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

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF RESPONDENT-APPELLANT

J.B. VAN HOLLEN
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Respondent-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

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ARGUMENT

I. THE DIVISION ACTED WITHIN ITS JURISDICTION.

In his opening brief, Division Administrator Schwarz argued 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. . . .'" Opening brief at 11-12 (quoting Wis. Admin. Code § DOC 328.17(2)). In his appellate brief, Greer asserts that one of those exceptions *is* relevant here. He is mistaken.

Greer argues that the Department of Corrections had the authority to discharge him before the end of the court-ordered term of probation under Wis. Admin. Code § DOC 238.17(2)(c). *See* Greer's brief at 12. That rule allows the DOC to issue a discharge certificate prior to the end of the court-ordered term of supervision if "[t]here is a reasonable probability that it is no longer necessary either for the rehabilitation and treatment of the client or for the protection of the public that the department retain custody, and discharge is merited." Wis. Admin. Code § DOC 238.17(2)(c) (2006).

There are two problems with Greer's reliance on that provision. First, Greer was not discharged under it; he was discharged as the result of the administrative error in not entering his consecutive probationary term into the department's record system (1:1; 3:27; A-Ap. 123). Second, the statutory authority for Wis. Admin. Code § DOC 238.17(2)(c) is Wis. Stat. § 973.09(3)(d). *See State v. Dowdy*, 2012 WI 12, ¶41, 338 Wis. 2d 565, 808 N.W.2d 691. That statute authorizes the DOC to "modify a person's period of probation and discharge the person from probation," but only "if the person has completed 50 percent of his or her period of probation." Wis. Stat. § 973.09(3)(d).

Greer had not completed fifty percent of his three-year period of probation when the DOC issued the discharge certificate. Greer completed serving his extended supervision term on September 28, 2007 (3:1; A-Ap. 116). Thus, as he acknowledges, three years of consecutive probation would have ended on September 28, 2010. *See* Greer's brief at 12.

The discharge certificate was issued on October 3, 2007, just five days after Greer completed the extended supervision term (3:54; A-Ap. 131). Because Greer was less than a week into his three-year probationary term when the DOC issued the discharge certificate, the DOC would have lacked the statutory authority to issue an early discharge under Wis. Admin. Code § DOC 238.17(2)(c) had it purported to act under that provision.

Greer cites *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 lost jurisdiction over him. *See* Greer's brief at 13-15. Because Greer relied on those cases in his circuit court brief, Administrator Schwarz addressed Greer's reliance those cases in his opening appellate brief. *See* opening brief at 15-19. Schwarz believes that his opening brief fully explains why Greer's reliance on *Rodriguez* and *Stefanovic* is unavailing and will not repeat that argument here.

Greer also argues that "[i]f this Court were to find this certificate was invalid and did not operate to terminate jurisdiction or actually reinstate Greer's civil rights, then Greer's actions

in relying on the certificate and voting in the 2008 Presidential Election would be committing a new felony offense and would subject him to further criminal liability, all due of [sic] the negligence of the Department." Greer's brief at 12-13. However, Greer does not cite the statute that he fears he would have violated were this court to disagree with his position, nor does he discuss the scienter requirement of that statute.

This court does not consider arguments that are undeveloped and that are unsupported by legal authority. *See State v. Flynn*, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994); *State v. Shaffer*, 96 Wis .2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980). On that basis alone, the court should disregard Greer's argument.

Moreover, Greer's concern appears to be unfounded. Administrator Schwarz assumes that Greer is referring to the election fraud statute, which provides that "[w]hoever *intentionally* does any of the following violates this chapter: (a) Votes at any election . . . if that person does not have the necessary elector qualifications. . . ." Wis. Stat. § 12.13(1)(a) (emphasis added). A person convicted of a felony is disqualified an elector until his or her right to vote has been restored through a pardon or completion of the term of imprisonment or probation. *See* Wis. Stat. §§ 6.03(1)(b), 304.078(3). A violation of Wis. Stat. § 12.13(1)(a) is a class I felony. *See* Wis. Stat. § 12.60(1)(a).

Given that the discharge certificate informed Greer, albeit erroneously, that his right to vote had been restored (3:54; A-Ap. 131), it seems highly doubtful that Greer had the requisite criminal intent to support a prosecution under Wis. Stat. § 12.13(1)(a). "'Intentionally' means that the actor either has a purpose to do the thing or

cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition . . . the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'." Wis. Stat. § 939.23(3); *see also* Wis. Stat. § 939.43(1) ("An honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime."). Under these circumstances and given that scienter requirement, it is difficult to imagine that Greer would be prosecuted for election fraud or, if he were, that the prosecution would be successful.

