COURT OF APPEALS DECISION DATED AND FILED

September 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2844

Cir. Ct. No. 2013CV2632

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN EX REL. MATTHEW TYLER,

PETITIONER-APPELLANT,

V.

BRIAN HAYES, ADMINISTRATOR,
DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL GUOLEE, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Matthew Tyler, *pro se*, appeals an order affirming a decision of the Division of Hearings and Appeals that denied his motion to reopen his revocation case. Tyler claimed newly discovered evidence proved that Probation Agent Stephanie Lutz falsely stated he had completed a residential sex

offender treatment program and that she refused to correct the information. Because he was neither enrolled in such a program nor had he completed one, Tyler argued that this was an available alternative to revocation. The Division concluded that Tyler failed to meet the criteria for a new hearing based on newly discovered evidence set out in ***State ex rel. Booker v. Schwarz***, 2004 WI App 50, ¶12, 270 Wis. 2d 745, 678 N.W.2d 361. We affirm.

BACKGROUND

¶2 We previously affirmed the Division's decision to revoke Tyler's extended supervision. *See* ***State ex rel. Tyler v. Wiedenhoeft***, No. 2012AP2766, unpublished slip op. (WI App Aug. 22, 2013). To get a sense of the procedural background, we briefly set forth some of the underlying facts:

> In 2000, Tyler was convicted of sexual assault and was sentenced to twenty years' imprisonment, consisting of seven years' initial confinement and thirteen years' extended supervision. Conditions of his extended supervision included, "Continue counseling and other assessments to be determined. Sex offender group therapy." In 2008, Tyler signed a Rules of Community Supervision form setting out the terms of his release from prison. The form stated: "[I]n addition to any court-ordered conditions ... [y]ou shall make every effort to accept the opportunities and counseling offered by supervision." The form notified Tyler that his release could be revoked if he failed to comply with any of the conditions. Upon reaching his mandatory release date in 2008, Tyler was transferred on extended supervision to [Department of Health Services (DHS)] facilities and was ultimately committed as a sexually violent person under WIS. STAT. § 980.06.
>
> At Sandridge Secure Treatment Center, a DHS facility, Tyler withdrew from assessment and refused to participate in treatment in 2011. On that basis, [the Department of Corrections] sought revocation of Tyler's extended supervision. The administrative law judge [(ALJ)] agreed, and revoked Tyler's extended supervision.

> The administrator of the Division of Hearings and Appeals sustained that decision[.]

Tyler, unpublished slip op. ¶¶2-3.

¶3 At the end of our decision resolving Tyler's prior appeal, we noted:

> Tyler's argument that information before the court was false or inaccurate is not properly before this court. As the circuit court noted in its order denying the motion for reconsideration, certiorari review is confined to the record and the court does not weigh the evidence or conduct a *de novo* review. ***State ex rel. Conn. v. Board of Trustees of Wis. Ret. Fund***, 44 Wis. 2d 479, 482, 171 N.W.2d 418 (1969). Evidence that Tyler obtained almost one year after his revocation cannot be considered. In order to pursue a challenge based on a claim of newly discovered evidence, Tyler would be required to request the Division of Hearings and Appeals to reopen the revocation proceeding based on newly discovered evidence. ***State ex rel. Booker v. Schwarz***, 2004 WI App 50, ¶15, 270 Wis. 2d 745, 678 N.W.2d 361. The initial determination regarding the significance of newly discovered evidence should be made by the Division. ***Id.***

Tyler, unpublished slip op. ¶9. The Wisconsin Supreme Court denied review.

¶4 Tyler subsequently moved to reopen his revocation case. In the underlying revocation case, the ALJ explained:

> As discussed above Mr. Tyler argues that violations have not been established. He also argues that the department made no effort to consider feasible alternatives to revocation. He argues that the request for revocation should be denied.
>
> After considering all of the evidence I find that there is no reasonable alternative to revocation and that revocation of the supervision of Matthew Tyler is warranted. I find, as discussed above, that the department established violation 2 [i.e., refusal to cooperate with the treatment opportunities offered to him]. Further based upon the revocation summary and the agent's testimony I find that the department did consider alternatives to revocation.

¶5 This conclusion, Tyler argued, was based on the revocation summary Lutz prepared and on her false testimony that Tyler had completed the Beacon residential sex offender treatment program. Tyler claimed that he was neither enrolled in nor did he complete the Beacon treatment program or any other sex offender treatment program. Tyler asserted that because he did not complete the treatment program, there was an alternative to revocation available. He further submitted that other WIS. STAT. ch. 980 patients received alternatives to revocation for allegations similar to the ones he faced.

¶6 Tyler claimed to have established that there was false information before the ALJ and that the ALJ relied on the inaccurate information to revoke him. Consequently, he argued that the revocation decision lacked a rational basis and as such, was arbitrary and capricious.

¶7 The Division denied Tyler's request to reopen. After setting out the five-prong test for newly discovered evidence, the Division advised Tyler:

> You have not met these criteria. The evidence you present does not establish it is reasonably probable that a different result would be reached at a new hearing. You violated your community supervision rules by failing to cooperate with treatment at the Sand Ridge Secure Treatment facility. You had a full and fair hearing before the [ALJ] who found that this violation warranted revocation. The [ALJ] also found that no alternatives to revocation were appropriate. The proffered new evidence in your letter that other treatment programs may have been available as alternatives to revocation does not change this decision by the [ALJ]. You were not amenable to treatment as shown by your refusal to comply with treatment at the Sand Ridge Treatment facility and revocation was warranted. As a result, I can find no legally compelling basis in this record to either reopen the underlying hearing or to hold an evidentiary hearing on your motion.

