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February 21, 2018

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

2017AP734

Steven Miller Johnson v. Brian Hayes
(L.C. # 2016CV3819)

Before Brennan, P.J., Kessler and Dugan, 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).

Steven Miller Johnson, *pro se*, appeals an order of the circuit court affirming the decision to revoke his probation. He argues on appeal that the Division of Hearings and Appeals (DHA) erred in determining that revocation was appropriate without first investigating whether reasonable alternatives were available. 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.

Background

In 2015, in Milwaukee County Circuit Court case No. 2014CF3253, Johnson was convicted of aggravated battery to an elderly person in a domestic abuse incident. At the time the crime was committed, Johnson lived with R.G. and her mother, E.W. That night, Johnson got home late and he and R.G. got into an argument outside of their house. Johnson punched R.G. several times in the face. R.G. retreated into the house, and Johnson kicked in the door to follow her. Once inside, Johnson pushed E.W. to the floor, grabbed a shovel, and hit R.G. with it.

The circuit court sentenced Johnson to two years of initial confinement and two years of extended supervision. That sentence was stayed and the circuit court ordered that Johnson be released to probation on March 10, 2015. One of the rules of his supervision was that he not contact the two battery victims, R.G. and E.W. The circuit court additionally ordered that Johnson have no further violations of the law, undergo an AODA assessment, comply with treatment, maintain absolute sobriety, and submit to random urine screens.

On October 2, 2015, Johnson was arrested for operating a motor vehicle while intoxicated (OWI) as a second offense. He later provided a statement to his probation agent. In the statement, Johnson admitted that he “drank like a pint of [m]ango flavored vodka” and that

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

he drove his friend's truck while under the influence and without a valid driver's license. He further stated that his friend and his friend's girlfriend, whom he did not identify by name, were in the truck with him. Johnson subsequently admitted that his friend's girlfriend was R.G. On December 23, 2015, Johnson pled guilty to OWI as a second offense, and the circuit court sentenced him to ninety days in jail.

Meanwhile, the Wisconsin Department of Correction (DOC) initiated revocation proceedings. DOC alleged that Johnson had violated the rules of his supervision in five ways: (1) consuming alcohol; (2) operating a motor vehicle without a valid driver's license; (3) operating a motor vehicle while under the influence of alcohol; (4) having contact with his victim, R.G., without permission from his agent; and (5) failing to provide truthful information to his agent.

A probation revocation hearing was held on December 30, 2015. Johnson stipulated to violations one, two, and three. After hearing testimony as to violations four and five, the administrative law judge (ALJ) concluded Johnson had violated the conditions of his supervision as alleged with regard to those violations.

Ultimately, the ALJ revoked Johnson's probation and rejected alternatives to revocation. The ALJ noted Johnson's serious health issues and the fact that Johnson was contrite in his testimony concerning the violations. However, the ALJ also pointed out Johnson's poor record while on supervision: "[Johnson] has been given treatment opportunities on supervision but [he] has not applied himself as much as he pledged to in the future. The offender is a poor risk on supervision." The ALJ explained that there were "no alternatives to revocation that would not unduly depreciate the seriousness of the violations."

Johnson appealed the ALJ's decision to DHA. DHA sustained the decision. In doing so, DHA accounted for Johnson's claims that the ALJ did not adequately consider his medical issues or placement at the Milwaukee Secure Detention Facility (MSDF) as an alternative to revocation. In explaining why revocation was appropriate, DHA emphasized the "extremely serious, violent crime" for which Johnson was serving probation. In its decision, DHA continued:

At sentencing, the court made it clear that Johnson was not to use any alcohol as a condition of his liberty within the community. The court stressed the point as follows: "Maintain absolute sobriety." Johnson not only ignored this court-ordered condition of probation, he drove while intoxicated. This resulted in his second conviction for operating while intoxicated. More importantly, Johnson subjected others using the public roadways to a danger of death or great bodily harm by driving while intoxicated. This shows that he is not only willing to ignore the court[-]ordered conditions of probation, he is a danger to the community. And while I do not doubt that Johnson has serious medical issues and treatment issues, public safety is the overriding concern in this case. I am satisfied that treatment alternatives are not appropriate and that revocation is necessary to protect the community from further crime.

(Record citations omitted.)

Johnson sought certiorari review by the circuit court. He did not challenge DHA's decision that he violated the conditions of his supervision; instead, he challenged DHA's discretionary determination that his violations warranted revocation and incarceration.

After DHA certified the revocation record, Johnson filed a motion to amend the record with several letters to and from DOC that he claimed showed DOC's failure to consider whether an alternative to revocation was available at MSDF. The circuit court denied the motion because the letters were not part of the final revocation hearing record. The circuit court also denied Johnson's motion to reconsider.

The circuit court then affirmed DHA's revocation decision after concluding that it was reasonable and supported by credible and substantial evidence in the record. The circuit court denied Johnson's motion to reconsider, and this appeal follows.

Discussion

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 DHA's decision, not the circuit court's. See *id.*; see also *State ex rel. Greer v. Wiedenhoef*, 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 DHA kept within its jurisdiction; (2) whether DHA acted according to law; (3) whether the decision “was arbitrary, oppressive, or unreasonable” and represented DHA'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 (citation omitted).

The decision to revoke probation is committed to the discretion of DHA. See *State ex rel. Lyons v. DHSS*, 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 may be appropriate if any of the following are found on the basis of the original offense and the intervening conduct:

- (i) confinement is necessary to protect the public from further criminal activity by the offender; or
- (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
- (iii) it would unduly depreciate the seriousness of the violation[s] if probation were not revoked.

State ex rel. Plotkin v. DHSS, 63 Wis. 2d 535, 544, 217 N.W.2d 641 (1974) (internal quotation marks and citation omitted).

If DHA 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).

Johnson’s sole argument on appeal is that DHA did not properly consider alternatives to revocation and did not adequately explain its reasoning on the record. To support his position, Johnson offers this court documents that are outside of the record. These documents were not included in the record because they were not considered by the ALJ at the final revocation hearing. Even if we accept for purposes of this appeal that there are documents showing an

alternative to revocation was available at MSDF, this information is irrelevant. At the final revocation hearing, DOC argued and DHA ultimately agreed that such an alternative was not appropriate given the severity of Johnson's violations.

To the extent Johnson asks us to reweigh facts that are of record that he believes shows the revocation decision was arbitrary and capricious, his argument also fails. We do not reweigh the evidence, nor may we substitute our judgment for that of DHA. *See Greer*, 353 Wis. 2d 307, ¶37; *Von Arx*, 185 Wis. 2d at 656.

The revocation decision was neither arbitrary nor capricious and was supported by substantial evidence. Such evidence related to the violent nature of the underlying crime for which Johnson was serving probation; the seriousness of the probation violations; and Johnson's need for correctional treatment due to his poor performance while on probation.

Therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals