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IN THE WISCONSIN COURT OF APPEALS
DISTRICT 1

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Appeal No. 2023AP1140

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State of Wisconsin ex rel. Wisconsin Department of Corrections, Division of Community Corrections,

Petitioner-Respondent,

v.

Brian Hayes Administrator, Division of Hearings and Appeals,

Respondent-Appellant,

Keyo Sellers,

Intervenor-Co-Appellant

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On Appeal From The Milwaukee County Circuit Court
The Honorable Thomas McAdams, Presiding
Milwaukee County Case No. 2022-CV-4878

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# BRIEF OF RESPONDENT-APPELLANT BRIAN HAYES

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**



**Other Authorities**

## ISSUES PRESENTED

1. Was the Administrator acting within his jurisdiction when he decided not to revoke Sellers's probation?

   Circuit Court Answered: Yes. (R. 36:13-14, 40.)

2. Was the Administrator's decision not to revoke Sellers's probation made according to law?

   Circuit Court Answer: No. (R. 36:13-14, 40.)

3. Was the Administrator's decision not to revoke Sellers's probation arbitrary, oppressive, or unreasonable?

   Circuit Court Answered: Yes. (R. 36:13-14, 40.)

4. Was the Administrator's decision not to revoke Sellers's probation one that he might have reasonably made based on the evidence?

   Circuit Court Answer: No. However, the court noted that "if this decision were solely about the sufficiency of the evidence, the standard of review would dictate that the DHA's discretion prevail." (R. 36:13-14, 40.)

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary for the legal issues presented in this matter. The Administrator anticipates the briefs will fully present and meet the issues on appeal. Wis. Stat. § 809.22(2)(b).

Publication of this decision is unnecessary because none of the criteria in Wis. Stat. § 809.23(1)(a) apply.

## STATEMENT OF THE CASE

### I. NATURE OF THE CASE

This case stems from a decision by Respondent-Appellant Brian Hayes, in his role as Administrator of Wisconsin's Division of Hearings and Appeals ("the Administrator"), not to revoke Intervenor-Co-Appellant Keyo Sellers's probation. (R. 8:72-75.) The circuit court granted a writ of certiorari in favor of the Wisconsin Department of Corrections ("DOC"), which reversed the Administrator's decision. The Administrator asks the Court to overturn the circuit court's holding, thereby affirming his original decision.

The Administrator has an obligation to oversee the administrative law judges ("ALJs") who serve as hearing examiners in the Wisconsin Division of Hearings & Appeals ("DHA") including and, very importantly, in probation revocation hearings. *See* Wis. Stat. § 301.035. When a decision of an ALJ is appealed, the Administrator has the discretion to "modify, sustain, reverse, or remand the administrative law judge's decision based upon the evidence presented at the hearing and the materials submitted for review." Wis. Admin. Code HA 2.05(9)(a).

In the appeal process, the Administrator of the DHA has an obligation to ensure that when a probationer's liberty is at stake, the ALJ who conducted the hearing recognized and enforced the probationer's due process rights. *See Morrissey v. Brewer*, 408 U.S. 471, 479–89 (1972). That obligation is particularly important because probation can be revoked for alleged acts committed while on probation after a hearing in which the burden of proof is well below the

standard of "beyond a reasonable doubt" and where incarceration almost surely follows. *See id.*

## II. STATEMENT OF FACTS

In June 2019, Sellers was placed on probation in Milwaukee County case number 2017CF4997 on a drug conviction. (R. 7:51, 8:1.) In March 2022, DOC initiated revocation proceedings, alleging that Sellers committed five violations of the terms of his probation: (1) entering K.A.B.'s residence without her consent; (2) sexually assaulting K.A.B.; (3) taking $30 from K.A.B. without her consent; (4) several days later, walking on K.A.B.'s porch and looking through the windows of her home without her consent; and (5) providing false information to his probation agent. (R. 7:16-17.) Sellers stipulated to allegation (5) at the revocation hearing. (R. 8:80.)

