FILED
11-10-2023
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COURT OF APPEALS

IN THE WISCONSIN COURT OF APPEALS
DISTRICT 1

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

REPLY BRIEF OF RESPONDENT-APPELLANT BRIAN HAYES

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ARGUMENT

In its brief, Petitioner-Respondent Department of Corrections ("DOC") misunderstands what decision is at issue in this matter and misapplies the applicable standard of review; concedes key arguments made in the opening brief of Respondent-Appellant Brian Hayes, Administrator of the Division of Hearings and Appeals (the "Administrator"); and fails in its evidentiary arguments to clear the high bar that the law requires here. The Court should overturn the circuit court and affirm the Administrator's decision not to revoke the probation of Intervenor-Co-Appellant Keyo Sellers ("Sellers").

I. The DOC wrongly focuses on the ALJ's decision when the decision under review is the Administrator's.

Throughout the DOC's brief, it refers to the initial decision issued by Administrative Law Judge ("ALJ") Carlson as if that decision were under this Court's review. It is not. For example, DOC incorrectly argues that: (1) "[t]he evidentiary burden for revocation is low and, if substantial evidence supported the revocation decision, it must be upheld" (Br. of Pet'r-Resp't 20-21); and (2) that the Administrator somehow "subverted the 'substantial evidence' standard by ignoring key non-hearsay evidence" presented to the ALJ (Br. of Pet'r-Resp't 24).

The DOC does not dispute the Administrator's argument that he acted within his jurisdiction in this matter because Wisconsin's Administrative Code provides him the authority to "modify, sustain, reverse, or remand" the ALJ's decision (Br. of Resp't-Appellant 11), and that issue is therefore conceded. *See O'Connor v. Buffalo Cty. Bd. of Adjustment*, 2014 WI App 60, ¶ 31, 354 Wis. 2d 231, 847 N.W.2d 881, review denied ("unrefuted arguments are deemed conceded").

Although the DOC cites the correct standard of review ("this Court's 'inquiry on [certiorari] review is limited to whether there is substantial evidence to support [DHA's] decision" (Br. of Pet'r-Resp't 20)), the "DHA" in this matter refers to the Administrator, not the ALJ.

The Administrator was not bound in any way to defer to any aspect of ALJ Carlson's decision under the *Von Arx* substantial evidence standard or on any other basis. *See Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540, 544 (Ct. App. 1994). Wisconsin's administrative code of the Division of Hearings and Appeals, which governs revocation proceedings, establishes a process to appeal the decision of the administrative law judge to the Administrator. *State ex rel. Mentek v. Schwarz*, 2001 WI 32, ¶ 7, 242 Wis. 2d 94, 624 N.W.2d 150; Wis. Admin. Code § HA 2.05(8) and (9). The code provides that the ALJ's decision is not final if a timely administrative appeal is filed. Wis. Admin. Code § HA 2.05(7)(i). Moreover, the note to § HA 2.05(8) states that the Administrator's decision is the "final decision and is not subject to further administrative review." *Mentek*, 2001 WI 32, ¶ 7, 242 Wis. 2d 94, 624 N.W.2d 150.

Accordingly, within the administrative appeal, the code authorizes the Administrator to reverse the ALJ's decision "based upon the evidence presented at the hearing and the materials submitted for review." Wis. Admin. Code § HA 2.05(9). Chapter HA 2 of the administrative code was promulgated pursuant to Wis. Stat. § 301.035(5). Therefore, these administrative code provisions carry the "force and effect of law." *See Law Enf't Standards Bd. v. Village of Lyndon Station*, 101 Wis. 2d 472, 488, 305 N.W.2d 89, 97 (1981). The Administrator's review of the ALJ's decision is de novo. *See State ex rel.*

Foshey v. Wisconsin Dep't of Health & Soc. Servs., 102 Wis. 2d 505, 516, 307 N.W.2d 315, 320 (Ct. App. 1981).

Put simply, the decision under review in this appeal is the decision issued by the Administrator (R. 8:72-75). It is that decision to which the standard of review applies. *See Goranson v. Dep't of Indus., Lab. & Hum. Rels.*, 94 Wis. 2d 537, 545, 289 N.W.2d 270, 274 (1980). The Court should ignore all of the DOC's arguments that reference the ALJ's decision as if it is the operative decision.

II. The DOC concedes that the Administrator acted according to law and properly exercised his discretion when he determined K.A.B.'s hearsay statements must be excluded from evidence.

The Administrator devoted a significant portion of his opening brief to an analysis of Sellers' due process right to confront K.A.B. and the lack of good cause to deny him that right. (*See* Br. of Resp't-Appellant 11-17.) The DOC's only response was to claim—with no basis in law—that the Administrator and Sellers forfeited any arguments about Sellers's due process rights because Sellers did not raise them himself in his initial administrative appeal of the ALJ's decision. (*See* Br. of Pet'r-Resp't 27-28.) Again, the decision under review here is the Administrator's. *See Goranson v. Dep't of Indus., Lab. & Hum. Rels.*, 94 Wis. 2d 537, 545, 289 N.W.2d 270, 274 (1980) (holding that waiver principals are not applicable even though the appellant did not raise the issue to the agency because "on judicial review, it is the findings of the Department which are scrutinized for their adequacy."). The Administrator's decision (R. 8:72-73) addressed Sellers's due process rights directly and those arguments are entirely proper for appellate review.

