COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-0543

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

STATE OF WISCONSIN EX REL.
DOUGLAS INGRAM,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed.*

Before Snyder, P.J., Anderson and Mawdsley,[1] JJ.

PER CURIAM. Douglas Ingram has appealed pro se from a trial court order quashing a petition for a writ of certiorari and affirming a decision of

[1] Circuit Judge Robert G. Mawdsley is sitting by special assignment pursuant to the Judicial Exchange Program.

the administrator of the Division of Hearings and Appeals (the Division) revoking Ingram's probation. We affirm the trial court's order.

Ingram was sentenced to a seven-year prison term on November 17, 1989. That sentence was stayed and Ingram was placed on a five-year term of probation, consecutive to another sentence. On October 30 and December 11, 1996, a hearing was held to determine whether his probation should be revoked based on threats made to Patricia Sikora. Following the hearing, the administrative law judge (ALJ) issued a decision finding that on September 6, 1996, Ingram came to Sikora's home and threatened her. The ALJ further found that on or about September 9, 1996, Ingram made threats by telephone to Sikora, threatening to kill his wife Diane Ingram and to poison Sikora's dog. In making these findings, the ALJ found Sikora's testimony to be credible and the testimony of Ingram to be incredible. It determined that these threats constituted violations of the conditions of Ingram's probation and ordered his probation revoked. The ALJ's decision was subsequently sustained by the Division administrator.

On appeal of a trial court order affirming a probation revocation decision, our scope of review is limited to the following issues: (1) whether the Division kept within its jurisdiction; (2) whether the Division acted according to law; (3) whether the Division's actions were arbitrary, oppressive or unreasonable and represented its will rather than its judgment; and (4) whether the evidence was such that the Division might reasonably make the decision in question. *See* ***Von Arx v. Schwarz***, 185 Wis.2d 645, 655, 517 N.W.2d 540, 544 (Ct. App. 1994). Based upon these standards, no basis exists to disturb the trial court's order.

Ingram's first contention is that he was denied due process when the ALJ required him to complete his cross-examination of Sikora, the primary

witness against him, through written questions rather than in face-to-face confrontation. Revocation of probation is a civil proceeding and the probationer is not entitled to the full panoply of rights afforded a defendant in the criminal process. *See* ***State ex rel. Vanderbeke v. Endicott***, 210 Wis.2d 502, 513, 563 N.W.2d 883, 887 (1997). The probationer is, however, entitled to due process of law. *See* ***id.*** at 513-14, 563 N.W.2d at 887. The minimum requirements of due process to be afforded a probationer include the right to confront and cross-examine adverse witnesses unless the ALJ specifically finds good cause for not allowing confrontation. *See* ***id.*** at 514, 563 N.W.2d at 887.

Ingram contends that due process was violated because the ALJ's decision to permit written questioning was based upon his counsel's conduct rather than his own. He contends that rather than limiting further cross-examination to written questioning, the ALJ should have required substitution of counsel or permitted cross-examination by telephone, by removing Ingram from the room, or by using a one-way mirror. Ingram also objects to the fact that Sikora's answers to the written questions were not notarized and to the fact that the questions were read to her by Mark Cacciotti, a probation agent who was a witness at the hearing, rather than Cacciotti's supervisor.

None of Ingram's arguments is sufficient to establish a due process violation. The record indicates that Sikora testified at the revocation hearing on October 30, 1996, completing direct examination and a portion of cross-examination. During direct examination she testified that she was having trouble breathing and that the police were protecting her because she feared for her safety based on Ingram's threats. After the ALJ interjected during cross-examination to direct defense counsel not "to badger the witness" and not to look at her "in the way [he was] looking at her," Sikora stated that she felt "very threatened here."

The ALJ then directed that a break be taken, noting that they were in a small room and that Ingram was "also engaged in the events." The ALJ also pointed out that Sikora was in tears and that defense counsel had to leave for a short time to attend another hearing.

