STATE OF WISCONSIN

IN SUPREME COURT

Case 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 FINAL ORDER OF THE
MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE THOMAS J. McADAMS, PRESIDING

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Hayes and Sellers's rationalizations for why Hayes's decision did not address the key, non-hearsay evidence that DOC submitted to prove Keyo Sellers's violations are unconvincing. DHA's decision also used an incorrect legal standard in disallowing statements from the victim as hearsay. This Court should reverse.

DHA's decision did not *mention* critical evidence, much less consider it. DNA evidence consistent with Sellers was found on K.A.B.'s pubic area shortly after she was raped, and a written report and lab-analyst testimony confirmed the DNA match. A witness testified with 99% certainty that Sellers was the person shown on surveillance videos one week after the assault, trespassing on K.A.B.'s porch. Substantial evidence does not support the decision not to revoke when DHA did not acknowledge, let alone consider, that probative evidence.

DHA's approach to a sexual-assault victim's not testifying at a probation-revocation hearing was inconsistent with the case law from this Court and the U.S. Supreme Court. *Morrissey v. Brewer*, 408 U.S. 471, 487, 489–90 (1972), and *State ex rel. Harris v. Schmidt*, 69 Wis. 2d 668, 684, 230 N.W.2d 890 (1975), set a lower bar for confronting a victim in civil probation-revocation cases than in criminal cases: as long as there is good cause for the victim's absence.

Here, there was good cause in the record for K.A.B.'s not testifying when she could not conclusively identify her masked assailant, and when other proof corroborated her accounts and established the violations by a preponderance of the evidence. There was no need to retraumatize K.A.B. at the hearing. DHA's view of a probationer's due-process rights would require a higher standard for a victim's not testifying at a revocation proceeding than in a criminal trial.

This Court should reverse.

ARGUMENT

I. DHA ignored evidence that established by a preponderance of the evidence that Sellers committed serious violations.

DHA's decision declined even to acknowledge—let alone consider and address—key DNA and security-camera footage and related hearing testimony that proved Sellers's serious violations by a preponderance of the evidence. An agency's decision is not supported by substantial evidence when the record includes no indication that it considered the relevant evidence at all.

A. DHA's decision does not show that DHA considered key DNA and security-camera evidence.

Hayes acknowledges that DOC must prove Sellers's rules violations by a preponderance of the evidence, but he then argues that, because DHA reviews de novo the evidence before the ALJ, that standard should excuse DHA's failing to address certain key evidence in its decision. (*See* Hayes Br. 15–16, 18, 28, 30.) He does not acknowledge that DOC's burden of proof did not change.

"'[P]reponderance of the evidence' means 'more likely than not.'" *Matter of R.I.B.*, 2023 WI App 9, ¶ 25, 406 Wis. 2d 170, 986 N.W.2d 325 (alteration in original) (citation omitted). The evidence here showed that it was more likely than not that Sellers committed the serious violations of which he was accused.

Credible testimony from Wisconsin State Crime Laboratories Analyst Michelle Burns explained that a specimen containing DNA consistent with Sellers was retrieved from K.A.B.'s pubic area shortly after she was assaulted. Specifically, Analyst Burns testified that a sample taken from K.A.B.'s pubic area in a SANE examination

shortly after the assault was consistent with Sellers's DNA profile, which would be found in only 1 in 278 African Americans. (R. 8:110, 114, 116.) DHA's decision did not mention, let alone address, this probative evidence.

In addition to the key DNA evidence, there were multiple pieces of circumstantial evidence that K.A.B. had been sexually assaulted without her consent. She immediately called the police and reported the assault. (R. 7:18, 19, 36, 45; 8:87, 90.) She consented to a sexual assault forensic examination at a hospital shortly after the assault. (R. 7:36, 46–48; 8:70, 90.) She installed a security system at her home a few days after the assault. (R. 8:90.) And Sellers never argued that he had consensual sexual contact with K.A.B. (R. 7:28–32 (Sellers's statements).) These undisputed facts are not hearsay, and they show that on September 15, 2021, K.A.B. was assaulted and did not consent.

As to whether Sellers trespassed on K.A.B.'s porch, a security camera took two videos of the trespasser peeping into her window, four minutes apart, after midnight on September 22, 2021. (R. 7:36, 1; 65–67.)