II. THE DIVISION ACTED ACCORDING TO LAW.

Greer argues that the Division did not act according to law for two reasons: first, that it is equitably estopped from revoking his probation because it issued a discharge certificate on which he relied, *see* Greer's brief at 16-23; and second, because the DOC violated his due process rights, *see id*. at 23-27. Neither of those arguments has merit.

A. Equitable estoppel does not apply in certiorari review.

In his opening brief, Administrator Schwarz relied primarily on *Town of Delafield v. Winkelman*, 2004 WI 17, 269 Wis. 2d 109, 675 N.W.2d 470, for the proposition that equitable doctrines such as equitable estoppel do not apply

on certiorari review.[1] Greer responds that "in *Winkelman*, the Supreme Court was not reviewing a certiorari decision." Greer's brief at 16. That is correct, but it is also irrelevant.

One of the issues before the court in *Winkelman* was whether the Winkelmans previously had an opportunity, when they sought certiorari review of the town's zoning decision, to present the equitable arguments that they raised in a subsequent enforcement action brought by the town. *Winkelman*, 269 Wis. 2d 109, ¶29. To answer that question, the supreme court necessarily examined the scope of certiorari review. *See id*. In doing so, the court held that "[b]y its nature, certiorari review is limited in scope," *id*., ¶30 and that it could "find no authority . . . that says that courts sit in equity in certiorari actions," *id*., ¶31.

As noted in the Administrator's opening brief, 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. Greer concedes that "[i]t is true, as the *Winkelman* court noted, that the 'traditional criteria by which certiorari [court's] review a board's decision do not involve consideration of equitable arguments.'" Greer's brief at 17 (quoting *Winkelman*, 269 Wis. 2d 109, ¶36). He argues,

[1]The Administrator also cited this court's holding in *Guerrero v. City of Kenosha Housing Authority*, 2011 WI App 138, ¶9, 337 Wis. 2d 484, 805 N.W.2d 127, that "a court on certiorari review is without statutory authority to provide the equitable relief [the plaintiff] requests." *See* opening brief at 25. The Administrator noted that a petition for review was pending in *Guerrero*. *See id*. According to the court's online case access system, the supreme court denied that petition for review on January 24, 2012.

however, that "[e]quitable estoppel is not limited to claims brought in equity." *Id.* He notes that equitable estoppel has been applied in non-equity actions such as actions under a note or contract and in family law cases. *See id.*

Greer is correct that the defense of equitable estoppel is not limited to actions brought in equity. *See, e.g., Gabriel v. Gabriel*, 57 Wis. 2d 424, 428, 204 N.W.2d 494 (1973). Indeed, Wisconsin has "abolished the distinction between actions at law and suits in equity." *White v. Ruditys*, 117 Wis. 2d 130, 140, 343 N.W.2d 421 (Ct. App. 1983) (citing 1 E. Bryant, *Wisconsin Pleading and Practice* § 6.10, at 278 (1978)). But it does not follow that equitable estoppel is available in every type of action that may be brought in circuit court. For example, equitable estoppel is not available as a defense to a criminal prosecution. *See State v. Drown*, 2011 WI App 53, ¶¶6-14, 332 Wis. 2d 765, 797 N.W.2d 919. And, because of the limited scope of certiorari review, it likewise is not available in certiorari review actions. *See Winkelman*, 269 Wis. 2d 109, ¶36.

Greer also argues that he reasonably relied on the discharge certificate when he voted in the 2008 presidential election. The DOC did not seek to revoke Greer for voting, however (3:24-25; Reply Ap. 101-02). It revoked him for committing a new crime of intimidating a witness by threat of force. Greer could not have reasonably relied on the issuance of the discharge certificate as a basis for believing that he could engage in that conduct.

B. The DOC did not violate Greer's right to due process.

Greer asserts that the DOC violated his right to procedural due process by failing to provide adequate notice "as to which case it was seeking revocation." Greer's brief at 24. He notes that one DOC form identifies the case as 04CF1184B and another form identifies it as 04CF1184A. *See id*.

