COURT OF APPEALS DECISION DATED AND FILED

April 15, 2008

David R. Schanker
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.

Appeal No. 2007AP1425

Cir. Ct. No. 2006CV8256

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN EX REL. WILLIAM LEACH,

PETITIONER-APPELLANT,

V.

DAVID SCHWARZ, ADMINISTRATOR, DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. William Leach appeals *pro se* from a circuit court order affirming a decision of the Division of Hearings and Appeals that revoked

Leach's parole and forfeited his good time. We agree with the circuit court's analysis and conclusions. We affirm.

Background

¶2 Leach was imprisoned following multiple felony convictions in 1982. He was released in November 2004, but absconded from supervision in January 2006. After receiving a formal alternative to revocation, Leach was arrested in March 2006 for two armed robberies. The Department of Corrections (Department) then sought revocation of Leach's parole on the basis of five alleged rule violations, including the two armed robbery charges. An Administrative Law Judge (ALJ) determined that the Department proved the violations and that there were no appropriate alternatives to revocation. The ALJ revoked Leach's parole and ordered the forfeiture of twenty-five years, four months, and six days of good time. Leach appealed to the Administrator of the Division of Hearings and Appeals, who affirmed.

¶3 Leach petitioned the circuit court for a writ of certiorari to review the administrative decision. Leach contended that: (1) his jury trial on the two armed robbery charges resulted in one acquittal and one conviction of a lesser offense, warranting a new revocation hearing; (2) the administrative decisions to revoke his parole and forfeit all accumulated good time are unreasonable; (3) the ALJ denied him due process when it refused him a continuance to present the testimony of a character witness; (4) the ALJ improperly refused to allow him to present evidence about his medical condition and treatment; (5) the Department unconstitutionally predicated his parole revocation on his refusal to give a statement to his parole agent; and (6) the Department lacked jurisdiction to proceed with revocation because Leach's parole agent failed to secure a

supervisor's signature on the form recommending administrative action. The circuit court denied the petition, and this appeal followed.

Discussion

¶4 On certiorari review of an administrative decision revoking parole, we review the decision of the agency, not that of the circuit court. *See* ***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). Our review is limited to four issues: "(1) whether the agency stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable, representing its will, not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question." ***State ex rel. Thorson v. Schwarz***, 2004 WI 96, ¶12, 274 Wis. 2d 1, 681 N.W.2d 914. Our scope of review is identical to that of the circuit court. *See* ***State ex rel. Staples v. DHSS***, 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987).

¶5 In its review of the agency's decision, the circuit court applied the proper legal standards to the relevant facts in a thorough and thoughtful written opinion. We conclude that the circuit court reached the correct conclusions for reasons that express our view of the law. Accordingly, we adopt the attached reasoning of the circuit court as our own and affirm. *See* WIS. CT. APP. IOP VI(5)(a) (Oct. 14, 2003) (court of appeals may adopt circuit court's opinion).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

STATE *ex rel.* WILLIAM LEACH,

Petitioner,

v.

DAVID H. SCHWARZ, Administrator,
Division of Hearings and Appeals,

Respondent.

DECISION AND ORDER

Case No. 06CV008256

This case comes before the court for review of a decision of David Schwarz, Administrator of the Division of Hearings and Appeals affirming the decision of the Department of Corrections to revoke William Leach's parole.

Because substantial evidence supports the Department's decision to revoke his parole and because the Department's procedure does not violate the law, I must affirm his revocation.

Background

Mr. Leach was convicted in 1982 of four armed robberies, an attempted armed robbery an attempted murder and false imprisonment. He was confined until his mandatory release date of November 9, 2004.

Mr. Leach was unsuccessful on parole. He absconded from supervision in January, 2006 and was not apprehended until March, 2006. He was released under the terms of a formal alternative to revocation, but within about two weeks he was apprehended for the robbery of Angeline Opsahl and William Holdmann.

Upon his apprehension the second time, the Department sought the revocation of his parole, claiming five violations of the rules governing his supervision (1) absconding;

(2) ingesting cocaine; (3) using what was thought to be a gun to rob Angeline Opsahl; (4) using what was thought to be a gun to rob William Holdmann; and (5) refusing to provide a statement to his agent on April 27, 2006.

On June 26, 2006, after hearing testimony and argument at a revocation hearing, ALJ Charles Goukas decided that the Department proved all of these allegations. The All ordered that Mr. Leach be reconfined for the entire time that was available, 25 years, 4 months and 6 days. The All ordered that Mr. Leach was eligible to earn good time.

On July 10, 2006, the Administrator of the Division of Hearings and Appeals, David Schwarz, affirmed the ALJ's decision.

