



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

May 19, 2021

To:

Hon. Dale L. English
Circuit Court Judge
Fond du Lac County Courthouse
160 S. Macy St.
Fond du Lac, WI 54935

Jody J. Schmelzer
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Ramona Geib
Clerk of Circuit Court
Fond du Lac County Courthouse
160 S. Macy St.
Fond du Lac, WI 54935

Jonathon M. Mark, #330078
Oshkosh Correctional Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

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

2018AP1387

State of Wisconsin ex rel. Jonathon M. Mark v. Brian Hayes
(L.C. #2017CV452)

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

Jonathon M. Mark appeals from circuit court orders affirming the revocation of his extended supervision on certiorari review and denying his motions to reconsider. Upon reviewing the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We affirm.

The Department of Corrections (DOC) sought to revoke Mark's extended supervision, alleging as violations that he (1) physically assaulted his girlfriend, C.W., and (2) ingested alcohol. In a statement to Mark's agent taken the day after the assault, C.W. stated that Mark

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

arrived home from work at about 3:30 p.m. “He had a bottle of vodka and was drunk.” He became angry about some fake cocaine he had purchased and began choking C.W. until she blacked out. Mark continued to assault C.W. for several hours. C.W. lost consciousness multiple times, but remembered Mark stomping on her, punching her in the face, smashing a coffee table over her, repeatedly choking her, pouring vodka down her throat until she threw up, and threatening to kill her. C.W. attempted to call 911 at around 10:00 p.m., but her call was mistaken for a misdial. C.W. waited until Mark fell asleep and called 911 again at around 4:00 a.m.

According to police reports, officers quickly arrived and found C.W. outside, severely injured. One of the officers saw the “broken coffee table in pieces behind the front door.” They rushed C.W. to the hospital. Mark’s agent, who also supervised C.W., took pictures of C.W.’s injuries.

The above evidence was introduced at Mark’s revocation hearing through police reports, C.W.’s written statement, photographs of C.W.’s injuries, and the testimony of both Mark’s agent and C.W. Mark testified and denied the allegations. He claimed that C.W. initiated the argument because she wanted money for drugs. According to Mark, they argued for two or three hours without any physical altercation, and C.W. left the house. Mark smashed the coffee table out of frustration and went to bed.

The administrative law judge determined that the DOC proved the violations by a preponderance of the evidence. The ALJ found C.W.’s testimony to be “more credible” than Mark’s, noting that it was consistent with her statements to police and to Mark’s agent, and was corroborated by photos of her injuries. The ALJ stated that Mark’s “assaultive conduct [was]

sufficiently serious to warrant revocation,” “[e]ven if allegation 2” (consuming alcohol) “had not been proven.”

The ALJ’s revocation decision was sustained on administrative review. The administrator explained that C.W.’s testimony was “consistent with her statement[s] to the police and to Mark’s agent” and “corroborated by the observations of her injuries by the police shortly after the assault took place.” The administrator’s decision did not mention the alcohol-consumption violation and concluded that revocation was warranted “to protect public safety from Mark’s assaultive conduct.”

Mark filed a petition for writ of certiorari in the circuit court. His arguments centered around an alleged surveillance video which, he asserted, would have aided his revocation defense. Specifically, he asserted that on the day of the assault, he walked past the county jail on his way home from work. According to Mark, surveillance video from outside the jail would have shown him without a bottle of vodka. Mark alleged that he urged his agent to obtain a copy of the video but she failed to do so. The court dismissed the writ petition and affirmed the revocation decision.

On certiorari review of an administrative decision revoking supervision, we review the decision of the agency, not the decision of the circuit court. *State ex rel. Warren v. Schwarz*, 211 Wis. 2d 710, 717, 566 N.W.2d 173 (Ct. App. 1997). Our review is limited to four inquiries: (1) whether the agency stayed within its jurisdiction, (2) whether it acted according to law, (3) whether its action was arbitrary, and (4) whether the evidence was such that the division could reasonably arrive at its decision. *Id.* In evaluating the sufficiency of the evidence, our inquiry is limited to whether there is “substantial evidence” supporting the revocation. *State ex*

rel. Washington v. Schwarz, 2000 WI App 235, ¶17, 239 Wis. 2d 443, 620 N.W.2d 414. “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). We determine only whether reasonable minds could arrive at the conclusion reached by the division. *George v. Schwarz*, 2001 WI App 72, ¶10, 242 Wis. 2d 450, 626 N.W.2d 57. We defer to the division’s credibility findings and to its determination concerning the weight of the evidence. *Id.*

On appeal, Mark makes various claims challenging his agent’s failure to obtain footage potentially taken by the jail’s camera on the day of the assault. Mark maintains that footage showing him on his way home from work would prove that he was not carrying a bottle of vodka and that the DOC’s failure to provide this footage violated his due process rights to a fair trial and meaningful access to the courts, as well as administrative regulations governing the DOC’s investigatory obligations.

We reject Mark’s claims because even if it existed, the jail surveillance video was irrelevant.² The primary focus of Mark’s revocation hearing was the violent assault of C.W., not whether Mark consumed alcohol. In fact, the ALJ affirmatively stated that the assault violation alone warranted revocation, and the administrator did not even mention the alcohol-consumption violation. The DOC met its burden to prove C.W.’s assault, and there is substantial evidence

² Asserting that Mark has been released from the period of reconfinement imposed after the revocation of his supervision, the division asks us to dismiss Mark’s appeal as moot. Instead, we choose to address his substantive arguments.

supporting the revocation decision. *See Warren*, 211 Wis. 2d at 724 (“Violation of a condition is both a necessary and a sufficient ground for the revocation of probation.”).³

Finally, we reject Mark’s contention that the DOC violated his due process rights by failing to turn over C.W.’s supervision file so that his revocation attorney could impeach C.W.’s credibility. Mark’s agent also supervised C.W. and was aware of her drug and alcohol issues. Mark’s attorney was able to elicit this information on cross-examination. Mark does not explain why this was insufficient.

Therefore,

IT IS ORDERED that the orders of the circuit court are 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

³ Even if the alcohol-consumption violation had been relevant to the revocation decision, the hypothetical jail video would have lacked probative value. Assuming, as Mark alleges, that the jail’s surveillance camera actually captured him on his walk home without a visible bottle of vodka, that footage would not materially contradict C.W.’s statement that Mark had vodka when he arrived home.