The document that provided notice to Greer of the nature of the allegations is the "Notice of Violation, Recommended Action, Statement of Hearing Rights and Receipt" that was provided to Greer on September 16, 2010 (3:24-26; Reply Ap. 101). That document identifies the court case for which revocation was recommended as 2004CF1184. The Administrative Law Judge found that that provided proper notice of the case on which the DOC was seeking to revoke Greer's supervision (13:10; R-Ap. 111).

Greer does not claim that he did not know that the department was seeking to revoke the consecutive probation term imposed in case no. 2004CF1184. His supervising agent testified at the revocation hearing that she told Greer on September 2, 2010, that he was being taken into custody for violations of his three-year consecutive probation (13:28; R-Ap. 129). Greer's notice claim lacks merit.

Greer also argues revoking his probation after he had been told that he had been discharged from supervision violated his substantive due process rights. *See* Greer's brief at 26. He argues that revocation "shocks the conscience" because it

deprived him of his "fundamental rights to freedom from the intrusion of the government and physical freedom from being taken and held in custody with no legal basis." *Id*.

Greer's argument fails because there was a legal basis for taking him into custody. The circuit court placed Greer on probation for three years consecutive to his extended supervision term. The erroneous issuance of the discharge certificate did not nullify the court's order or deprive the Department of jurisdiction over Greer. His probation was revoked because he committed a new criminal offense. Under those circumstances, revocation of Greer's probation did not violate his substantive due process rights.

III. THE DIVISION'S ACTION WAS NOT ARBITRARY, OPPRESSIVE OR UNREASONABLE AND DID NOT REPRESENT ITS WILL RATHER THAN ITS JUDGMENT.

The Division Administrator determined that revocation of Greer's probation was appropriate based on Greer's new criminal conviction for threatening behavior involving the use of a weapon to intimidate a witness (3:105; A-Ap. 117). 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" (*id.*).

Notwithstanding that explanation, Greer argues that the decision to revoke was arbitrary because the DOC initially did not believe that revocation was warranted; because he testified at

the revocation hearing that he used a toy gun to commit the offense and the DOC could not prove that he used a real gun; because he had not committed any new offenses during the ten months between his release on bond on the new offense and his being taken into custody by the DOC on the probation hold and therefore was not a threat to the community; because the Administrator did not address the legal ramifications of the department's error or the "contradictory nature of the ALJ's decision"; and because he was only twenty-seven days away from completing his consecutive probation term when the DOC discovered that he was still on probation. Greer's brief at 27-31.

One of those assertions is wrong. The Administrator did consider the legal ramifications of the DOC's error; he concluded 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). Most of Greer's other complaints address factors more appropriately considered in his argument that the evidence did not support revocation.

That the Administrator did not give the same weight to various mitigating factors that Greer gives to them does not mean that the Administrator did not properly exercise his discretion. Greer has not shown that the Division acted arbitrarily and capriciously when it revoked his probation based on his new felony conviction.

IV. THE EVIDENCE WAS SUCH THAT THE DIVISION MIGHT REASONABLY MAKE THE DECISION THAT IT DID.

Greer acknowledges that he "entered a no contest plea to Intimidation Witness/Threat of Force on June 25, 2010." Greer's brief at 31. He nevertheless argues that the Division could not reasonably decide to revoke his probation because the evidence presented at the hearing demonstrated that he was not a danger to the community. *Id*. at 32.

Greer notes that the DOC initially did not intend to seek revocation. *See id*. He does not explain, however, why the Department or the Division is bound by that initial assessment of the case.

Greer also notes that the ALJ found that the DOC had not proven that he used a real handgun to commit the offense. *See id*. However, the ALJ did find that when Greer threatened Shawn Griffin, he used "a facsimile weapon with the intent for Shawn Griffin to believe it was real and Griffin did believe it was real" (3:13; A-Ap. 121). The Division Administrator could reasonably conclude that Greer posed a danger to the community even if the weapon he used to threaten his victim was only a convincing facsimile.

The bottom line is that Greer violated his probation by committing a serious new felony offense. Intimidation of a witness by threat of force is a Class G felony, punishable by up to ten years' imprisonment. *See* Wis. Stat. §§ 939.50(3)(g), 940.43(3). The decision to revoke

Greer's probation was amply supported by the evidence.

CONCLUSION

For the reasons stated above and in the Administrator's opening brief, 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 10th day of April, 2012.

J.B. VAN HOLLEN
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Respondent-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,655 words.

_____
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 10th day of April, 2012.

_____
Jeffrey J. Kassel
Assistant Attorney General