STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2011AP2188

STATE OF WISCONSIN
EX REL. ARDONIS GREER,

Petitioner-Respondent,

v.

DAVID H. SCHWARZ, ADMINISTRATOR,
DIVISION OF HEARING AND APPEALS

Respondent-Appellant.

ON APPEAL FROM A FINAL ORDER
ENTERED IN THE RACINE COUNTY
CIRCUIT COURT, THE HONORABLE
CHARLES H. CONSTANTINE, PRESIDING

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT

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BRIEF OF RESPONDENT-APPELLANT

STATEMENT OF THE ISSUE

Is petitioner-respondent Ardonis Greer entitled to certiorari relief reversing a decision of the Division of Hearing and Appeals that revoked his probation?

The circuit court reversed the Division's decision to revoke Greer's probation. The court ruled that the Department of Corrections was equitably estopped from seeking revocation because it had issued, albeit erroneously, a certificate discharging Greer from supervision.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Respondent-appellant David H. Schwarz does not request oral argument. Publication of the court's decision is warranted because there are no published decisions discussing the legal effect, if any, of a certificate of discharge erroneously issued by the DOC before a probationer has completed a court-ordered term of probation.

STATEMENT OF THE CASE

This is an appeal by respondent-appellant David H. Schwarz, Administrator of the Division of Hearing and Appeals, from an order of the Racine County Circuit Court on certiorari review that reversed the Division's decision to revoke petitioner-respondent Ardonis Greer's probation (11:1; A-Ap. 101).

Greer was convicted of two felonies in Racine County case no. 04CR1184: possession with intent to deliver THC, and possession of a firearm by a felon (3:28; A-Ap. 124). On March 14, 2005, the court sentenced Greer to three years of imprisonment on the drug count, consisting of fourteen months of initial confinement and twenty-two months of extended supervision (*id.*). On the felon-in-possession count, the court imposed and stayed a six-year sentence and placed

Greer on three years of probation consecutive to his sentence on the first count (3:16, 28; A-Ap. 128, 124).

The Department of Corrections failed to input the consecutive probation term into its record system (1:1; 3:27; A-Ap. 123). As a result, when Greer reached the end of extended supervision on the first count, DOC issued him two certificates, both dated October 3, 2007, discharging him from supervision (3:27, 54-55; A-Ap. 123, 131-32). One of the discharge certificates stated that Greer was sentenced in case no. 04CF1184 for violating Wis. Stat. § 961.41(1m)(h)2 and that "[t]he department having determined that you have satisfied said judgment, it is ordered that effective September 28, 2007, you are discharged from said judgment only" (3:55; A-Ap. 132). The other certificate stated that Greer was "sentenced to Wisconsin State Prisons" and that "[t]he department having determined that you have satisfied said sentence, it is ordered that effective September 28, 2007, you are discharged absolutely" (3:54; A-Ap. 131).

On November 9, 2009, Greer was charged with three new criminal counts: felony intimidation of a witness with the use of a dangerous weapon, as a repeater; second-degree reckless endangerment, as a repeater; and disorderly conduct with a dangerous weapon as an act of domestic abuse, as a repeater (3:37-38). He was convicted on June 25, 2010, of the felony intimidation of a witness charge (3:12, 85; A-Ap. 120).

On September 1, 2010, a DOC agent who was conducting a presentence investigation in the new case discovered that the consecutive

probation term in the 2004 case had not been entered into DOC's record system (3:27; A-Ap. 123). After that discovery, probation revocation proceedings were initiated (*id.*). Two of the alleged violations involved the conduct that had led to the new criminal charges (*id.*). The other alleged violations involved Greer's failure to report for consecutive probation supervision, a speeding ticket, and consumption of alcohol (*id.*).[1]

Following a hearing, an Administrative Law Judge ordered that Greer's probation be revoked (3:11-13; A-Ap. 119-21). The ALJ rejected Greer's argument that DOC lacked jurisdiction because he had been issued discharge certificates (3:12; A-Ap. 120). The ALJ found that violation two – that on November 5, 2009, Greer had threatened another man (3:27; A-Ap. 123) – had been proven because Greer had been convicted of felony intimidation of a witness based on that conduct (3:12; A-Ap. 120). The ALJ also found that allegation five – that Greer had consumed alcohol – had been proven based on Greer's admission to that conduct (3:13; A-Ap. 121). The ALJ concluded that revocation of Greer's probation was warranted because of the seriousness of Greer's new criminal conduct and the need to protect the public. (3:13; A-Ap. 121.)

