COURT OF APPEALS
DECISION
DATED AND FILED

November 30, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0899 **Cir. Ct. No. 03CV004178**

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

STATE OF WISCONSIN EX REL.
ANDRE WINGO,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ, ADMINISTRATOR,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 FINE, J. Andre Wingo appeals, *pro se*, from an order affirming the revocation of his probation. He claims that: (1) his due-process rights were violated because he did not have a preliminary hearing, and the final revocation hearing was untimely; and (2) there was insufficient evidence to support his revocation. We affirm.

I.

¶2 Andre Wingo was convicted of third-degree sexual assault and substantial battery in 1997. He was released on probation on February 23, 2002. Among the rules of probation were directions that he: (1) not commit acts of physical violence; (2) not change his residence without the approval of his probation agent; (3) not have contact with a person under eighteen years old unless supervised by an approved adult; (4) inform his probation agent of his whereabouts and activities; and (5) provide true and correct information in response to his probation agent's inquiries. On August 6, 2002, Mary Blaha made a domestic-violence complaint against him. According to a police report, on August 4, 2002, Blaha had asked Wingo, her then live-in boyfriend, to move out. Blaha told the police that Wingo said that he did not want to move out, hit her, and "threw her about the house."

¶3 Wingo's probation agent filed a "Notice of Violation," notifying Wingo that he had committed five violations:

> 1. On or about 8/04/02, [Wingo] did hit and/or slap Mary Blaha without her consent, causing injuries.
>
> 2. On or about 8/04/02, [Wingo] did "stay" and/or reside at 2336A South 8th Street, Milwaukee, without this agent's prior approval.
>
> 3. On or about 8/04/02, [Wingo] did have contact with Mary Blaha's four children (believed to be ages 13, 12, 6, and 5) without a preapproved supervising adult present.
>
> 4. On or about 8/06/02, [Wingo] did provide false information on his Offender Report Form.
>
> 5. On or about 8/15/02, [Wingo] did fail to provide true and correct information when requested by this agent.

(Rule violations omitted.) The "Notice of Violation" also informed Wingo that he would not have a preliminary hearing because he had given a signed statement admitting the violations.

¶4 A final revocation hearing was held on September 25, 2002. Blaha testified that she lived at 2336A South 8th Street with her children. She claimed that she and Wingo were dating, but that Wingo did not live with her or spend the night at her house. Blaha told the administrative law judge that on the morning of August 4, 2002, she and Wingo got into a "heated discussion." She claimed that she could not remember if Wingo had hit her because depression affected her memory. Blaha remembered going to the hospital, however, because, she testified, her lip was "busted open." After Blaha testified, the hearing was adjourned.

¶5 On February 6, 2003, the hearing resumed and Robert Griebel, the officer who wrote the police report, testified that he talked to Blaha on August 6, 2002. Griebel testified that, while he was talking to Blaha, he noticed that she had scratches on her eyes and neck, bruises to her eyes, and cuts on her upper and lower lip. According to Griebel, Blaha told him that Wingo hit her. Griebel then went to Blaha's house and arrested Wingo.

¶6 Griebel interviewed Wingo and wrote out the first half of what Wingo told him. After briefly looking at what Griebel wrote, Griebel testified that Wingo told him that he lived at Blaha's house. According to Griebel, Wingo claimed that he did not hurt Blaha, and suggested that Blaha had hurt herself when she fell out of bed and hit a table. Wingo also told Griebel that Blaha may have been hurt during a fight with her twelve- and thirteen-year-old boys. Griebel testified that he was having trouble communicating with Wingo, so he let Wingo

write the second half of the statement. Wingo signed the complete statement. On cross-examination, Griebel admitted that Blaha's injuries were not listed on a supplemental incident report.

¶7 Wingo's probation agent, Mark Kluck, also testified. After discussing several of the exhibits with the administrative law judge, Kluck told the judge that Wingo had written on an offender report form dated August 6, 2002, that he lived at 1703 North 4th Street. Kluck further testified that Wingo never told him that he was living at 2336A South 8th Street, and that Wingo did not have permission to be around children.

¶8 Wingo also testified at the hearing. He denied that he hit Blaha, and claimed that her injuries could have been caused by one of her older sons. He also claimed that he did not live with Blaha or have contact with her children because he went over to her house when the children were at school.

¶9 The administrative law judge determined that Wingo had committed the first four alleged probation violations. Wingo appealed to the Division of Hearings and Appeals. The division sustained the administrative law judge's findings of fact and legal conclusions.

II.

