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DISTRICT II

February 15, 2023

To:

Hon. Anthony G. Milisauskas
Circuit Court Judge
Electronic Notice

Brian Keenan
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
Electronic Notice

James E. Curtis
2217 54th St.
Kenosha, WI 53140

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

2021AP883

State of Wisconsin ex rel. James E. Curtis v. Brian Hayes
(L.C. #2019CV1474)

Before Gundrum, P.J., Neubauer and Lazar, 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).

James E. Curtis, pro se, appeals a circuit court order affirming the revocation of his probation on certiorari review. 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 (2021-22).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Curtis was on probation for bail jumping as a repeater² when the Department of Corrections (DOC) sought to revoke his probation. DOC alleged he committed nine violations of his probation conditions. A revocation hearing was held before an Administrative Law Judge (ALJ) on September 18, 2019. Curtis was represented by counsel and testified on his own behalf. Curtis's probation agent and other witnesses testified for the DOC.

The ALJ found that Curtis committed eight violations, noting that he had stipulated to allegations five through eight.³ In her written decision, the ALJ set forth the evidence establishing each violation. The ALJ stated that alternatives to revocation were inappropriate and that "[r]evocation is appropriate to protect the public from Mr. Curtis'[s] criminal behavior." The ALJ determined that Curtis continued to drink and drive, that he clearly has an alcohol problem, and that he was in complete denial about his addiction. The ALJ concluded that, until he addresses his alcohol addiction, Curtis will be a danger to the community. The ALJ revoked Curtis's probation and ordered that he serve his imposed and stayed sentence.

Curtis appealed his revocation. The Division of Hearings and Appeals (DHA) reversed the ALJ's decision regarding the first alleged violation but sustained the ALJ's findings that Curtis had committed or admitted to violations two through eight. DHA affirmed the ALJ's decision. Curtis sought certiorari review of DHA's determination and the circuit court affirmed DHA's decision.

² On the same day Curtis was convicted of bail jumping, he was also convicted of operating while intoxicated (OWI), third offense, and sentenced to six months in jail. That conviction is not at issue here, as Curtis was not sentenced to probation on the OWI conviction.

³ The ninth allegation was withdrawn.

There are two steps in deciding a revocation case: (1) determining whether the offender in fact violated one or more conditions of supervision and, if so, (2) determining whether supervision should be revoked. See *State ex rel. Plotkin v. DHSS*, 63 Wis. 2d 535, 543, 217 N.W.2d 641 (1974). The first step involves a purely factual question. *Id.* The second step involves the exercise of expertise and discretion by the administrative agency “in making a prediction as to the ability of the individual to live in society without committing antisocial acts.” *Id.*

On certiorari review of a revocation, we review DHA’s decision, not that of the circuit court. *State ex rel. Greer v. Wiedenhoeft*, 2014 WI 19, ¶34, 353 Wis. 2d 307, 845 N.W.2d 373. Our review is limited to four inquiries: (1) whether DHA kept within its jurisdiction; (2) whether DHA acted according to law; (3) whether the decision “was arbitrary, oppressive, or unreasonable and represented [DHA’s] will and not its judgment;” and (4) whether the evidence was such that the decision in question might reasonably be made. See *State ex rel. Washington v. Schwarz*, 2000 WI App 235, ¶16, 239 Wis. 2d 443, 620 N.W.2d 414 (citation omitted).

“An agency’s decision is not arbitrary and capricious and represents its judgment if it represents a proper exercise of discretion.” *Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994). “A proper exercise of discretion contemplates a reasoning process based on the facts of record ‘and a conclusion based on a logical rationale founded upon proper legal standards.’” *Id.* (citation omitted).

“A certiorari court may not substitute its view of the evidence for that of the [agency].” *Van Ermen v. DHSS*, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978). The only inquiry is whether substantial evidence supports DHA’s decision. *Id.* “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*, 185 Wis. 2d at 656 (quoting *Cornwell Personnel Assocs. v. LIRC*, 175 Wis. 2d 537, 544, 499 N.W.2d 705 (Ct. App. 1993)). If substantial evidence supports DHA’s decision, it must be affirmed even if the evidence also supports a contrary determination. *Von Arx*, 185 Wis. 2d at 656.

Curtis argues there was insufficient evidence supporting DHA’s decision. He contends that DOC’s witnesses were part of a conspiracy against him and that their testimony was fabricated and incredible. We reject Curtis’s challenge.

