COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2927

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

STATE OF WISCONSIN EX REL. RONALD E. PATTEN,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARTZ, IN HIS CAPACITY AS ADMINISTRATOR, DEPARTMENT OF ADMINISTRATION DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

PER CURIAM. Ronald Patten appeals an order affirming the revocation of his probation. The dispositive issue is whether there was sufficient evidence to support a finding that the agency considered alternatives to revocation of his probation. We conclude there was, and we affirm.

This case arises from the Department of Corrections' attempt in 1996 to revoke Patten's probation. The probation had been imposed following his conviction for first-degree sexual assault of a child and another offense. The parties agree that the department was obliged to consider alternatives to revocation, such as participation in the Division of Intensive Sanctions (DIS). At the administrative hearing, Lisa Kenyon, Patten's probation officer, testified that she submitted Patten's file to the Office of Offender Classification (OOC), which must approve any referral to DIS. She stated several times, in several ways, that OOC had considered Patten for DIS, but ultimately recommended revocation.

After the close of testimony, but before the decision by the administrative law judge, Patten submitted a copy of a document from the Division of Probation and Parole identified as "Administrative Directive #92-19." That document had an effective date of December 1, 1992, and stated as "policy" that OOC "will review all felony probation … revocations, except for clients on supervision for a sex offense." Patten argued that in light of this directive, Kenyon's assertion that OOC considered his participation in the DIS "must be regarded as a false assertion," because "no such consideration could have been given" under the announced policy.

The administrative law judge ordered Patten's probation revoked, but did not expressly address his argument about the administrative directive and consideration of DIS. Patten pursued the appropriate administrative appeals, and

then filed a petition for a writ of certiorari in circuit court. That court affirmed the revocation.[1]

On appeal, Patten first argues that the administrative finding that the department considered alternatives to revocation is erroneous because the department failed to consider DIS. Although Kenyon testified that OOC considered Patten for DIS placement, Patten argues that her testimony was "at best, disingenuous," because the administrative directive shows that OOC did not make such a consideration. We reject the argument. There is no evidence in the record that the directive was in effect at the time of Patten's revocation more than three years later. Even if it were, there is no evidence as to whether OOC followed that policy in its review of Patten's file. Patten points to no direct evidence as to what actually occurred during the OOC review that is contrary to Kenyon's testimony. On certiorari review, we apply the substantial evidence test, that is, whether reasonable minds could arrive at the same conclusion reached by the administrative decision maker. *See* ***State ex rel. Richards v. Traut***, 145 Wis.2d 677, 680, 429 N.W.2d 81, 82 (Ct. App. 1988). On this record, the finding that the department considered alternatives to revocation is supported by substantial evidence.

[1] In his brief to this court, Patten states that the circuit court held that the evidence supported the revocation decision, but that the court did not otherwise address his contention that the department failed to properly consider DIS as an alternative to revocation. We note that the circuit court's order states that, in spite of its letter setting a date more than three months prior for Patten to file his brief, no brief had been filed. The court thus decided the matter without briefing. On appeal this court does not review the merits of the circuit court's decision, but instead conducts its own review of the administrative proceeding. However, this does not mean that parties may decline to participate in circuit court proceedings. An appellant's failure to raise an issue in circuit court certiorari proceedings invites a potential waiver argument from the respondent on appeal. The respondent in this appeal, however, does not argue that Patten waived any claims of error by failing to raise them in the circuit court.

Because it has not been shown that the administrative directive played any role whatsoever in the revocation of Patten's probation, we need not address his remaining arguments regarding whether the directive should have been promulgated as a rule and whether it is consistent with other laws.

By the Court.—Order affirmed.

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