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September 16, 2020

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

2019AP1430

State of Wisconsin ex rel. Solomon Armstrong v.
Brian Hayes, Administrator (L.C. #2018CV1026)

Before Neubauer, C.J., Reilly, P.J., and Davis, 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).

Solomon Armstrong appeals from a circuit court order affirming the decision of the Division of Hearings and Appeals and its administrator Brian Hayes (collectively, DHA) to revoke Armstrong's supervised release. Armstrong does not contest that he violated his conditions of release; Armstrong challenges DHA's discretionary determination that his violations warranted revocation and incarceration. 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 (2017-18).¹ We affirm DHA’s decision as reasonable based upon the substantial evidence offered.

Armstrong was convicted in 2009 of first-degree sexual assault of a child under age thirteen and sentenced to a prison term.² He was released to extended supervision on November 1, 2016. Armstrong’s rules of extended supervision included, among other things, that he be required to register as a sex offender, prohibited him from accessing the internet without agent approval, prohibited him from dating or having a sexual relationship without agent approval, and prohibited him from possessing materials that depicted the “intimate parts of an adult.”

In September 2017, Armstrong was found in possession of a smart phone, which revealed that he had accessed the internet to visit pornography and dating sites. The Department of Corrections (DOC) moved to revoke Armstrong’s extended supervision on the grounds that he had accessed the internet without agent approval; had pursued a dating relationship without prior agent approval; had failed to comply with the Sex Offender Registry Program (SORP) requirements by not reporting his internet identifiers; had possessed materials that depicted the intimate parts of an adult; and had failed to provide true, accurate, and complete information about his cellular devices.

¹ All references to the Wisconsin Statutes are to the 2017-18 version.

² While out on bond and awaiting sentencing in the sexual assault case, Armstrong was also charged with disorderly conduct and felony bail jumping for driving his car up to a thirteen-year-old girl, “ask[ing] her whether she wanted some candy,” and proceeding to follow her in his car. He pled no contest and was convicted of disorderly conduct and sentenced to ninety-days’ confinement.

At the hearing, Armstrong admitted all of the violations with the exception of the dating allegation.³ Substantial evidence was offered that Armstrong did pursue a dating relationship without agent approval, including evidence that Armstrong signed up for a dating site and had internet “dating” conversations. The Administrative Law Judge (ALJ) found that Armstrong did pursue a dating relationship without agent approval. The ALJ also found that Armstrong was rejecting the restrictions imposed on him, engaged in new criminal conduct by failing to comply with SORP requirements, and engaged in “secretive behavior, involving viewing sexually explicit images, and in pursuing surreptitious intimate relationships.”

The ALJ revoked Armstrong’s extended supervision on the grounds that it was “necessary to avoid undue depreciation of the seriousness of the proven violations and to protect the community from further criminal conduct by Mr. Armstrong” and found that no suitable alternative to incarceration existed. Armstrong was ordered back to prison for two years and nineteen days.

Armstrong appealed, and the DHA Administrator sustained Armstrong’s revocation. Armstrong sought certiorari review. The circuit court affirmed DHA’s decision. Armstrong appeals.

On certiorari review we review the agency decision, not the decision of the circuit court.

Kozich v. Employee Tr. Funds Bd., 203 Wis. 2d 363, 368-69, 553 N.W.2d 830 (Ct. App. 1996).

³ Armstrong admitted that he accessed the internet without his agent’s approval; possessed material that depicted intimate parts of an adult; failed to provide DOC with complete information regarding his cellular devices; and failed to comply with SORP by failing to report his internet identifiers. The failure to comply with SORP is a criminal offense. WIS. STAT. § 301.45(6)(a). The violation of a condition of supervision is sufficient grounds for revocation. *State ex rel. Cutler v. Schmidt*, 73 Wis. 2d 620, 622, 244 N.W.2d 230 (1976).

Our review is limited to “(1) [w]hether [DHA] kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.” *Van Ermen v. DHSS*, 84 Wis. 2d 57, 63, 267 N.W.2d 17 (1978) (citation omitted). We may not substitute our judgment for that of the agency, and our inquiry is limited to whether there is substantial evidence to support the agency’s decision. *Id.* at 64. “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 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, Armstrong bears the burden of proving the decision was arbitrary and capricious. *Id.* at 655.