Two witnesses identified Sellers on that video. K.A.B. believed that the man in the videos was the same man who sexually assaulted her based upon his height, weight, build, approximate age, receding hairline, prominent forehead, and cigarette tucked behind his ear in the videos (because he smelled heavily of cigarettes). (R. 7:37.) Probation agent Geraldine Kellen knew Sellers and identified him in the videos. She testified that she was "99%" certain that "it was Mr. Sellers [in the videos] based on his appearance, based on his walk, and based on the fact that [she] supervised him, you know, for almost 18 months." (R. 8:129.) There was no reason for Sellers to be on K.A.B.'s porch late that night, and K.A.B. did not consent to his presence there, as evinced by the fact that K.A.B. installed security cameras around her residence

shortly after she was sexually assaulted. And the fact that he trespassed and window peeped one week after the assault corroborated K.A.B.'s statements that her attacker told her that he had been watching her for one year and had gone into her home when she was not there. (R. 7:34.)

DHA's decision addressed none of this non-hearsay evidence and demonstrated no consideration of it. Hayes argues that DHA's "decision shows that he was *aware of* the non-hearsay record evidence but did not consider it sufficient to prove the crucial 'non-consensual' element of four of the five charges against Sellers in the absence of K.A.B.'s testimony." (Hayes Br. 28 (emphasis added).) He also argues that he "determined the non-hearsay evidence was insufficient to justify revocation." (*Id.* at 30.) DHA's written decision contains no language showing that Hayes considered any of this evidence, much less considered it insufficient.

Hayes misconstrues DOC's argument as being that DHA "weighed the evidence incorrectly" and that DHA "should have considered the hearsay statements of Sellers's victim." (*Id*. at 7.) This is doubly wrong.

First, DOC is not arguing that DHA failed to properly *weigh* the evidence. DOC is arguing that DHA failed to even *consider* it.

Second, DOC argued that there was sufficient proof of the rules violations *without* K.A.B.'s hearsay statements. (*See* DOC Br. 25–29.) In other words, the *non*-hearsay evidence was enough to prove the violations by a preponderance of the evidence.

DHA's decision must be "based upon the evidence presented at the hearing." Wis. Admin. Code HA § 2.05(9)(a). DHA had to show its work and actually address the evidence. *Cf. Verhaagh v. LIRC*, 204 Wis. 2d 154, 160, 554 N.W.2d 678 (Ct. App. 1996) (review of an agency's exercise of discretion considers whether the decision "was made based upon the

relevant facts"). Without evincing its consideration and weighing of the evidence, Hayes erred as a matter of law, and the decision fails the substantial evidence standard.

B. DOC is not asking this Court to revisit the certiorari standards or rewrite the rules governing hearsay in revocation proceedings.

Hayes argues that DOC would like this Court to "rewrite the rules governing the reliance on hearsay in revocation hearings, and revisit the certiorari review standard." (Hayes Br. 15.) Not so.

First, DOC relies on the prevailing certiorari standard. DOC argued that DHA's decision was erroneous under the four-part certiorari rationale that the parties agree is the appropriate test. (DOC Br. 23, 26–29; Hayes Br. 8–9, 14–29; Sellers Br. 8, 15.)

DOC is not asking this Court to change that test, just apply it. Specifically, DHA's decision fails certiorari prongs three and four because it was "unreasonable and represented [DHA's] will and not its judgment," and "the evidence was such that [DHA could not] reasonably make the order or determination in question." *State ex rel. Washington v. Schwarz*, 2000 WI App 235, ¶ 16, 239 Wis. 2d 443, 620 N.W.2d 414 (citation omitted).

While the ALJ's decision is definitely *not* on review here, (*see* Sellers Br. 9–11), its reasoning as to the impact of the evidence is persuasive. The ALJ specifically relied on *non*-hearsay evidence in reaching her decision to revoke: the DNA evidence and security-camera footage and testimony identifying Sellers in that footage. (R. 8:65.) DHA's decision, in contrast, did not address Analyst Burns's probative, non-hearsay testimony or her DNA report whatsoever, even though this evidence was the focus of the ALJ's revocation decision. (R. 8:65 ("The credible testimony of Analyst Burns

confirms that a DNA profile consistent with Mr. Sellers was recovered from K.A.B. There is no credible explanation for why Mr. Sellers' DNA would be on K.A.B. but for the assault.").) DHA did not question Analyst Burns's credibility; instead, it did not address her testimony and conclusions at all.