Mr. Leach was prosecuted for the robberies of Ms. Opsahl and Mr. Holdmann. On July 19, 2006, the State went to trial on charges of attempted armed robbery of Ms. Opsahl and armed robbery of Mr. Holdmann. On July 21, 2006, the armed robbery charge was amended to a charge of robbery. On July 21, 2006, the jury rendered its verdicts. It acquitted Mr. Leach of the charge involving Ms. Opsahl and convicted Mr. Leach of the amended offense of robbing Mr. Holdmann.

Petitioner's Arguments

Mr. Leach argues that the Department failed to provide substantial evidence to support the revocation and that the Department denied him due process. Mr. Leach makes the following six claims: (1) He is entitled to a new revocation hearing because the ALJ's finding that he attempted to rob Ms. Opsahl and Mr. Holdmann using a toy gun is refuted by the subsequent jury verdicts. (2) Even if he is not entitled to a new hearing, the decision to revoke him for 25 years was unreasonable and contrary to law given the lesser severity of the offense of which he ultimately was convicted. (3) The ALJ erroneously denied his request for a continuance to

furnish the testimony of Wilma Wells about his condition and behavior during the time he was living with her. (4) The ALJ refused to allow Mr. Leach to present evidence about his various medical conditions, and that he was taking a prescription narcotic for some or all of them. (5) He declined to give a statement to his agent only because his attorney told him not to. (6) The All lacked jurisdiction or violated Mr. Leach's right to due process because the All proceeded without requiring Mr. Leach's agent to obtain a supervisor's or regional chief's signature on a DOC-44 Form Recommendation for Administrative Action.

Analysis

1. Standard of review

When the circuit court is asked to conduct a *certiorari* review of a parole revocation decision, the scope of the court's review is limited to four familiar inquiries: (1) whether the Department acted within the bounds of its jurisdiction; (2) whether the Department acted according to law; (3) whether the Department's action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that revocation was reasonable. *State ex rel. Tate v. Schwarz,* 2002 WI 127, ¶ 15, 257 Wis. 2d 40, 48.

Mr. Leach's attack on his revocation seems to focus on first, second and fourth factors.

2. Does substantial evidence support the decision to revoke Mr. Leach's parole?

What may seem to be the most compelling claim Mr. Leach makes is that a jury acquitted him of one of the offenses on which the Department relied to revoke his parole, and the offense of which he was convicted was less egregious than the other offense for which his parole was revoked. In Mr. Leach's view, the jury's verdict trumps the ALJ's conclusions. Mr. Leach

contends further that once the robbery allegations are put aside, the Department's remaining allegations against him provide little justification for ordering him confined for 25 years.

The flaw in Mr. Leach's argument is the jury verdict does not trump the ALJ's decision. The Department is not held to the same heavy burden of proof as the State is held in a criminal trial. The Department was not required to prove the robbery allegations against Mr. Leach beyond a reasonable doubt. Furthermore, on a *certiorari* review, the court does not hold the Department to such a heavy burden. I am not authorized to scrutinize the record for proof beyond a reasonable doubt that Mr. Leach committed the offenses which led to revocation.

The evidence in support of the allegations against Mr. Leach need merely be "substantial" for the court to uphold revocation. In *Van Ermen v. Department of Health & Social Services,* 84 Wis. 2d 57, 64 (1978), the supreme court explained:

> "Substantial evidence does not mean a preponderance of the evidence. Rather, the test is whether, taking into account all the evidence in the record, 'reasonable minds could arrive at the same conclusion as the agency."' . . . Where there is substantial evidence in the record, we will uphold those findings.

RURAL v. PSC, 2000 WI 129, 1120, 239 Wis. 2d 660, 676 (2002), *quoting Madison Gas & Electric Co. v. PSC,* 109 Wis. 2d 127, 133 (1982)(further quotation omitted). *See also Samens v. Labor & Industry Review Commission,* 117 Wis. 2d 646, 660 (1984)("There may be cases where two conflicting views may each be sustained by substantial evidence. In such a case, it is for the agency to determine which view of the evidence it wishes to accept . . . ")(citation omitted); *Omernick v. Department of Natural Resources,* 100 Wis. 2d 234, 250-251 (1981)(court may not upset an agency's decision "even if it may be against the great weight and clear preponderance of the evidence;" the decision may be undone only if a reasonable person *"could not* have reached the decision from the evidence and its inferences" (emphasis in original; citations omitted));

State ex rel. Beierle v. Civil Service Commission, 41 Wis. 2d 213, 217 (1968)("findings are conclusive if in any reasonable view the evidence sustains them").

