

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 20, 2011

A. John Voelker
Acting 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. 2009AP3203

Cir. Ct. No. 2009CV177

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**STATE OF WISCONSIN EX REL. JOHN D. TIGGS, JR.
N/K/A A'KINBO J.S. HASHIM,**

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Grant County:
CRAIG R. DAY, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Blanchard, JJ.

¶1 PER CURIAM. A'Kinbo J.S. Hashim, f/n/a John Tiggs, Jr., appeals a circuit court order that affirmed the revocation of both his probation in one case and his extended supervision in another case. We affirm.

BACKGROUND

¶2 On April 9, 1996, Hashim was sentenced to an indeterminate prison term of 112 months on one armed robbery charge and an imposed and stayed term of fifteen years, subject to fifteen years of probation, on a companion armed robbery charge. On October 2, 2003, Hashim was sentenced to two years of initial confinement and three years of extended supervision on a charge of battery by a prisoner, consecutive to the armed robbery sentence. On July 22, 2008, after the sentence on the first armed robbery count had discharged, the Division of Community Corrections recommended that Hashim's probation on the second armed robbery count and his extended supervision on the battery count be revoked based on allegations that Hashim had mouth-to-penis contact with a teen-aged boy and had struck the boy with a leather belt.

¶3 Following a revocation hearing at which the teenager testified, the administrative law judge (ALJ) issued a decision in which he accepted the teenager's testimony as credible, found that the violations had occurred, rejected institution-based programming as an alternative to revocation, and concluded that revocation for the entire remaining time on the battery case was necessary to protect the public, to address Hashim's rehabilitative needs, and to avoid unduly depreciating the seriousness of the violations. We will set forth additional facts as necessary in our discussion of the issues below.

STANDARD OF REVIEW

¶4 Review of revocation decisions is by certiorari, and is limited to determining whether the ALJ acted: (1) within the scope of his or her jurisdiction; (2) according to law; (3) in a non-arbitrary manner; and (4) based upon the evidence. *George v. Schwarz*, 2001 WI App 72, ¶10, 242 Wis. 2d 450,

626 N.W.2d 57. “The evidentiary test on certiorari review is the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion that the ALJ reached.” *Id.*

DISCUSSION

¶5 Hashim raises the following claims on appeal: (1) the Department acted arbitrarily by refusing to accept his attempted waiver of the preliminary and final revocation hearings; (2) the Department lost competency to proceed by not holding the preliminary hearing within 15 days; (3) the Department failed to act according to law when it proceeded on the second alleged violation after the magistrate did not find probable cause for it at the preliminary hearing; (4) the Department acted arbitrarily by failing to conduct an independent investigation; (5) there was insufficient evidence to support the violations; (6) the Department failed to act according to law when it failed to record and/or transcribe the preliminary hearing or to provide either a DVD or transcript of Hashim’s police interview that was relied upon at the preliminary hearing; (7) the ALJ acted arbitrarily and/or contrary to law when he refused to allow Hashim to represent himself at the final hearing; (8) the ALJ deprived Hashim of his right to impeach the seventeen-year-old victim by refusing to allow Hashim to present evidence about the victim’s prior criminal convictions; (9) the ALJ denied Hashim the right to present a full defense by testifying; and (10) the ALJ acted contrary to law by soliciting additional evidence after the hearing. We will address each contention in turn.

Attempt To Waive Revocation Hearings

¶6 Hashim alleges that, when his probation agent visited him in jail to inform him of the impending revocation proceeding, Hashim demanded to waive

both the preliminary and final revocation hearings, but the agent refused his request. Hashim contends that the agent's refusal to honor his attempted waiver deprived him of the opportunity to receive a sentence of twenty-one months and seven days in accordance with the Department's recommendation matrix on the battery revocation, rather than the 15-year sentence ultimately imposed on the armed robbery revocation.

¶7 We question the factual basis for Hashim's premise that he would have been likely to receive a lesser sentence if he had been allowed to waive his hearings immediately. First, the fifteen-year term for the armed robbery charge had already been imposed in 1996; that sentence automatically became effective upon revocation. Second, the ALJ explicitly rejected the Department's recommendation on the battery charge as inadequate, and would not have been bound to follow that recommendation just because Hashim had waived one or both of his hearings.