Greer filed an administrative appeal of the ALJ's decision with the Division of Hearing and Appeals (3:67-78). In an appeal decision dated December 22, 2010, Division Administrator Schwarz sustained the ALJ's decision to revoke Greer's probation (3:104-05; A-Ap. 116-17). Administrator Schwarz ruled that the ALJ correctly found that Greer was subject to

[1]One of the court-order conditions of probation was "[n]o use or possession of alcohol or controlled substances" (3:16; A-Ap. 128).

revocation because "[t]he courts have determined that the department's error does not deprive it of jurisdiction, nor does it relieve the offender of liability for misconduct, particularly criminal offenses" (3:104; A-Ap. 116). Administrator Schwarz found that "Greer would have been in court at sentencing and therefore knew, or should have known, that he was required to serve a consecutive probation term" and that Greer "should also have known that he would not have finished serving both the three year prison sentence and the consecutive three year probation term by the time he engaged in new criminal conduct on November 9, 2009, less than five years after his sentencing" (*id.*).

Administrator Schwarz rejected Greer's argument that DOC lost jurisdiction when it issued the discharge certificates (3:105; A-Ap. 117). He found that "nothing in the discharge documents indicates the department's intent to discharge Greer from his probation" (*id.*). He noted that "both discharge documents begin with the phrase, 'You were sentenced to Wisconsin State Prisons'" and that "[t]he courts have long recognized that probation is not a sentence" (*id.*).

The Administrator also rejected Greer's argument that revocation of his probation violated Greer's due process rights and offended notions of decency and fairness (*id.*). He found that "[t]hat argument is not persuasive when it comes to new criminal behavior. 'A petitioner cannot seriously contend that a probationer can violate the criminal laws of this state without affecting his or her probationary status. . . .'" (*id.*) (quoting *State ex rel. Rodriguez v. Dept. of Health and Social Services*, 133 Wis. 2d 47, 393 N.W.2d 105, 107 (Ct. App. 1986)). Administrator Schwarz found that

"[a]llowing Greer by windfall to escape possible revocation despite new criminal behavior would unduly jeopardize community safety" (*id*.).

> I am satisfied that revocation is appropriate based on Greer's new criminal offense. He engaged in threatening behavior involving the use of a weapon to intimidate a witness, resulting in a new criminal conviction. This conduct shows that Greer is a potential danger to others. This is especially true given the serious nature of his underlying firearm offense. The need to protect the community from further violent crime outweighs the positive factors that Greer cites on appeal. I therefore agree that revocation is appropriate and I sustain the underlying decision.

(*Id*.)

Greer filed a timely petition for writ of certiorari in the circuit court (1:1-7). In a decision entered on June 23, 2011, the court granted the petition and reversed the decision of the Division of Hearing and Appeals (7:12; A-Ap. 113). The court held that the department kept within its jurisdiction, that its action was not arbitrary, oppressive or unreasonable, and that its determination was warranted by the evidence (7:4-8; A-Ap. 105-109). However, the court concluded that the Division did not act according to law because the DOC was equitably estopped from seeking probation revocation as a result of Greer's reasonable reliance on the erroneous discharge certificate (7:8-12; A-Ap. 109-113).

Administrator Schwarz filed a motion for reconsideration in which he argued that equitable principles, including equitable estoppel, are not applicable in a certiorari review (8:1-2). In a decision entered on August 2, 2011, the court

denied the reconsideration motion (10:1-2; A-Ap. 114-15). On August 4, 2011, the court entered a written order stating that "the Respondent was estopped from pursuing revocation against Petitioner and the decision to revoke Petitioner's probation is reversed" (11:1; A-Ap. 101).

Administrator Schwarz filed a notice of appeal on September 16, 2011 (12:1-2).

ARGUMENT

In his circuit court brief in support of his certiorari petition, Greer argued that the decision of Administrator Schwarz "was without jurisdiction, arbitrary and capricious, oppressive and unreasonable, representing his will and not his judgment, [and] contrary to the law and the evidence in the record" (4:1). His arguments relied primarily on the fact that the Department of Corrections issued a discharge certificate to him in 2007 (4:6-17).[2]

As Administrator Schwarz will discuss below, the erroneous issuance of the discharge certificate did not cause DOC or the Division of

[2]The department issued two discharge certificates the same day (3:54, 55; A-Ap. 131, 132). One of those certificates referred specifically to the drug charge for which Greer was incarcerated and stated that he was "discharged from said judgment only" (3:55; A-Ap. 132). The other certificate stated that Greer was "sentenced to Wisconsin State Prisons" and that "[t]he department having determined that you have satisfied said sentence, it is ordered that effective September 28, 2007, you are discharged absolutely" (3:54; A-Ap. 131). Only the latter certificate could be interpreted to apply to the felon-in-possession count on which the court imposed and stayed a prison sentence and placed Greer on consecutive probation.

Hearing and Appeals to lose jurisdiction over Greer. In addition, the record demonstrates that the Division acted according to law, that its action was not arbitrary, oppressive or unreasonable, and that the evidence supported its decision. Accordingly, this court should reverse the circuit court's order that reversed the Division's decision to revoke Greer's probation.

The circuit court held that the DOC was equitably estopped from revoking Greer's probation. On certiorari review of an administrative decision revoking probation, an appellate court reviews the decision of the Division of Hearings and Appeals, not that of the circuit court. *State ex rel. Warren v. Schwarz,* 211 Wis. 2d 710, 717, 566 N.W.2d 173 (Ct. App. 1997), *aff'd,* 219 Wis. 2d 615, 579 N.W.2d 698 (1998). For that reason, the appellate court does not consider alleged errors in the circuit court, because this has no bearing on whether the Division properly revoked the probationer. *Id.*

Administrator Schwarz acknowledges that established principle of appellate review. However, he anticipates that Greer may adopt the circuit court's reasoning in his appellate respondent's brief, even though he did not argue equitable estoppel below (4:1-17). According, Administrator Schwarz will discuss in this brief why equitable estoppel does not provide a basis for reversing the Division's decision.

I. APPLICABLE LEGAL STANDARDS.

As previously noted, the court of appeals reviews the decision of the agency, not that of the circuit court. *Warren,* 211 Wis. 2d at 717.

Appellate review of a revocation decision is limited to determining whether: (1) the Division of Hearings and Appeals stayed within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive or unreasonable and represented its will, not its judgment; and (4) the evidence was such that it might reasonably make the decision that it did. *State ex rel. Tate v. Schwarz,* 2002 WI 127, ¶15, 257 Wis. 2d 40, 654 N.W.2d 438.

The division, not the reviewing 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). "A *certiorari* court may not substitute its view of the evidence for that of the [division]." *Id.* Rather, the court's inquiry "is limited to whether there is substantial evidence to support the [division]'s decision." *Id.* 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). However, whether the Division acted according to law is a question of law that an appellate court reviews de novo. *Tate*, 257 Wis. 2d 40, ¶16.

II. THE DECISION OF THE DIVISION OF HEARING AND APPEALS SHOULD BE AFFIRMED.

In his certiorari petition (1:6) and supporting brief (4:1), Greer argued that the Division's revocation decision failed to meet any of the four criteria necessary to affirm the Division's revocation decision: "It is the position of Petitioner Greer that the Department of Corrections . . . lacked jurisdiction over him, that the decision of David H. Schwarz, Administrator of

the Division of Hearings and Appeals . . . , was without jurisdiction, arbitrary and capricious, oppressive and unreasonable, representing his will and not his judgment, contrary to the law and the evidence in the record" (*id.*). Because none of those contentions is correct, this court should reverse the circuit court's order and should affirm the Division Administrator's decision to revoke Greer's probation.

A. The Division acted within its jurisdiction.

Greer argued in the circuit court, as he did during the administrative proceedings, that the Department of Corrections and the Division of Hearing and Appeals lacked jurisdiction over him because DOC issued a discharge certificate that terminated his supervision (4:1, 6-10). However, the DOC lacked authority to discharge Greer from probation because he had not completed the term of probation ordered by the circuit court. The discharge certificate was invalid, therefore, and did not operate to terminate the DOC's jurisdiction over Greer.

When a court places a person on probation, "[t]he period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously." Wis. Stat. § 973.09(1)(a). Consecutive sentences are treated as one continuous sentence. *See* Wis. Stat. § 302.11(4). A defendant is not discharged from the department's legal custody until he or she has served the entire aggregated sentence when consecutive sentences have been imposed. *See Ashford v. Division of Hearings and Appeals,* 177 Wis. 2d 34, 43-44, 501 N.W.2d 824 (1993). The department retains jurisdiction over the offender

until the date of discharge "from the entire sentence." *Dept. of Corrections v. Schwarz,* 2005 WI 34, ¶31, 279 Wis. 2d 223, 693 N.W.2d 703.

Wisconsin's probation statute provides that a person will be discharged from probation only after the period of probation has expired. The statute reads, in relevant part:

> **(5)** *When the period of probation for a probationer has expired*, the probationer shall be discharged from probation and the department shall do all of the following:
>
> (a) If the probationer was placed on probation for a felony, issue the probationer one of the following:
>
> 1. A certificate of discharge from probation for the felony for which he or she was placed on probation if, at the time of discharge, the probationer is on probation or parole for another felony.
>
> 2. A certificate of final discharge if, at the time of discharge, the probationer is not on probation or parole for another felony. A certificate of final discharge under this subdivision shall list the civil rights which have been restored to the probationer and the civil rights which have not been restored to the probationer.
>
> * * *
>
> (c) In all cases, notify the court that placed the probationer on probation that the period of probation has expired.

Wis. Stat. § 973.09(5) (emphasis added.)