In support of the remaining allegations, DOC introduced testimony by Milwaukee Police Officer Michael Walker, Michelle Burns, an analyst with the Wisconsin State Crime Laboratories, and Sellers's probation agent Geraldine Kellen. (R. 8:86-137.) The DOC chose not to present any testimony from K.A.B., the complaining witness and alleged victim. (R. 8:130.) Agent Kellen testified that she chose not to subpoena K.A.B. for the revocation hearing because "she can't 100% ID her assailant [so] I didn't feel it was necessary to have her come in and provide testimony and go through the trauma of her assault to only say she believes that Mr. Sellers could be the assailant, but she doesn't know 100%." (*Id.*) Sellers's admissible statement asserted that he had never been to K.A.B.'s residence and "did not sexually assault anyone." (R. 7:20.)

The Administrator, after reviewing the evidence de novo, decided not to revoke Sellers's probation. (R. 8:72-75.) Reversing an ALJ's initial decision to the contrary, the Administrator found that DOC had not proven any of the contested allegations. (R. 8:73.) The Administrator determined that "K.A.B.'s account of the events is critical to the DOC's allegations" as "the only account that describes the alleged non-consensual entry into K.A.B.'s home, the alleged non-consensual sexual contact with her, the alleged non-consensual taking of $30 from her, and the subsequent alleged trespassing on her property (which requires evidence of non-consent)." (R. 8:72.) The Administrator found that without K.A.B.'s testimony, Sellers's testimony denying the allegations was "the only non-hearsay account of what Sellers was actually doing." (R. 8:73.)

The Administrator found that to rely on hearsay statements that DOC attributed to K.A.B. would deprive Sellers of his constitutionally protected right to confront his accuser in violation of *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), *Black v. Romano*, 471 U.S. 606, 611-613 (1985), and *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶ 15, 250 Wis. 2d 214, 224–25, 640 N.W.2d 527, 533. (R. 8:72-73.) The Administrator evaluated whether there was good cause to justify denying Sellers of his right to confrontation and found there was not because DOC's choice not to subpoena K.A.B. was not due to any "difficulty, expense, or other barrier to obtaining live testimony." (*Id.*) He also determined there was no alternate path to admitting K.A.B.'s out-of-court statements under Wisconsin's rules of evidence. (R. 8:73.)

The Administrator then applied the relevant criteria and decided that, based on the only proven allegation (that Sellers provided false

information to his probation agent), as well as Sellers's subsequent confinement and intervening conduct, revocation of his probation was not warranted. (*Id.*) In making that determination, the Administrator noted that Sellers's probation officer, Agent Kellen, testified that "the DOC would not have pursued revocation for [only] the proven violation." (R. 8:74.)

DOC challenged the Administrator's decision on a petition for a writ of certiorari in circuit court, which reversed the Administrator's decision not to revoke Sellers's probation. (R. 2:3-10, 36:37-42; 47:1.) The circuit court stayed the effect of its decision pending this appeal. (R. 46:1-2.)

## STANDARD OF REVIEW

When a court of appeals reviews a writ of certiorari, it reviews the agency's decision, not the decision of the circuit court. *Kraus v. City of Waukesha Police & Fire Comm'n*, 2003 WI 51, ¶ 10, 261 Wis. 2d 485, 492, 662 N.W.2d 294, 297. When reviewing a revocation decision, the court of appeals "defer[s] to the decision of the Division of Hearings and Appeals, applying the same standard as the circuit court." *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶10, 250 Wis. 2d 214, 640 N.W.2d 527. The review is limited to the following questions: "(1) whether DHA kept within its jurisdiction; (2) whether DHA acted according to law; (3) whether DHA's actions were arbitrary, oppressive or unreasonable and represented its will rather than its judgment; (4) and whether the evidence was such that DHA might reasonably make the decision in question." *Id.*

## ARGUMENT

The Administrator's decision not to revoke Sellers's probation should not have been overturned by the issuance of a writ of certiorari because the record shows that: (1) he acted within his jurisdiction; (2) he acted according to law; (3) his decision was neither arbitrary, oppressive, nor unreasonable, and (4) he reasonably made the decision based on the evidence.

