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DISTRICT IV

November 10, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP2453

State of Wisconsin ex rel. Orlando Larry v. Brian Hayes
(L.C. # 2014CV1345)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Orlando Larry appeals an order affirming a decision of the Division of Hearings and Appeals to revoke Larry's extended supervision. On appeal, Larry raises numerous issues related to the preliminary revocation hearing, the final revocation hearing, and the ultimate decision of the division to revoke. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

The relevant facts are not disputed. On August 28, 2013, Larry was arrested as part of an undercover investigation into the sale of crack cocaine and heroin. At the time, Larry was on extended supervision arising from a 2009 conviction. After his arrest, his supervising agent ordered a custody hold. Agents from the Department of Corrections interviewed Larry on September 4 and September 19, 2013. Larry was given written notice of the department's intent to revoke on September 24, 2013. A preliminary revocation hearing was held on September 26, 2013. Larry was not represented by counsel at the preliminary revocation hearing.

On September 26, 2013, Larry was given notice of a final revocation hearing. The department alleged seven violations of Larry's conditions of supervision—five directly related to the delivery and sale of narcotics and two related to allegedly false statements given by Larry to department agents. The final hearing was scheduled for November 13, 2013. On that date, Larry requested and received an adjournment. When the final revocation hearing was held on January 14, 2014, Larry was represented by counsel. Three police officers, Larry's supervising agent, and the manager of the hotel where Larry had been living at the time of his arrest testified at the hearing. On January 29, 2014, the administrative law judge found that the department had established the five controlled substance-related violations. The two statement-related violations were dismissed. Larry timely appealed to the division. The division issued its written decision upholding the revocation on March 27, 2014. Larry then sought certiorari review in the circuit court.

When reviewing revocation decisions, we defer to the division's determinations. *Von Arx v. Schwarz*, 185 Wis. 2d 645, 655, 517 N.W.2d 540 (Ct. App. 1994). Our review is limited to: “(1) whether the division kept within its jurisdiction; (2) whether the division acted according to law; (3) whether the division's actions were arbitrary, oppressive or unreasonable

and represented its will and not its judgment; and (4) whether the evidence was such that the division might reasonably make the order or determination in question.” *Id.*

The department has the burden at the revocation hearing to prove the alleged violation by a preponderance of the evidence. *Id.* However, on appeal the burden shifts to the offender, who must show that the decision was arbitrary and capricious. *Id.* If the division properly exercises its discretion, its decision is not arbitrary and capricious. *Id.* at 656. The division properly exercises its discretion if it employs a reasoning process based on the facts of record and reaches a conclusion based upon a logical rationale founded upon proper legal standards. *Id.*

Larry argues that the division lost jurisdiction to revoke his extended supervision because the preliminary revocation hearing was not timely held. He also contends that he was denied counsel at the preliminary revocation hearing. We agree with the division that those issues are not within the scope of certiorari review. The Department of Corrections is the agency charged with the initiation of proceedings to revoke extended supervision. *See* WIS. ADMIN. CODE ch. DOC 331. When an offender challenges revocation, the department also conducts further internal proceedings. However, the department’s decision to revoke extended supervision is reviewed by a different entity, the Division of Hearings and Appeals, and that review process is governed by separate practices and procedures. *See* WIS. ADMIN. CODE ch. HA 2. Certiorari review of the division’s determination does not reach back to the revocation decision made by the department, an independent decision maker.

Even if the claimed errors relating to the preliminary revocation hearing were before this court, we would affirm. Larry’s supervising agent met with him within one week of his arrest, undoubtedly within the “reasonable period of time” required by WIS. ADMIN. CODE § DOC

331.03(1). Larry was given written notice of the department's intent to revoke on September 24, 2013, within the "reasonable time" required by WIS. ADMIN. CODE § DOC 331.04. Larry's preliminary revocation hearing was held on September 26, 2013, within the requisite "5 working days" deadline of WIS. ADMIN. CODE § DOC 331.05(4). Moreover, the time limits governing the revocation process are "directory, not mandatory." *See State ex rel. Jones v. Division of Hearings & Appeals*, 195 Wis. 2d 669, 672, 536 N.W.2d 213 (Ct. App. 1995). The division's authority to revoke Larry's extended supervision was not affected by the time limits. *See id.* at 673. Finally, an offender does not have an unqualified right to counsel at a preliminary revocation hearing. *See* WIS. ADMIN. CODE § DOC 331.05(5). More specifically, Larry was not entitled to counsel because he did not raise a "plausible claim" that he did not commit the alleged violations nor were the issues so "complex[]" that it was "difficult for [him] to present his ... case." *See* WIS. ADMIN. CODE § DOC 331.05(5).

Larry claims error because the department's request for a final revocation hearing was made one day before the magistrate issued his decision on the preliminary revocation hearing. The notice for Larry's final revocation hearing was issued on the same day as the magistrate's decision. Larry does not explain how he was prejudiced by that chronology. Therefore, he is not entitled to relief. *See* WIS. ADMIN. CODE § DOC 331.12 (noncompliance with a requirement of WIS. ADMIN. CODE ch. DOC 331 is harmless error "if it does not prejudice a fair proceeding or disposition").

Larry argues that his final revocation hearing was not timely held. The initial scheduled date was November 13, 2013, within the 50-day time limit found in WIS. ADMIN. CODE § HA 2.05(4). Because the hearing was adjourned at Larry's request, he cannot now complain. Furthermore, as noted above, the time limits are directory. *See Jones*, 195 Wis. 2d at 672.

Larry seems to assert that the division's decision was issued 49 days after the final revocation hearing, and, therefore, the division's decision was not timely issued. While WIS. ADMIN. CODE § HA 2.05(9)(b) contains a 21-day time limit for the issuance of the written appeal decision, that time may be extended by the division. We agree that the 21-day time limit was not met. The final revocation hearing was held January 14, 2014, and the decision was issued on March 27, 2014. However, as we have explained, the time limits are directory, *see Jones*, 195 Wis. 2d at 672, and any delay did not affect Larry's substantive rights. *See* WIS. ADMIN. CODE § HA 2.08 (an error in the appeal process is harmless if it does not affect the offender's "substantive rights").

In a conclusory argument, Larry contends that the division's decision to revoke his extended supervision was arbitrary and capricious. We disagree. The division's decision is not arbitrary and capricious if it employs a reasoning process based on the facts of record and reaches a conclusion based upon a logical rationale founded upon proper legal standards. *Von Arx*, 185 Wis. 2d at 656. Revocation is warranted if confinement is necessary to protect the public from further criminal activity by the offender, the offender is in need of correctional treatment which can most effectively be provided in confinement, or it would unduly depreciate the seriousness of the violation if revocation were not ordered. *See State ex rel. Plotkin v. DHSS*, 63 Wis. 2d 535, 544, 217 N.W.2d 641 (1974). Larry admitted to traveling out of state, in violation of his conditions of supervision. The record contains overwhelming evidence of Larry's involvement in cocaine and heroin dealing. The division properly concluded that confinement was necessary to protect the public.

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals