STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT I

Appeal No. 2023AP1140

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

On Appeal From a Decision and Order in the Milwaukee County Circuit Court,
The Honorable Thomas J. McAdams, Presiding
Milwaukee County Case No. 22CV4878

BRIEF OF INTERVENOR-CO-APPELLANT KEYO SELLERS

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1. In declining to revoke the probation of Keyo Sellers, did the Division of Hearings and Appeals (DHA) act within its jurisdiction?

   The circuit court did not answer.

2. Was the DHA's decision made according to law?

   The circuit court answered "No". (R. 36:37-40)

3. Was the DHA's decision arbitrary, oppressive or unreasonable and an exercise of its will rather than its judgment?

   The circuit court answered "Yes". (R. 36:40)

4. Was the DHA's decision one that could be reasonably made based on the evidence?

   The circuit court answered "No". (R. 36:40)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Intervenor-Co-Appellant does not believe that oral argument will be necessary in this case. We anticipate the issues in this case can be adequately presented to the Court in briefs. Wis. Stat. § 809.22(2)(b).

Publication of this decision will not be necessary as none of the criteria in Wis. Stat. § 809.23(1)(a) is likely to apply.

STATEMENT OF THE CASE

This is an appeal of a decision in the Milwaukee County Circuit Court, the Honorable Thomas McAdams, presiding, granting certiorari relief to the Wisconsin Department of Corrections, Division of Community Corrections, and reversing the decision of Brian Hayes, the Administrator of the Division of Hearings and Appeals, not to revoke the community supervision of Keyo Sellers.

A. FACTUAL AND PROCEDURAL HISTORY

Keyo Sellers was convicted on one count of Delivery of Sch. I or II Narcotics, as a Party to a Crime, in Milwaukee County Case 17CF4997 and was placed on probation for three years. (R. 7:51). He began his probationary supervision June 17, 2019. (R. 7:24).

According to documents introduced at his hearing, K.A.B. reported a home invasion and assault that took place on September 15, 2021. (R. 7:40). Five months later, on February 25, 2022, Keyo Sellers was detained by the Wisconsin Department of Corrections, Division of Community Corrections ("DOC"), and he was held in custody under a "hold" placed by his probation agent. (R. 7:25). The DOC subsequently requested revocation of Sellers' probation, alleging five violations of his Rules of Supervision on or around September 15, 2021: 1) that Sellers entered K.A.B.'s residence without her consent; 2) that he sexually assaulted K.A.B without consent; 3) that he took $30 from K.A.B. without her consent; 4) that one week later he trespassed on K.A.B.'s property, outside of her residence, without her consent; and 5) that he provided false information to his agent around the time the hold was placed on him. (R. 7:18). Sellers stipulated to Allegation #5. (R. 8:65).

A revocation hearing was held on March 29 and May 4, 2022, before Administrative Law Judge Martha Carlson ("ALJ") of the Division of Hearings and Appeals ("DHA") to determine if the remaining allegations were proven and if

revocation of Sellers' probation were necessary in response to the allegations that had been proven. (R. 61-66). At Mr. Sellers' revocation hearing, the DOC presented extensive Milwaukee Police reports and associated documents describing the investigation subsequent to K.A.B.'s initial report. (R. 7:46-50, 8:17-53). The portion of the Milwaukee Police report documenting the initial investigation and the interview of K.A.B. was not presented. A Probable Cause Statement, executed on December 29, 2001, was submitted instead. (R. 40-42). The DOC also presented a statement made by K.A.B. to Agent Kellen on January 25, 2022, (R. 7:33-37) and compulsory statements made by Mr. Sellers to DOC staff on January 12 and March 4, 2022, (R. 7:28-32) as well as other documents contained in the DOC's Revocation Packet (R. 7:14-51, 8:1-54). The DOC also produced the live testimony of Agent Kellen, Milwaukee Police Office Michael Walker and Michelle Burns, an analyst at the Wisconsin Crime Laboratories. (R. 8:86-137).