DHA erred by failing to consider relevant evidence at all. And that evidence, along with the other circumstantial proof of K.A.B.'s non-consent to being assaulted and trespassed upon, was enough to prove Sellers's rules-of-supervision violations. (*See* DOC Br. 25–29.)

II. Under *Morrissey*, Sellers's conditional right to confront K.A.B. would not be violated by considering her out-of-court statements.

This Court can rule in DOC's favor without considering the hearsay evidence at issue, as the non-hearsay evidence proves Sellers's violations. If the Court reaches the question of whether K.A.B. was required to testify, it should conclude that she did not need to testify because there was good cause demonstrated in the record to excuse confrontation.

A. DHA misapplied the "good cause" standard under *Morrissey*, as the circuit court aptly reasoned.

Hayes argues that DHA correctly applied the *Morrissey* "good cause" standard to determine that K.A.B.'s statements cannot be relied upon without violating Sellers's due-process rights. (Hayes Br. 21–23; *see also* Sellers Br. 18–24.) That is incorrect.

As the circuit court recognized, DHA applied a standard for good cause that would be even stricter than the due process afforded a defendant in a criminal trial. (R. 36:40–41, App. 150–51.) That cannot be a correct conception of due process under *Morrissey*, and this Court should correct DHA's

error and reiterate why civil revocation proceedings should not be treated like criminal trials.

The circuit court's view of what due process requires is the correct one. The court explained that "[a]n ALJ can permissibly rely on hearsay and non-hearsay" (R. 36:28, App. 138), and "there were reasons supporting 'good cause'" for K.A.B. not testifying (R. 36:34 (citation omitted), App. 144). Specifically, K.A.B. could not identify her masked assailant, so "[i]t would have been a useless gesture to call her as a witness *not to identify* Mr. Sellers." (R. 36:34, App. 144.) The court explained that it was "a reasonable decision" to not have K.A.B. "relive her victimization" under the circumstances. (R. 36:34, App. 144.)

The court found that the ALJ gave "clear" reasoning for her decision about K.A.B. not testifying, and "simply chose to rely on the DNA evidence." (R. 36:35, 36, App. 145, 146.) While the ALJ did not expressly make a "good cause" finding, the reasoning to find "good cause" for K.A.B. not testifying "is found in the record." (R. 36:36, App. 146.) Ultimately, "[a] revocation hearing is clearly not a criminal trial, and a requirement was imposed here [by DHA] that does not exist even at a criminal trial where the burden of proof is much higher." (R. 36:36–37, App. 146–47.)

This Court should hold that, under *Morrissey* and its progeny, good cause was shown to exempt K.A.B. from confrontation by Sellers. Forcing her to testify would revictimize her with no utility to the revocation case because other, non-hearsay evidence proved the probation violations.

B. Applying *Morrissey*, Wisconsin courts have admitted out-of-court statements by a sexual-assault victim in revocation proceedings.

This Court will not be making new law if it holds that the *Morrissey* good-cause standard was met to excuse K.A.B.'s testimony. (*See* DOC Br. 31–33.)

Hayes argues that "DOC overstates this Court's precedent when it says, 'Wisconsin courts have recognized that *Morrissey* allows out-of-court statements by a sexual assault victim in revocation hearings.'" (Hayes Br. 33 (citation omitted).) He argues that *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, 250 Wis. 2d 214, 640 N.W.2d 527, and *Schmidt* "involved cases of alleged sexual assault of a young child, not an adult," so the standard should be different. (Hayes Br. 33.) Sellers argues for an affirmation of *Simpson*, but that case does not help him. (Sellers Br. 24.)

First, DOC has not misstated precedent. Hayes and Sellers do not explain why K.A.B. should be treated differently than the young victims in *Simpson* and *Schmidt*. The adult age of the non-testifying victim cannot be a sufficient reason to provide a probationer with an escape hatch from consideration of the additional, damning evidence admitted in his case.

Second, *Simpson* teaches that "hearsay, . . . is sufficient to prove a probation violation so long as the hearsay is reliable." 250 Wis. 2d 214, ¶ 30 n.6. And "the more reliable the proffered evidence is, the less necessary it would be for the State to show that obtaining a witness's live testimony would be difficult." *Id.* ¶ 21. Here, the DNA and security-camera evidence corroborate K.A.B.'s hearsay statements about the assault and trespass and make them sufficiently reliable to be considered without confrontation.

