COURT OF APPEALS
DECISION
DATED AND FILED

November 2, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0008 **Cir. Ct. No. 03CV000433**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

DEAN SNODGRASS,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Dean Snodgrass appeals from an order denying his petition for certiorari review of the Department of Corrections' decision to revoke his probation. Snodgrass argues the administrative law judge (ALJ) acted in an "arbitrary, oppressive, or unreasonable manner" when he revoked Snodgrass's

probation.[1] Because substantial evidence supported the ALJ's decision, we reject Snodgrass's argument and affirm the circuit court's order.

BACKGROUND

¶2 In 2001, Snodgrass was convicted of second-degree sexual assault of a child, his daughter, as an habitual offender. His sentence was stayed and he was placed on twenty years' probation. After the disposition of his case, Snodgrass went to live at the Ponderosa Motel in Wausau, Wisconsin, where he did odd jobs in return for a rent reduction and eventually became a manager.

¶3 In January 2003, Snodgrass was notified that he was alleged to have violated the terms of his probation by (1) having "repeated contact with Michael T.," a two-year-old child, without his agent's knowledge or permission; (2) beginning a relationship with Shawnna T., the child's mother, without his agent's knowledge or permission; and (3) giving false information about his employment at the Ponderosa Motel, by not informing his agent that he was a manager with access to room keys.

¶4 After a hearing, the ALJ issued a decision revoking Snodgrass's probation. The ALJ found evidence of brief contacts between Snodgrass and Michael T., which were "very troubling" given the nature of Snodgrass's crime. The ALJ also found that Snodgrass was employed regularly by the Ponderosa as a manager, which gave him access to rooms and room keys, while failing to "truthfully and fully report his employment status." Finally, the ALJ found that

[1] We do not address any constitutional claims Snodgrass might have with regard to his probation conditions because he did not raise those claims before the ALJ, the circuit court or in this appeal.

while there was no evidence that Snodgrass and Shawnna had ever dated or had a sexual relationship, Snodgrass nevertheless violated Rule 24 of his probation conditions by having an "intimate relationship" with Shawnna. The ALJ found that intimate meant "close acquaintance, association, or familiarity" based on the AMERICAN HERITAGE COLLEGE DICTIONARY definition of the word. It was this relationship and Snodgrass's lack of honesty about it that formed the primary basis for the ALJ's finding.

¶5 Snodgrass appealed the revocation to the Division of Hearings and Appeals. The division affirmed the decision. Snodgrass then filed a petition for a writ of certiorari review with the circuit court, which was rejected. Snodgrass now appeals that order.

STANDARD OF REVIEW

¶6 Review of a parole revocation pursuant to a writ of certiorari is limited to the following questions:

> (1) whether the division kept within its jurisdiction; (2) whether the division acted according to law; (3) whether the division's actions were arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the division might reasonably make the order or determination in question.

Von Arx v. Schwarz, 185 Wis. 2d 645, 655-56, 517 N.W.2d 540 (Ct. App. 1994). At the revocation hearing, the division has the burden of proving the alleged violation or violations by a preponderance of the evidence. ***State ex rel. Thompson v. Riveland***, 109 Wis. 2d 580, 585, 326 N.W.2d 768 (1982). On appeal, the burden switches to the probationer to prove by the same standard that

the decision was arbitrary and capricious. ***State ex rel. Solie v. Schmidt***, 73 Wis. 2d 76, 79-80, 242 N.W.2d 244 (1976).

¶7 The division's decision is not arbitrary or capricious if it constitutes a proper exercise of discretion. ***Van Ermen v. DHSS***, 84 Wis. 2d 57, 65-66, 267 N.W.2d 17 (1978). To be a proper exercise of discretion, the decision must reflect a reasoning process based on the facts on the record and a "conclusion based on a logical rationale founded upon proper legal standards." ***Von Arx***, 185 Wis. 2d at 656. This court may not substitute its judgment for the division's; if substantial evidence supports its determination, we will affirm even though the evidence may support a contrary determination. ***Id.*** We shall, however, set aside the division's action or remand the case to the division if we conclude that the division's action depends on any finding of fact that is not supported by substantial evidence in the record. WIS. STAT. § 227.57(6).[2] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. ***Cadott Educ. Ass'n v. WERC***, 197 Wis. 2d 46, 52, 540 N.W.2d 21 (Ct. App. 1995).

DISCUSSION

¶8 The ALJ found that Snodgrass's contacts with Michael violated probation Rule 1, requiring him to avoid "conduct … not in the best interest of the public [or his] rehabilitation," and probation Rule 28, "you shall not have any contact with anyone under the age of 18 unless it is supervised and approved of in advance by your agent." The ALJ noted the contacts between Michael and Snodgrass were brief, but found them troubling nonetheless because of the "nature

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

of [Mr. Snodgrass's] underlying crime." The ALJ also found that the type of work that Snodgrass engaged in "increased the likelihood of additional contact" with Michael and other young children around the motel.