The ALJ determined that all of the remaining allegations had been proven and that revocation was appropriate. (R. 8:61-66). We note that, in so deciding, the ALJ quotes extensively from K.A.B.'s January 25th testimonial hearsay statement to Agent Kellen – K.A.B.'s quote comprises the bulk of two pages of the ALJ's written decision. (R. 8:63-64).

Sellers filed a timely administrative appeal and Administrator Hayes undertook a *de novo* review of the testimony and evidence presented at the hearing. (R. 8:69-74). In his written appeals decision, Hayes declined to revoke Mr. Sellers' probation. Hayes found first that there was no good cause for the failure of the DOC to call the accuser, K.A.B., to testify and be cross-examined, pursuant to *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶15, 250 Wis. 2d 214, 224 (Wis. App. 2002). In so finding, the Administrator determined that the hearsay statements of K.A.B. recorded in the police reports and by Agent Kellen and testified to by Officer Walker were not subject to any hearsay exception under the Wisconsin Rules of Evidence. (R. 8:73). He also determined that a balancing

of the defendant's need to be able to confront and cross-examine the accuser and the DOC's desire to prevent such confrontation (do, e.g. to factors such as "the difficulty, expense or other barriers to obtaining live testimony") weighed in favor of Sellers need to confront, as Agent Kellen did not claim that there were any barriers to producing K.A.B. for live testimony. Id. Having performed the balancing test and searched for exceptions to the hearsay rule, the Administrator correctly concluded, under *Simpson* and *Morrissey v. Brewer,* 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), that K.A.B.'s hearsay statements could not be used to revoke Mr. Sellers' probation without violating his constitutional rights. (R. 8:73).

In reviewing the evidence presented at the hearing, the Administrator made a factual finding that the contested allegations against Sellers could not be proven without K.A.B.'s account of events on the dates in question. Id. "It is the only account that describes the alleged [violations]". Id. Accordingly, those allegations were not proven. Id.

Administrator Hayes considered the one allegation that Sellers had stipulated to, providing false information to his agent, and found that revocation was not necessary to protect the public or to prevent undue depreciation of the seriousness of the violation. (R. 8:74). Hayes took into account Sellers history on supervision, the time he had already spent in custody on the hold and the agent's statement that the DOC would not have sought revocation on that allegation alone. Id. Sellers was released from custody at some point following DHA's decision not to revoke his supervision.

The DOC subsequently filed a Summons and Complaint against Administrator Hayes in the Milwaukee County Circuit Court, requesting certiorari relief and the reversal of the Division's decision. (R. 2). The issues were briefed and the court, the Hon. Thomas McAdams presiding, granted the relief prayed for, ordering that decision of the Division be reversed. (R. 36, 47). The court stayed it's ruling pending appeal. (R. 46).

STANDARD OF REVIEW

On appeal of a certiorari decision in the circuit court, the court of appeals reviews the decision of the governmental body, not the decision of the circuit court. *Questions, Inc. v. City of Milwaukee*, 2011 WI App 126, ¶ 13, 336 Wis.2d 654, 807 N.W.2d 131. "When reviewing a decision to revoke probation, [the Court of Appeals] defer[s] to the decision of the Division of Hearings and Appeals, applying the same standard as the circuit court." *Simpson*, 2002 WI App 7 at ¶10.

Review of administrative decisions in parole and probation revocation matters is "by certiorari directed to the court of conviction," *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 550, 185 N.W.2d 306, 311 (1971). The certiorari court is limited in its inquiry to examine:

> (1) Whether the Division kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was 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 or determination in question.

State ex rel. Foshey v. DHSS, 307 N.W.2d 315, 318, 102 Wis.2d 505 (Wis. App., 1981). It must be presumed that the agency "acted according to law and the official decision is correct and the weight and credibility of the evidence cannot be assessed." *State ex rel. Ruthenberg v. Anuity & Pension Bd. Of Milwaukee*, 89 Wis.2d 463, 473, 278 N.W.2d 835 (1979). "[T]he petitioner bears the burden to overcome the presumption of correctness." *Ottman v. Town of Primrose*, 2011 WI 18, ¶50, 332 Wis.2d 3, 796 N.W.2d 411.