As Armstrong admittedly and clearly violated his rules of extended supervision, we conclude that there is substantial evidence to support DHA’s revocation decision and the decision was not arbitrary and capricious. Armstrong first argues that DHA needed to follow the DOC’s internal manual on Evidence Based Response to Violations (EBRV) in determining sanctions to impose.⁴ Armstrong is wrong as a hearing officer retains the right to exercise his or her discretion in revocation hearings free from guidelines found in operation manuals; the hearing examiner is not bound by the DOC’s EBRV manual. *See George v. Schwarz*, 2001 WI App 72, ¶¶1, 30, 242 Wis. 2d 450, 626 N.W.2d 57. The ALJ and DHA considered all statutory

⁴ According to DHA, “[t]he EBRV manual provides guidance for classifying and responding to supervision violations based on their severity.”

and administrative factors they were required to consider. Given the evidence presented, there was more than substantial evidence to support the decision that confinement was necessary to protect the public from Armstrong's criminal activity and that correctional treatment was best provided in a confined setting. *See* WIS. ADMIN. CODE § HA 2.05(7)(b)3. (Mar. 2017). DHA appropriately found that it would unduly depreciate the seriousness of Armstrong's violations if supervision was not revoked. *See id.*

Armstrong next argues that the conditions of his extended supervision are overly broad and unconstitutional. We disagree. Conditions of supervision need not directly relate to the offense for which the defendant was convicted as long as the condition is reasonably related to the dual purposes of extended supervision. *State v. Miller*, 2005 WI App 114, ¶13, 283 Wis. 2d 465, 701 N.W.2d 47. The dual purposes of extended supervision are rehabilitation of the offender and the protection of the public. *Id.*, ¶11. A condition is reasonably related to a person's rehabilitation "if it assists the convicted individual in conforming his or her conduct to the law." *State v. Rowan*, 2012 WI 60, ¶10, 341 Wis. 2d 281, 814 N.W.2d 854 (citation omitted). All the rules challenged by Armstrong are reasonably related to Armstrong's rehabilitation and the safety of the community.

Given Armstrong's conviction and resulting status as a sex offender, it is reasonable that Armstrong is required to receive approval from his agent before accessing the internet. Armstrong is not denied access to the internet; he simply must obtain prior approval for the sites he wishes to access. *Cf. State v. Simonetto*, 2000 WI App 17, ¶8, 232 Wis. 2d 315, 606 N.W.2d 275 (1999) (concluding prior agent approval exception was one reason a supervision condition was not overly broad); *State v. Miller*, 175 Wis. 2d 204, 212, 499 N.W.2d 215 (Ct. App. 1993) (same). Likewise, agent approval for pursuing a romantic relationship is reasonably related to

both the rehabilitation and protection of the community. Armstrong and his agent can discuss how he must conform his conduct while pursuing a relationship and the community can be protected by the potential romantic partner being apprised of Armstrong's status as a sex offender. *See Krebs v. Schwartz*, 212 Wis. 2d 127, 131-32, 568 N.W.2d 26 (Ct. App. 1997). Prohibiting a sex offender from viewing pornography is a "normative practice" across the country in aiding the rehabilitation of a sex offender as well as protecting the community, *see Kasischke v. State*, 991 So. 2d 803, 834 n.36 (Fla. 2008) (Bell, J., dissenting) (collecting cases); *see also United States v. Loy*, 237 F.3d 251, 266 (3d Cir. 2001) ("We in no way mean to imply that courts may not impose restrictions on the consumption of sexually explicit materials by persons convicted of sex crimes" as "almost any restriction upon sexually explicit material may well aid in rehabilitation and protection of the public."), and Armstrong's prohibition from viewing pornography is not a First Amendment violation as conditions of supervision that are not overly broad and are reasonably related to rehabilitation may impinge upon constitutional rights, *State v. Stewart*, 2006 WI App 67, ¶12, 291 Wis. 2d 480, 713 N.W.2d 165.

Armstrong's final argument is that the Ex Post Facto Clause is violated by DHA in failing to follow the DOC's EBRV manual. Armstrong asserts that the DOC's internal guidelines suggest "severity levels" for conduct violations, and DHA's failure to adhere to the classifications within the guidelines violated his liberty interests by imposing sanctions (return to prison) when he was not given proper notice. We dismiss this argument as the Ex Post Facto Clause applies only to laws, *see* U.S. CONST. art. I, §§ 9-10; WIS. CONST. art. I, § 12, and Armstrong has not identified any statute or law that has been violated. The DOC guidelines are not law.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court affirming the decision of DHA is summarily affirmed pursuant to 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