Consistent with that statute, the rules of the Department of Corrections provide that, other than for exceptions not relevant here, *see* Wis. Admin. Code §§ DOC 238.17(2)(a)-(e), a supervisee

"shall be discharged upon the issuance of a discharge certificate issued by the [DOC] secretary *at the expiration of the term noted on the court order* committing the client to the custody and supervision of the department. . . ." Wis. Admin. Code § DOC 328.17(2) (emphasis added).[3] Accordingly under both the applicable statute and the administrative rules, the department may not issue a discharge certificate until the supervisee has completed service of all the consecutive sentences and probationary terms imposed by the sentencing court.

In the 2004 case, the court sentenced Greer to three years of imprisonment on the first count, consisting of fourteen months of initial confinement and twenty-two months of extended supervision, imposed and stayed a six-year sentence on the other count, and placed Greer on three years of probation consecutive to his sentence on the first count (3:16, 28; A-Ap. 128, 124). Accordingly, Greer was to remain under the DOC's supervision until he completed serving the three-year sentence on the first count and three consecutive years of probation on the other count – a total of six years.

When the department issued the discharge certificate on October 3, 2007, Greer had not served to the expiration of his entire term of legal custody because the consecutive term of probation had not been completed. Thus, the discharge certificate was issued in violation of Wis. Stat. § 973.09(5) and Wis. Admin. Code § DOC 328.17(2).

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[3]Except where otherwise noted, all references to the Wisconsin Administrative Code are to the December 2006 version, which is the current version of the rules.

An administrative agency has only those powers that are expressly conferred or necessarily implied from the statutory provisions under which it operates. *See Conway v. Board of the Police and Fire Comm'rs*, 2002 WI App 135, ¶7, 256 Wis. 2d 163, 647 N.W.2d 291. An agency act performed in excess of those powers is invalid. *See Seider v. O'Connell*, 2000 WI 76, ¶¶26, 28, 236 Wis. 2d 211, 612 N.W.2d 659. Because Wis. Stat. § 973.09(5) directs the DOC to discharge a petitioner only upon expiration of a period of probation, the DOC had no statutory authority to discharge Greer before his probation term expired.

Because the discharge certificate was issued in violation of the statute and the department's rules, it was invalid. *See State ex rel. Anderson-El v. Cooke,* 2000 WI 40, ¶20, 234 Wis. 2d 626, 610 N.W.2d 821. Because the discharge certificate was invalid, it could not affect the department's legal custody of Greer.

In his circuit court brief, Greer cited *State ex rel. Rodriguez v. Dep't of Health and Social Services,* 133 Wis. 2d 47, 393 N.W.2d 105 (Ct. App. 1986), and *State v. Stefanovic,* 215 Wis. 2d 310, 572 N.W.2d 140 (Ct. App. 1997), to support his argument that the issuance of the discharge certificate meant that the department had lost jurisdiction over him (4:7-10). However, neither *Rodriguez* nor *Stefanovic* addressed the significance of an invalid discharge certificate.

In *Rodriguez*, the probationer had been sentenced to four yours in prison on one count and a consecutive two-year term of probation on a second count. *Rodriguez*, 133 Wis. 2d at 49. However, Rodriguez's probation and parole agent was unaware of the court-ordered probation term

and told Rodriguez that he would be discharged from supervision at the completion of his sentence on the first count on April 6, 1985. *Id*. The agent subsequently discovered the mistake and informed Rodriguez on May 21, 1985, that he was still on probation. *Id*. at 50.

Between those two dates, however, Rodriguez assaulted a woman. *Id*. at 49. The department commenced probation revocation proceedings based in part on that incident. *Id*. at 50. The hearing examiner rejected Rodriguez's argument that he had been discharged at the time of the attack and that it would be unfair to revoke him because he did not know that he was under supervision at the time. *Id*. The hearing examiner found that Rodriguez knew that he was on probation because the sentencing court had informed him that he would be serving a consecutive probationary term after he completed serving his prison sentence. *Id*. The examiner also determined that Rodriguez was aware of his responsibilities on supervision based on his parole supervision and that he was not relieved of those responsibilities because his agent was unaware of the probationary term. *Id*. at 50-51.

The circuit court granted Rodriguez's petition for certiorari and reversed the revocation. *Id*. at 51. The court concluded that, although erroneous, the probation agent's statement to Rodriguez released Rodriguez from probation and deprived the department of jurisdiction over Rodriguez until the agent discovered the error and informed Rodriguez that he was still on probation. *Id*.

The court of appeals reversed, holding that Rodriguez remained under the department's jurisdiction during that time. The court explained:

> The judgment of conviction unambiguously decreed that probation be served consecutive to the prison sentences. Rodriguez was therefore turned over to the custody of the department for purposes of serving *both* the prison sentence and the probationary term.
>
> Once custody is transferred to the department, discharge from probation or parole under the release of the department occurs only "upon the issuance of a discharge certificate by the secretary [of DH&SS] at the expiration of the term noted on the court order." Wis. Admin Code, sec. HSS 328.17(2). Because no discharge certificate was produced for the child abuse and battery conviction, the department still had jurisdiction even given the agent's erroneous statement.
>
> This is especially so in this instance since Rodriguez knew that the sentencing court had ordered his continuation on probation immediately upon the expiration of parole.

