COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP728 **Cir. Ct. No. 2009CV6381**

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

STATE OF WISCONSIN EX REL. GREGORY HOLLOWAY,

PETITIONER-APPELLANT,

V.

DAVID SCHWARZ, ADMINISTRATOR, DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Gregory Holloway, *pro se*, challenges a circuit court order upholding the revocation of his extended supervision. We affirm.

BACKGROUND

¶2 Holloway pled guilty in 2001 to possession of a firearm by a felon and possession of THC as a second or subsequent offense. He completed his period of initial confinement in 2007 and was released to extended supervision. On August 14, 2008, his extended supervision agent, Michael Roehl, received an anonymous tip that Holloway had marijuana and a handgun in his residence. On several occasions before Roehl received the tip, Holloway had provided urine samples that, when tested, reflected the presence of marijuana. Roehl therefore responded to the anonymous tip by detaining Holloway. Roehl and several other agents then searched Holloway's home. The search uncovered a handgun, a quantity of marijuana, a digital scale, and more than $15,000 in cash.

¶3 Roehl initiated proceedings to revoke Holloway's extended supervision. Roehl alleged that Holloway violated the rules of community supervision on August 14, 2008, by possessing a firearm, marijuana, and drug paraphernalia. Roehl also alleged that Holloway violated the rules of supervision by refusing to speak with Roehl on August 18, 2008, and by using marijuana in July 2008.

¶4 Holloway disputed the allegations and demanded a hearing. An administrative law judge in the division of hearings and appeals rejected his contentions and entered an order revoking his extended supervision. Holloway appealed the revocation to the administrator of the division of hearings and appeals. The administrator affirmed, and Holloway next sought *certiorari* review in the circuit court. The circuit court affirmed in turn, and this appeal followed.

DISCUSSION

¶5 "Judicial review on *certiorari* is limited to whether the agency's decision was within its jurisdiction, the agency acted according to law, its decision was arbitrary or oppressive and the evidence of record substantiates the decision." ***State ex rel. Staples v. DHSS***, 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987) (emphasis added). We review the decision of the agency, not the decision of the circuit court. *See* ***Kozich v. Employe Trust Funds Bd.***, 203 Wis. 2d 363, 368-69, 553 N.W.2d 830 (Ct. App. 1996).

¶6 Holloway contends that the administrative law judge should have suppressed the evidence collected during the search of his home because, in his view, the search violated his rights under the Fourth Amendment of the United States Constitution and various provisions of WIS. ADMIN. CODE § DOC 328.21 (Dec. 2006). Holloway is not correct.

¶7 Revocation hearing procedure is governed by WIS. ADMIN. CODE § HA 2 (May 2010). The code provides, in pertinent part: "[e]vidence to support or rebut the allegation [of wrongful conduct] may be offered. Evidence gathered by means not consistent with ch. DOC 328 or in violation of the law may be admitted as evidence at the hearing." WIS. ADMIN. CODE § HA 2.05(6)(c) (May 2010).[1] Thus, assuming that Roehl and the other agents seized evidence against Holloway in an unlawful manner, the evidence was admissible nonetheless. *See* ***id.***; *see also* ***State v. Wheat***, 2002 WI App 153, ¶25, 256 Wis. 2d 270, 647 N.W.2d

[1] The version of WIS. ADMIN. CODE § HA 2.05(6)(c) in effect at the time of Holloway's revocation hearing was identical to the current version.

441 (citing § HA 2.05(6)(c) and stating that evidence obtained in violation of the Fourth Amendment is admissible at a revocation hearing).

¶8 Moreover, Holloway fails to show that Roehl conducted the search improperly. An extended supervision agent may search "an offender's living quarters or property ... if there are reasonable grounds to believe that the quarters or property contain contraband." WIS. ADMIN. CODE § DOC 328.21(3) (Dec. 2006). Holloway contends that Roehl lacked reasonable grounds to conduct a search in this case because Roehl did not first confirm the reliability of the informant. Holloway believes that such confirmation is required by WIS. ADMIN. CODE § DOC 328.21(7) (Dec. 2006). We disagree.