### I. The Administrator acted within his jurisdiction when he decided not to revoke Sellers's probation.

The Administrator's decision was within his jurisdiction under Wis. Stat. § 301.035 and Wis. Admin. Code § HA 2.05(9). The administrator of DHA has a statutory duty to "be the administrative reviewing authority for decisions of the division." *See* Wis. Stat. § 301.035. Upon an administrative appeal of the decision in a probation revocation hearing, the "administrator may modify, sustain, reverse, or remand the administrative law judge's decision based upon the evidence presented at the hearing and the materials submitted for review" and shall produce a written decision. *See* Wis. Admin. Code § HA 2.05(9). Here, in accordance with his jurisdiction as defined by statute and administrative code, the Administrator reviewed the ALJ's decision, reversed it, and produced a written decision. (*See* R. 8:72-75.)

### II. The Administrator acted according to law when he decided not to revoke Sellers's probation.

The Administrator's decision hinged primarily on his determination that relying on K.A.B.'s out-of-court statements would violate Sellers's constitutional rights, and that those statements therefore had to be excluded from evidence. (*See* R. 8:72-75.) DOC chose

not to call K.A.B. to testify at Sellers's hearing (R. 8:130) and relied instead on her out-of-court statements to provide her account of the events (R. 7:18-20, 23-24, 33-37, 40-41, 44-45; 8:32-33, 37-40, 87-93, 95-98, 130-131). Agent Kellen testified that she chose not to subpoena K.A.B. for the revocation hearing because "she can't 100% ID her assailant [so] I didn't feel it was necessary to have her come in and provide testimony and go through the trauma of her assault to only say she believes that Mr. Sellers could be the assailant, but she doesn't know 100%." (*Id.*) Sellers's admissible statement asserted that he had never been to K.A.B.'s residence and "did not sexually assault anyone." (R. 7:20.)

The Administrator correctly noted in his decision that "the right to confront and cross-examine adverse witnesses" is among the "minimum requirements of due process (unless the hearing officer specifically finds good cause for not allowing confrontation)," *Morrissey v. Brewer*, 408 U.S. 471, 488–89, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484 (1972), and that the ALJ did not make such a finding of good cause. (R. 8:72-73.) The Administrator also evaluated the record de novo and found "there was no basis upon which to find good cause." (R. 8:72-73.) The Administrator concluded that K.A.B.'s out-of-court statements could not be used without violating Sellers's constitutional right to due process, that DOC did not prove the relevant allegations, and that revocation of Sellers's probation was therefore not warranted. (R. 8:73-74.)

The Administrator's decision to exclude K.A.B.'s out-of-court statements was based on two well-established due process principles: (1) a defendant has a conditional right to confront adverse witnesses during a probation revocation hearing, and (2) there must be good

cause to deny a defendant's right to confront adverse witnesses. The Administrator correctly stated and proceeded according to each principle of law in his decision.

### A. The Constitution provides a defendant with a conditional right to confront adverse witnesses during a probation revocation hearing.

In revocation cases, a defendant has a Fourteenth Amendment right to confront adverse witnesses. In *Morrissey v. Brewer*, the United States Supreme Court affirmed that a revocation hearing must incorporate the "minimum requirements of due process." 408 U.S. 471, 489 (1972). This minimum due process includes "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Id.*

Although *Morrissey* involved parole revocation, the Supreme Court extended this holding to probation revocation proceedings. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (a case that arose from Wisconsin administrative probation revocation proceedings). The court held that administrative processes for probation revocation required the "conditional right to confront adverse witnesses" and the other minimum due process guaranteed in *Morrissey*. *Id.* at 786.