Id. at 51-52.

Greer argued below that *Rodriguez* is significant because "[i]n *Rodriguez*, there was a similar mistake made by the DOC, however, Rodriguez did not receive documentation that he had been absolutely discharged or that his civil rights had been restored. Even the *Rodriguez* court recognized the importance of a discharge certificate" (4:8-9). Greer is correct that this case is different from *Rodriguez* because Greer received a discharge certificate while Rodriguez was simply informed by his agent that his supervision had been terminated. However, *Rodriguez* does not

stand for the proposition that a discharge certificate operates to terminate supervision even if the certificate is erroneously issued. That is so for two reasons.

First, the issue was not before the *Rodriguez* court, as no discharge certificate had been issued in that case. *See Rodriguez*, 133 Wis. 2d at 51. Second, the *Rodriguez* court cited the then-applicable administrative rule for the proposition that "discharge from probation . . . under the release of the department occurs only 'upon the issuance of a discharge certificate by the secretary [of DH&SS] *at the expiration of the term noted on the court order*.'" *Id*. at 51 (quoting Wis. Admin Code, § HSS 328.17(2)) (emphasis added). That rule is identical to the current rule. *See* Wis. Admin. Code § DOC 328.17(2) (the client "shall be discharged upon the issuance of a discharge certificate issued by the secretary [of DOC] at the expiration of the term noted on the court order committing the client to the custody and supervision of the department").

The *Rodriguez* court recognized that a discharge certificate is issued "at the expiration of the term noted on the court order." The discharge certificate issued to Greer was issued nearly three years before the expiration of the probationary term noted on the court order (3:12, 54, 55: A-Ap. 120, 131, 132). *Rodriguez* thus supports the Division's conclusion that the DOC retained jurisdiction over Greer notwithstanding the erroneously issued discharge certificate.

Greer's circuit court brief also cited the court of appeals' statement in *Stefanovic* that "*Rodriguez* is . . . instructive because it signals that the department's issuance of a discharge

certificate is of significant legal moment" (4:8-9) (quoting *Stefanovic*, 215 Wis. 2d at 315-16). Unlike *Rodriguez*, the probationer in *Stefanovic* had been issued a discharge certificate. *See Stefanovic*, 215 Wis. 2d at 316. Unlike Greer's circumstances, however, the discharge certificate in *Stefanovic* was properly issued because the department issued it upon Stefanovic's completion of her probationary term. *See id*. at 316.

In *Stefanovic,* the trial court withheld sentence and placed Stefanovic on probation for a year. *See id*. at 312. As a condition of probation, the court ordered her to serve thirty days in jail. *See id*. The court granted Stefanovic's motion for release pending appeal, so she did not serve any jail time. *See id*. However, the court did not stay Stefanovic's probation, and she completed her probation while her appeal was pending. *See id*. The Department of Corrections issued a certificate of discharge. *See id*.

After the department had issued the discharge certificate, the court of appeals affirmed Stefanovic's conviction and remitted the case to the trial court. *See id*. The trial court determined that Stefanovic should serve the jail term imposed as a condition of probation, noting that it had stayed the jail term at Stefanovic's request and that she not be allowed to use her right to release pending appeal as a means to frustrate the court's sentence. *See id*. at 313.

The court of appeals reversed. *Id*. at 313, 320. Although the court acknowledged that *Rodriguez* was not a revocation case, it found *Rodriguez* instructive "because it signals that the department's issuance of a discharge certificate is of significant legal moment." *Id*. at 315-16. The

court of appeals quoted the relevant language in Wis. Admin. Code § 328.17(2), which provides that "[a] client shall be discharged upon the issuance of a discharge certificate issued by the secretary at the expiration of the term noted on the court order committing the client to the custody and supervision of the department" unless "[t]he court has subsequently modified the term and extended or reduced it." *Id*. at 316. The court of appeals held that "the trial court never modified or extended Stefanovic's probationary term" and that "[a]bsent such action, the department properly issued its certificate of discharge to Stefanovic." *Id*. Accordingly, the court of appeals said, "*Rodriguez* supports Stefanovic's argument" that the trial court lost jurisdiction over the case. *Id*. at 316, 319.

Stefanovic thus involved a certificate of discharge that, according to the court of appeals, was "properly issued." *Id*. It is in that context that the court's statement in *Stefanovic* that "*Rodriguez* . . . signals that the department's issuance of a discharge certificate is of significant legal moment," *id*. at 315-16, must be understood.