¶8 In any event, we are not persuaded that it was arbitrary for the probation agent to refuse to accept Hashim's immediate waiver request when she believed that he was in too emotional a state to make the decision, and she did not even have the reincarceration data with her to fill out the form. Hashim could have renewed his request at the beginning of either hearing, and did not do so.

Timeliness Of Preliminary Revocation Hearing

¶9 Hashim contends that the ALJ lost competency to proceed by failing to hold his preliminary revocation hearing within the 15-day time period set forth

in WIS. STAT. § 302.335(2)(a) (2009-10).¹ Hashim acknowledges that his attorney waived the time limit, but contends that the attorney had no authority to do so without first consulting with Hashim. Hashim is mistaken about the law on both propositions.

¶10 First, under WIS. STAT. § 302.335(3), the potential consequence of failing to hold either a preliminary or final revocation hearing by the stated deadline is release from detention while the revocation matter is pending, not loss of competency to proceed on the revocation. *Cf. State ex rel. Jones v. Division of Hearings & Appeals*, 195 Wis. 2d 669, 672-73, 536 N.W.2d 213 (Ct. App. 1995) (explaining why final revocation hearing deadline is directory, not mandatory). Second, while a criminal defendant has the right to make final decisions on whether to exercise key constitutional rights—such as whether to enter a plea or go to trial, whether to testify, and whether to waive counsel—counsel has broad latitude to make other strategic decisions in the course of representation. *See, e.g., Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) (recognizing that counsel is not obligated to raise every issue requested by a defendant). Waiving the time limit for a preliminary revocation hearing is a statutory procedural matter, not a question of a fundamental constitutional right that Hashim needed to decide personally.

Proceeding On Previously Dismissed Allegation

¶11 Hashim contends that it was improper for the Department to proceed on the second alleged violation after the magistrate at the preliminary revocation

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

hearing found probable cause only with respect to the first alleged violation. However, *State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 260 N.W.2d 727 (1978), explicitly holds that it is *not* necessary to find probable cause with respect to each alleged violation. Rather, “[o]nce probable cause is established with regard to any charge, the function of the preliminary hearing in a parole revocation proceeding [*i.e.*, to determine whether detention of the parolee is warranted] has been fulfilled.” *Id.* at 392. Additional charges may be considered at the final revocation hearing so long as adequate notice has been provided. *Id.*

¶12 Hashim attempts to distinguish *Flowers* on the grounds that, in that case, the Department added alleged violations that had not been considered at the preliminary hearing, whereas here, the Department reinstated an alleged violation that had been considered and dismissed for lack of evidence. Hashim believes that it was somehow improper for the Department to produce additional evidence at the final revocation hearing that it chose not to produce at the time of the preliminary revocation hearing. Contrary to Hashim’s apparent belief, however, there is no requirement that the Department disclose its entire case at the preliminary hearing.

Independent Investigation

¶13 Hashim contends that his agent failed to adequately “investigate the facts underlying an alleged violation” as required by WIS. ADMIN. CODE § DOC 331.03(2). He believes that a more thorough investigation would have revealed discrepancies in the victim’s account, particularly as to the timeline of the incident, and the fact that, during Hashim’s police interview, a detective observed “a little something” on Hashim’s neck that Hashim claimed was a hickey given to him by the victim. However, we see nothing in the administrative code that would require an agent to locate all potential evidence that might be favorable to a

parolee or probationer; the agent's responsibility is merely to obtain sufficient evidence to make an evaluation as to probable cause. We are satisfied that the agent here properly discharged her investigatory duties by speaking to the victim and to a law enforcement officer who had already conducted an investigation into the matter.

Sufficiency Of The Evidence

¶14 A teen-aged boy testified that he asked Hashim for a ride home because he had been told Hashim was a lawyer and he wanted to seek some legal advice. Rather than taking the boy home, however, Hashim drove to a remote location where he got on top of the boy while in the car, bit the boy's neck, pulled the boy's penis out of his pants, and performed oral sex on the boy without his consent. Hashim then drove back to his own home, where he took the boy to the basement, directed him to remove his pants, and then struck him several times with what the boy thought was a belt before the boy was able to leave.

¶15 If believed, the victim's testimony was plainly sufficient to support each of the violations. Hashim contends that his own account was more believable for a variety of reasons. However, the ALJ explicitly found the victim's testimony to be credible, and such credibility determinations are conclusive on certiorari review.