ARGUMENT

A. The DHA acted within its jurisdiction.

When the DOC seeks revocation of community supervision, the DHA, not the circuit court, is authorized to conduct a final revocation hearing. *State v. Horn*,

226 Wis.2d 637, 646, 594 N.W.2d 772 (1999). In this case, the administrator of DHA exercised his authority, under Wis. Admin. Code § HA 2.05(9), to conduct a *de novo* review of Mr. Sellers' case and made the decision not to revoke his probation.

Having done so, "the administrator's decision is 'the final decision'". *State ex rel. Mentek v. Schwarz*, 2001 WI 32, ¶7, 242 Wis.2d 94. 624 N.W.2d 130. Having exercised his authority to make a final decision on behalf of his agency, it is the administrator's decision that is reviewed and no other. "Certiorari lies only to review a final agency determination." *State ex rel. Braun v. Krenke*, 146 Wis.2d 31, 39, 429 N.W.2d 114 (Ct. App. 1988).

B. The DHA acted accoding to law.

"In determining whether an agency acted 'according to law', a court sitting in certiorari considers whether the agency's decision comports with due process." *State ex rel. Greer v. Wiedenhoeft*, 2014 WI 19, ¶37, 353 Wis.2d 307, 845 N.W.2d 373.

Mr. Sellers has a due process right to confront and cross-examine his accuser in a revocation proceeding. See *Morrissey v. Brewer,* 408 U.S. 471, 488-89, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 782, (1973); *Black v. Romano*, 471 U.S. 606, 611-13, 105 S.Ct. 2254, 85 L.Ed. 2d 636; *Simpson*, 2002 WI App 7, ¶15. That right can be set aside upon a finding of good cause by DHA. Id. 'Good cause' can be found in one of two ways.

First, good cause is satisfied if hearsay statements made by the accuser would be admissible under the Wisconsin Rules of Evidence. See *Simpson*, 2002 WI App 7, ¶22. Secondly, good cause can be found as a result of "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." *Simpson*, 2002 WI App 7, ¶20.

"The need of the probationer in cross-examining the witness" is self-evident. Law enforcement personnel, corrections officers and written documents can't be effectively cross-examined as to details of an allegation. No questions can be asked of the witness that weren't asked, or accurately recorded, by the hearsay witnesses. Not all accusers are truthful, and they can be examined for the consistency of their account. In this case, the accuser could not identify her assailant and could have been asked details of her recollections by Sellers' counsel that might have made Sellers a more, or less, likely suspect.

A due process right to confront one's accuser in administrative hearings is particularly applied to the defendant in cases of revocation and potential reconfinement. The United States Supreme Court observed in *Morrissey,*

> …that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment.

Morrissey, 408 U.S. at 482.

In Mr. Sellers' case, the DHA examined the evidence offered at trial on behalf of the accuser, K.A.B. That evidence consisted primarily of a statement made to Agent Kellen and hearsay testimony from the officer describing what K.A.B. had told him. (R. 7:33-37, 8:87-91). After careful examination, the administrator determined that none of K.A.B.'s hearsay statements introduced at the hearing would be admissible under the Wisconsin Rules of Evidence. (R. 8:73). In considering the balancing test described in *Simpson*, the administrator considered that the DOC had not claimed any barriers to producing K.A.B. for live testimony. He notes that "Agent Geraldine Kellen testified that she decided not to present K.A.B. because K.A.B. could not unequivocally identify Sellers as the assailant. Id. Therefore, the administrator concluded that no good cause existed

for denying Mr. Sellers an opportunity to confront and cross-examine his accuser. Id.

The administrator in this case followed state and federal law on due process reasonably and faithfully executed his duty to ensure due process be extended to those facing revocation of community supervision.