¶10 On appeal, we review the decision of the Division of Hearings and Appeals, applying the same standard as the trial court. ***State ex rel. Simpson v. Schwarz***, 2002 WI App 7, ¶10, 250 Wis. 2d 214, 222, 640 N.W.2d 527, 532. Our review 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 rather than its judgment; and (4) whether the evidence was such that the division might reasonably make the decision in question. ***Ibid.*** We address Wingo's contentions in turn.

¶11 First, Wingo argues that his due-process rights were violated because he never had a preliminary hearing. We disagree. Due process requires that "some minimal inquiry" be conducted after an alleged violation of parole conditions. *See* ***Morrissey v. Brewer***, 408 U.S. 471, 485 (1972). As relevant to our inquiry, the primary purpose of the preliminary hearing is to "provide assurance that there is reasonable justification for the deprivation involved in detaining the parolee for a final revocation hearing." ***State ex rel. Flowers v. Department of Health & Soc. Servs.***, 81 Wis. 2d 376, 391, 260 N.W.2d 727, 736 (1978). The same standard applies to the need for a preliminary hearing for probationers who are taken into custody. *See* ***Gagnon v. Scarpelli***, 411 U.S. 778, 782 n.3 (1973) ("Despite the undoubted minor differences between probation and parole, the commentators have agreed that revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole.").

> This purpose "is served by demonstrating any reasonable ground for incarceration." Once it is found at a preliminary hearing that there is probable cause that a violation occurred, the need to determine whether there is probable cause to detain the arrested person pending a final revocation hearing has been met. Thus, a preliminary hearing is not required if grounds for detention have been established in some other manner.

State ex rel. Brown v. Artison, 138 Wis. 2d 350, 356–357, 405 N.W.2d 797, 801 (Ct. App. 1987) (quoted source and citations omitted).

¶12 A preliminary hearing is not required when the parolee or probationer admits the violations in a document that he or she signed. *See* WIS. STAT. § 302.335(2)(a)(2).[1] As we have seen, Wingo wrote out his version of the events. In that writing he contended: "On 8-4-02 Mary Blaha did commit a battery on her children Laquon Spencer for disobeying her. During this they were kicking and fighting each other Sunday night and was left with scars. Mr. Wingo then left the residence and Ms. Blaha then proceeded to argue with her kid." This admits the third alleged probation violation, *i.e.*, it shows that Wingo had contact with Blaha's children. Thus, a preliminary hearing was not required. *See* ***Flowers***, 81 Wis. 2d at 392, 260 N.W.2d at 736 ("Once probable cause is established with regard to any charge, the function of the preliminary hearing in a parole revocation proceeding has been fulfilled.").

¶13 Wingo also argues that the transcript from the final revocation hearing is inadequate because part of a discussion about his preliminary-hearing claim was "deleted" by the Division of Hearings and Appeals. He thus claims that the record on appeal is insufficient. We disagree. There is no evidence that the

[1] WISCONSIN STAT. § 302.335(2)(a)(2) provides:

> (a) The department shall begin a preliminary revocation hearing within 15 working days after the probationer, parolee or person on extended supervision is detained in the county jail, other county facility or the tribal jail. … This paragraph does not apply under any of the following circumstances:
>
> ….
>
> 2. The probationer, parolee or person on extended supervision has given and signed a written statement that admits the violation

See also WIS. ADMIN. CODE § DOC 331.04(2)(b) (preliminary hearing not required when "[t]he client has given and signed a written statement which admits the violation").

division "deleted" part of the transcript. Although the transcript shows that parts of the discussion were not transcribed because they either were inaudible or were held off the record, the record is sufficient for us to review Wingo's preliminary-hearing claim because Wingo's written and signed admission to having violated a condition of his probation is in the record on appeal.[2]

¶14 Second, Wingo alleges that his due-process right to a speedy final revocation hearing was violated because the division did not commence the hearing within ten days of the September 25 adjournment under WIS. STAT. § 302.335(2)(b). Wingo misreads the statute.

¶15 WISCONSIN STAT. § 302.335(2)(b) provides that, "[t]he division shall begin a final revocation hearing within 50 calendar days after the person is detained in the county jail, other county facility or the tribal jail. The department may request the division to extend *this* deadline by not more than 10 additional calendar days." (Emphasis added.) In this case, there is no dispute that Wingo's hearing began within fifty days of his detention. The ten-day extension applies to the original fifty-day deadline, not a situation such as this where the hearing is started within fifty days, but adjourned to a later date. We thus analyze whether the adjournment of Wingo's hearing was reasonable under due-process standards.