Hayes and Sellers interpret *Simpson* to foreclose consideration of K.A.B.'s statements because there was not a sufficient explanation for why she did not testify. (*See* Hayes Br. 33–37; Sellers Br. 20–24.) DOC disagrees that the explanation given was insufficient. Specifically, Agent Kellen testified that DOC did not subpoena K.A.B. to testify because "she told the police and she's told [Agent Kellen] she can't 100% ID her assailant," so Agent Kellen "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 that she believes that Mr. Sellers could be the assailant, but she doesn't know 100%." (R. 8:130.) Avoiding retraumatizing the victim was sufficient good cause under *Morrissey* when other evidence corroborated her account of the events.

Third, under Wis. Stat. § 911.01(4)(c), the hearsay rules do not apply in probation-revocation proceedings, so it would be incorrect to require heightened caution as to corroborated hearsay evidence from a victim when such evidence is expressly permitted by law.

Fourth, in *Schmidt*, this Court held that a hearing examiner "did not abuse his discretion"—specifically under *Morrissey*—in not having a five-year-old sexual-assault victim "produced for either examination or cross-examination, and it was not error in admitting hearsay statements by the boy concerning the incident made to his mother the next day, later to the probation agent, and to his mother at a later time about other facets surrounding the incident." *Schmidt*, 69 Wis. 2d at 684.

Even the dissenting justices in *Schmidt* explained that "a probation revocation hearing '. . . need not be a formal trial-type hearing and that technical rules of evidence need not be observed.'" *Id.* at 686 (Hansen, R.W., J., dissenting) (citation omitted). Relying on *Morrissey*, they explained that ". . . there is no thought to equate this second stage of pa[r]ole revocation to a criminal prosecution in any sense. It is a

narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." *Schmidt*, 69 Wis. 2d at 686 (Hansen, R.W., J., dissenting) (quoting *Morrissey*, 408 U.S. at 489). This was the correct approach to due process and good cause, and DHA should have followed it.

This Court has not expressly adopted the *Simpson* good-cause standard that Hayes and Sellers would like strictly enforced. Citing *Simpson*, Hayes and Sellers argue that good cause is limited to specific reasons for unavailability, but they misread the case. (*See* Hayes Br. 34; Sellers Br. 23.) *Simpson* was instead most concerned with the reliability of the evidence. That is why the court addressed the residual exception, under which hearsay evidence may be admitted if it "possesses 'circumstantial guarantees of trustworthiness,' comparable to those existing for enumerated exceptions." *Simpson*, 250 Wis. 2d 214, ¶ 23 (citation omitted). K.A.B.'s statements would meet that standard, as they were corroborated and reliable based upon the *non*-hearsay evidence, as argued above. Thus, under *Simpson*, K.A.B.'s statements should have been considered.

* * *

In sum, DHA failed to follow the correct standard under *Morrissey*, *Simpson*, and *Schmidt*. If uncorrected, DHA's position on the law will negatively impact victims and their families, in addition to allowing supervisees to avoid revocation when the evidence warrants it.

III. The court of appeals erroneously upheld DHA's refusal to revoke Sellers's probation.

Hayes argues that "[w]here 'substantial evidence' could support two contradicting conclusions, the court defers to DHA's determination." (Hayes Br. 38 (citing *Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994).) *Von Arx* did not so hold, and his argument fails.

Von Arx held that "[i]f substantial evidence *supports* the division's determination, it must be affirmed even though the evidence may support a *contrary* determination." 185 Wis. 2d at 656 (emphasis added). Here, substantial evidence does not *support* DHA's decision—the decision ignored the key, non-hearsay evidence that DOC relied upon to prove its case. And DHA's decision is not a *contrary* determination—it is a determination that did not grapple with the evidence at all.

An agency's decision fails the "substantial evidence" test when it ignores key evidence. That is because "reasonable minds could [not] arrive at the same conclusion [that DHA] reached" without similarly—and erroneously—ignoring the key non-hearsay evidence. *State ex rel. Ortega v. McCaughtry*, 221 Wis. 2d 376, 386, 585 N.W.2d 640 (Ct. App. 1998).

CONCLUSION

This Court should reverse the court of appeals.

Dated this 17th day of January 2025.

Respectfully submitted,

Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2996 words.

Dated this 17th day of January 2025.

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CERTIFICATE OF E-FILE/SERVICE

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

Dated this 17th day of January 2025.

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