¶9 WISCONSIN ADMIN. CODE § DOC 328.21(7) (Dec. 2006) lists numerous factors that are potentially relevant when an agent contemplates searching an offender's home. One such factor is "[t]he reliability of the informant." *See* § DOC 328.21(7)(d). The agent is not required, however, to consider all of the factors listed in the regulation. Rather, the regulation provides that an agent "shall consider *any* of the [factors]." *See* § DOC 328.21(7) (emphasis added). Among the listed factors is "activity ... that relates to whether the [offender] might possess contraband or may have used or be under the influence of an intoxicating substance." *See* § DOC 328.21(7)(e). Holloway does not deny that he gave urine samples that tested positive for narcotics, nor does he dispute that Roehl considered the urinalysis results when deciding whether to conduct a search in this case. These factors support the search regardless of whether Roehl also considered the reliability of the informant. Thus, Holloway shows no violation of § DOC 328.21(7).

¶10 Holloway also asserts that he was not given notice before the agents conducted the search and that such notice is required by WIS. ADMIN. CODE § DOC 328.21(6) (Dec. 2006). Because he did not claim lack of notice in the circuit court, we do not consider the claim here. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 ("It is a fundamental principle of appellate review that issues must be preserved at the circuit court.").

¶11 Holloway next contends that the agents violated his rights under the Fourth Amendment of the United States Constitution by conducting the search without a warrant. Again, Holloway is not correct. "A parole search under sec. DOC 328.21(3) has been permitted as an exception to the warrant requirement." ***State v. West***, 185 Wis. 2d 68, 94, 517 N.W.2d 482 (1994). The search in this case is also excepted from the warrant requirement because "extended supervision and reconfinement are, in effect, substitutes for the parole system that existed under prior [Wisconsin] law." *See* ***State v. Brown***, 2006 WI 131, ¶44, 298 Wis. 2d 37, 725 N.W.2d 262.

¶12 We turn to Holloway's claim that no "clear evidence" supports the revocation decision. We must reject this argument. The division, not this court, weighs the evidence presented at a revocation hearing. *See* ***Van Ermen v. DHSS***, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978). The division's factual findings are conclusive if any reasonable view of the evidence supports them. *See* ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 386, 585 N.W.2d 640 (Ct. App. 1998). Additionally, we defer to the division's credibility findings. *See* ***State ex rel. Washington v. Schwarz***, 2000 WI App 235, ¶26, 239 Wis. 2d 443, 620 N.W.2d 414. Our "inquiry is limited to whether there is substantial evidence to support the [division]'s decision." ***Van Ermen***, 84 Wis. 2d at 64. The evidence presented in this case satisfies the applicable standard.

¶13 The administrative law judge in this case heard evidence from numerous witnesses including Roehl, Agent Aimee Kroening, Holloway, Holloway's investigator, and several members of Holloway's family. The judge credited the testimony of the agents and found the testimony of Holloway and his family members unreliable and unbelievable. Roehl presented evidence that he and Kroening searched Holloway's residence on August 14, 2008, and that Holloway lived alone. The agents found a firearm under the mattress of the only bed in the home, marijuana in a drawer, a digital scale in plain view on a dresser, and over $15,000 stashed in three shoes. Holloway and his relatives offered testimony that the contraband and most of the money belonged to third parties, but the administrative law judge rejected the explanations as incredible.

¶14 Roehl also provided evidence that a chemical test of Holloway's urine in July 2008 showed the presence of marijuana, and Holloway offered nothing to rebut that evidence. Further, Roehl testified that Holloway refused to meet with Roehl at the Milwaukee County Jail on August 18, 2008. The administrative law judge determined that the jail records and circuit court docket entries admitted as exhibits did not support Holloway's contention that he was in court at the time of the attempted meeting. The evidence and testimony credited by the fact-finder fully supports the findings that Holloway violated the rules of extended supervision. Therefore, we affirm.

By the Court.—Order affirmed.

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