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**DISTRICT I**

December 23, 2019

To:

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

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2019AP69

State of Wisconsin ex rel. Jeffrey Scott Polar, Jr. v. Brian Hayes,  
Administrator (L.C. # 2017CV13477)

Before Brash, 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).**

Jeffrey Scott Polar, Jr., appeals the circuit court's order affirming a decision of Brian Hayes, the Administrator of the Division of Hearings and Appeals. Polar argues that Hayes should have reopened the decision revoking Polar's extended supervision based on newly discovered evidence. After review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).<sup>1</sup> We affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

In 2005, Polar was convicted of armed robbery with threat of force, armed robbery with use of force, false imprisonment, and unlawfully possessing a firearm as a convicted felon. In August 2014, he was released on extended supervision. In March 2017, the Department of Corrections initiated revocation proceedings, alleging that Polar violated the rules of his extended supervision. In June 2017, a hearing examiner revoked Polar's extended supervision based on fourteen rule violations, which included four rule violations for which Polar was also criminally charged. In July 2017, Hayes sustained the hearing examiner's decision. In October 2017, the State dismissed the criminal charges because the victim, who is Polar's cousin, failed to appear after being subpoenaed. After the criminal charges were dismissed, Polar filed a motion to reopen the revocation hearing based on the fact that the criminal charges were dismissed. Hayes denied the motion to reopen. Polar petitioned the circuit court for certiorari review. The circuit court affirmed. Polar then appealed to this court.<sup>2</sup>

Polar contends that Hayes erred in refusing to reopen his revocation proceedings based on what he characterizes as newly discovered evidence—the fact that the criminal charges against him were dismissed. An offender seeking to reopen a revocation hearing based on newly discovered evidence must show that he or she meets a five-part test: (1) the evidence came to the moving party's knowledge after the hearing; (2) the moving party was not negligent in seeking to discover it; (3) the evidence is material to the issue; (4) the evidence is not cumulative to evidence that was introduced at the hearing; and (5) it is reasonably probable that a different result would be reached at a new hearing. See *State ex rel. Booker v. Schwarz*, 2004 WI App

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<sup>2</sup> We review the decision of the agency, not the circuit court. See *State ex rel. Warren v. Schwarz*, 211 Wis. 2d 710, 717, 566 N.W.2d 173 (Ct. App. 1997).

50, ¶¶12, 14, 270 Wis. 2d 745, 678 N.W.2d 361. Where, as here, the motion is denied without a hearing because the record conclusively shows that the movant is not entitled to relief, our review is limited to whether the agency properly exercised its discretion. *See id.*, ¶15.

Hayes properly exercised his discretion in concluding that Polar was not entitled to reopen his revocation proceedings because Polar has not shown that the dismissal of criminal charges is material to the decision revoking his extended supervision and has not shown that it is reasonably probable that he would not be revoked at a new hearing based on the fact that the criminal charges against him were dropped. It is well established that the outcome of criminal charges is not material to a revocation arising out of the same or similar conduct. *See State ex rel. Lyons v. DHSS*, 105 Wis. 2d 146, 150, 312 N.W.2d 868 (Ct. App. 1981). If an offender violates the rules of supervision, the offender may be revoked even if the State is unable to prove all of the elements of the criminal charge that may arise out of the same conduct. *Id.* We agree with Hayes's reasoning in his decision denying the motion to reopen:

Revocation proceedings are separate and distinct from the criminal process. They have a different burden of proof, use different rules of evidence and do not rely on the outcome of criminal proceedings. Even an acquittal in a criminal proceeding does not preclude revocation for that same conduct. *See WIS. ADMIN. CODE § DOC 331.09*. Consequently the dismissal of criminal charges has no bearing on the outcome of the revocation action and would not result in a different decision in this case.

Moreover, we note that Hayes specifically stated in his decision affirming the hearing examiner, which he made while the criminal charges were pending, that he would affirm the hearing examiner's order based on the other rule violations regardless of the criminal allegations. We therefore conclude that Hayes properly exercised his discretion in finding that Polar had not met the standard for a new revocation hearing.

Therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2017-18).

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*