C. DHA's actions were not arbitrary, oppressive or unreasonable and did not represent its will rather than its judgment.

The burden to prove that the DHA's actions were arbitrary or unreasonable rest with the party attacking that decision, here the DOC. See *Von Arx v. Schwarz*, 185 Wis. 2d 645, 655, 517 N.W.2d 540, 544 (Ct. App. 1994). "The agency's decision is not arbitrary and capricious and represents its judgment if it represents a proper exercise of discretion." Id. at 656. The agency properly exercises its discretion if it engages in "a reasoning process based on the facts and a conclusion based on a logical rationale founded upon proper legal standards." Id.

In this case, the DHA properly exercised its discretion, insofar as these matters were subject to discretion, in finding, first, that no good cause had been shown for failing to provide K.A.B. for live testimony (for reasons outlined above). Secondly, in finding that the one proven allegation did not require revocation to either protect the public or drive home the seriousness of the violation, the agency relied on the Sellers' mixed record on supervision, the amount of time he had already spent in custody awaiting hearing, the nature of the proven violation and the agent's statement that DOC would not have sought revocation on that allegation alone. (R. 8:73). Finally, in concluding that the disputed allegations against Sellers could not be proven without the hearsay statements of K.A.B. the administrator determined that K.A.B.'s account of events was "critical" to establishing the DOC's allegations. (R. 8:72) (as further explained in the next section).

The final decision of DHA demonstrates a proper exercise of its discretion.

D. The evidence supports the DHA order in question.

The evidence presented at the hearing is sufficient to support the ultimate decision of DHA in this matter.

In revocation hearings, the DOC has the burden of proving their allegations by a preponderance of the evidence. Wis. Admin. Code § 2.05(6)(f). On certiorari and appeal, the court considers a challenge to sufficiency of the evidence by examining whether substantial evidence supports the agency's findings. See *State ex rel. Washington v. Schwarz*, 2000 WI App 235, ¶17, 239 Wis.2d 443, 620 N.W.2d 414. If substantial evidence supports the agency's determination, the court must uphold that determination, even if the evidence might also support some other conclusions. See *Van Arx*, 185 Wis.2d at 656. The agency, not the court, weighs the evidence presented at a revocation hearing. See *Van Ermen v. DHSS*, 84 Wis.2d 57, 64, 267 N.W.2d 17 (Wis. 1978).

In examining the record, the administrator found that the only account that described the basic facts of the events underlying the contested allegations, that told the story, including the element of non-consent, were the hearsay statements of K.A.B. (R. 8:72). However, having found no good cause to deny Sellers an opportunity to cross-examine K.A.B., and lacking any exception under which her hearsay statements might be admissible, the administrator concluded that basing a finding that the allegations had been proven on the hearsay statements would violate Sellers constitutional right to due process. Id. "And without K.A.B.'s hearsay statements, there is no evidence to explain what took place." Id.

The substantial evidence test, which applies here, calls upon the court to determine whether reasonable minds could arrive at the same conclusions, based on the evidence, as reached by the agency. See *State ex rel. Ortega v. McCaughtry*, 221 Wis.2d 376, 386, 585 N.W.2d 640. "The facts found by the [agency] are conclusive if supported by any reasonable view of the evidence, and we may not substitute our view of the evidence for that of the [agency]." Id.

The DHA's decision that the allegations could not be proven without the hearsay statements of K.A.B. is reasonable and should not be disturbed. Supporting the administrator's finding, it should be noted that the ALJ relied upon a direct quote from K.A.B.'s written statement to Agent Keller that extends well over a full page in the ALJ's decision. (8:63-64). Without K.A.B.'s account, there is nothing to establish a basis for allegations 1-4. The administrator's view of the evidence presented in Mr. Sellers hearing is, at a minimum, entirely reasonable.

CONCLUSION

For the reasons stated herein, the decision and order of the Division of Hearings and Appeals regarding the revocation of the probation of Keyo Sellers does not fail scrutiny on any of the four questions reviewable by this Court. Accordingly, The Court should reverse the certiorari order of the circuit court and sustain the action taken by the agency.

Respectfully submitted this 17th 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), (bm) and (c) for a brief produced in proportional serif font. The length of the brief is 2,906 words.

Dated this 17th day of September, 2023.

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