

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JUNE 10, 1997

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

NOTICE

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

No. 96-2810

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN EX REL NEAL A. JOHNSON,

PETITIONER-APPELLANT,

V.

**DAVID H. SCHWARTZ, ADMINISTRATOR, DIVISION OF
HEARINGS AND APPEALS,**

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Neal Johnson appeals a judgment denying certiorari relief from an order revoking his parole and forfeiting two years, nine months and one day of good time. The administrative law judge's decision, later sustained by the Administrator of the Division of Hearings and Appeals,

determined that Johnson was guilty of four of the five violations alleged by his parole officer. Johnson argues that the evidence does not support two of the allegations, that the allegations taken individually or collectively are insufficient to warrant revocation of parole, and that the forfeiture of his good time was arbitrary and capricious. We reject these arguments and affirm the judgment.

A reviewing court can overturn a parole revocation only if the prisoner demonstrates by the preponderance of the evidence that the department's action was arbitrary and capricious. *See State ex rel. Johnson v. Cady*, 50 Wis.2d 540, 550, 185 N.W.2d 306, 311 (1971). A reviewing court must determine whether there was substantial evidence to warrant revocation. *See Van Ermen v. DHSS*, 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978). Revocation of parole is appropriate if the hearing examiner finds, on the basis of the original offense and the client's intervening conduct that: (a) confinement is necessary to protect the public from further criminal activity; (b) the client is in need of correctional treatment which can most effectively be provided if confined; or (c) it would unduly depreciate the seriousness of the violations if the client were not revoked. *See WIS. ADM. CODE § HA 2.05(7)(b)3.*

Johnson was convicted of second-degree murder in 1983 and was sentenced to twenty years in prison. At the time of that offense, Johnson was abusing chemicals. His previous parole had been revoked because of allegations that he battered his girlfriend and consumed alcohol. After his subsequent parole, Johnson was in a tavern and had been drinking on December 23, 1994. Although this conduct was a violation of the rules of parole supervision, the Department of Corrections decided not to revoke his parole at that time and approved an alternative to revocation under which Johnson was required to attend a "cognitive restructuring treatment program." His parole agent informed him that he was

required to attend every session of this program. He was also to consume no alcohol or drugs and possess no drug paraphernalia.

Less than three months later, Johnson failed to attend a required session and failed to notify his agent of his absence. The agent then went to Johnson's apartment where he performed a search, finding a small amount of marijuana and rolling papers in a jacket. He also found \$658 in cash on Johnson's person. Johnson was evasive when he attempted to explain to his agent how he obtained the cash. When he was taken into custody, he refused to provide jail personnel with booking information. As a result of this conduct, the hearing examiner revoked Johnson's bail and forfeited his good time based on four specific allegations: (1) possession of marijuana; (2) failure to attend the scheduled therapy session; (3) Johnson's refusal to promptly explain the money found in his possession; and (4) Johnson's failure to cooperate during the booking process.

Johnson argues that his room was accessible to others and that someone else may have planted the marijuana in his coat pocket. He also argues that the small amount of marijuana found does not warrant revocation of his parole. Substantial evidence supports the finding that the marijuana belonged to Johnson. The finding is not arbitrary or capricious merely because it is theoretically possible for someone else to have planted the marijuana for no apparent reason. As in *Van Ermen*, the seriousness of this violation is apparent by an examination of the underlying offense and Johnson's subsequent history. The murder was committed while Johnson was abusing chemicals. He had previously violated the terms of his parole by drinking and had missed a therapy session that was designed to be an alternative to revocation. The circumstances surrounding

the underlying murder offense and Johnson's overall performance on parole justify the revocation and the forfeiture of his good time.

Johnson describes his failure to attend the therapy session as a "misunderstanding" and as a "technical violation." He claims that he was told by the group leader that three absences were allowed and states that he does not remember his parole agent informing him that missing one session would be a violation of his parole. The hearing examiner had the right to believe the parole agent's account of the instructions he gave Johnson. See *Van Ermen* 84 Wis.2d at 64, 267 N.W.2d at 20; WIS. ADM. CODE § HA 2.05(6)(b).

Johnson argues that the finding that he refused to answer his agent's questions about the money found on his person is against the preponderance of the evidence. He explains that the money was "an advance" received from the company that prepared his income tax returns and that he believed it was a loan because he was required to repay the money when he received his tax refund. The hearing examiner found that Johnson was, at best, "being disingenuous at the jail. At worst, he was trying to pull the wool over his agent's eyes. Either way, he was not being as candid and cooperative with his agent as a parolee should be" The record supports the finding that the convoluted manner in which Johnson answered the parole agent's questions regarding the money depicts a refusal to forthrightly address the parole agent's concerns.

Johnson argues that missing one therapy session, belatedly explaining the money found on his person and refusing to answer questions while being booked at the jail do not constitute such outrageous conduct as to justify revocation of parole or the forfeiture of his good time. We disagree. In light of the nature and circumstances of the initial offense, his continued substance abuse,

his previous failure to abide by the conditions of his parole and the department's previous willingness to forego revocation in favor of additional therapy that required Johnson's cooperation, the collective effect of his violations justifies revocation and forfeiture of his good time.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

