COURT OF APPEALS DECISION DATED AND FILED

December 22, 2009

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. 2008AP2675

Cir. Ct. No. 2008CV2815

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN EX REL. CLAYBORN L. WALKER,

PETITIONER-APPELLANT,

V.

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

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Clayborn L. Walker appeals from an order affirming the revocation of his extended supervision and parole.[1] The issues are: (1) whether Walker's due process rights were violated when the decision of the Administrative Law Judge ("Judge") was allegedly predicated on her personal beliefs as opposed to an impartial assessment of the alternatives to revocation; (2) whether the Judge acted contrary to law by ignoring the existence of an alternative to revocation and instead reconfining Walker; and (3) whether ***State ex rel. Lyons v. Health and Social Services Department***, 105 Wis. 2d 146, 312 N.W.2d 868 (Ct. App. 1981), is wrong as a matter of law. We conclude that: (1) the Judge did not prejudge Walker's case and ignore her obligation to impartially evaluate the available alternatives to revocation; (2) the Judge's disagreement with Walker's assessment of his proposed alternative to revocation does not preclude her assessment and rejection of that proposed alternative; and (3) we cannot overrule ***Lyons***, although Walker has preserved the issue for supreme court review. Therefore, we affirm.

¶2 Walker pled guilty to armed robbery with the use of force as a party to the crime. The trial court imposed a six-year sentence, comprised of two- and four-year respective terms of initial confinement and extended supervision. Walker was released to extended supervision that was later revoked for his absconding and resisting arrest. The trial court imposed a two-year period of reconfinement. While serving his period of reconfinement, Walker was charged

[1] The circuit court's order technically affirms the decision of the respondent, Division of Hearings and Appeals ("Division"), that sustained the Administrative Law Judge's revocation decision.

with and later entered an ***Alford*** plea to battery by a prisoner.[2] The trial court imposed a four-month consecutive sentence for that battery.

¶3 Walker was again released to extended supervision. Within one month, he was returned to custody for allegedly tampering with his electronic monitoring equipment, using marijuana, leaving a correctional facility without permission and resisting an officer. Walker's extended supervision was again revoked, and the Judge imposed the entire available aggregate period for reconfinement.[3] It is from this revocation and reconfinement order Walker appeals.

¶4 Walker was diagnosed as mentally retarded and mentally ill. The issues he raises on appeal require consideration of his intellectual limitations and related problems. Walker's challenges also focus on how his assessment of his limitations differs from that of the Judge; what he fails to recognize however, is that that difference, although valid and reasonable, does not constitute error.

¶5 Judicial review of revocation decisions by certiorari is limited to:

> (1) Whether the [Division] 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.

[2] An ***Alford*** plea waives the trial and constitutes consent to the imposition of sentence, despite the defendant's claim of innocence. *See* ***North Carolina v. Alford***, 400 U.S. 25, 37-38 (1970); *accord* ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995) (acceptance of an ***Alford*** plea is discretionary in Wisconsin).

[3] One year, eleven months and twenty-four days remained available from the armed robbery; two months and thirteen days remained available from the battery.

Van Ermen v. DHSS, 84 Wis. 2d 57, 63, 267 N.W.2d 17 (1978). We review the agency decision, not the decision of the trial court. *See* ***Kozich v. Employe Trust Funds Bd.***, 203 Wis. 2d 363, 368-69, 553 N.W.2d 830 (Ct. App. 1996). An appellate court's scope of review in certiorari proceedings is the same as that of the circuit court. *See* ***State ex rel. Palleon v. Musolf***, 117 Wis. 2d 469, 473, 345 N.W.2d 73 (Ct. App. 1984), *aff'd*, 120 Wis. 2d 545, 356 N.W.2d 487 (1984).

> We may not substitute our judgment for that of the division; we inquire only whether substantial evidence supports the division's decision. If substantial evidence supports the division's determination, it must be affirmed even though the evidence may support a contrary determination. "Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion."

Von Arx v. Schwarz, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994) (citations omitted). We review the evidence to ensure that the decision was not arbitrary and capricious. *See* ***State ex rel. Solie v. Schmidt***, 73 Wis. 2d 76, 79-80, 242 N.W.2d 244 (1976).

