COURT OF APPEALS DECISION DATED AND FILED

June 24, 2010

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. 2009AP1168

Cir. Ct. No. 2008CV4019

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN EX REL. LEONARD JONES,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: WILLIAM E. HANRAHAN, Judge. *Affirmed*.

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Leonard Jones appeals the order denying his request for relief in a certiorari review of the decision to revoke his parole. Jones argues that the Division of Hearings and Appeals acted improperly when it relied on a police report that Jones violated his parole rules by hitting and threatening a

woman because Jones was not allowed to confront and cross-examine the officer who wrote the report at his revocation hearing. We conclude that we need not decide whether the administrative law judge (ALJ) erred by considering the police officer's statements in this report because, even if it was error, the error was harmless. Consequently, we affirm the order of the circuit court.

¶2 Jones was convicted in 1997 for having beaten and choked a young woman he believed had taken his drugs. He was sentenced to twelve years in prison and released in March 2007. Shortly after his release, Jones began a relationship with a twenty-one-year-old woman named Shannon McKnight. McKnight lived in Jones's apartment off and on over a six-month period. On September 19, 2007, the police were called to Jones's apartment. Officer Dustin Clark responded, and found McKnight sitting outside with a bloody cut to her forehead and a black eye. Eventually, and reluctantly, McKnight told Officer Clark that "Leonard" had done this to her. She also told Officer Clark that the person who hurt her had told her that if she told anyone he would "take [her] out to a cornfield and torture and kill [her]." Jones was arrested the next day after a traffic stop. Inside Jones's car, police found drug paraphernalia, crack cocaine, and a scale with cocaine residue on it.

¶3 Jones was charged with six violations of the Rules of Community Supervision: (1) using THC and cocaine; (2) striking McKnight in the eye; (3) causing McKnight to strike her head on a door frame; (4) threatening to torture and kill McKnight; (5) having drug paraphernalia in his car; and (6) having crack cocaine in his car. Jones, McKnight, two police officers, and Jones's parole agent testified at the revocation hearing. The parole agent represented the State. Officer Clark did not respond to the subpoena, and did not appear at the hearing. At the start of the hearing, the ALJ identified the exhibits that she would consider. These

exhibits included Exhibit 6, which was the Madison Police Department report prepared by Officer Clark dated September 20, 2007, describing his encounter with McKnight the day before. After marking all of the exhibits, the ALJ asked Jones: "Did you have any objections to any of these exhibits?" Jones responded that he did not. Later in the hearing, Jones noted that he had some questions for Officer Clark, but that "[Clark's] not with us." The ALJ said: "Well [Jones's parole agent] subpoenaed him and he didn't show up, so." The parole agent said: "Nothing we can do about it."

¶4 The ALJ determined that there was insufficient evidence to establish that Jones used THC or cocaine, but that the Department had established that Jones committed the other five violations. In her decision, the ALJ stated: "Although the reporting police officer was not present to testify, I find that the report is a reliable document prepared during the normal course of police business and that it contains credible personal observations of the police officer related to the injuries sustained by Shannon McKnight."[1] The ALJ noted that McKnight had subsequently recanted the statements she had made, but that her "blanket denials" were "unpersuasive and unreliable." The ALJ revoked Jones's parole.

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[1] We also note that, throughout the hearing, Jones referred to the September 20, 2007, report prepared by Officer Clark. When Jones cross-examined his parole agent, he asked questions about statements contained in the September 20 report. When Jones himself testified, he relied on the September 20 report to support his contention that McKnight was drunk when she talked to Officer Clark. Jones said: "The 19th [McKnight] again was drunk as usual. Police reports will verify." And when Jones examined McKnight, he referred many times to the allegations in the report. Prior to the hearing, McKnight had recanted the statements she had made in the report. When Jones called her as a witness, McKnight again denied the allegations contained in Officer Clark's report. Jones then asked her: "Why has your story changed? I mean or – you testified obviously to things stated in the Criminal Complaint [or] Police Report?"