¶9 The record establishes that Snodgrass's agent knew he was living at the Ponderosa Motel and doing odd jobs there, circumstances that might have tended to bring him into direct contact with children. The record also shows that during a home visit by a probation agent, Michael ran into the open door of Snodgrass's room. Although Snodgrass promptly removed the child, the agent observed that the television set in his room was turned to the Disney Channel and, on further investigation, discovered that Snodgrass had been seen with Michael on several occasions. During a later search of Snodgrass's room, his agent found some children's toys and clothes and a letter from Shawnna saying her son loved Snodgrass.

¶10 There is no suggestion there was anything criminal about these contacts. Nor did the ALJ explain why he was especially troubled by contacts between Snodgrass and a two-year-old boy when Snodgrass's conviction was for sexually assaulting a girl. Nevertheless, facts in the record support the conclusion that Snodgrass had some contacts with Michael that were unsupervised and unapproved, violating Rule 28.

¶11 The ALJ also found that the preponderance of the evidence proved that Snodgrass had violated Rule 1, avoiding conduct not in "the best interest of the public or his rehabilitation," and Rule 15, "you shall provide true information verbally and in writing, in response to inquiries by the agent" because he did not inform his agent he was a manager at the Ponderosa Motel, a position that gave him access both to guest rooms and room keys.

¶12 Snodgrass's agent gave him permission to move to the Ponderosa and did not deny she knew Snodgrass was answering phones at the motel. Snodgrass and his agent gave conflicting testimony about what else Snodgrass told his agent about his employment, and the agent did not explain why Snodgrass continued to check unemployed on his forms at the same time that he stated in writing that he was answering phones, cleaning and doing other work at the motel. However, there was evidence that Snodgrass was given authority to act as manager, had room keys in his possession and did not put those facts in writing on his offender report forms. From that evidence, a reasonable person might conclude that Snodgrass did not fully inform his agent about aspects of his employment he should have known were important under the probation rules.

¶13 Finally, the ALJ found that Snodgrass violated Rule 24, "you shall not enter into any dating, intimate, or sexual relationships with anyone without prior approval of your agent," when he "began a relationship with Shawnna without [his] agent's knowledge or permission."[3] The ALJ recognized that there was "no evidence in this record to show that Mr. Snodgrass ever engaged in a 'dating' or 'sexual relationship' with Shawnna." But he still found that Snodgrass violated Rule 24 because he developed a "close, personal relation with [Shawnna]." The ALJ concluded, based on the standard dictionary definition of intimate, that Rule 24 forbade "close acquaintance, association, or familiarity."

¶14 The facts that support this conclusion are few. Shawnna and Snodgrass testified they were merely acquaintances. Snodgrass spoke to his agent

[3] Snodgrass's agent alleged this relationship violated Rule 1 as well. It is unclear from the ALJ's decision whether he also found that the relationship violated both rules or only Rule 28.

once about what would be entailed if he began a dating relationship with Shawnna. However, as the ALJ observed, there was no evidence that they actually began such a relationship, only evidence that Snodgrass considered doing so, and that he consulted his agent before beginning to date, as he was required to do. Several weeks after Shawnna and Snodgrass met, Shawnna wrote him a two-page letter expressing her affection for him and her desire to marry him. The division also offered as evidence a commercial greeting card signed by Shawnna with the printed message, "I Love You, Dammit!," on the front and a handwritten message, "Thank you for everything," inside. Finally, the division presented a statement made by another motel customer, Joan Westberg, that she had seen Michael in Snodgrass's rooms on numerous occasions and that Snodgrass had told her "he was going to marry Shawnna."[4]

¶15 The facts on the record suggest that Shawnna had feelings for Snodgrass, that Snodgrass was at least contemplating a dating relationship with Shawnna and that he may have considered marriage as well. What these facts establish about any actual, as opposed to desired, relationship between Shawnna and Snodgrass is difficult to say. However, the record shows some credible evidence a reasonable mind might accept that Shawnna and Snodgrass had, under the ALJ's expansive construction of Rule 24, an intimate relationship.

[4] Westberg did not testify at the hearing. She had moved and the division could not locate her. Snodgrass argued that Westberg's absence deprived him of his right of confrontation under the Sixth and Fourteenth Amendments. The circuit court observed that Westberg appeared to be a citizen and not a police informant, which warranted her as being treated as personally reliable; the question was, therefore, whether she was observationally reliable. *See* ***State v. Knudson***, 51 Wis. 2d 270, 274, 187 N.W.2d 321 (1971). The court concluded that, in combination with Snodgrass's failure to question Westberg's reliability in "any significant way," enough facts collaborated her account to make this hearsay testimony reliable and admissible.