¶6 Walker's first challenge is that he was deprived of his due process right to "a neutral and detached hearing body" because the Judge allegedly believed that anyone who violates a rule of supervision deserves to be revoked and reconfined, rather than considering the evidence and recommendations in that particular petitioner's record. ***Morrissey v. Brewer***, 408 U.S. 471, 489 (1972). Walker is entitled to a "neutral and detached" judge; he has not shown, however, that the Judge's disagreement with his recommendations constituted partiality or preconceived notions. The Department of Corrections ("Department") has the burden of proving the violations; the petitioner has the burden of proving that the decision was arbitrary and capricious. *See* ***Von Arx***, 185 Wis. 2d at 655.

¶7 The present dispute does not center on Walker committing the violations; the dispute is whether the revocation and reconfinement decisions were "arbitrary, oppressive, or unreasonable and represented [the Judge's] will and not its judgment." ***Van Ermen***, 84 Wis. 2d at 63. Walker presented diagnoses and recommendations from two experts, a psychiatrist, John Pankiewicz, M.D., and a psychologist, Christopher T. Tyre, Ph.D. Dr. Tyre diagnosed Walker as mentally retarded and mentally ill, recommending that those conditions lend themselves to a highly structured type of supervision. Dr. Pankiewicz opined that the past focus was on Walker's behavioral problems as opposed to his attentional difficulties diagnosed as a cognitive disorder. Dr. Pankiewicz also recommended an alternative to revocation, emphasizing that Walker had "more complicated needs."

¶8 The Judge reasoned that "the mere existence of an alternative to revocation does not mandate the continuation of supervision [because t]here is no point in recommending an alternative to revocation if an individual is unlikely or unwilling to comply with supervision." Walker contends that the foregoing reasoning evinces the preconceived notion that a violation of the rules of supervision automatically leads to a future unwillingness to comply with supervision. We disagree. The Judge recited the various forms of treatment and accommodations that were attempted to accommodate Walker, and how those attempts and accommodations were either futile or had failed. Walker was already receiving mental health treatment. Medication was prescribed; Walker "chose not to take it." Walker was afforded electronic monitoring and told "not to touch [it]." He did repeatedly, tampering with it and disconnecting it from the telephone line, rendering the equipment useless. He used marijuana, left Departmental custody without permission, and resisted arrest. The Judge determined that "Walker is not

capable of following the rules of supervision. As such, there is no alternative to revocation."

¶9 We do not view the Judge's recitation of Walker's past refusals and failures as predicated on a preconceived notion; the recited examples of Walker's conduct are from the record, and the Judge's decision from those factual examples of record is reasoned and reasonable, albeit different than Walker's assessments of that same evidence. Although the Judge would have been within the law to follow the defense experts' recommendations, the Judge was not acting contrary to law for explaining, with examples from the record, why rejecting those proposed recommendations was appropriate.

¶10 Walker's second challenge is his claim that the Judge ignored the proposed alternatives to revocation. He contends that revocation and reconfinement must be a last resort and that if there are any legitimate alternatives to revocation, they must be attempted unless "confinement is necessary to protect the public …; the offender is in need of correctional treatment which can most effectively be provided if he is confined; or it would unduly depreciate the seriousness of the violation if [extended supervision, parole or] probation were not revoked." ***State ex rel. Plotkin v. H&SS Dep't***, 63 Wis. 2d 535, 544, 217 N.W.2d 641 (1974). Walker contends that the Judge ignored the alternatives to probation contrary to ***Plotkin***. We disagree.

¶11 Dr. Pankiewicz supported the following proposals that Walker offered as alternatives to revocation: an assessment by the Department of Vocational Rehabilitation "to determine what sorts of adaptive skills Mr. Walker has in the realm of employability;" to assign Walker to a mental health unit because he has "more complicated needs;" have a psychiatrist determine "the issue

of medications" to help with Walker's attention and impulse control problems; to modify any substance abuse treatment to accommodate Walker's mental retardation; and "[b]ecause of his cognitive difficulties, Mr. Walker would be appropriate for a case management system in the community … [to] help him with housing, managing funds … and further assistance with constructive activities such as group programming or sheltered employment."[4]

¶12 The Judge rejected this proposed alternative. The Judge reasoned that:

> By failing to take his medications, by failing to co-operate with electronic monitoring, by walking away from the Department's overflow site and by resisting the officers'[] efforts to remove him from a vehicle, Mr. Walker has demonstrated that he poses an unreasonable risk of future criminal behavior. Confinement is necessary to protect the public.
>
> Mr. Walker does, indeed, need treatment addressing his mental health issues, substance abuse issues and errors in his cognitive thinking. However, Mr. Walker's compliance with community-based treatment is unlikely, given that he didn't take his medications as prescribed and given that he walked away from the Department's overflow site before he could even begin treatment. Therefore, it is found that Mr. Walker's rehabilitative needs require his confinement in a prison setting.