¶5 Jones then appealed to the Administrator of the Division of Hearings and Appeals. In this appeal, Jones argued that he was denied his right to confront Officer Clark. He stated: "The ALJ has violated Mr. Jones' Fourteenth Amendment substantive due process right by relying on a police report that Mr. Jones had no opportunity to impeach since he was deprived of an opportunity to confront, cross-examine and impeach the author of the report, Officer Dustin Clark." The Administrator rejected the argument on the basis that: "The police report, as an official record, bears substantial indicia of reliability and is an effective and reasonable substitute for testimony from the officer." The revocation decision was sustained. Jones moved the Division to reconsider its decision. In this motion, Jones argued for the first time that the police report was inadmissible hearsay. The motion for reconsideration was also denied.

¶6 Jones then petitioned the circuit court for certiorari review. Jones argued that he was denied his right to confront Officer Clark when Clark did not appear for the hearing. The circuit court determined that Jones had not established that the Division of Hearings and Appeals had acted arbitrarily or capriciously when it revoked his parole, that the decision was reasonable and supported by substantial evidence, and that the ALJ had appropriately considered alternatives to revocation and concluded that institutional confinement was necessary.

¶7 The decision to revoke probation or parole lies within the discretion of the Department of Corrections. ***State ex rel. Lyons v. DHSS***, 105 Wis. 2d 146, 151, 312 N.W.2d 868 (Ct. App. 1981). Appellate review of the Department's revocation decision is limited to four inquiries:

> (1) whether the Department acted within the bounds of its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will, not its judgment; and

> (4) whether the evidence was sufficient that the Department might reasonably make the determination that it did.

State ex rel. Warren v. Schwarz, 219 Wis. 2d 615, 628-29, 579 N.W.2d 698 (1998). The Department must prove the violation by a preponderance of the evidence. ***State ex rel. Washington v. Schwarz***, 2000 WI App 235, ¶17, 239 Wis. 2d 443, 620 N.W.2d 414.

¶8 Jones argues on appeal that the ALJ erred when she considered Officer Clark's report of the September 19, 2007, incident as the "sole evidence" to support the allegation that he had hit and threatened McKnight. Jones alleges both that the evidence was inadmissible hearsay and that he was denied his right to confront Officer Clark. Jones further argues that, under ***State ex rel. Simpson v. Schwarz***, 2002 WI App 7, ¶¶15-16, 250 Wis. 2d 214, 640 N.W.2d 527 (Ct. App. 2001), the ALJ was required to make a good cause finding that Jones would not be allowed to confront and cross-examine Clark, and that good cause was neither specifically found nor can it be inferred from a review of the record. Jones concedes that the failure to make a good cause determination is not fatal if the evidence relied on in lieu of the live testimony is admissible under the Wisconsin Rules of Evidence. ***Id.***, ¶22. Jones argues, however, that Officer Clark's report was not admissible because police reports are inherently unreliable hearsay made in anticipation of litigation.

¶9 Jones and the State have framed the question of whether the police report was admissible hearsay in the context of whether Jones was denied his due process right to confront the witness. Officer Clark's report contains two potential levels of hearsay: the officer's report about what he saw and what he did is the first level; the officer's report about what McKnight said to him at the scene is the second level. A statement is not hearsay, however, if the declarant testifies at the

hearing, is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony. WIS. STAT. § 908.01(4)(a)1.[2] Consequently, the only hearsay at issue in this case are the statements made by Officer Clark. We do not need to decide whether the ALJ erred by considering these statements at the revocation proceeding, however, because we conclude that any error in considering Officer Clark's statements was harmless.

¶10 A constitutional error is harmless if the court is able to say that there is no reasonable possibility that the error might have contributed to the outcome of the case. ***Simpson***, 250 Wis. 2d 214, ¶16. The ALJ found that Jones committed five violations of the Rules of Community Supervision. Two of these violations—having drug paraphernalia in his car and having crack cocaine in his car—were established by the testimony of another officer who actually testified at the revocation hearing. Jones has not alleged any basis for challenging the evidence in support of those two violations. Since the ALJ had a sufficient basis for revoking Jones's parole on these grounds, it does not matter whether the ALJ improperly considered Officer Clark's statements when deciding whether to revoke Jones on the other grounds. We conclude that there is no reasonable probability that the error contributed to the ALJ's decision to revoke Jones's parole. We therefore affirm the order of the circuit court.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

By the Court.—Order affirmed.

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