In both of those seminal cases, the Supreme Court deemed the right to confront an adverse witness guaranteed unless a hearing officer finds good cause to deny it because confrontation is the only way to ensure that "liberty is not unjustifiably taken away" from a parolee or probationer. *Id.* at 785.

In his decision, the Administrator properly cited and applied those well-established principles of law. (R. 8:72-73.)

### B. There must be good cause to deny a defendant's right to confront adverse witnesses.

A hearing officer must find there is "good cause" to deny a defendant's conditional right to confront adverse witnesses to "protect the defendant against revocation of probation in a constitutionally unfair manner." *Black v. Romano*, 471 U.S. 606, 611-613 (1985) and *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶15, 250 Wis. 2d 214, 224 - 225 (Ct. App. 2001) ("an ALJ may not avoid making [a good cause] finding whenever he or she determines that [hearsay] evidence is reliable.").

*Simpson* addressed whether it was permissible for a court to rely on the testimony of a minor's mother about the minor's out-of-court statements to prove allegations of her sexual abuse. *See* 2002 WI App 7. The court confirmed that "*Morrissey*, *Gagnon*, and *Black* hold unequivocally that hearing examiners must specifically find that good cause exists for not allowing confrontation of adverse witnesses." *Id.* The court further noted that a hearing examiner's failure to specifically make a good cause finding does not *require* automatic reversal. *See Simpson*, 2002 WI App 7, ¶¶ 15-16. "[T]he failure to make a specific finding of good cause is harmless [and therefore permissible] where good cause exists, its basis is found in the record, and its finding is implicit in the ALJ's ruling." *Id.* at ¶ 16.

Having found that Sellers had a conditional right to confront adverse witnesses at his revocation hearing, the Administrator went on to cite and apply the relevant law to determine that K.A.B.'s out-of-court statements must be excluded. (R. 8:73.)

## III. The Administrator's decision not to revoke Sellers's probation was not arbitrary, oppressive, or unreasonable.

On a petition for writ of certiorari, DOC has the burden of proving that the Administrator's decision was arbitrary and capricious. *See Von Arx v. Schwarz*, 185 Wis. 2d 645, 655, 517 N.W.2d 540, 544 (Ct. App. 1994). An agency's decision is not arbitrary and capricious "if it represents a proper exercise of discretion." *Id.* at 656. "A proper exercise of discretion contemplates a reasoning process based on the facts of record and a conclusion based on a logical rationale founded upon proper legal standards." *Id.* (internal citations and quotations omitted).

The Administrator properly exercised his discretion in determining (1) that there was no "good cause" to deny Sellers's Constitutional right to confront K.A.B. and (2) that based on the only proven allegation and the relevant factors, Sellers's probation should not be revoked. The Administrator's decision was not arbitrary and capricious, oppressive, or unreasonable.

### A. The Administrator properly exercised his discretion in determining that there was not good cause to deny Sellers's Constitutional right to confront K.A.B.

There are two recognized tests for determining whether there is good cause to deny confrontation at a revocation hearing. *See Simpson*, 2002 WI App 7, ¶¶ 20, 22. The first involves "a balancing of the need of the probationer in cross-examining the witness and the interest of the State in denying confrontation, including consideration of the reliability of the evidence and the difficulty, expense, or other barriers to obtaining live testimony." *Id.* at ¶20. The *Simpson* court cited the example in *State ex rel. Harris v. Schmidt*, 69 Wis.2d 668, 683–84, 230

N.W.2d 890 (1975), in which a court "upheld a hearing examiner's finding of good cause after both concluding that the hearsay evidence met the excited utterance exception under WIS. STAT. § 908.03 and that it was reasonable not to produce the witness because of the nature of the charge (sexual assault) and the age of the alleged victim (five years old).)" *Id.* at ¶ 20. The court also pointed to the good cause evaluation found in *Gagnon*, which discussed "the difficulty and expense of procuring witnesses" as a factor to consider with respect to a probationer's right to confront adverse witnesses. *Id.* (citing *Gagnon*, 411 U.S. at 782 n. 5, 93 S.Ct. 1756.)

