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DISTRICT II

February 22, 2023

To:

Hon. Daniel J. Bissett
Circuit Court Judge
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Karla Z. Keckhaver
Electronic Notice

Peter J. Long, #383030
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1803

Peter J. Long v. Brian Hayes (L.C. #2021CV93)

Before Gundrum, P.J., Neubauer 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).

Peter J. Long, pro se, appeals an order affirming the revocation of his extended supervision. 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 (2019-20).¹ We affirm.

Long was on extended supervision for his fifth and eighth operating while intoxicated convictions when the Department of Corrections (DOC) sought to revoke Long's supervision.

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

The DOC alleged he committed eight violations of his supervision conditions. A revocation hearing was held before an Administrative Law Judge (ALJ) on October 6, 2020, and continued on November 30. Long was represented by counsel and testified on his own behalf. Several police officers and other witnesses testified for the DOC. In the closing written argument submitted by Long's attorney, he argued that allegations five through eight should be dismissed because the DOC added those allegations on September 30—less than five working days before the October 6 hearing, contrary to WIS. ADMIN. CODE § HA 2.05(2) (Mar. 2017).

The ALJ rejected Long's argument, noting an objection was not made at either hearing. The ALJ also reasoned that, because the hearing was continued to November 30, Long "had adequate opportunity to address and present a defense to the allegations added on September 30." The ALJ concluded Long committed all the alleged violations, except operating a motor vehicle while under the influence of alcohol (allegation one) and lying to an agent (allegation eight). The ALJ revoked Long's extended supervision.

Long appealed his revocation, and the DOC appealed the ALJ's dismissals of allegations one and eight. The Division of Hearings and Appeals (DHA) concluded there was sufficient evidence to conclude Long drove his motorcycle while under the influence of alcohol (allegation one) but insufficient evidence to conclude Long consumed THC (allegation seven). The DHA sustained the ALJ's determinations on the remaining allegations. As to Long's procedural argument, the DHA determined Long waived his objection to the amended allegations by failing to object at the hearings. The DHA also determined that, because the hearing was continued to November 30, Long had opportunity to respond to the amended allegations and his substantive rights were not affected. Any error was harmless. *See* WIS. ADMIN. CODE § HA 2.08. The DHA revoked Long's extended supervision and ordered him to return to prison for approximately three

years. Long sought certiorari review of the DHA's determination, and the circuit court affirmed the DHA's decision.

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

Long first argues the DOC violated his right to due process by serving the amended revocation notice less than five working days before the October 6 hearing. He likens his situation to *State ex rel. Anderson-El v. Cook*, 2000 WI 40, 234 Wis. 2d 626, 610 N.W.2d 821 and asks us to invalidate his revocation proceeding. In *Anderson-El*, the supreme court invalidated a prison discipline proceeding after the DOC failed to follow its rules and notify the inmate about the DOC discipline proceeding, which was a violation of the inmate's fundamental right to adequate notice. *Id.*, ¶¶16, 24. However, *Anderson-El* did not create a blanket rule requiring the invalidation of all disciplinary proceedings where prison officials violate their own rules. *See State ex rel. Anderson v. Gamble*, 2002 WI App 131, ¶¶7-9, 254 Wis. 2d 862, 647 N.W.2d 402 (a violation of a nonfundamental right does not require the disciplinary proceeding to be invalidated). Further, in this case, we are reviewing a hearing conducted by the DHA. The DHA is *not* the DOC. *George v. Schwarz*, 2001 WI App 72, ¶21, 242 Wis. 2d 450, 626 N.W.2d 57. Any procedural errors on the part of the DOC are not attributable to the DHA. *See id.*

We conclude Long forfeited his challenge to the timing of the amended allegations by not objecting at the evidentiary hearings. See *Bunker v. LIRC*, 2002 WI App 216, ¶¶15, 17, 257 Wis. 2d 255, 650 N.W.2d 864 (“[T]o preserve an issue for judicial review, a party must [timely] raise it before the administrative agency.”). In any event, we agree with the DHA that, because the October 6 hearing was continued to November 30, Long had ample time to prepare a defense to the additional allegations. Long has not identified how his substantive right to a fair hearing was violated because of the untimely amendment. The DHA correctly concluded the error was harmless. See WIS. ADMIN. CODE § HA 2.08 (“If any requirement of this chapter or ch. DOC 328 or 331 is not met, the ... administrator may deem it harmless and disregard it if the error does not affect the client’s substantive rights.”).

Long next argues the DOC did not follow its guidelines when it made its incarceration recommendation. However, as Long concedes, the DHA is not bound by the DOC’s guidelines. See *George*, 242 Wis. 2d 450, ¶¶19-25, 30. Rather, the DHA is free to “order the person to be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence.” WIS. STAT. § 302.113(9)(am). Here, Long, through his attorney, made arguments regarding incarceration time to the DHA. That the DHA did not adopt Long’s recommendation does not mean he is entitled to relief.

Long next contends the DOC had no authority to appeal the ALJ’s dismissal of the two allegations. WISCONSIN ADMIN. CODE § HA 2.05(8), however, explicitly permits the DOC to appeal the ALJ’s decision. Long then argues the DOC’s appeal was untimely because it was not filed within ten days of the ALJ’s decision as required by § HA 2.05(8). Long overlooks the DOC had ten “working” days to file an appeal. See WIS. ADMIN. CODE § HA 2.02(5). The appeal was timely. Moreover, even if the DOC did not appeal, the DHA “may modify, sustain,

reverse, or remand the administrative law judge's decision based upon the evidence presented at the hearing and the materials submitted for review." See § HA 2.05(9)(a). The DHA's review of the allegations dismissed by the ALJ was appropriate.

Finally, Long argues there was insufficient evidence supporting the DHA's conclusion that Long operated a motor vehicle while under the influence of alcohol (allegation one).² He notes the criminal charges underlying this incident were dismissed. However, the dismissal of Long's criminal charges has no bearing on his revocation for the same underlying conduct. See WIS. ADMIN. CODE § DOC 331.09 (June 2013) ("An acquittal in a criminal proceeding for an offender's conduct underlying an alleged violation shall not preclude revocation of that offender's supervision for the same or similar conduct."). Here, officers testified at the revocation hearing that on August 20, 2020, at around 2:50 a.m., they found a Harley Davidson motorcycle with "a little damage" that was perpendicular to, and partially on, the road. The motorcycle's front tire was hanging off the curb and its back tire was stuck in dirt behind the curb. The motorcycle was registered to Long. Officers found Long sleeping in a ditch nearby. Long advised that, while walking from his house to a pond to release some rodents, he fell into the ditch, hurt his ankle, and decided to sleep there until morning. Long had slurred speech, smelled of intoxicants, had injuries that appeared to be road rash, and was in possession of the motorcycle's key. When officers confronted Long about the motorcycle key, he told them he did

² The State argues Long never raised this issue in the circuit court and it cannot be raised for the first time on appeal. We observe that although Long seemingly raised this argument in his initial petition for writ of certiorari, he did not include this issue in his briefs or argument before the circuit court. We conclude Long abandoned this argument in the circuit court. See *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) (an issue raised but not briefed or argued is deemed abandoned). However, in the interest of judicial efficiency we address the argument on the merits.

not own a Harley. He later admitted the motorcycle was his, but stated a friend had been driving him. Long also admitted to drinking. Given the totality of the circumstances, we agree with the DHA that “the preponderance of the evidence proves that Long drove the motorcycle while under the influence of alcohol (which resulted in his losing control of the motor vehicle and injuring himself).”

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* 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