Rather than attempt to refute the Administrator's arguments, the DOC claims that the lack of good cause to deny Sellers's right to confront K.A.B. is immaterial because "[t]he case did not depend on the accuracy of K.A.B.'s account of the assault" and "non-hearsay evidence in the record aside from K.A.B.'s account proved that Sellers assaulted her and trespassed on her property by a preponderance of the evidence." (Br. Of Pet'r-Resp't 28.) The DOC's failure to respond and its position that K.A.B.'s testimony is irrelevant concedes the Administrator's arguments that he acted according to law and properly exercised his discretion when he determined K.A.B.'s hearsay statements must be excluded from evidence. *See O'Connor*, 2014 WI App 60, ¶ 31.

III. The DOC has not met its burden under the standard of review and cannot show that the Administrator's decision was not one that he might have reasonably made based on the evidence.

The remainder of the DOC's brief presents its own preferred view of the evidence in this matter (*see* Br. of Pet'r-Resp't 21-28), but the Court "is not called upon the weigh the evidence… [and] may not substitute its view of the evidence for that of [DHA.]" *Van Ermen v. State Dep't of Health & Soc. Servs.*, 84 Wis. 2d 57, 64, 267 N.W.2d 17, 20 (1978). The Court may not upset the Administrator's finding "even if it may be against the great weight and clear preponderance of the evidence." *Omernick v. Dep't of Nat. Res.*, 100 Wis. 2d 234, 250, 301 N.W.2d 437, 445 (1981). The only question is whether the Administrator's perspective is so contrary to the evidence that "a reasonable man… could not have reached the decision from the

evidence and its inferences." *Id.* Here, the DOC's arguments are unavailing.

The DOC's arguments on the evidence are as follows: (1) "DNA consistent with Sellers was retrieved from K.A.B.'s pubic area after the assault" (Br. of Pet'r-Resp't 21-22); (2) "security-camera footage from K.A.B.'s porch show[ed] a man who witnesses identified as Sellers peeping into the first-floor window, trespassing" (Br. of Pet'r-Resp't 23); and (3) that circumstantial evidence shows that K.A.B. was assaulted, because she "immediately called the police and reported the assault," "consented to a sexual assault forensic examination," and because she "installed a security system at her home" (Br. of Pet'r-Resp't 22). With regard to the DNA evidence, the DOC asks rhetorically: "[i]f Sellers was not the assailant, how did DNA matching his profile get on K.A.B.'s body?" (Br. of Pet'r-Resp't 22.) While the DOC is welcome to conclude that sexual assault is the only way one person's DNA may get on another person's body, that is not the only reasonable inference one could make. So too with the DOC's conclusions about the porch video and referenced circumstantial evidence.

The problem with the DOC's view of the evidence is that without K.A.B.'s testimony, there is no non-hearsay direct evidence in the record that an assault occurred at all. Without testimony explaining what occurred, testimony that Sellers's DNA was found on K.A.B. can only establish exactly that: that Sellers's DNA was found on K.A.B. Without testimony from K.A.B., even assuming that the porch video shows Sellers was on K.A.B.'s porch and looked into her windows a full week after the alleged assault, that is all it shows. A video recording of

a porch only shows what occurred on the porch—it cannot show that someone on the porch does not have permission to be there. DNA evidence in isolation does not prove anything about consent or the lack thereof, nor does video footage of a man on a porch.

The Administrator accurately noted in his decision that Sellers stood accused of entering K.A.B.'s residence without consent, sexually assaulting K.A.B., taking $30 from K.A.B. without consent, and being on K.A.B.'s porch on a different day without consent. (R. 8:72.) He explained why he determined K.A.B.'s testimony was necessary as follows:

> K.A.B.'s account of the events is critical to the DOC's allegations. It is 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 dollars [sic] from her, and the subsequent alleged trespassing on her property (which requires evidence of non-consent). Each of these allegations requires K.A.B.'s account of events… [W]ithout K.A.B.'s hearsay statements, there is no evidence to explain what took place. (R. 8:72.).

Whereas the DOC's arguments require leaps of reasoning, the Administrator's determination that K.A.B.'s account of the events was critical to proving the allegations is logical and reasoned. Nowhere in the decision did the Administrator claim that allegations requiring evidence of non-consent always require direct testimonial proof of that non-consent. However, upon his review of the record, in his discretion, the Administrator reasonably determined that K.A.B.'s account of the events was critical in the particular circumstances before him.

Neither the DOC nor this Court may substitute its own view of the evidence for that of the Administrator. *Van Ermen*, 84 Wis. 2d 57, 64 (1978). The Administrator reviewed the evidence and determined that it was insufficient to prove that Sellers had committed the contested violations of which he was accused. (R. 8:72-73.) Under the standard of review applicable here, the Administrator's decision was reasonable according to the evidence and must be sustained.

CONCLUSION

The Court should overrule the circuit court and affirm the decision made by the DHA Administrator.

Respectfully submitted this 10th day of November, 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 1,741 words.

Dated this 10th day of November, 2023.

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