STATE OF WISCONSIN

IN THE SUPREME COURT

Appeal No. 2023AP1140

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

Petitioner-Respondent-Petitioner,
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

RESPONSE TO PETITION FOR REVIEW OF KEYO SELLERS

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TABLE OF AUTHORITIES

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I.

In reference to the petitioner's first criteria for review, review by this Court is not needed to develop, clarify or harmonize Wisconsin law. See Wis. Stat. § 809.62 (1r)(c). The law governing evidentiary standards in agency revocation decisions and the right to confrontation in revocations is well settled. This case also does not meet the additional requirement in sec. 809.62 (1r)(c), stats. under subs 1, 2 and 3, that this case calls or the adoption of a new doctrine rather than simply the application of well-settled principles, or that the questions presented are novel, or that the question presented is a question of law rather than fact that requires resolution by this Court – nor does the DOC so allege.

While the DOC's arguments overlap across the three criteria they name, it alleges that DHA "ignored", "failed to consider", displayed "willful ignorance" and "did not consider the DNA and security camera evidence *at all*." Pet. for Rev. at 23, 24, 25 and 28 (emphasis in the original). The DOC however does not point to anything in the record or offer any evidence to support this claim. There is no evidence in the record that DHA failed to consider any of the evidence in Sellers' case. On administrative appeal of a hearing decision, the DHA Administrator is required to review the evidence and produce a written decision explaining the reasons for his action. See. Wis. Admin. Code § HA 2.05 (9). We are not aware of any rule that requires DHA to provide an exhaustive narrative of every phase of the hearing or a detailed critique of each witness and item entered into evidence.

In this case, the administrator examined the evidence and concluded that, absent K.A.B.'s live testimony, neither a sexual assault nor a trespass could be proven without violating Mr. Sellers' due process rights. "[W]ithout K.A.B.'s hearsay statements, there is no evidence to explain what took place." (R. 8:72). Had the DOC argued in the court of appeals that DHA was wrong in

its application of the two-pronged test from Simpson and succeeded, DHA would have then had to pick up the analysis where it left off and decide whether the evidence in this case, including K.A.B.'s hearsay statement, was sufficient to prove the allegations.[1] DHA's decision followed state and federal law correctly and, insofar as the administrator made factual determinations, they were well founded and certainly conclusions upon which reasonable minds might agree.

II.

As to the petitioner's second criteria, this case does not present a real and important question about federal constitutional law. See Wis. Stat. § 809.62 (1r)(a). The DOC claims the question to be, "under *Morrissey*, whether and in what circumstances out-of-court statements by sexual assault victims are admissible in a probation-revocation proceeding." Pet. for Rev. at 9. First, the DOC appears to be confused as to the admissibility of hearsay evidence in corrections revocation hearings. Hearsay is generally admissible at revocation hearings. See Wis. Admin. Code § HA 2.05(6)(d) and *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). Indeed, all of the hearsay offered by the DOC was admitted into evidence at Seller's hearing and is present in the record today.

The DHA, however, cannot base a finding that an allegation has been proven on any evidence in violation of the defendant's basic constitutional rights. In this case, like the right to be competent at the time of one's hearing or the right to be represented by counsel, the defendant has a right to confront and cross-examine his accuser that must be ensured by the DHA. "A hearing officer must find 'good cause' before denying this right in order to 'protect the defendant against revocation of probation in a constitutionally unfair manner'".

[1] That conclusion is not as self-evident as the DOC assumes. As the court of appeals notes, the DNA evidence that is consistent with Mr. Sellers is equally consistent with approximately 400 other African American males in the city of Milwaukee alone. See *Hayes*, 2023AP1140, 2024 WL 2146952 at ¶ 19.

State ex rel. Wis. Dep't of Corrs., Div. of Cmty. Corrs. v. Hayes, No. 2023AP1140, 2024 WL 2146952 (Wis. Ct. App. May 14, 2024) (unpublished); (Pet.'s App. 106) (citing *Black v. Romano*, 471 U.S. 606, 611-13 (1985); *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶ 15, 250 Wis. 2d 214, 640 N.W.2d 527). The limited right to confrontation in a revocation context arises not from the Sixth Amendment but from the Fourteenth Amendment's due process considerations. See *Morrissey*, 408 U.S. at 482.

The question of how a limited right to confrontation should apply in a revocation hearing was settled in Wisconsin 20 years ago by the court of appeals in *Simpson*. *Simpson* applied a two-prong test in which satisfaction of either prong would constitute 'good cause' for the hearing judge to dispense with the necessity of confrontation. If either, a) the proffered hearsay statement would be admissible under a well-established hearsay exception in criminal court, or b) a balancing test between the DOC's difficulty, expense or other reasons for wishing to deny confrontation with the defendant's need for cross-examination should weigh in favor of the state, then 'good cause' can be found. *Simpson*, 2002 WI App 7, ¶20.

The question of when a sexual assault victim should be excused from testifying is also not a new question. *Simpson* was a case involving that precise question. Rather than exempting an entire category of victim from a defendant's due process rights however, *Simpson* applied its two-pronged test and found 'good cause' under the residual hearsay rule, as the assault victim in that case was a very young child. See *Simpson*, 2002 WI App 7, ¶30.