Transcripts

¶16 Hashim moved the circuit court to direct the respondent to file an amended certiorari return that included a transcript of the preliminary revocation hearing and exhibits from that proceeding, including a transcript or DVD of Hashim's police interrogation. The respondent replied that the preliminary

revocation hearing had not been recorded, and that the only documents submitted at the preliminary revocation hearing were the violation report and police report, which were already included in the certiorari return. Although the parties have not directed our attention to an order in the record, we presume the circuit court subsequently denied Hashim's motion, either expressly or by inference.

¶17 Hashim argues that it was the Department's responsibility to provide an adequate record for review, and that the lack of a transcript from the preliminary revocation hearing impairs his ability to challenge that proceeding, thus depriving him of due process of law. While we agree with the general proposition that an administrative agency must provide an adequate record for review, it does not necessarily follow that the preliminary revocation hearing needed to be recorded and transcribed. The method of documenting administrative proceedings may vary with the type of proceeding. Here, the certiorari return does contain a letter from the preliminary revocation hearing magistrate summarizing what happened at the hearing, along with the basis for his decision and a listing of the documents relied upon. Since this court has essentially accepted Hashim's factual allegations as to what occurred at the hearing as being consistent with the magistrate's written summary (although we disagree with Hashim's assessment of the legal significance of those facts), we conclude that Hashim has not been denied due process by the absence of a transcript from that proceeding.

Self-Representation

¶18 At the final revocation hearing, Hashim asked that he be allowed to cross-examine the witnesses, with his attorney acting as standby counsel.² The ALJ denied the request. Hashim contends this denied him his right to self-representation. We disagree. A parolee or probationer has the right to decide whether or not to be represented by counsel, but does not have a right to hybrid representation. Rather, the decision whether to allow someone to represent himself with the assistance of standby counsel is a discretionary one. *State v. Cummings*, 199 Wis. 2d 721, 754, 546 N.W.2d 406 (1996). Since Hashim did not seek to fully waive his right to counsel, the ALJ had no obligation to grant Hashim’s request.

Impeachment Evidence

¶19 When Hashim’s attorney began to question the teen-aged victim about the victim’s prior criminal convictions, the ALJ interrupted, saying:

All right, now I don’t want to spend too much time on [the victim’s] legal difficulties unless whatever he has previously been convicted of has something to do with his honesty.

Counsel explained that his line of questioning “goes to a potential motive to why he would want to testify against [Hashim].” The ALJ then allowed counsel to proceed, and counsel asked several additional questions about the victim’s prior criminal convictions, culminating with an inquiry as to whether the victim had been told that he would not be revoked if he testified against Hashim.

² Hashim also complains that his request to present closing argument himself was denied. The record, however, does not show that any such request was denied.

¶20 Hashim complains that the ALJ's interruption prevented him from adequately impeaching the victim with information about the victim's criminal history. We do not agree with that characterization of the exchange. The ALJ did not prevent Hashim from asking any particular question, and the questions that counsel did ask were sufficient to alert the ALJ that the victim had several prior convictions and a potential motive for falsification.

Right To Testify

¶21 When Hashim's attorney asked Hashim what happened on the night of the incident, Hashim's answer started to drift off into a discussion of prior events that were not responsive to the question. The ALJ interrupted to redirect Hashim to discussing the night in question. Contrary to Hashim's argument on appeal, he did not have a right to provide whatever testimony he wanted on whatever topic he wanted. The ALJ properly limited Hashim to providing testimony that was directly relevant to the revocation incidents.

Supplemental Evidence

¶22 After the final hearing, the ALJ requested copies of the judgments of conviction for the first armed robbery count and the battery case, and accepted them into evidence as Exhibit 23. We will assume for the sake of argument that this procedure was improper. However, we conclude that any error was harmless.

¶23 We note that the first armed robbery count was not a subject of the revocation proceeding, and that the conviction for the second armed robbery count had already been admitted as Exhibit 10. Similarly, the battery conviction was already documented in the revocation materials, admitted as Exhibit 1. Therefore,

we see no reason why the ALJ could not have reached the same conclusion even without the admission of Exhibit 23.

By the Court.—Order affirmed.

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