Under the first test, the Administrator evaluated the record and determined there was no basis upon which to find good cause to deny Sellers's right to confront K.A.B. (R. 8:73.) K.A.B. is an adult. (R. 7:18.) No evidence exists in the record suggesting that she was unable to appear at the hearing. Nor is there evidence that K.A.B. was unwilling to participate or that securing her participation created any burden on DOC. As the Administrator noted in the decision, a DOC representative testified that she chose not to present K.A.B. because K.A.B. could not unequivocally identify Sellers as the assailant. (R. 8:130). As the Administrator also noted, there was no basis to find that there was any "difficulty, expense, or other barriers to obtaining live testimony" of K.A.B. *See Simpson*, 2002 WI App 7, ¶20.

Under *Simpson*, the second and alternative test provides that good cause can be "met when the evidence offered in lieu of an adverse witness's live testimony would be admissible under the Wisconsin Rules of Evidence." 2002 WI App at ¶22, 250 Wis. 2d at 229. Here, the Administrator evaluated the record and determined there was no basis

to find that K.A.B.'s hearsay statements were admissible under the rules of evidence. (R. 8:73.)

Upon his inspection of the record, in his discretion, the Administrator properly determined that there was no good cause to deny Sellers his right to confront K.A.B. (R: 8:73.) He detailed that Sellers had a strong need to cross-examine the witness because of the importance of her account of events to prove the allegations and evaluated DOC's stated reason for not having K.A.B. testify. (R. 8:72-73.) He properly noted that the hearing officer had not found good cause and that he had separately evaluated the record and determined there was "no basis upon which to find good cause." (R. 8:73.) That conclusion was neither arbitrary or capricious, oppressive, nor unreasonable.

### B. The Administrator properly exercised his discretion in determining that based on the only proven allegation and the relevant factors, Sellers's probation should not be revoked.

The Administrator concluded that, without admissible testimony providing K.A.B.'s account of the events, the only violation DOC had proven was the one stipulated by Sellers: that he had provided false information to his probation officer. (R. 8:73-74.) Administrator Hayes decided not to revoke Sellers's probation for that stipulated violation based on his evaluation of the relevant factors under the standard for revocation set by the Wisconsin Administrative Code. (*See* R. 8:73-74.) In his decision, he cited those factors and explained his reasoning:

> The decisions on revocation and confinement are governed by Wisconsin Administrative Code Chapter HA 2. In deciding whether to revoke supervision, findings

must be made "on the basis of the original offense and the intervening conduct of the client." Wis. Admin. Code § HA 2.05(7)(b)3. Furthermore, revocation is justified only if: (a.) confinement is necessary to protect the public from further criminal activity by the client; or (b.) the client is in need of correctional treatment which can most effectively be provided if confined; or (c.) it would unduly depreciate the seriousness of the violation if supervision were not revoked. Wis. Admin. Code § HA 2.05(7)(b)3.

Sellers was convicted of Delivery of Narcotics, a Class E Felony, in Milwaukee County Case No. 17-CF-4997 and he was placed on probation with a stayed sentence of two years and six months of initial confinement, followed by two years and six months of extended supervision. His intervening conduct has been mixed. He obtained some employment, which is positive. And he appeared to maintain sobriety for a number of months. However, he used cocaine and marijuana in January of 2021 and then used cocaine, marijuana, and alcohol from September through December of 2021. (Exh. 1 at 9, 15 - 16). He failed to report for supervision as directed on September 28, 2021. (Exh. 1 at 15). And, as stipulated, Sellers lied to his agent, as noted in allegation 5. But his agent testified that she would not have pursued revocation solely based on allegation 5, in the absence of any other violations. (May 4, 2022, Hearing Record Track 2 at 13:00— 13:31).