¶16 Based on these three violations, the ALJ found that revocation was justified. The ALJ determined that Snodgrass's decision to have an intimate relationship with a woman who had a young child and his concomitant contacts with the child made him a poor risk for continued supervision. Snodgrass's underreporting of his work at the Ponderosa further justified the decision to revoke: "offenders who do not fully report their activities are a threat to the public." The ALJ concluded that, in light of the underlying nature of Snodgrass's crime, continuing probation would unduly deprecate the seriousness of these violations and unreasonably endanger the public. Revocation was therefore the only "viable alternative."

¶17 Wisconsin has adopted AMERICAN BAR ASSOCIATION *Standards Relating to Probation* § 5.1(a) (Approved Draft, 1970), identifying three grounds for revocation: (1) that the confinement is necessary to protect the public from further criminal activity; (2) the offender needs correctional treatment which can most effectively be provided if he is confined; and (3) it would unduly depreciate the seriousness of the violation if probation were not revoked. ***State ex rel. Plotkin v. DHSS***, 63 Wis. 2d 535, 544, 217 N.W.2d 641 (1974). Under the ABA standards, the revoking authority must find one of these three grounds for revocation after considering various intermediate steps as an alternative to revocation. ***Id.*** at 544-45.

¶18 Snodgrass argued at the hearing that revocation for the full term of his sentence was extreme. In his appeals of that decision, he argued rather more clearly that the ALJ failed to consider alternatives to revoking his probation, and that revocation was contrary to the purposes of probation. "[B]efore revoking probation, there should be an exercise of discretion in respect to whether the rehabilitation of the criminal can continue to successfully be accomplished outside

of the prison walls." ***Id.*** at 543-44. Issues to be considered are whether alternatives to probation exist in a particular case and whether continued probation will be likely to further the criminal's rehabilitation. ***Id***.

¶19 The ALJ referred to two of three of the probation revocation grounds Wisconsin has adopted.[5] He then concluded there was no "viable alternative" to revocation without either explaining or rationalizing that conclusion. The record before the ALJ contained a ***Plotkin*** analysis, which briefly discussed revocation alternatives:

> A minimum camp was considered and rejected as they do not offer sex offender treatment. Placement on the electronic monitor was considered but rejected due to the seriousness of the violations and it would not deter his having contact with [Shawnna] or her son. Placement at Jackson or Racine Correctional was considered, however, as Mr. Snodgrass has been in treatment in the community for nearly two years, a Sex Offender Treatment Alternative to Revocation (ATR) is not appropriate at this time as it will do nothing to change his thinking.

The question is whether, in light of the ALJ's silence about the basis of his conclusion, there is substantial evidence that the "feasibility and availability of alternatives" were considered and rejected with "some logical explanation," the requirements for the proper exercise of discretion. *See* ***State ex rel. Warren v. Schwarz***, 211 Wis. 2d 710, 725-26, 566 N.W.2d 173 (Ct. App. 1998), *aff'd,* 219 Wis. 2d 615, 579 N.W.2d 698 (1998).

[5] The ALJ and the division did not agree on which grounds, however. The ALJ concluded continuing probation would unduly deprecate the seriousness of Snodgrass's violations and unreasonably endanger the public. The Violation/Revocation Summary, which contains the ***Plotkin*** analysis, also identified the unduly deprecate standard, but chose the "offender is in need of correction treatment which can most effectively be provided if he/she is confined" as the second ground.

¶20 Although the ALJ did not explicitly identify the division's ***Plotkin*** analysis as the source of his conclusion that revocation was the only alternative, that analysis forms part of the record and is implicitly a basis for his decision. *See*, *e.g.,* ***State ex rel. Foshey v. Wisconsin DHSS***, 102 Wis. 2d 505, 519-20, 307 N.W.2d 315 (Ct. App. 1981) (division secretary's decision to reverse the hearing examiner was a proper exercise of discretion because the duty to consider revocation alternatives was satisfied by facts in the record, including agent's statement that alternatives were considered). The division's discussion of alternatives was cursory, but it provided some logical explanation for why potential alternatives were dismissed. While reasonable minds might not agree that these particular violations were sufficiently serious to warrant revocation or that the explanations for rejecting the revocation alternatives were compelling, this court is restricted to inquiring whether the ALJ erroneously exercised his discretion to revoke.

¶21 We conclude that Snodgrass did not meet his burden of proving the ALJ's decision was arbitrary or capricious. Substantial evidence supported the ALJ's finding that Snodgrass violated probation conditions, and the division's ***Plotkin*** analysis provides some evidence that revocation alternatives were properly considered and rejected. We therefore affirm the circuit court's order.

By the Court.—Order affirmed.

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