

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 6, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 01-0281

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. WAYLON M. REDDING,

PETITIONER-RESPONDENT,

V.

**DAVID H. SCHWARZ, ADMINISTRATOR, DIVISION OF
HEARINGS AND APPEALS, STATE OF WISCONSIN,**

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
JOHN C. ALBERT, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. David Schwarz, Administrator of the Division of Hearings and Appeals, appeals an order reversing a probation revocation decision. The issue is whether that decision was reasonable and supported by substantial evidence. We affirm the trial court's determination that it was not.

¶2 Waylon Redding, then nineteen, was convicted on two counts of second-degree sexual assault of a child, after he had sexual relations with two fifteen-year-old girls. The trial court withheld sentence and imposed two concurrent fifteen-year probation terms with one-year concurrent terms in the Dane County jail as a condition of probation. Redding received eighty-two days credit for time served, and the trial court stayed the second six months of the jail terms if Redding complied with all the conditions of his probation.

¶3 Over the next three months, while serving his jail term with Huber privileges, Redding violated probation by: (1) stealing some items from his employer and offering to sell them to other inmates; (2) accepting a ride from his brother on March 10, 2000; (3) failing to report to his initial intake appointment for sex offender treatment on March 8, 2000; and (4) committing numerous Dane County jail rule violations over the period of his incarceration.

¶4 On March 16, 2000, the Department of Corrections (DOC) commenced a revocation proceeding. Four days later, on the DOC's petition, the trial court revoked the stay on the second six months of Redding's jail terms.

¶5 At Redding's revocation hearing, his agent, Jodi Voegeli, testified that the reasons for revocation included Redding's violation of the rules of probation, his failure to cooperate with treatment and his multiple violations of jail rules. Voegeli stated her belief that Redding needed prison confinement for treatment purposes. When asked if alternatives to probation were considered, she indicated that they were not seriously considered because "we just deemed it inappropriate because he's already been confined has not been released [sic]." When asked why having Redding serve the second six months of his jail term was not an acceptable alternative to revocation, Voegeli replied that the DOC rejected

that alternative “because of his negative behavior in the jail and it was felt that more time here in jail would serve no purpose of allowing him to receive the treatment that he needs because he abuses his Huber and continues to violate.” She did not explain why the DOC simultaneously sought revocation and the additional jail term.

¶6 Redding admitted his violations. After Redding’s revocation hearing, the administrative law judge (ALJ) ordered probation revoked, concluding, in part, that

Redding’s youth and immaturity may explain his behavior to some extent, but they do not protect the public nor do they equip [him] to benefit from community supervision in terms of his own rehabilitation. Given his very strong propensity to violate rules of supervision and his failure to show that he is able and willing to avoid violations for any significant period of time, I do not believe the alternative to revocation proposed by Redding’s counsel or any other available alternative to revocation would adequately protect the public from Redding’s continued criminal activity. ...

Redding appears to need sex offender treatment. ... He has not shown the willingness and ability to comply with the rules and conditions of probation enough to receive treatment of any kind in the community. ... Redding’s treatment needs will be better met in a confined setting.

¶7 On review of the ALJ’s determination, Administrator Schwarz affirmed. He concluded that Redding’s many jail violations were “extremely troubling” and that his theft of property from his employer was “particularly disturbing.” He further concluded that Redding was a poor risk for community supervision and that it was unsafe to continue his probation even with his additional six-month jail confinement. “In the final analysis, I am satisfied that a continuation of his probation would unduly depreciate the seriousness of his

behavior and make a mockery of the probation process.” However, on certiorari review the trial court reversed, concluding that the division failed to adequately consider alternatives to revocation.

¶8 We review the division’s decision, not the trial court’s. *State ex rel. Warren v. Schwarz*, 211 Wis. 2d 710, 717, 566 N.W.2d 173 (Ct. App. 1997), *aff’d*, 219 Wis. 2d 615, 579 N.W.2d 698 (1998). We affirm if the division stayed within its jurisdiction, acted according to law, did not act arbitrarily, oppressively or unreasonably and had sufficient evidence to reasonably make the decision it did. *Warren*, 211 Wis. 2d at 717. A proper exercise of the division’s authority under these standards requires that it at least consider whether alternatives to revocation are available and feasible. *Id.* at 725-26. In order to revoke, the division must also find that confinement is necessary to protect the public from further criminal activity; or that the client is in need of correctional treatment which can most effectively be provided if confined; or that it would unduly depreciate the seriousness of the violation if supervision were not revoked. WIS. ADMIN. CODE § HA 2.05(7)(b)(3).

¶9 Under normal circumstances, the evidence of Redding’s acts would support a finding that revocation was necessary to protect the public. However, the situation here involves the additional consideration that Redding had just commenced a six-month jail term predicated on those same acts. The division did not adequately consider whether this new sanction was a satisfactory means to protect the public and the record does not reveal to this court any reason why it was not.

¶10 The same circumstances prevent a reasonable finding that revocation was necessary to avoid unduly depreciating the seriousness of Redding’s

violations. One might reasonably deem his misdemeanor and various other violations serious. However, there was no evidence to reasonably conclude that the extended jail term was insufficient to recognize that seriousness.

¶11 Finally, the evidence did not support the finding that Redding needed treatment in a prison-type setting. The DOC stressed this factor as most important in the revocation decision. However, revocation occurred before Redding had received any community-based treatment. Therefore, any inadequacy it may have was never demonstrated.

¶12 To summarize, it does not appear from the record that jail, as an alternative to probation revocation, was properly considered or found to be either unavailable or infeasible as a means of dealing with Redding's failure to succeed during his first four months on probation.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5. (1999-2000).