Neither *Rodriguez* nor *Stefanovic* addressed the legal significance of an improperly issued discharge certificate. Both decisions, however, relied on the administrative code provisions that a supervisee "shall be discharged upon the issuance of a discharge certificate issued by the secretary at the expiration of the term noted on the court order committing the client to the custody and supervision of the department." *See Stefanovic*, 215 Wis. 2d at 316 (quoting Wis. Admin. Code § DOC 328.17(2)); *Rodriguez*, 133 Wis. 2d at 51 (quoting Wis. Admin Code, § HSS 328.17(2)).

In this case, the department issued a discharge certificate to Greer almost three years before "the expiration of the term noted on the court order committing the client to the custody and supervision of the department." Wis. Admin. Code § DOC 328.17(2). Because the department had no authority to discharge Greer from probation before the expiration of the probationary term imposed by the circuit court, the department did not lose jurisdiction over Greer.

B. The Division acted according to law.

In his brief in support of his certiorari petition, Greer argued that the Division did not act according to law because it ignored the legal significance of the fact that he had been issued a discharge certificate (1:20). That contention merely restates the jurisdictional claim that was addressed in the previous section of this brief.

The Division acted according to law when it revoked Greer's probation. The judgment of conviction on Count 3 states that probation was imposed "[c]onsecutive to Count 1" and that Greer "[m]ust obey all rules and Department regulations while on probation" (3:16; A-Ap. 128). In a written statement, Greer stated, "I was in court the date of sentencing, but did not know if the 3 years were consecutive since I went to prison and then had 22 months on extended supervision" (3:34). However, the ALJ found that Greer "was present at the time he was sentenced and would have directly heard the court sentencing him to prison and also to a consecutive three year period of probation" (3:12; A-Ap. 120).

In his appeal decision, Administrator Schwarz rejected Greer's additional argument that revocation of his probation violates Greer's due process rights and offends notions of decency and fairness (3:105; A-Ap. 117). Citing *Rodriguez*, the Administrator stated that "[t]hat argument is not persuasive when it comes to new criminal behavior" (*id*.).

The Administrator's reliance on *Rodriguez* was well founded. In *Rodriguez*, the court of appeals rejected Rodriguez's argument that because he did not sign a probation agreement when his probation began, the department could not revoke him for violating the terms of the agreement. *See Rodriguez*, 133 Wis. 2d at 52. The court reasoned:

> While a probation agreement may be tailored to meet the needs of a specific individual and while violation of an unsigned agreement of this nature may not result in revocation, a different situation arises here. Section 973.10(1), Stats., places a probationer under the control of the department "under conditions set by the court and rules and regulations established by the department." Thus, even without a written agreement, Rodriguez still had to abide, as a matter of law, with departmental regulations prohibiting "conduct which is in violation of state statute." Wis. Adm. Code, sec. HSS 328.04(3)(a). Rodriguez's assaultive conduct obviously violated this regulation.
>
> We also agree with the state that Rodriguez's assaultive conduct might justify revocation simply on the basis that some conditions are so essential that they automatically inhere in the concept of probation. *Cf. Wagner v. State,* 89 Wis. 2d 70, 77, 277 N.W.2d 849, 852 (1979). A petitioner cannot seriously contend that a probationer can violate the criminal laws of this state

> without affecting his or her probationary status, even without signing a probation agreement. The purpose of probation is to rehabilitate the person and help the person lead a law-abiding life. By further violating the criminal statutes, the probationer violates the whole concept of probation.

Id. at 52-53.

As was the case in *Rodriguez*, the administrative rules for probation currently require that probationers "[a]void all conduct which is in violation of state statute." Wis. Adm. Code § DOC 328.04(3)(a). And, as the court stated in *Rodriguez* "[a] petitioner cannot seriously contend that a probationer can violate the criminal laws of this state without affecting his or her probationary status, even without signing a probation agreement." *Rodriguez*, 133 Wis. 2d at 52. The Division acted within the law when it revoked Greer's probation for committing a new crime.

In his circuit court brief, Greer argued that "[t]o revoke Petitioner Greer under these circumstances deprives Petitioner Greer of his right to due process under *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and *Morrissey v. Brewer*, 408 U.S. 471 (1972)" (4:17). Those cases, however, address the *procedural* due process requirements in a revocation proceeding. In *Morrissey*, the Court held that due process requires "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional

parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." *Morrissey*, 408 U.S. at 489; *see also State v. Burris*, 2004 WI 91, ¶24, 273 Wis. 2d 294, 682 N.W.2d 812 (describing *Morrissey*'s holding). "These due process protections were extended to probation revocations in *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973), along with a recognition that the state must provide counsel to probationers in some revocation proceedings." *Burris*, 273 Wis. 2d 294, ¶25. Because *Gagnon* and *Morrissey* address the procedural protections to which a supervisee is entitled in a revocation proceeding, neither case supports Greer's claim that revoking his probation "under these circumstances" deprives him of his right to due process.[4]