First, as DHA affirmed, Curtis admitted to violations five through eight, which were committed within less than a year after his conviction on April 9, 2018: (5) failing to take a required alcohol-monitoring test on November 16, 2018; (6) taking a required alcohol-monitoring test 48 minutes late on November 23, 2018; (7) consuming alcohol, resulting in a positive test on the alcohol-monitoring test on November 26, 2018; and (8) failing to take required fifteen-minute-interval alcohol-monitoring tests three consecutive times.⁴ Even one violation of a condition of supervision is a sufficient basis for revocation. *See State ex rel. Warren v. Schwarz*, 211 Wis. 2d 710, 724, 566 N.W.2d 173 (Ct. App. 1997) (quoting *Plotkin*, 63 Wis. 2d at 544) (“Violation of a condition is both a necessary and a sufficient ground for the

⁴ Curtis stipulated to these rule violations in an alternative to revocation agreement on December 5, 2018. He specifically agreed to attend a treatment program and to attend aftercare following that program. His agent testified that he failed to attend the first aftercare meeting on March 25, 2019, which he affirmed. In its decision affirming revocation on these four grounds, DHA noted that Curtis admitted that he never completed the aftercare program. On appeal, Curtis contends that he never admitted to these violations, which is directly refuted by the agreement. DHA also credited the probation agent’s testimony that she advised him of the date of the first aftercare program.

revocation of probation.”); *State ex rel. Cutler v. Schmidt*, 73 Wis. 2d 620, 622, 244 N.W.2d 230 (1976).

While these violations alone provide sufficient grounds for revocation, substantial evidence also supports DHA’s determination that Curtis committed rule violations two, three, and four by: (2) driving a motor vehicle without a valid driver license; (3) driving without an ignition interlock device installed; and (4) failing to take his name off his car’s registration.

Among the plethora of evidence provided at the revocation hearing, Curtis’s probation agent testified that he did not have a valid driver’s license, that his judgments of conviction prohibited him from driving for two years, and that he either needed to take his name off his car’s registration or obtain an ignition interlock device. Curtis never obtained permission from his agent to drive, nor did he ask her to confirm proper installation of the device, and when she saw his vehicle, it did not have the device.⁵ Two individuals testified at the revocation hearing, consistently with their prior written statements, that they witnessed Curtis driving a vehicle on March 25, 2019. Both individuals identified Curtis based on their experience with him in a treatment program for three months. Curtis contends that these witnesses were not credible because their descriptions of the type of vehicle he drove varied and they were part of a conspiracy to ensure Curtis’s revocation. However, the ALJ found their testimony credible, as

⁵ The probation agent also testified that Curtis was “a very, very difficult offender to supervise,” who was frequently disrespectful, argumentative, and had a bad attitude. She set forth in detail how Curtis consumed alcohol six different times while on supervision in violation of court ordered rules of sobriety, despite multiple warnings and opportunities for recovery and all the while denying having an alcohol problem. He contended that the testing equipment showed positive results due to mouthwash, alcohol wipes for his face, paint thinner, hair spray and filling up his car which, his agent noted, the subsequent testing (fifteen-minute intervals) after the initial positive results refuted. The agent did not recommend alternatives to revocation because Curtis already failed in multiple efforts, including time in jail, and because he was in denial of his alcoholism.

did DHA. See *George v. Schwarz*, 2001 WI App 72, ¶10, 242 Wis. 2d 450, 626 N.W.2d 57 (we defer to DHA’s credibility findings and to its determinations concerning the weight of the evidence). Likewise, DHA credited the agent’s testimony regarding Curtis’s violations arising from his driving without a driver’s license and failing to install an interlock ignition device.

As to the fourth violation, Curtis’s probation agent testified that she had never received notice that Curtis had changed the registration for his car, as she had told him he must do, and that she had not seen an ignition interlock device installed in the car. While Curtis offers excuses for failing to do either, the ALJ found that he did not comply, which was unrebutted. DHA also determined that the evidence established that Curtis had not changed his vehicle registration.

We further conclude that DHA properly exercised its discretion in revoking Curtis’s probation. 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 by the offender; *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 (emphases added) (citation omitted). Here, DHA properly determined based upon substantial evidence in the record that Curtis committed numerous violations of his rules of supervision and that his violations and overall disrespect for the terms of his probation warranted revocation. After analyzing the *Plotkin* criteria in light of Curtis’s specific case, DHA properly determined that confinement was necessary to protect the public and to not depreciate

the seriousness of the violations and explained the reasons for its decision. That Curtis disagrees with this decision does not render it arbitrary or capricious.

Lastly, we reject Curtis's challenge to the effectiveness of his counsel in the revocation proceeding. We lack authority to consider this challenge in this certiorari action. *See State v. Ramey*, 121 Wis. 2d 177, 182, 359 N.W.2d 402 (Ct. App. 1984) (certiorari is not an appropriate procedure to raise ineffective assistance of counsel during revocation proceedings).⁶

Upon the foregoing reasons,

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

⁶ We also reject Curtis's factually and legally undeveloped complaints that the ALJ and his probation agent spoke with each other when leaving the hearing, and that his agent noted in her testimony that another drunk driving revocation was under consideration in Illinois. *See State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992).

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

Sheila T. Reiff
Clerk of Court of Appeals