

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 3, 2013**

Diane M. Fremgen  
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. 2012AP2422**

**Cir. Ct. No. 2012CV68**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN EX REL. TORRENCE HARRIS,**

**PETITIONER-APPELLANT,**

**V.**

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

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Dodge County:  
ANDREW P. BISSONNETTE, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Torrence Harris appeals the circuit court's order that affirmed, on certiorari review, an administrative decision to revoke Harris's extended supervision. For the reasons discussed below, we affirm.

## BACKGROUND

¶2 The Department of Corrections sought to revoke Harris's extended supervision on three cases based on allegations that he: (1) spoke on the telephone, exchanged texts, and had in-person contact with Rosalind Metcalf, a woman he was prohibited from contacting; (2) fired multiple shots at Metcalf, striking her in one leg and grazing the other; (3) lied to his agent about his contacts with Metcalf; and (4) failed to complete community service hours. Harris does not dispute the first and third alleged violations on this appeal.

¶3 As to the second alleged violation, the department attached to its Violation Investigation Report a number of police reports, which included Metcalf's statement to police that Harris shot her. That packet was marked as Exhibit 5.

¶4 Shortly after the beginning of the revocation hearing, counsel for Harris advised the administrative law judge (ALJ) that he needed time to review a packet of additional police reports brought to the hearing by the department's agent. The ALJ asked if Harris wished to make the packet an exhibit, and then adjourned the hearing so that counsel for Harris could review the additional materials and adjust his questions for the witnesses accordingly. That packet, which included materials relevant to Harris's alibi, was marked as Exhibit 12.

¶5 When the hearing resumed, the ALJ addressed the division's agent to remind her where they had left off:

And then we were getting into talking about whether the alibi was substantiated and that's when you brought up the other police reports and I do note that the police, in the police reports they talked to his um, alibi witness and they also talked to the other people who he said he was with that day who confirmed his story essentially.

¶6 Counsel for Harris proceeded to question the agent on notations that she had made in her chronological log, which was marked as Exhibit 13. The agent testified about a conversation in which a police detective had informed her that the police had questioned three people about Harris's alibi, and that Harris's whereabouts had been confirmed. The agent subsequently received a voice mail from the same detective suggesting that Harris's phone was not in the area at the time of the shooting. This was substantially the same information that was contained in the police reports in Exhibit 12.

¶7 After counsel had finished questioning the agent, the ALJ engaged the witness in the following exchange:

ADMINISTRATIVE LAW JUDGE: All right so when you say, when you told me with respect to number two, you were relying on the police reports to prove this. Really there's nothing in the police reports that links him to the shooting other than what Ms. Metcalf had said ok?

AGENT RICHARDS: That is correct.

....

ADMINISTRATIVE LAW JUDGE: So really it, I believe her I believe he did it. If I don't believe her I can't believe he did it, correct?

AGENT RICHARDS: Correct.

¶8 Metcalf was the next witness, and she testified consistently with her statement in the police report that Harris had come out of some bushes while Metcalf was standing by a car in the street, and had fired multiple shots at her and the man she was with, hitting her in the legs as she ran away.

¶9 Harris testified about how Metcalf had been charged with arson for setting fire to a residence where Harris was staying with his children and his

children's mother. He was not directly questioned about whether he had shot Metcalf, or about his alibi.

¶10 As to the fourth alleged violation, the agent testified that she had received the attendance list from the community service organizer, and Harris's name was not on it. Harris himself testified that, when he went to check in at his community service, his name was not on the clipboard, so the agent hand-wrote his name in. He then described in detail what his crew had done, and who was there with him.

¶11 In her decision concluding that all of the allegations had been proven, the ALJ explicitly stated that she found Metcalf to be credible because Metcalf identified Harris as her shooter to a police officer immediately after being shot. The ALJ considered Metcalf's statement at that time likely to be reliable because Metcalf was still experiencing the stress and excitement of the shooting. As to Harris's alibi, the ALJ acknowledged that there was potentially exculpatory evidence in the police reports, but noted that it was uncorroborated hearsay because the defense had not presented at the hearing the investigating detective or any of the three witnesses who had confirmed Harris's whereabouts. The ALJ also rejected Harris's own hearsay assertions regarding his alibi and his testimony regarding his community service on the ground that he had proven himself to be a liar with respect to the third alleged violation.

