 2017

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

2016AP2352

State of Wisconsin ex rel. John Turcotte v. Brian Hayes,
Administrator, Division of Hearings and Appeals
(L.C. #2015CV1616)

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

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).

John Turcotte appeals a circuit court order denying his petition for writ of certiorari to

review the DHA's order revoking his supervision.¹ Upon reviewing the briefs and the record, we conclude at conference the case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm the order.

In 1997, Turcotte was convicted in Kenosha County, as a habitual offender, of aggravated battery, intent to cause substantial bodily harm. He was sentenced to twelve years in prison. Released on discretionary parole in 2004, his supervision was transferred to Florida. Drunk driving in 2008 led to a conviction for vehicular homicide and drew a sentence of seven years in prison and eight years' probation.²

The DOC moved to revoke his parole on completion of his Florida confinement. It alleged that Turcotte violated his agreed-upon rules of supervision by (1) consuming alcohol; (2) consuming marijuana; and that, while operating a motor vehicle, he (3) was under the influence of alcohol; (4) had an open bottle of rum in his possession; (5) caused property damage; (6) caused serious bodily injury to another; and (7) caused or contributed to the death of a human being. Turcotte stipulated to all but (2) and (4), saying the rum was not his. The DOC sought reincarceration for the full nearly five and one-half years remaining on his 1997 sentence.

¹ This opinion uses the following acronyms: DHA (Division of Hearings and Appeals); DUI (driving under the influence); DOC (Wisconsin Department of Corrections); ALJ (administrative law judge), and DCC (the DOC's Division of Community Corrections).

Contrary to Turcotte's certification, his appendix does not include DHA Administrator Hayes's order, the "final decision of the administrative agency." *See* WIS. STAT. RULE § 809.19(2)(a) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² He also was convicted of DUI causing serious bodily injury and three counts of DUI causing damage to person or property. He received probation on those counts concurrent to that in count 1.

Turcotte and a DCC agent testified at the revocation hearing. After considering their testimony, the nature of the 1997 offense, the seriousness of the parole violations, the affidavit in support of the arrest warrant, and other exhibits, the ALJ found that reincarcerating Turcotte for the balance of his sentence was warranted, as six of the alleged violations were proved,³ and alternatives to revocation were not appropriate. The administrator sustained the decision.

On appeal of an order denying a petition for certiorari review of a parole revocation decision, we review the decision of the agency, not the circuit court. *State ex rel. Ortega v. McCaughtry*, 221 Wis. 2d 376, 385-86, 585 N.W.2d 640 (Ct. App. 1998). Our review is limited to determining whether: (1) the agency stayed within its jurisdiction; (2) the agency acted according to law; (3) its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) the agency reasonably could make the decision it did based on the evidence. *Van Ermen v. DHSS*, 84 Wis. 2d 57, 63, 267 N.W.2d 17 (1978). If substantial evidence supports the revocation decision, the decision will be affirmed. *Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994).

Violation of a rule or condition is a sufficient ground for revocation of supervision if the ALJ finds *either* that (1) confinement is necessary to protect the public from further criminal activity by the person; *or* (2) correctional treatment could be provided most effectively in confinement; *or* (3) not revoking supervision would unduly depreciate the seriousness of the violation. WIS. ADMIN. CODE § HA (7)(b)3 (emphasis added). The ALJ found all three.

³ Turcotte's blood test showed 7.2 nanograms of a marijuana metabolite. The ALJ found the result insufficient to prove either its reliability or that Turcotte had used marijuana the day of the crash.

The ALJ reasonably found that: (1) the community needs protection from Turcotte because, while on parole for an “extremely violent offense,” he racked up “extremely serious new violations”; (2) he needs correctional treatment to address his “thinking errors” and his alcohol use and the consequences of it; and (3) to continue Turcotte on parole after committing these “incredibly severe violations” would unduly depreciate both their seriousness and the fact that he committed them while on parole. “The facts found by the [agency] are conclusive if supported by ‘any reasonable view’ of the evidence, and we may not substitute our view of the evidence for that of the [agency].” *State ex rel. Jones v. Franklin*, 151 Wis. 2d 419, 425, 444 N.W.2d 738 (Ct. App. 1989) (citation omitted).

Pointing to the DCC agent’s testimony that she and her supervisor believed that he got a “sweetheart deal” in Florida and the ALJ’s “exclusive[]” focus on the seriousness of his violations, Turcotte complains that the decision to revoke him clearly was “arbitrary and contrary to law because it was wholly based on a desire to punish.” He argues that “[r]evocation hearings are not concerned with retribution,” and supervision is “intended to foster the reintegration of the individual into society at the earliest opportunity.” See *State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 385, 260 N.W.2d 727 (1978). It is Turcotte’s burden to prove that the decision was arbitrary. See *State ex rel. Solie v. Schmidt*, 73 Wis. 2d 76, 79-80, 242 N.W.2d 244 (1976).

“The ultimate question in revocation proceedings is whether the parolee remains a ‘good risk’—that is, whether the person’s rehabilitation can be more successfully achieved “outside prison walls” or “by returning him [or her] to a closed society.” *Flowers*, 81 Wis. 2d at 385. To the extent sentencing after revocation has some punitive aspect, it “is attributable to the crime for which the parolee was originally convicted and sentenced.” *Id.* at 386.

We reject Turcotte's contention that no evidence was presented here showing it is unsafe to supervise him in the community. His violations were evidence that he is not a "good risk" for rehabilitation "outside prison walls." The ALJ did acknowledge that the Florida confinement seemed insufficient, but ordering Turcotte to serve out the remainder of his sentence was not retaliatory; it reflected the gravity of the violations of his discretionary parole.

We also reject out of hand his assertion that DHA's decision was unreasonable because Florida deemed him safe for community supervision. Directly upon completing the confinement portion of his Florida sentence, Turcotte was extradited to Wisconsin for revocation proceedings. The Florida parole board did not determine that he could be safely supervised in the community.

Sufficient evidence supports the ALJ's decision. Turcotte has not proved the decision was arbitrary.

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