COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 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.

No. 01-0639

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

STATE OF WISCONSIN EX REL.
COREY J. HAMPTON,

PETITIONER-APPELLANT,

V.

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

RESPONDENT-RESPONDENT.

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

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Corey J. Hampton, *pro se*, appeals from the circuit court order affirming his probation revocation. He argues: (1) that his due process rights were repeatedly violated; (2) that the Administrative Law Judge (ALJ) erroneously exercised discretion by allowing the introduction of hearsay

evidence during his revocation hearing; (3) that the "proceedings undertaken and the decision to revoke [his] probation were erroneous, arbitrary, capricious, and contrary to the Wisconsin and United States Constitution[s]"; (4) that the Division relied on unsubstantial, false and incorrect information when it weighed whether he was eligible for alternatives to revocation; and (5) that the circuit court denied him fair judicial review when it denied his request to correct transcripts of his revocation hearing. We reject his arguments and affirm.

I. BACKGROUND

¶2 In 1999, Hampton was convicted of the second-degree sexual assault of his fifteen-year-old niece. He received a stayed sentence of twelve years with twelve years' probation. Shortly thereafter, Hampton signed conditions of probation which required, among other things, that he: (1) not leave Milwaukee County without prior approval from his probation agent; (2) have no contact, including phone contact, with any person under the age of eighteen; (3) stay away from any child's residence unless supervised by a previously authorized adult; (4) not sleep overnight at any residence where a person under the age of eighteen is also sleeping; and (5) stay out of and be at least two-blocks from schools, parks, playgrounds, day care centers and areas of public recreation.

¶3 On December 21, 1999, Hampton received notice of his alleged probation violations. The notice cited fifteen violations, and included allegations that Hampton had repeatedly propositioned twelve-year-old Heather S., the granddaughter of Char K., whom Hampton refers to as his "foster mother." The notice alleged that Char had told Hampton's probation agent that Hampton, while swimming with Heather in August 1999, put his hand down the front of her swimsuit; that he had also repeatedly telephoned Heather to talk "dirty" to her; and

that he had stayed overnight at her (Char's) home while Heather and her girlfriend were sleeping over. The allegations also included a detailed statement from Heather in which she described three instances of physical contact with Hampton during the summer of 1999. She also confirmed that Hampton had spent the night at her grandmother's house while she was present. In addition, she stated that Hampton had called her at least twenty-nine times during the month of December 1999, and that during these calls he discussed sexual matters with her.

¶4 On February 17, 2000, the ALJ found Hampton in violation of his conditions of probation and revoked his probation. The Division of Hearings and Appeals affirmed the ALJ's decision. On May 3, 2000, Hampton filed a *pro se* petition for a writ of certiorari, seeking circuit court review. On January 22, 2001, the circuit court affirmed the decision and order revoking Hampton's probation.

II. DISCUSSION

A. Standard of Review

¶5 "[P]robation revocation is the product of an administrative, civil proceeding[.]" ***State ex rel. Cramer v. Wisconsin Court of Appeals***, 2000 WI 86, ¶28, 236 Wis. 2d 473, 613 N.W.2d 591. Appeal of a revocation decision is accomplished by a writ of certiorari to the circuit court, *see* ***id.***, and is not subject to *de novo* review, ***Van Ermen v. DHSS***, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978). On review to this court, we apply the same standard of review as the circuit court. ***State ex rel. Cox v. DHSS***, 105 Wis. 2d 378, 380, 314 N.W.2d 148 (Ct. App. 1981). Review by certiorari of a revocation decision is limited to the following issues:

> (1) Whether the board kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action

> was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.

Van Ermen, 84 Wis. 2d at 63 (citation omitted).

¶6 "[T]he department has the burden to prove the allegation of the violation by a preponderance of the evidence." ***State ex rel. Thompson v. Riveland***, 109 Wis. 2d 580, 585, 326 N.W.2d 768 (1982). When the sufficiency of the evidence is challenged, we are limited to the question of whether substantial evidence supports the department's decision. ***Id.*** at 585-86. Substantial evidence is the "quantity and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion." ***State ex rel. Eckmann v. DHSS***, 114 Wis. 2d 35, 43, 337 N.W.2d 840 (Ct. App. 1983) (citation omitted).

