



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

July 19, 2023

To:

Hon. Paul V. Malloy
Circuit Court Judge
Electronic Notice

David Malkus
Electronic Notice

Connie Mueller
Clerk of Circuit Court
Ozaukee County Justice Center
Electronic Notice

Jonathan James Whitney
Electronic Notice

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

2022AP1481

Matthew Holmes v. Brian Hayes (L.C. #2021CV163)

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).

Matthew Holmes appeals from an order entered by the circuit court affirming a decision by Brian Hayes, administrator of the Division of Hearings and Appeals (DHA), that revoked Holmes's probation. Holmes argues that the revocation must be vacated because a burglary allegation that was part of the grounds for the revocation was not supported by substantial evidence. 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

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

We conclude that substantial evidence exists to support the burglary and other allegations that led to the revocation and thus affirm the circuit court's order.

In October 2020, while Holmes was on probation in connection with three felony convictions, the Department of Corrections (DOC) initiated revocation proceedings based on four alleged violations of his probation terms: (1) burglarizing a Milwaukee business in May 2020; (2) receiving a speeding ticket in July 2020; (3) failing to notify his probation agent of the police contact resulting from the speeding incident; and (4) an assault that occurred in October 2020.

At the revocation hearing, DOC presented testimony from a Milwaukee police officer to substantiate the burglary allegation. The officer testified that she was dispatched to a business in Milwaukee on the night of May 30, 2020, when the city was experiencing "a lot of riots" and "observed that the store had pretty much been ransacked." The officer also observed "blood on the inside of the door to the front of the building," on a glass window, and "on some of the shattered pieces on the ground as well." The officer testified that a forensic investigator collected blood from the scene. The officer also testified that she subsequently learned from another officer that the DNA collected from the scene belonged to Holmes. DOC did not submit any reports regarding the DNA match and did not call a witness from the crime lab to testify.

In a statement submitted at the hearing, Holmes initially wrote, "I don't know how my blood got on a broken window" at the store. Later in the statement, however, Holmes acknowledged that he had been at the store two days "after the news reported all the rioting" and had "scraped" his hand "a little bit" on some broken glass behind a board while he tried to look into the store "to see how bad things were." Holmes wrote that he "wasn't bleeding out

profusely” after he scraped himself on the broken glass and that he did not remember going to the store when his probation agent first asked him about it “because it wasn’t anything major.”

In support of the speeding and failure-to-notify allegations, DOC relied on testimony from Holmes’s probation agent, who stated that Holmes failed to report the police contact to her. Instead, she learned of the speeding violation by searching through CCAP records. Holmes also acknowledged receiving the ticket in his written statement.

Finally, DOC presented testimony from two Milwaukee police officers in support of the assault allegation. The officers testified that they were dispatched in response to a reported assault on October 2, 2020, and that the victim identified Holmes as one of several persons who had assaulted him. In his written statement, Holmes denied that he assaulted the victim and claimed that a friend he was with had punched the victim.

The administrative law judge (ALJ) who presided at the hearing denied revocation. She concluded that DOC had proven the speeding and failure-to-notify allegations but had not proven the burglary or assault allegations. The ALJ also determined that revocation was not warranted with respect to the speeding and failure-to-notify allegations. DOC appealed, and Administrator Hayes reversed the ALJ’s decision. Hayes concluded that DOC had proved the burglary allegation by a preponderance of the evidence and that revocation was warranted in light of Holmes’s prior felony convictions and the three proven allegations of misconduct.²

² Hayes did not address the ALJ’s conclusion that DOC had not proven the assault allegation.

Holmes filed a petition for a writ of certiorari challenging his revocation. The circuit court initially vacated the revocation based on its determination that the evidence presented at the revocation hearing was insufficient to sustain the burglary and assault allegations but later reversed course and affirmed the revocation after Hayes filed a motion for reconsideration. Holmes appeals.