The circuit court held that the Division had not acted according to law because the Department of Corrections was equitably estopped from seeking revocation (7:8-12; A-Ap. 109-13). The circuit court was wrong, for two reasons. The first is that under the limited scope of certiorari review, a circuit court may not grant equitable relief. The second is that even if equitable estoppel were theoretically applicable, Greer could not

[4]Greer also argued below, without any further explanation, that "[t]o revoke Petitioner Greer would also offend the basic canons of decency and fairness. *See Rochin v. California*, 342 U.S. 165 (1962)" (4:17). In *Rochin*, the Supreme Court held evidence obtained by "conduct that shocks the conscience" – in that case, forcing a tube into the suspect's stomach and pumping an emetic solution to induce him to vomit evidence he had swallowed – violated the due process clause. *See id.* at 166, 172. The relevance of that precept of due process to Greer's circumstances is not apparent.

reasonably have relied on the discharge certificate when he committed a new crime.

The supreme court discussed the availability of equitable relief in a certiorari action in *Town of Delafield v. Winkelman*, 2004 WI 17, 269 Wis. 2d 109, 675 N.W.2d 470. In *Winkelman*, the town zoning board placed certain conditions on its approval of a zoning variance for property owned by the Winkelmans, including a requirement that they remove a rental residence from the property. *See id.* at ¶6. The Winkelmans sought certiorari review of the board's decision, but the certiorari court upheld the board's decision. *See id.*, ¶7. The Winkelmans did not appeal. *Id.*

When the Winkelmans did not comply with the condition, the town brought a motion requesting the certiorari court to order the Winkelmans to raze the house or allow the town to do so. *Id.*, ¶8. The certiorari court granted the town's motion and the Winkelmans appealed. *Id.* The court of appeals reversed, holding that the town board needed to obtain jurisdiction over the Winkelmans for the enforcement action by serving either a summon and complaint or an appropriate original writ. *Id.*, ¶9.

The town then commenced a new action by filing a complaint requesting forfeitures along with an order directing the Winkelmans to remove the rental residence. *Id.*, ¶10. The circuit court granted the town's summary judgment motion. *Id.*, ¶11. The court rejected the Winkelmans' argument that it was required to hear their equitable argument, concluding that it did not have the equitable power in the context of the enforcement action to deny injunctive relief. *Id.*

The supreme court disagreed. It held that when a governmental body exercises its statutory authority and seeks injunctive relief in the circuit court, the court has the power to consider a property owner's equitable arguments against granting that relief. *Id*., ¶28.

The supreme court then addressed the town's argument that the Winkelmans already had an opportunity to present their equitable arguments before the certiorari court and had in fact done so. *Id*., ¶29. The town argued that allowing the enforcement court to consider the property owners' equitable arguments would deny finality to the certiorari court's decision and upset the doctrines of issue and claim preclusion. *Id*.

The supreme court stated that "[t]he difficulty we have with the Town's position is its premise that certiorari review is a proper forum for consideration of the equities." *Id*., ¶30. The court explained:

> By its nature, certiorari review is limited in scope. Unless otherwise provided by statute, the traditional standards of common-law certiorari review apply. These include determining (1) whether the board kept within its jurisdiction; (2) whether it acted according to law; (3) whether its actions were arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order of determination in question. Although the Town maintains that the third prong of certiorari review reflects the same criterion that is required for making decisions on equitable arguments, we are not persuaded.
>
> In its decision, the court of appeals noted, "we find no authority, and counsel at oral argument was unable to cite to any, that

> says that courts sit in equity in certiorari actions." Like the court of appeals, we too have discovered no precedent that allows certiorari courts to sit in equity. Indeed, the Town acknowledges in its brief that, "Wisconsin Courts have developed no legal authority with regard to this issue." As a result, we agree with the court of appeals that, "[w]hile in certain circumstances a certiorari court has the authority to take additional evidence . . . simply allowing a court to add to the record does not mean that the court is then sitting in equity.

Id., ¶¶30-31 (citations omitted).

Equitable estoppel is an equitable doctrine, and a court applying equitable estoppel is employing its equitable power. *See Randy A.J. v. Norma I.J.*, 2004 WI 41, ¶28, 270 Wis. 2d 384, 677 N.W.2d 630; *Nugent v. Slaght,* 2001 WI App 282, ¶¶29–30, 249 Wis. 2d 220, 638 N.W.2d 594. A certiorari court may not use equitable estoppel as the basis for its decision because a certiorari court is not "sitting in equity." *Winkelman*, 269 Wis. 2d 109, ¶31; *see also Guerrero v. City of Kenosha Housing Authority*, 2011 WI App 138, ¶9, __ Wis. 2d __, 805 N.W.2d 127 (petition for review filed) ("a court on certiorari review is without statutory authority to provide the equitable relief Guerrero requests").