¶12 The Administrator of the Division of Hearings and Appeals sustained the ALJ's decision to revoke Harris's extended supervision, and the circuit court affirmed on certiorari review. On this appeal, Harris contends that the Division of Hearings and Appeals violated his due process and equal protection rights, and also demonstrated bias, by employing different standards of

admissibility for hearsay depending on whether it helped or hurt Harris's case. He further claims that the circuit court exceeded its authority by inserting additional evidence into the record and by conducting its own quasi-hearing.

## STANDARD OF REVIEW

¶13 Our certiorari review is limited to the record created before the administrative agency. *State ex rel. Whiting v. Kolb*, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). With regard to the substance of an administrative decision, we will consider only whether: (1) the agency stayed within its jurisdiction, (2) it acted according to law, (3) its action was arbitrary, oppressive, or unreasonable, and represented its will rather than its judgment, and (4) the evidence was such that the agency might reasonably make the order or determination in question. *Id.* We may, however, independently determine whether an inmate was afforded due process during administrative proceedings. *See State ex rel. Staples v. DHSS*, 128 Wis. 2d 531, 534, 384 N.W.2d 363 (Ct. App. 1986), *overruled on other grounds*, 142 Wis. 2d 348, 418 N.W.2d 333 (1987).

¶14 Because we review the decision of the administrative agency rather than the decision of the circuit court, we will not address Harris's third claim of error regarding the circuit court's review of this case.

## DISCUSSION

### *Admission Of Hearsay*

¶15 Harris's first argument on appeal is that the ALJ "applied different standards of admissibility for hearsay" to Harris's exculpatory alibi evidence (which was contained in the police reports and the agent's logs rather than testified

to by the alibi witnesses themselves) and to other inculpatory evidence of Harris's whereabouts. This argument goes nowhere because Harris does not point to any place in the record where the ALJ excluded the relevant alibi evidence from the record. To the contrary, the ALJ marked the police reports containing the alibi evidence as Exhibit 12, and continued the hearing so that counsel could question the agent about them.

¶16 In his reply brief, Harris concedes that the exculpatory portions of the police reports and agent's logs were admitted as evidence, but refines his argument to a contention that the exculpatory evidence was "excluded from consideration." However, the ALJ's statements during the hearing and in her opinion plainly show that she had read the police reports and understood their import—namely, that the only evidence against Harris was Metcalf's testimony and that the police investigation had produced potentially exculpatory evidence. That constitutes consideration of the evidence.

¶17 Taken in context, then, we understand the ALJ's comments about Harris's failure to produce live testimony from any of his alibi witnesses to be an explanation for why the ALJ found evidence less credible than live testimony of Metcalf, who the ALJ had an opportunity to observe and found to be credible. In other words, Harris's real complaint is not with the admission or exclusion of evidence, but with the weight the ALJ assigned to the evidence in his favor. This court will not, however, substitute its judgment for that of the ALJ with regard to the weight of the evidence.

#### *Alleged Bias*

¶18 Harris further contends that the manner in which the ALJ discounted the hearsay evidence from his alibi witnesses to find him guilty on the second

alleged violation, while at the same time relying upon the hearsay evidence of the community service organizer to find him guilty on the fourth alleged violation, demonstrated bias against him. We disagree.

¶19 First, contrary to Harris’s assertion, we see no reason why the ALJ was compelled to treat the various hearsay statements before it as “equally reliable.” Harris’s alibi witnesses included his pregnant girlfriend and a longtime friend, each of whom could have motive to provide false statements to protect Harris. In contrast, the community service organizer had no discernible motive to lie about whether Harris was present or on the list.

¶20 Moreover, in evaluating what weight to give to each hearsay statement, the ALJ necessarily had to consider what contrary evidence existed on that point. The hearsay statements of Harris’s alibi witnesses conflicted with the live testimony of Metcalf, who the ALJ explicitly found to be credible. The hearsay statement of the community service organizer conflicted with the live testimony of Harris, who the ALJ explicitly found to be not credible. The ALJ rationally explained the reasons that she found Metcalf to be credible and Harris to be not credible, and we will not set aside the ALJ’s credibility determinations.

¶21 In sum, Harris has not persuaded this court that the ALJ made any error with respect to the admission of hearsay or that she demonstrated any bias in her evaluation of the evidence before her.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