Thus it is irrelevant whether the evidence against Mr. Leach was sufficient to persuade a jury beyond a reasonable doubt that Mr. Leach attempted, using a toy gun, to rob Ms. Opsahl and Mr. Holdmann. If the evidence presented was "substantial," then the court has no choice but to affirm the Department's findings.

In Mr. Leach's case, the evidence amply meets the substantial evidence standard. Ms. Opsahl and Mr. Holdmann testified in detail about the robbery and the ALJ believed them. I am not entitled to discredit their testimony, and I cannot find that a reasonable person presented with this evidence could not have reached the conclusion that Mr. Leach tried to rob them using a toy gun.

There also is substantial evidence to support the other findings made by the ALJ. Mr. Leach admitted absconding and using cocaine and admitted as well that he did not give a statement to his agent when a statement was requested.

3. Did the procedures followed by the Department in revoking Mr. Leach's parole violate due process?

Mr. Leach complains that certain procedural errors require that his revocation be reversed or at least that he be granted a new hearing. I disagree.

Mr. Leach contends that his request for a continuance to furnish the testimony of Rev. Wilma Wells, about his condition and behavior during the time he was living with her, was erroneously denied. But Mr. Leach fails to show how that testimony would have made a difference to the outcome of the hearing. Rev. Wells was not a witness to the robberies or to his absconding or cocaine use. At best she might have provided positive character evidence which,

in a different case, might tip the balance in deciding whether a parolee could be trusted to cooperate with and benefit from an alternative to revocation. But given the seriousness of Mr. Leach's robbery offenses – and the fact that Mr. Leach already had been released as an alternative to revocation – another alternative to revocation was highly unlikely.

Mr. Leach complains that he was not allowed to present evidence about his various medical conditions, for some or all of which he was taking a prescription narcotic. But he does not explain the relevance of this testimony, or how it would have changed the outcome of his revocation hearing.

Mr. Leach contends that the All lacked jurisdiction to hear the matter, or may even have violated Mr. Leach's right to due process, because the ALJ proceeded without requiring Mr. Leach's agent to obtain a supervisor's or regional chief's signature on a DOC-44 Form Recommendation for Administrative Action. Mr. Leach's invocation of the due process clause requires me to consider whether insisting upon a supervisor's approval would have made such a difference to his defense that the constitution is implicated. The due process clause ensures safeguards against unfair results, and the person invoking the clause bears the burden of demonstrating the need for the safeguard that was denied. *See Mathews v. Eldridge,* 429 U.S. 319, 334-335 (1976). *See also State ex rel. Vanderbeke v. Endicott,* 210 Wis. 2d 502, 514-515 (1997)("The minimum requirements of due process . . . applicable to probation revocation, include: (1) written notice of the claimed violation(s) of probation; (2) disclosure to the probationer of evidence against him or her; (3) the opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a neutral and detached hearing body, members of which need not be judicial

officers or lawyers; and (6) a written statement by the fact finder regarding the evidence relied on and the reasons for revoking probation").

Mr. Leach's due process argument fails because he makes no showing that there is a constitutional due process right to a supervisor's approval before the Department can proceed with a revocation hearing. Furthermore, Mr. Leach does not demonstrate how the outcome of his case might have changed if the ALJ had insisted on receiving a signed form DOC-44.

Finally, Mr. Leach implies that it was wrong for his agent to demand a statement from him after his arrest for armed robbery. Buried in Mr. Leach's argument may be a valid point — *see State ex rel. Tate v. Schwarz,* 2002 WI 127, ¶ 4, 257 Wis. 2d 40, 44 ("a defendant in this situation cannot be subjected to probation revocation for refusing to admit to the crime of conviction, unless he is first offered the protection of use and derivative use immunity for what are otherwise compulsory self-incriminatory statements") — but his argument is not sufficiently developed for the court to analyze it. Mr. Leach mentions the fact that his attorney advised him not to speak, but Mr. Leach does not demonstrate that he invoked his Fifth Amendment privilege or discuss the legal consequence of such an invocation. A court need not consider amorphous and undeveloped argument. *State v. Adams,* 223 Wis. 2d 60, 82 (Ct. App. 1998). But even if I were to consider the argument, and find that Mr. Leach's failure to cooperate with his agent should be set aside, the other rule violations he committed while under supervision are serious enough by themselves to justify the Department's decision to revoke his parole and order him to serve the rest of his sentence in confinement, subject to good time credit. Thus, whatever due process violation may have occurred in the attempt to take Mr. Leach's statement after his arrest for armed robbery, or the State's reliance upon his failure to speak as a basis for revoking his parole, is immaterial.

Conclusion

For all of the foregoing reasons, IT IS HEREBY ORDERED THAT the decision of the Division Administrator, David H. Schwarz, is affirmed.