¶16 A due-process claim based on delay is judged by the speedy trial standards in ***Barker v. Wingo***, 407 U.S. 514, 530 (1972). *See* ***State ex rel. Alvarez***

[2] In his reply brief, Wingo contends that his statement to the police was not admissible at the final revocation hearing because the police did not tell him of his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966). We will not address this claim, however, because it is raised for the first time in his reply brief. *See* ***Sisters of St. Mary v. AAER Sprayed Insulation***, 151 Wis. 2d 708, 723–724 n.4, 445 N.W.2d 723, 729 n.4 (Ct. App. 1989) (we will not review an issue raised for the first time in the reply brief).

v. Lotter, 91 Wis. 2d 329, 334–335, 283 N.W.2d 408, 410 (Ct. App. 1979). The four factors to be considered are: (1) the length of the delay; (2) the reason for the delay; (3) the assertion, if any, by the claimant for a speedy trial; and (4) the prejudice to the claimant. ***Barker***, 407 U.S. at 530.

¶17 The first factor, the length of the delay, is a threshold question, and we must determine whether the length of delay is presumptively prejudicial before the inquiry can be made into the remaining factors. ***Hatcher v. State***, 83 Wis. 2d 559, 566–567, 266 N.W.2d 320, 324 (1978). In this case, the final revocation hearing was not completed until approximately six months after Wingo's arrest. Assuming, without deciding, that the six-month delay was prejudicial, we turn to the other factors. *See* ***United States ex rel. Sims v. Sielaff***, 563 F.2d 821, 825 (7th Cir. 1977) (three months between execution of arrest warrant and revocation hearing appears to be maximum delay tolerable). An analysis of these factors shows that Wingo's right to a speedy hearing was not violated.

¶18 As we have seen, the second factor is an assessment of the reason for the delay. Wingo's hearing was adjourned because a police officer could not testify at the September 25, 2002, hearing. The unavailability of a witness is a valid reason for an adjournment. *See* ***Barker***, 407 U.S. at 531. We see nothing in the record, and Wingo points to nothing, indicating that the State had any intent to deliberately impede Wingo's defense or had an improper motive for the delay. *See* ***id.***

¶19 The third factor is whether the defendant asserted his or her right to a speedy trial. Other than a belated reference to his speedy-hearing rights at the end of the final revocation hearing, Wingo did not seek a speedy hearing or complain about the adjournment. Indeed, Wingo's lawyer at the hearing consented to the

adjournment. *See* ***Hadley v. State***, 66 Wis. 2d 350, 361, 225 N.W.2d 461, 466 (1975) (defendants must be charged with some responsibility to assert their right to a speedy trial so that those who do assert that right can be distinguished from those "who are consciously seeking to avoid the day of reckoning").

¶20 The last factor is whether there is prejudice to the defendant. Wingo has not shown any prejudice from the delay. In his reply brief, he alleges that he was "clearly prejudiced because he lost key witnesses that would have appeared at the hearing to testify on his behalf." Wingo does not, however, identify the witnesses or indicate what they would have said if called to testify. Wingo was not denied due process by the delay in conducting the final revocation hearing.

¶21 Finally, Wingo challenges the sufficiency of the evidence adduced at the final revocation hearing. When the sufficiency of the evidence is challenged, we are limited to the question of whether substantial evidence supports the division's decision. ***Von Arx v. Schwarz***, 185 Wis. 2d 645, 656, 517 N.W.2d 540, 544 (Ct. App. 1994). "'Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion.'" ***Ibid.*** (quoted source omitted). "If substantial evidence supports the division's determination, it must be affirmed even though the evidence may support a contrary determination." ***Ibid.***

¶22 In this case, Wingo argues that there was insufficient evidence to find that he committed the first four violations because: (1) at the hearing, Blaha testified that Wingo "did not commit any of the allegations"; and (2) Griebel and Kluck's testimony was unreliable "second hand" information. We disagree for two reasons.

¶23 First, a probation violation may be proven with hearsay as long as the evidence is reliable. *See* ***State ex rel. Henschel v. Department of Health & Soc. Servs.***, 91 Wis. 2d 268, 271, 282 N.W.2d 618, 619 (Ct. App. 1979); *see also* WIS. STAT. RULE 911.01(4)(c) (rules of evidence do not apply to revocation hearings). Second, the credibility of witnesses is determined by the administrative law judge. *See* ***State ex rel. Cox v. Department of Health and Soc. Servs.***, 105 Wis. 2d 378, 384, 314 N.W.2d 148, 151 (Ct. App. 1981). In this case, the administrative law judge implicitly found Griebel and Kluck credible, and Blaha incredible. Wingo does not show how these findings are unreasonable.

By the Court.—Order affirmed.

Publication in the official reports is not recommended.