In its order denying the Administrator's motion for reconsideration, the circuit court said that "[a]ny discussion [in *Winkelman*] concerning whether certiorari Courts are precluded from hearing equitable arguments was, at best, dicta and not controlling" (10:1; A-Ap. 114). Administrator Schwarz does not believe that the supreme court's discussion in *Winkelman* of the limited powers of a certiorari court was dictum.

"'[W]hen a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision.'" *State v. Kruse*, 101 Wis. 2d 387, 392, 305 N.W.2d 85 (1981) (quoting *Chase v. American Cartage*, 176 Wis. 235, 238, 186 N.W. 598 (1922)). More importantly, even if the circuit court felt free to disregard a statement in a supreme court opinion that it believed to be dictum, the supreme court has held that "the court of appeals may not dismiss a statement from an opinion by this court by concluding that it is dictum." *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682.

The doctrine of equitable estoppel is not applicable in a certiorari review proceeding. But even if it were, Greer would not have been able to establish an essential element of equitable estoppel, reasonable reliance. *See State v. City of Green Bay,* 96 Wis. 2d 195, 202, 291 N.W.2d 508 (1980).[5] Had the Division revoked Greer's probation for conduct that would have been permitted had he not been on probation, a claim of reasonable reliance might have some traction. But the only basis for revocation upon which the

[5]"The defense of equitable estoppel consists of action or non-action which, on the part of one against whom estoppel is asserted, induces reliance thereon by the other, either in action or non-action, which is to his detriment." *City of Green Bay,* 96 Wis. 2d at 202 (quoted source omitted). Accordingly, "[t]hree facts or factors must be present: (1) *Action or nonaction* which induces (2) *reliance* by another (3) to his *detriment*." *Gabriel v. Gabriel*, 57 Wis. 2d 424, 429, 204 N.W.2d 494 (1973). "It is elementary, however, that the reliance on the words or conduct of the other must be reasonable and justifiable." *City of Green Bay,* 96 Wis. 2d at 202.

Administrator relied was Greer's new criminal conduct (3:105; A-Ap. 117). Greer could not have reasonably relied on the issuance of the discharge certificate as a basis for believing that he could commit a new felony offense.

C. The Division's action was not arbitrary, oppressive or unreasonable and did not represent its will rather than its judgment.

An agency's decision to revoke supervision is not arbitrary and capricious and represents its judgment rather than its will if the decision represents a proper exercise of discretion. *Warren* 211 Wis. 2d at 724. In exercising that discretion, the Division must consider whether alternatives to revocation are available and feasible. *Id*. at 725. On appeal challenging the division's decision to revoke, the probationer has the burden of proving the decision was arbitrary and capricious, that is, that the Division did not properly exercise its discretion. *Id*. at 726.

In this case, the Division Administrator determined that revocation was appropriate based on Greer's new criminal offense (3:105; A-Ap. 117). The Administrator found that Greer "engaged in threatening behavior involving the use of a weapon to intimidate a witness, resulting in a new criminal conviction" and that "[t]his conduct shows that Greer is a potential danger to others" (*id*.). The Administrator found that "[t]his is especially true given the serious nature of his underlying firearm offense" (*id.)*, that is, Greer's 2004 conviction for being a felon in possession of a firearm (3:16; A-Ap. 128). The Administrator

concluded that revocation was appropriate because "[t]he need to protect the community from further violent crime outweighs the positive factors that Greer cites on appeal" (3:105; A-Ap. 117).

The Administrator provided a reasoned and reasonable explanation for why alternatives to probation revocation were not appropriate. The court should conclude, therefore, that the Administrator properly exercised his discretion and that the Division's action was not arbitrary, oppressive or unreasonable.

D. The evidence was such that the Division might reasonably make the decision that it did.

During the revocation proceedings, Greer acknowledged that he "entered a no contest plea to Intimidation Witness/Threat of Force on June 25, 2010" (3:85). Based on that conviction, the administrative law judge found that Greer had violated a condition of probation (3:12; A-Ap. 120). In sustaining the ALJ's decision the Division Administrator found that Greer "engaged in threatening behavior involving the use of a weapon to intimidate a witness, result in a new criminal conviction" (3:105; A-Ap. 117). In his certiorari petition, Greer again acknowledged that he "entered a no contest plea to Intimidation Witness/Threat of Force on June 25, 2010" (1:3).

There is no dispute that Greer was convicted of a new crime on June 25, 2010. Accordingly, the court should find that the evidence was such that

the Division might reasonably make the decision that it did.

CONCLUSION

For the reasons stated above, the court should reverse the order of the circuit court and should affirm the decision of the Administrator of the Division of Hearing and Appeals that revoked the probation of Ardonis Greer.

Dated this 20th day of December, 2011.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,969 words.

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Jeffrey J. Kassel
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of December, 2011.

_____
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