[4] Dr. Pankiewicz also explained that some professionals who have evaluated Walker have identified his symptoms such as his "hearing voices" that prompted him to leave custody without permission as incident to:

> a psychotic disorder such as Schizophrenia. [Dr. Pankiewicz] believe[s] his voices are more a consequence of immature coping skills found in individuals with mental retardation. [Dr. Pankiewicz] believe[s] they are validly reported complaints by Mr. Walker, but simply have been misunderstood by previous examiners trying to look at them in the context of psychotic spectrum disorder.

> Mr. Walker was on supervision for less than a month when he started to tamper with his electronic monitoring bracelet and deviate from his approved schedule. The Department generously gave him an alternative to revocation that consisted of treatment at a halfway house. Before Mr. Walker could start the treatment, he left the Department's overflow site, where he was to stay until his treatment program began. Under such circumstances, a failure to revoke would result in the undue depreciation of Mr. Walker's violations.
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> ….
>
> Mr. Walker is on supervision for extremely serious offenses….
>
> Mr. Walker's conduct in the institution was mediocre at best. He has an underlying battery offense that occurred while in jail. While in prison, Mr. Walker completed phases 1 and 2 of cognitive interventions but accumulated 1 major and 15 minor conduct report[s].
>
> Mr. Walker's adjustment to supervision has been extremely poor. His extended supervision was previously revoked because he absconded a month after his release from prison and when confronted by police, ran away and resisted arrest. During his current period of supervision, Mr. Walker again lasted only a month during which time he tampered with his electronic monitoring bracelet, deviated from his approved schedule, used drugs, absconded from an overflow sight while waiting to start an alternative to revocation program and when confronted by police, again resisted arrest.

After considering the alternative to revocation and explaining the reasons why there was no viable alternative based on the facts of record, the Judge then concluded that:

> [l]ooking at the totality of the circumstances, it is found that the Department's recommendation is appropriate and necessary to impress upon Mr. Walker the gravity of his behavior, to protect the public and to give Mr. Walker sufficient time in the institution to address his mental health and substance abuse issues.

¶13 The Judge considered the proposed alternative to revocation and reconfinement. The fact that the Judge did not assess the feasibility or wisdom of the alternative to revocation the way that Walker did, however, is not contrary to ***Plotkin***. *See* ***id.***, 63 Wis. 2d at 544. Walker contends that the Judge ignored ***Morrissey***'s directive to determine the appropriate action to protect society and promote the inmate's opportunity for rehabilitation. *See* ***Morrissey***, 408 U.S. at 479-80. We disagree.

¶14 The judge did not ignore ***Morrissey***'s directive; the judge determined that revocation and reconfinement were necessary to protect society and to improve Walker's rehabilitative opportunities. Walker's repeated and continued violations and his "extremely poor" adjustment to supervision was not well served when he was supervised in the community. The Judge concluded and explained why Walker's revocation and reconfinement was "necessary to protect the public," as Walker had repeatedly committed some violent (armed robbery and battery) and disruptive offenses (absconding and resisting arrest). The Judge explained why outpatient or community-based treatment had not succeeded; Walker refused to take his medications as prescribed, and he repeatedly tampered with his electronic monitoring equipment. The Judge also concluded that these repeated experiences while he had been released on extended supervision, considered in conjunction with the severity of the offenses for which he had already been convicted (robbery at gunpoint including hitting the victim in the head, and attacking an inmate and continuing to beat him "after he fell to the ground") would unduly depreciate the seriousness of the repeated violations. The judge complied with the obligations imposed by ***Plotkin***, ***Morrissey*** and ***Van Ermen***.

¶15 Much of the problem underlying revocation and the differing assessments of the feasibility or futility of alternatives to revocation and

reconfinement centers on Walker's mental retardation and mental illness. Consequently, Walker also seeks to overrule or otherwise modify ***Lyons*** to now allow a defense based on a mental disease or defect. *See* ***Lyons***, 105 Wis. 2d at 150. He acknowledges that he raises this issue to preserve it for supreme court review because we are not permitted to overrule or modify ***Lyons***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).