On certiorari review, the circuit court affirmed.

ANALYSIS

A. Circuit court's acceptance of response brief.

¶8 At the outset, we briefly address Tyler's challenge to the circuit court's decision to accept the Division's response brief, which he argues was filed late and contained information outside the record.

¶9 Pursuant to the briefing schedule, the Division's brief was due on August 21, 2013. In a letter dated August 27, 2013, Tyler pointed out to the circuit court and to counsel for the Division that the Division's brief was late. Tyler asserted that this amounted to a concession by the Division that Tyler was entitled to relief.

¶10 The Division, in response to Tyler's letter, submitted a motion to file its response brief instanter. In the motion, counsel for the Division advised that he did not recall receiving a briefing schedule and could not locate one in his files. Additionally, the motion relayed that default judgments are never an option when courts are reviewing agency decisions on certiorari. *See, e.g.*, ***State ex rel. Treat v. Puckett***, 2002 WI App 58, ¶26, 252 Wis. 2d 404, 643 N.W.2d 515 (default unavailable in certiorari actions).[1]

¶11 In its decision, the circuit court found that Tyler was not prejudiced by the late filing and considered the Division's brief based on excusable neglect. We see no basis on which to overturn this discretionary decision. *See* ***Alexander***

[1] We are not persuaded by Tyler's argument that ***State ex rel. Treat v. Puckett***, 2002 WI App 58, 252 Wis. 2d 404, 643 N.W.2d 515, is distinguishable because in that case, Treat moved for a default judgment before the record was returned. *See* ***id.***, ¶25. This appeared to have little significance for the ***Treat*** court. *See* ***id.***, ¶25 n.15.

v. Riegert, 141 Wis. 2d 294, 298, 414 N.W.2d 636 (1987) (The circuit court's decision to modify a scheduling order is reviewed for an erroneous exercise of discretion.); *see also* ***Parker v. Wisconsin Patients Comp. Fund***, 2009 WI App 42, ¶10, 317 Wis. 2d 460, 767 N.W.2d 272 (Circuit courts have the inherent power to control their own dockets.).

¶12 Tyler further contends that the circuit court erroneously exercised its discretion by accepting the Division's brief because it contained information outside the record—namely, the circuit court's decision and order denying the petition for writ of certiorari Tyler filed after he was revoked and the listing of entries found on Wisconsin Supreme Court and Court of Appeals Case Access (WSCCA) related to Tyler's previous appeal. We disagree with Tyler's argument that this information should have been ignored. Instead, this information was properly subject to judicial notice. *See* WIS. STAT. § 902.01 (judicial notice proper for facts not subject to reasonable dispute); *see also* ***Johnson v. Mielke***, 49 Wis. 2d 60, 75, 181 N.W.2d 503 (1970) ("Generally, a court may take judicial notice of its own records and proceedings for all proper purposes. This is particularly true when the records are part of an interrelated or connected case, especially where the issues, subject matter, or parties are the same or largely the same.").

B. Newly discovered evidence.

¶13 Next, we address Tyler's claim that the Division should have granted his request for an evidentiary hearing based on newly discovered evidence that Lutz falsely stated he had completed a residential sex offender treatment program. According to Tyler, his revocation was based entirely on Lutz's credibility.

¶14 A person seeking a new revocation hearing based on newly discovered evidence must satisfy a five-prong test: (1) the evidence must have come to the moving party's knowledge after the revocation hearing; (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 that was introduced at the revocation hearing; and (5) it must be reasonably probable that a different result would be reached at a new hearing. *See* ***Booker***, 270 Wis. 2d 745, ¶12. We review the Division's decision, not that of the circuit court. ***Id.***, ¶10. Our review is limited to determining whether the Division stayed within its jurisdiction, acted according to law, was not arbitrary, oppressive, or unreasonable, and whether the evidence was such that the Division might reasonably make the decision that it did. ***Id.*** This court must affirm the Division's decision if reasonable minds could arrive at the same conclusion. ***Jackson v. Buchler***, 2010 WI 135, ¶39, 330 Wis. 2d 279, 793 N.W.2d 826.

¶15 We agree with the Division's conclusion that Tyler's assertions do not warrant a new hearing based on his failure to prove the fifth factor referenced above; i.e., it must be reasonably probable that a different result would be reached at a new hearing. As the State sums it up:

> Ultimately, Tyler could not have proven that it was outcome-determinative whether he had completed the Beacon program or whether Agent Lutz knew that he had not. It most certainly was not, as the Administrator decision confirmed, in articulating reasons that Tyler failed to fulfill the criteria for ***Booker*** relief. It simply did not matter whether there were one or many treatment programs "*available*" since the problem was that Tyler had—perhaps on a bad assumption—refused assessment for a treatment that was offered to him.

> Tyler tries to transform analysis of alternatives to revocation, after violations are found, into far more than it is.

(Record citations omitted.) We agree.

¶16 Even if we accept Tyler's contention that Lutz made false statements regarding his completion of the Beacon sex offender treatment program, Tyler has not established that a new revocation hearing would yield a different result. He claims that at a new hearing, his participation in a sex offender treatment program would be deemed a viable alternative to revocation; however, given his track record of refusing to be assessed for treatment—which led to the revocation proceedings in the first place—this court is not convinced.

By the Court.—Order affirmed.

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