When reviewing a revocation decision, “we defer to the decision of the Division of Hearings and Appeals, applying the same standard as the circuit court.” *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶10, 250 Wis. 2d 214, 640 N.W.2d 527. Our review is limited to the following considerations: “(1) whether DHA kept within its jurisdiction; (2) whether DHA acted according to law; (3) whether DHA’s actions were arbitrary, oppressive or unreasonable and represented its will rather than its judgment; (4) and whether the evidence was such that DHA might reasonably make the decision in question.” *Id.*

Holmes invokes the fourth criteria, arguing that the evidence regarding the burglary allegation did not reasonably support revocation. When considering the sufficiency of the evidence, our task is limited to determining “whether there is substantial evidence to support [DHA]’s decision.” *State ex rel. Washington v. Schwarz*, 2000 WI App 235, ¶17, 239 Wis. 2d 443, 620 N.W.2d 414. Substantial evidence is a low bar to clear; it “is the ‘quantity and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion.’” *Id.* (alteration in original; quoting *State ex rel. Eckmann v. DHSS*, 114 Wis. 2d 35, 43, 337 N.W.2d 840 (Ct. App. 1983)). Our job is not to reweigh the evidence; we may find substantial evidence “even if there is evidence that could support a contrary determination.” *State ex rel. Greer v. Schwarz*, 2012 WI App 122, ¶6, 344 Wis. 2d 639, 825 N.W.2d 497, *aff’d*, 2014 WI 19, 353 Wis. 2d 307, 845 N.W.2d 373.

Holmes contends that Hayes's determination that he committed burglary is not supported by substantial evidence. In his written decision, Hayes cited several pieces of evidence to support his determination. First, Hayes relied on Holmes's admissions that: (1) "he was familiar with the store because he had been there before the date of the incident"; and (2) "he returned to the store, tried to look inside by grabbing a board, and accidentally scratch[ed] himself on broken glass behind that board." Hayes construed the latter admission as "conclusive[]" proof that Holmes's "DNA was deposited on the glass at the point of entry for the burglary." Next, Hayes noted that blood was present near the entrance to the store on the night of the burglary, as the officer had testified. Hayes did not believe Holmes's claim that he was not at the store until two days after the officer observed blood near the entrance and construed Holmes's "attempt at distancing himself from the date of the burglary (by providing false information to his agent) [as] evidence of his consciousness of guilt."

Holmes raises several arguments in response. He emphasizes that DOC did not introduce the DNA report or testimony from a witness about its contents. He also cites the ALJ's finding that the officer's testimony about the contents of the DNA report contained multiple levels of hearsay and was not reliable. Next, Holmes notes that he admitted only that he "scratched" his hand when he went to the store several days after it was damaged, not "that he cut his hand or that he bled." He also observes that the officer noticed the blood during a period of rioting in which "any one of many individuals could have deposited blood at the scene." In addition, Holmes asserts that even if his blood was present at the scene, DOC introduced no evidence that he actually entered the building, much less that he did so intending to steal or commit a felony, as required to prove a burglary occurred. *See* WIS JI—CRIMINAL 1421, 1424. Finally, Holmes

argues that Hayes merely speculated in perceiving “consciousness of guilt” in Holmes’s acknowledgement that he was present at the store days after the rioting.

Holmes’s arguments do not show that Hayes’s decision was not supported by substantial evidence. At most, they invite this court to reweigh the evidence and draw inferences other than those drawn by Hayes, inferences which tend to exculpate Holmes. That is not our role in determining whether substantial evidence exists to support Hayes’s decision. *See Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994) (“We may not substitute our judgment for that of [DHA.]”). Evidence presented at the hearing indicated that the store was burglarized. Holmes admitted that his blood was found on a broken window at the store. Testimony from the investigating officer placed the blood at the scene on the night of the burglary. Given this evidence, Hayes could reasonably conclude that Holmes’s denial of involvement was not credible and that his inconsistent statements about his presence at the store reflected “consciousness of guilt” and an attempt to avoid responsibility for his actions.³

In sum, the evidence presented was of a quantity and quality sufficient for a reasonable person to conclude that Holmes committed the burglary. *See id.* Together with the undisputed evidence regarding the speeding and failure-to-notify violations, substantial evidence exists to support Hayes’s decision to revoke Holmes’s probation. For these reasons,

³ Holmes challenges DOC’s reliance on the officer’s hearsay testimony about the DNA report, arguing that DOC’s failure to introduce the report or call anyone with first-hand knowledge of its contents deprived him of the right to confront an adverse witness. *See State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶12, 250 Wis. 2d 214, 640 N.W.2d 527 (recognizing probationer’s right to confront adverse witnesses in revocation proceeding unless hearing officer finds good cause for not allowing confrontation). We need not address this argument because Hayes’s written decision does not identify the officer’s hearsay testimony about the report’s conclusion as support for his determination that DOC had presented sufficient evidence to establish the burglary.

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.

Samuel A. Christensen
Clerk of Court of Appeals