From *Morrissey* to *Simpson*, courts have recognized that the right to confrontation is an important element of the defendant's right to due process and to the fair administration of justice. In a case where the accusing witness (not always a victim) is the only witness to an alleged violation of the rules, only that person can tell their story; only they can answer (sometimes innocuous) questions from counsel about the setting of the incident, the action

they observed, or didn't observe, that law enforcement did not think to ask or did not choose to ask, that may make it more or less likely that defendant is the person responsible.

In any event, the case under review is not an appropriate case to examine the DOC's argument that sexual assault victims should not be required to testify at revocation hearings against their will. In this case, we have no indication that K.A.B. had any objection to testifying. Reviewing the agent's testimony, the administrator found that "K.A.B. was not called to testify because the [DOC] voluntarily chose not to subpoena her". (R. 8:72). "In this case [the probation agent] testified that she decided not to present K.A.B. because K.A.B. could not unequivocally identify Sellers as the assailant." (R. 8:73). Well aware of the requirements of *Simpson* and *Morrissey*, the DOC chose not to present K.A.B. to testify for its own reasons, not as far as we know in response to any reluctance on the part of the witness.

The case under review does not present a real and important question about federal constitutional law. Any such questions are long settled and very clear.

III.

As to the petitioner's third criteria for review, this Court's review is not needed "to develop, clarify, and harmonize the law regarding how reviewing courts should conduct certiorari review when the agency's probation-revocation decision makes an error of law about the evidence it considers." Pet. for Rev. at 9, Wis. Stat. § 809.62 (1r)(c).

Again, we note that DOC does not allege, as sec. 809.62 (1r)(c), stats., requires, that one of three other conditions be present: that the case calls for a new doctrine, that the question presented is a novel one, or that the question is

one of law, rather than fact, that will recur unless settled by this Court. See id., subsections 1-3.

More importantly, none of the criteria argued by the DOC was raised or argued by them in the court of appeals. In Mr. Sellers' case, DHA performed the two-prong test required by *Simpson* and found that it could not excuse the witness' live testimony and could not find the allegations proven without her account of what had happened. The court of appeals observed that,

> [o]n appeal, DOC does not appear to argue that this conclusion was erroneous, and it concedes that DHA kept within its jurisdiction and acted according to law. Instead, DOC argues that ALJ Carlson did not need to find good cause to consider K.A.B.'s out-of-court, testimonial hearsay statements because she did not rely on any of these statements in reaching her conclusion to revoke Sellers' probation. DOC further argues that ALJ Carlson's decision to revoke was supported by substantial non-hearsay evidence, namely, the DNA evidence and surveillance camera footage.

Hayes, 2024 WL 2146952, ¶ 15; (Pet.'s App. 107) (footnote omitted).

The court found that that argument failed because the court does not compare the ALJ's decision to the administrator's, it reviews the ultimate decision of DHA and, in a question of the evaluation of evidence, it must defer to the agency if substantial evidence supports the agency's findings, even if evidence may also support a contrary conclusion. See id. at ¶¶ 16-17, citing *Van Arx v Schwarz*, 185 Wis. 2d 645, 656, 517 N.W. 2d 540 (Ct. App. 1994) ("On certiorari review, we are not permitted to re-weigh or substitute a different view of the evidence in place of DHA's", *Hayes*, at ¶ 17, citing *Van Ermen v. DHSS*, 84 Wis. 2d 57, 64, 217 N.W. 2d 17 (1978)).

The DOC is asking this Court to step into the decision making process of a state agency and tell the agency how to conduct its fact-finding and which evidence is persuasive and important. Indeed, only this Court is able to do that as the courts below have been restrained by the long-standing rule that courts may not substitute their own view of the evidence for conclusions made by the agency. Should Wisconsin courts be given the power to review agency hearing

results *de novo* and dictate to the agency how it should assess evidence, courts would likely be deluged by aggrieved parties in revocation cases, DOC disciplinary hearings, local zoning commission decisions and from a swath of other agencies and local bodies across the state. The chart cited by the DOC in its Petition for Review shows that of 3,027 corrections cases decided by DHA in 2023, only 39 were appealed to the circuit court.[2] (Pet. for Rev. at 9, footnote 1, referencing https://doa.wi.gov/Pages/LicensesHearings/CorApp.aspx). As a defense attorney who practices in revocation cases, undersigned counsel would be delighted if courts could be asked to relitigate determinations made by DHA, but that would be a fundamental reorganization of the function of agencies and local boards in Wisconsin. In its petition, the DOC offers no reason why that action would be desirable and proposes no framework for a new system of review.

Wisconsin law governing the authority of courts to review agency decisions by writ of certiorari is well established and action by this Court is not needed to clarify or harmonize it. The DOC disagrees with the conclusions made by DHA on the evidence in Sellers' case and, as in certiorari cases brought by many probationer-petitioners before them, the reviewing court has had to defer to the findings of the agency.

[2] This number includes a certain number of *pro se* writs filed by prisoners, usually with little chance of success. The Wisconsin Public Defender will appoint attorneys for writs of certiorari but only when convinced that a meritorious argument is at issue. Because of the deference courts are required to show to agency determinations, that number is exceptionally small.

CONCLUSION

For the reasons stated herein, the Court should deny the petitioner's Petition for Review.

Respectfully submitted this 27th day of June, 2024.

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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 (8g) for a brief produced in proportional serif font. The length of the brief is 1,977 words.

Dated this 27th day of June, 2024.

Electronically signed by Daniel R. Drigot

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this *Petition for Review* with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 27th day of June, 2024.

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