B. Due Process

¶7 Hampton contends that his due process rights were repeatedly violated during his revocation proceedings. We disagree.

¶8 Although probationers are not entitled to the "full panoply of rights" accorded criminal defendants, ***State ex rel. Vanderbeke v. Endicott***, 210 Wis. 2d 502, 513, 563 N.W.2d 883 (1997), "[i]t is well settled . . . that a probationer is entitled to due process of law before probation may be revoked, because probation revocation may entail a substantial loss of liberty," ***id.*** at 513-14 (footnote omitted). Probation revocation has two components: (1) the factual determination of whether the probationer violated the conditions of probation; and (2) if the violation is established, the determination of what sanction is appropriate. ***Id.*** at 514. To ensure that these determinations are made fairly, the law requires that probationers receive:

> (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.

Id. at 514-15.

¶9 Hampton first argues that he was deprived of the right to a preliminary hearing. We disagree. While a preliminary hearing may be required in some cases, *see* ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 394, 260 N.W.2d 727 (1978) (requiring preliminary hearings only to determine justification for the detention of the probationer/parolee and to give probationer/parolee notice and an opportunity to prepare a defense), this is not one of them. Here, Hampton admitted to having spent the night in the same residence where Heather was staying and he also admitted to having spoken with her on the phone; these admissions justified his detention. Hence, no preliminary hearing was required.

¶10 Hampton next claims that the ALJ and the court made numerous evidentiary errors. Primarily, he addresses the failure of Heather and her grandmother to testify at the hearing, the lack of a specific ruling by the ALJ that good cause had been shown for not calling them to testify, and his resulting inability to confront them. The State responds:

> [Heather's] out-of-court statement, while it touched upon a variety of factual matters, provided the only evidence at the hearing to support the allegations that Hampton had violated probation rules (that he engage in no criminal conduct and that he have no contact with a minor child) by biting [her] and touching her breasts while swimming with the child on June 26, 1999. But the ALJ

> made clear in his decision that his finding that Hampton had sexually assaulted the child on June 26 was not the sole basis for the decision to revoke probation. Indeed, the ALJ specifically stated that even without the unlawful sexual conduct finding, he "would still order revocation of the client's supervision."

The circuit court order echoed this analysis, commenting:

> [Hampton's] due process rights were not violated because the allegations against him were not proved entirely by unsubstantiated hearsay. Petitioner admits that he left Milwaukee County on June 26, 1999, without prior agent approval, and went [to] a pool in West Bend, which violated probation rules that forbid such behavior. This evidence alone is sufficient to support the Division's decision to revoke petitioner's probation….
>
> Moreover, [Hampton's] own testimony and his cell phone records provide corroboration for the statements given by [the twelve-year-old child] and her grandmother.

¶11 We agree. Although evidentiary rules may be relaxed somewhat at a revocation hearing, ***State ex rel. Prellwitz v. Schmidt***, 73 Wis. 2d 35, 39, 242 N.W.2d 227 (1976), they cannot be relaxed to the point where a parole violation may be proved entirely by unsubstantiated hearsay testimony. Here, however, the violations were not solely established by hearsay. Hampton's own testimony and cell phone records corroborated Heather's statements.

¶12 WISCONSIN STATUTE § 911.01(4)(c) specifically provides that the restrictions on the admissibility of hearsay testimony, normally applicable in criminal and civil trials, are inapplicable to probation revocation proceedings. In fact, a probation violation may be proved with hearsay evidence as long as that evidence is deemed reliable. *See* ***State ex rel. Thompson***, 109 Wis. 2d at 583. Here, the ALJ identified several reasons for concluding that Heather's statement was reliable. He noted that Heather's statement was very detailed, and that it was corroborated by Hampton's revocation-hearing admission that he had left the

county without his agent's permission and had spent the night at the same house with Heather. Thus, the ALJ concluded that Heather's out-of-court statement should not be excluded on hearsay grounds. The ALJ was correct.

