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DISTRICT II/IV

January 8, 2019

To:

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

2018AP574

Marvin D. Lothar v. Brian Hayes (L.C. # 2017CV1394)

Before Blanchard, Kloppenburg and Fitzpatrick, 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).

Marvin Lothar appeals the circuit court order dismissing Lothar's petition for certiorari review of an agency decision revoking Lothar's 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(1) (2015-16).¹ We affirm.

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

Lother was alleged to have violated several conditions of his extended supervision, including by possessing and discharging a firearm causing injury to A.D. An administrative law judge (ALJ) found that the alleged firearm incident was sufficiently proven and, as a result, concluded that Lother's extended supervision should be revoked and Lother reconfined to prison. Lother sought administrative review of the ALJ's decision, and the Division of Hearings and Appeals (DHA) administrator issued a decision sustaining revocation.

We review the DHA administrator's decision, not the ALJ's decision or the circuit court's decision. See *State ex rel. Mentek v. Schwarz*, 2001 WI 32, ¶¶6-7, 242 Wis. 2d 94, 624 N.W.2d 150; *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶10, 250 Wis. 2d 214, 640 N.W.2d 527. "Our review is limited to the following questions: (1) whether DHA kept within its jurisdiction; (2) whether DHA acted according to law; (3) whether DHA's actions were arbitrary, oppressive or unreasonable and represented its will rather than its judgment; and (4) whether the evidence was such that DHA might reasonably make the decision in question." *Simpson*, 250 Wis. 2d 214, ¶10.

Lother argues that DHA failed to act according to law and violated his due process rights because the ALJ erroneously relied on impermissible hearsay evidence from several non-testifying witnesses. Lother also argues that the ALJ improperly shifted the burden of proof to Lother.

The respondent, the DHA administrator, contends that Lother's arguments are beside the point because they are directed at the ALJ's decision instead of the administrator's decision. We agree. As noted, we review the administrator's decision, not the ALJ's decision. We further agree with the administrator that the administrator did not rely on the hearsay evidence that

Lothar challenges. Rather, the administrator relied on testimony from A.D.’s sister describing statements by A.D. that meet the excited utterances exception to the general rule against hearsay as statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” *See* WIS. STAT. § 908.03(2). Specifically, A.D.’s sister testified that she was upstairs in the residence where the incident occurred; that she heard a “bam-bam” from downstairs and then heard A.D. moaning and saying “help me, help me”; that she went downstairs and found A.D. saying “my leg, my leg”; that she dialed 911; and that A.D. told her that Lothar had shot him. This testimony provides a sufficient basis to uphold the administrator’s decision.

Therefore,

IT IS ORDERED that the circuit court’s order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals