COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2001

Cornelia G. Clark
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. 00-2826 **Cir. Ct. No. 99-CV-111**

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

STATE OF WISCONSIN EX REL. GREGORY PIK,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ, ADMINISTRATOR, DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Gregory Pik appeals the circuit court's order denying his motion to reconsider its decision affirming his probation revocation. Pik argues: (1) that the Division of Hearings and Appeals violated his constitutional right to due process because it did not hold a preliminary hearing;

(2) that the revocation decision is not supported by substantial evidence; and (3) that the circuit court should have recused itself from this case. We affirm.

¶2 On April 18, 1997, Pik was convicted of child abuse. Pik's sentence was withheld and he was placed on probation for five years. On August 19, 1999, the Department of Corrections initiated probation revocation proceedings against Pik. On September 24, 1999, a hearing examiner revoked Pik's probation. The Division of Hearings and Appeals affirmed the decision on October 12, 1999. On certiorari review, the circuit court affirmed. Pik moved for reconsideration, but the circuit denied his motion.

¶3 Pik first argues that a preliminary hearing was not held as required by WIS. ADMIN. CODE § DOC 331.04, violating his right to due process.[1] WISCONSIN ADMIN. CODE § DOC 331.04(2)(b) provides that a preliminary hearing "shall be held" unless "[t]he client has given and signed a written statement which admits the violation." On August 18, 1999, Pik wrote the following statement on the back of his new probation rules: "I will not [abide] by [rule] seventeen as my wife has children that I'm not the natural born father of." Rule seventeen stated: "you may not reside in any residence where minor children reside other than your natural born children." In Pik's written statement, he admitted that he would not follow the rule seventeen. We conclude that Pik's statement satisfies the requirement that he "admit[ted] the violation." Because an

[1] An agency is bound to follow its own rules. ***Meeks v. Gagnon***, 95 Wis. 2d 115, 119, 289 N.W.2d 357 (Ct. App. 1980). An agency's failure to do so may implicate due process. ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, ¶¶24-26, 234 Wis. 2d 626, 610 N.W.2d 821.

exception to holding a preliminary hearing applied, there was no violation of due process.[2]

¶4 Pik next argues that the revocation decision is not supported by substantial evidence. "We may not substitute our judgment for that of the division; we inquire only whether substantial evidence supports the division's decision." ***Von Arx v. Schwarz***, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (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.'" ***Id.*** (quoted source omitted). "If substantial evidence supports the division's determination, it must be affirmed even though the evidence may support a contrary determination." ***Id.***

¶5 There is substantial evidence to support the division's decision to revoke Pik. Pik was prohibited from living with minor children until further order of the court. He was also prohibited by the rules of his probation from changing residences without prior approval from his probation agent. Pik moved to Dawn Polkinghorn's residence without prior approval of his agent in early July 1999. At the revocation hearing, probation agent Jennifer Victoria testified that one of Dawn Polkinghorn's two children was living at the home with Pik and Polkinghorn for a period of time in mid-July. These facts constitute substantial evidence to support the revocation.

[2] To bolster his due process argument, Pik points to the fact that the rule he stated in writing he would not follow on August 18, 1999, did not, in the end, serve as the basis for his revocation. Be that as it may, at the time the preliminary hearing determination was made, that rule was the basis for the revocation proceedings. That Pik allowed the allegations to be amended the day of the hearing does not change this result.

¶6 Finally, Pik argues that the circuit court judge should have recused himself from this action reviewing the decision to revoke because he had recused himself from the sentencing after revocation. On appeal, we review the decision of the division, not the decision of the circuit court. *See* ***Arndorfer v. Sauk County Bd. of Adjustment***, 154 Wis. 2d 333, 337, 453 N.W.2d 168 (Ct. App. 1990), *rev'd on other grounds*, 162 Wis. 2d 246, 469 N.W.2d 831 (1991). Therefore, the issue of the circuit court judge's recusal is moot. ***City of Racine v. J-T Enters. of America, Inc.***, 64 Wis. 2d 691, 700, 221 N.W.2d 869 (1974) (a matter is moot if a determination is sought that cannot have a practical effect on an existing controversy).

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.