Sellers has been in custody on the allegations since February 25, 2022. (Exh. 1 at 12). That is a significant amount of time in response to the proven violation of providing false information to his agent. Based on the proven violation, revocation and confinement are not needed to protect the public from further crime or to prevent the undue depreciation of the seriousness of the violation. And, given the agent's testimony that the DOC would not have pursued revocation for the proven violation, revocation is not required for the purpose of providing confined correctional treatment. Accordingly, the underlying decision is reversed.

(*Id.*) The Administrator based his decision on the correct factors, explained his reasoning with citations to the record, and that reasoning reflects his thoughtful analysis and application of his discretion. DOC's own probation officer testified in Sellers's revocation hearing that "[w]e wouldn't be here if that was the only violation… I wouldn't have been proceeding or initiated revocation on Mr. Sellers not providing correct information." (R. 8:135.) The Administrator agreed with Sellers's probation officer and determined that revocation was not warranted based on the only proven violation. His decision was not arbitrary and capricious, unreasonable, or oppressive.

## IV. The Administrator's decision not to revoke Sellers's probation was one that he might have reasonably made based on the evidence.

The decision of whether to revoke probation is committed to the discretion of DHA. *See State ex rel. Lyons v. DHSS*, 105 Wis. 2d 146, 151, 312 N.W.2d 868 (Ct. App. 1981). Where there is substantial evidence, the agency's decision must be affirmed, even where the evidence supports a contrary determination. *Von Arx v. Schwarz*, 185 Wis. 2d at 656. "Substantial evidence" is evidence that is "relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion." *Cornwell Personnel Assoc. v. LIRC*, 175 Wis. 2d 537, 544, 499 N.W.2d 705 (Ct. App. 1993). On certiorari review, a court is not permitted to re-weigh or substitute a different view of the evidence in place of the Administrator's. *Van Ermen v. State Dep't of Health & Soc. Servs.*, 84 Wis. 2d 57, 64, 267 N.W.2d 17, 20 (1978). The agency's decision may be set aside only if "a reasonable man . . . could not have reached

the decision from the evidence and its inferences." *Omernick v. Dep't of Nat. Res.*, 100 Wis. 2d 234, 250-51, 301 N.W.2d 437, 445 (1981).

It was reasonable for the Administrator to find that there was insufficient evidence to prove the allegations. (*See* R. 8:73.) The only account of events to support the relevant allegations were the hearsay statements of K.A.B. (*Id.*) But that hearsay evidence could not be used without violating Sellers's due process right of confrontation. (R. 8:72-73.) As a result, the only non-hearsay account of events was that of Sellers, which was admissible because it was offered against him as a party opponent at the hearing, Wis. Stat. § 908.01(4)(b). (R. 8:73.) In Sellers's non-hearsay statement, he denied being at K.A.B.'s home and denied sexually assaulting anyone. (R. 7:28-31.)

Since K.A.B.'s hearsay statements were constitutionally impermissible and there was no good cause for not calling K.A.B. as a witness, the Administrator could not rely on K.A.B's statements. The only account of the events that may be used is Sellers's – which was a complete denial of the allegations. (R. 7:28-31; 8:73.) Therefore, it was reasonable to find that DOC did not meet its burden to prove that Sellers committed the alleged violations.

Based on the remaining evidence, it was reasonable for the Administrator to determine that Sellers's probation should not be revoked. Since the Administrator's findings on the evidence are reasonable, they are conclusive. *See Omernick v. Dep't of Natural Resources*, 100 Wis. 2d at 250-51. The Administrator reasonably made the order not to revoke Sellers's probation based on the evidence.

## CONCLUSION

Because the Administrator stayed within DHA's jurisdiction; acted according to law; was neither arbitrary, oppressive, nor unreasonable; and the evidence was such that he might reasonably have made the order or determination in question, the Court should overrule the circuit court and affirm the decision made by the Administrator and the DHA.

Respectfully submitted this 8th day of September, 2023.

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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 the brief is 3,827 words.

Dated this 8th day of September, 2023.

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