C. Arbitrariness

¶13 Hampton next argues that the ALJ's and the Division's decision to revoke his probation was arbitrary and capricious. We disagree.

¶14 As noted, on appeal, this court must defer to the Division's determinations. *See* ***Van Ermen***, 84 Wis. 2d at 63-64. In addition, the determinations of credibility and the weight of evidence are within the Division's discretion and may not be second-guessed by this court. ***Id.*** Again, this court is limited to determining whether the agency kept within its jurisdiction; whether it acted according to law; whether its action was either arbitrary or unreasonable; and whether the evidence reasonably supported the decision. ***Id.*** at 63. If substantial evidence supports the decision, then it must be affirmed even though evidence my support a contrary determination. ***Von Arx v. Schwarz***, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994).

¶15 Here, the Department of Corrections clearly was within its jurisdiction in seeking to revoke Hamilton's probation on the basis of reports that he had committed multiple probation-rule violations. Further, substantial evidence supported the ALJ's decision to revoke Hampton's probation. Hampton's admission that, on June 26, 1999, he traveled outside Milwaukee County without his agent's permission, and that, on December 7-8, 1999, he had stayed overnight in the same house with two minors established some of his many violations. Although these statements alone were sufficient to warrant Hampton's revocation,

additional evidence, including Heather's statement to Hampton's probation agent, served as the basis for numerous other violations. Consequently, we, like the circuit court, conclude that substantial evidence supported the ALJ's and the Division's decision to revoke Hampton. The decision was neither arbitrary nor capricious.

D. Alternatives to Revocation

¶16 Hampton next argues that neither the ALJ nor the Division considered alternatives to revocation. Again, we disagree.

¶17 "[B]efore revoking probation, there should be the exercise of discretion in response to whether the rehabilitation of the criminal can continue to successfully be accomplished outside of the prison walls." ***State ex rel. Plotkin v. DHSS***, 63 Wis. 2d 535, 543-44, 217 N.W.2d 641 (1974). Issues to be considered are: (1) whether alternatives to probation exist in the particular case; and (2) whether probation is necessary to protect the community and advance the probationer's rehabilitation. ***Id.***

¶18 Here, the ALJ and the Division properly considered the requisite factors and came to the appropriate result. As the circuit court noted:

> While the Division did not conduct formal consideration of alternatives to revocation, it did consider the facts and evidence contained in the record, which contained a *Plotkin* analysis and possible alternatives to revocation that were developed and considered by the Department of Corrections. Consequently, the Division properly considered and rejected alternatives to revocation . . . .

We agree. In light of Hampton's violations, the only reasonable action was revocation and imprisonment. Evidence established that Hampton had committed at least thirteen separate rule violations. These violations included failing to abide

by rules requiring that Hampton: (1) have no contact with children; (2) stay away from places where children were likely to be present; and (3) have no physical contact with children. Clearly, these rules were designed to meet Hampton's rehabilitative needs and to protect the community from his repeated sexual exploitation of children. Clearly, Hampton's repeated violations indicated the danger he posed to others and his lack of rehabilitation. Consequently, revoking Hampton's probation was the only reasonable course of action.[1]

By the Court.—Order affirmed.

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

[1] Hampton also claims that he was denied a fair opportunity for judicial review due to a number of "inaudibles" in the transcript of his previously recorded probation revocation hearing. We disagree. The circuit court rejected Hampton's motion to correct the hearing transcript, concluding that none of the "inaudibles" in the transcript was either material to the review of his revocation order or prejudicial to his right to certiorari review. We also have reviewed the transcript and concur in the circuit court's conclusion. The occasional and momentary "inaudible" in the hearing transcript has neither prevented Hampton from challenging his revocation nor hindered this court's review of the proceedings.