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**DISTRICT II**

December 22, 2021

To:

Hon. Paul V. Malloy  
Circuit Court Judge  
Electronic Notice

Marylou Mueller  
Clerk of Circuit Court  
Ozaukee County  
Electronic Notice

Hannah Schieber Jurss  
Electronic Notice

Donald Bates, #527463  
Jackson Correctional Inst.  
P.O. Box 233  
Black River Falls, WI 54615-0233

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

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2020AP943

State of Wisconsin ex rel. Donald Bates v. Brian Hayes  
(L.C. #2019CV432)

Before Neubauer, Reilly and Grogan, 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).**

Donald Bates appeals a circuit court order affirming the revocation of his extended supervision on certiorari review. Based upon our review of 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).<sup>1</sup> We affirm.

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

In 2007, Bates received a bifurcated prison sentence in connection with his conviction for possessing child pornography. He was released to extended supervision in 2015, but was quickly revoked and reincarcerated for three years.

Bates again was released to extended supervision in February 2018. A little over a year later, the Department of Corrections (DOC) sought to revoke Bates's extended supervision, alleging that he committed thirteen violations of his supervision conditions. Specifically, the DOC alleged that Bates: (1) created and used numerous internet accounts without prior approval or subsequent notification; (2) created and maintained those accounts using a name other than his own; (3) used an iPhone to access the internet without prior approval; (4) accessed numerous online dating sites without prior approval; (5) viewed and possessed on his iPhone images depicting intimate parts of adults; (6) viewed and possessed on his iPhone an image that depicted the intimate parts of a child; (7) viewed and possessed on his iPhone numerous images of children which he used for sexual gratification; (8) failed to cooperate with sex offender treatment resulting in his being terminated from the program; (9) consumed alcohol on several occasions; (10) smoked marijuana on at least two occasions; (11) left Ozaukee County and traveled to Milwaukee County; (12) failed to stay overnight in his approved home between 10 p.m. and 6 a.m. without prior approval; and (13) possessed alcohol inside his home.

Following a revocation hearing at which Bates was represented by counsel, the administrative law judge found that Bates had committed all thirteen violations and that there were no appropriate alternatives to revocation. The ALJ determined that a five-year term of reincarceration was "warranted and necessary."

Bates filed an administrative appeal in which he admitted ten of the violations but denied allegations seven, eight, and twelve. Bates denied possessing images of children for the purpose of sexual gratification, asserting that he believed he was following his sex offender treatment manual (allegation 7). He further asserted that he was unaware he had not been complying with his treatment programming (allegation 8). Bates also denied that he failed to stay overnight at his approved residence between 10 p.m. and 6 a.m. (allegation 12). He admitted that he helped a friend with a ride, but asserted that he returned home at some point and did not actually “fail to stay overnight” in his home.

As to the *Plotkin*<sup>2</sup> criteria, Bates first argued that DOC failed to show that confinement was necessary to protect the public, asserting that with better psychological treatment he would be a productive member of society. Second, he asserted a need for special psychological treatment unavailable in prison. Third, he argued that it would not unduly depreciate the seriousness of the violations if his supervision were not revoked, because the violations were either “minor” or he “misunderstood what he was able to do and not do.”

The ALJ’s decision was sustained on administrative review. The administrator rejected Bates’s challenges to the three disputed violations, adding that “even if these three violations were not proven, the ten violations to which Bates admits are serious enough to warrant revocation of his supervision and demonstrate that confinement is necessary to protect the public.” The administrator explained:

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<sup>2</sup> *State ex rel. Plotkin v. DHSS*, 63 Wis. 2d 535, 544, 217 N.W.2d 641 (1974) (revocation is warranted if confinement is necessary to protect the public from further criminal activity by the offender, the offender is in need of correctional treatment which can most effectively be provided in confinement, or it would unduly depreciate the seriousness of the violation if revocation were not ordered).

Bates is on supervision for Possession of Child Pornography and has now engaged in high risk behavior and acted without the knowledge of his agent, his sex offender treatment provider, and the sex offender registry. By using alcohol and marijuana, using an i-phone without agent permission, accessing the internet and dating websites, accessing Pornhub, using names not provided to the sex offender registry, and by viewing and keeping images of adults and children that depict intimate parts, Bates has demonstrated that he needs sex offender treatment and AODA treatment in a confined setting away from distraction. To not revoke with the nature and number of these violations would depreciate the nature of Bates' supervision.

The administrator further determined that five years of reconfinement was appropriate and necessary to protect the public, give Bates time to complete treatment, and allow for a period of supervision after his release. Bates filed a petition for writ of certiorari in the circuit court. The court dismissed the writ petition and affirmed the revocation decision.

On appeal, we review the decision of the Division, not the decision of the circuit court. *State ex rel. Greer v. Schwarz*, 2012 WI App 122, ¶6, 344 Wis. 2d 639, 825 N.W.2d 497. Our review is limited to four inquiries: “(1) whether the Division stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will, not its judgment; and (4) whether the evidence was such that it might reasonably make the decision it made.” *Id.* As long as there is substantial evidence supporting the Division's decision, we must affirm. *Id.*

We begin by noting that the vast majority of Bates's appellate arguments are forfeited because he failed to raise them before the Division.<sup>3</sup> See *Bunker v. Labor and Industry Review*

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<sup>3</sup> These issues are set forth in the respondents' brief and include but are not limited to claimed violations of Bates's due process rights and his rights under the First and Fourth Amendments to the United States Constitution.

*Comm'n*, 2002 WI App 216, ¶15, 257 Wis. 2d 255, 650 N.W.2d 864 (“It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency.”). We decline to make an exception where, as here, the facts needed to decide the forfeited issues are not included in the record. See *id.*, ¶¶16-17. Similarly, though not forfeited, Bates’s arguments that the circuit court failed to grant him bail or hear his full statement at the certiorari petition hearing are not properly before this court. See *Greer*, 344 Wis. 2d 639, ¶6.

In terms of Bates’s preserved claims, we first conclude that the Division’s decision was supported by substantial evidence, which 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). As to the three disputed violations, the administrator found that Bates’s denials were “self-serving and not believable” and that Bates “was not at home when he was supposed to be,” regardless of his “attempt[] to parse the definition” of “stay overnight.” See *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 determinations concerning the weight of the evidence). Additionally, even without the three disputed violations, the revocation decision was supported by substantial evidence. See *State ex rel. Warren v. Schwarz*, 211 Wis. 2d 710, 724, 566 N.W.2d 173 (Ct. App. 1997) (“Violation of a condition is both a necessary and a sufficient ground for the revocation of probation.”).

As to Bates’s second preserved claim, we conclude that the Division properly exercised its discretion in revoking his supervision. Under *Plotkin*, an authority exercising revocation discretion should consider whether, on the basis of the original offense and the offender’s intervening conduct, (i) “confinement is necessary to protect the public from further criminal activity,” 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 if [supervision] were not revoked.” *Plotkin*, 63 Wis. 2d at 544 (italics added). *See also* WIS. ADMIN. CODE § HA 2.05(7)(b)3 (Mar. 2017). Here, the administrator analyzed each of the *Plotkin* criteria in light of Bates’s specific case, determined that all three were present, and explained the reasons for the Division’s decision. That Bates disagrees with this decision does not render it arbitrary or capricious.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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*