COURT OF APPEALS
DECISION
DATED AND FILED

September 24, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1729 **Cir. Ct. No. 2011CV5177**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN EX REL. ARTHUR J. FARIOLE,

PETITIONER-APPELLANT,

V.

DAVID SCHWARZ, DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Arthur J. Fariole appeals the circuit court's order affirming a decision revoking his parole. Fariole argues: (1) that the circuit court should have held an evidentiary hearing; (2) that the circuit court should have allowed him to introduce evidence showing that the testimony of Gary Klotz, one

of the witnesses at the revocation hearing, was false; (3) that the circuit court erred when it stated that he admitted to a rule violation; (4) that the hearing examiner should not have allowed Klotz to testify by phone because it violated Fariole's constitutional right to confront and cross-examine the witnesses against him; (5) that the hearing examiner improperly admitted a written statement because it was hearsay; and (6) that he is entitled to a new parole hearing or, in the alternative, an evidentiary hearing based on newly discovered evidence. We affirm.

¶2 Fariole was convicted of first-degree sexual assault, armed burglary, and armed robbery in 1980. He was sentenced to fifty years in prison. He was paroled in 2003, but revoked in 2004. In 2010, he was again paroled. A few months after his second release, the department again sought revocation. The hearing examiner revoked Fariole's parole, concluding that he should serve the remainder of his sentence, twenty-four years. The circuit court denied Fariole's petition for *certiorari* review of the revocation proceedings without a hearing. Fariole appeals the circuit court's order.

¶3 An appeal of an order denying a petition for *certiorari* review of a parole revocation decision, we review the decision of the agency, not the circuit court. ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 385–386, 585 N.W.2d 640, 646 (Ct. App. 1998). Our review of the agency's decision is limited. ***State ex rel. Riesch v. Schwarz***, 2005 WI 11, ¶13, 278 Wis. 2d 24, 30–31, 692 N.W.2d 219, 222. We determine only whether: (1) the agency stayed within its jurisdiction; (2) the agency acted according to law; (3) the agency's action was arbitrary, oppressive or unreasonable; and (4) the agency might reasonably make the decision it did based on the evidence. ***Id.***

¶4 Fariole's first three arguments center on actions taken by the circuit court. He contends that the circuit court should have held an evidentiary hearing before making its decision, that the circuit court should have allowed him to introduce evidence that Klotz's testimony at the revocation hearing was false, and that the circuit court erred when it stated that he admitted to a rule violation. These alleged errors by the circuit court are not grounds for appellate relief because we review the decision of the agency, not the circuit court. ***State ex rel. Ortega***, 221 Wis. 2d at 385–386, 585 N.W.2d at 646. Therefore, we do not address these claims.

¶5 Fariole next argues that the hearing examiner should not have allowed Klotz to testify by phone because it violated his constitutional right to confront and cross-examine the witnesses against him. This argument, like others Fariole makes, mistakenly assumes that during the parole revocation proceeding, Fariole was entitled to the same rights that a criminal defendant enjoys. It is well established that "[a]n individual on parole is not entitled to the full range of constitutional rights accorded citizens." ***State ex rel. Ludtke v. DOC***, 215 Wis. 2d 1, 12, 572 N.W.2d 864, 869 (Ct. App. 1997). The Wisconsin Administrative Code explicitly permits appearances by telephone at parole revocation proceedings. WIS. ADMIN. CODE § HA 2.05(6)(a) (May 2010). Fariole had an opportunity to object to Klotz's appearance by phone, but did not. Moreover, Fariole's attorney was permitted to cross-examine Klotz by telephone during the hearing. The hearing examiner did not err by allowing Klotz to testify by phone.

¶6 Fariole next argues that the hearing examiner improperly admitted into evidence a written statement from James Nichols because it was hearsay. Hearsay is admissible during all administrative proceedings, including parole

revocations. WIS. ADMIN. CODE § HA 2.05(6)(d). The hearing examiner did not err by allowing Nichols's written statement.

¶7 Finally, Fariole argues that David Schwarz, the Administrator of the Division of Hearings and Appeals, should have granted his request for a new parole hearing or, in the alternative, an evidentiary hearing based on newly discovered evidence. Fariole contends he has an affidavit establishing that Klotz told people about a man who took his "money, dog and tools" in February, March, and April of 2010, before Fariole was released from prison. Fariole contends the story was similar to Klotz's testimony about him in this case, and therefore undermines Klotz's credibility.

¶8 "[W]hether a claim that newly discovered evidence entitles a probation revokee to an evidentiary hearing to determine whether a new probation revocation hearing should be conducted [is] governed by procedures analogous to those in criminal cases." ***State ex rel. Booker v. Schwarz***, 2004 WI App 50, ¶14, 270 Wis. 2d 745, 756, 678 N.W.2d 361, 368. A movant is entitled to a new trial based on newly discovered evidence if the following criteria are met:

> (1) [t]he evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial.

State v. Bembenek, 140 Wis. 2d 248, 252, 409 N.W.2d 432, 434 (Ct. App. 1987) (citation omitted).

¶9 We agree with Schwarz's conclusion that Fariole's assertions do not warrant a new hearing:

> [Y]our request for a new hearing on the basis of newly discovered evidence fails under point five in [***Bembenek***, which requires that "it must be reasonably probable that a different result would be reached."] The purported evidence that you cite as contradicting Mr. Klotz's testimony is not specific enough to cast doubt on any of the underlying findings and conclusions. Moreover, the allegations relating to Mr. Klotz were not the only ones proven at the final hearing. Independent of Mr. Klotz's testimony, the record established that you committed serious violations by visiting a shopping mall and lying to your agent. A new hearing is therefore not likely to result in a different outcome.

¶10 A single parole violation is sufficient grounds for revocation. *See* ***State ex rel. Cutler v. Schmidt***, 73 Wis. 2d 620, 622, 244 N.W.2d 230, 231 (1976). Fariole had multiple violations. Even if the affidavit had been more specific and had significantly undermined Klotz's credibility, a new hearing would not likely result in a different outcome because Fariole's parole was revoked for more violations than the one about which Klotz testified.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.