At the end of the break, the ALJ was informed that Sikora had lung cancer, that she was having trouble breathing and had to go home to take medication, and that she would not be returning that day because she had no transportation. Cacciotti subsequently testified that Sikora was frightened, stating that after service of the revocation notice on Ingram, Sikora had received a phone call from an unnamed female who made threatening comments to her about her testimony against Ingram.

After receiving this information and being informed by defense counsel that he had about ten or fifteen more questions to ask Sikora on cross-examination, the ALJ, relying on WIS. ADM. CODE § HA 2.05(5), ruled that cross-examination of Sikora would be completed by written questions, which were to be prepared by defense counsel and submitted to Sikora. Defense counsel subsequently submitted written questions, which were read by Cacciotti to Sikora over the telephone. The questions and answers were tape-recorded and a written transcript was prepared.

WISCONSIN ADM. CODE § HA 2.05(5) was enacted to provide protective procedures for witnesses in light of ***State v. Thomas***, 150 Wis.2d 374, 442 N.W.2d 10 (1989). *See* WIS. ADM. CODE § HA 2 app. Note: HA 2.05. WISCONSIN ADM. CODE § HA 2.05(5)(b) provides that the testimony of a witness may be taken outside the presence of the probationer when there is a substantial likelihood that the witness will suffer significant psychological or emotional

trauma if the witness testifies in the presence of the probationer or when there is a substantial likelihood that the witness will not be able to give effective, truthful testimony in the presence of the probationer. It further provides that the ALJ shall indicate in the record that such testimony has been taken and the reasons for it, and the ALJ must give the probationer an opportunity to submit questions to be asked of the witness.

Contrary to Ingram's contention, the ALJ did not require the completion of Sikora's cross-examination by written questions based solely on the conduct of counsel. Instead, in a ruling fully setting forth its reasons, the ALJ considered Sikora's fear in coming to the hearing, a fear which arose from threats made against her. The ALJ also considered her tearfulness, her statement that she felt threatened during questioning, and her serious medical condition. He also specifically described the nature of counsel's cross-examination of Sikora and what amounted to a stare down of Sikora by counsel during cross-examination, a situation which had been discussed on the record as it occurred, including a statement by the ALJ indicating that Ingram was also engaged in the events. In addition, the ALJ considered the intimidating influence of Ingram's size and the small room.

Because the ALJ fully set forth the reasons for his decision and because those reasons support his finding that Sikora was substantially likely to suffer significant psychological or emotional trauma if required to testify in Ingram's presence, Ingram has failed to establish that his rights were violated by requiring written questions. In making this determination, we reject Ingram's claim that the ALJ was required to order a procedure less restrictive to Ingram than written questioning. WISCONSIN ADM. CODE § HA 2.05(5)(b) specifically provides that the ALJ must "give the client an opportunity to submit questions to

be asked of the witness." This is precisely what the ALJ did here. Moreover, the written questioning occurred after direct examination and extensive cross-examination. Ingram has not shown that the procedure prevented him from asking any material questions and thus has failed to show that he was prejudiced by the procedure.

Ingram also fails to show any prejudice arising from the fact that the questions were asked of Sikora by Cacciotti rather than his supervisor and were not notarized. The questions asked by Cacciotti were precisely the questions propounded by defense counsel, and the answers were both tape-recorded and transcribed. Who asked the questions was thus irrelevant. In addition, hearsay evidence as well as letters, affidavits and other material which would not be admissible at a criminal trial may be considered at a revocation hearing. *See* ***Morrissey v. Brewer***, 408 U.S. 471, 489 (1972); WIS. ADM. CODE § HA 2.05(6)(d). Because such materials may be relied on at a revocation hearing, we are not persuaded that the lack of notarization of Sikora's answers provides a basis for relief from the revocation order.

Ingram's next argument is that the ALJ failed to adequately set forth reasons for determining that Sikora was more credible than he. He also contends that there were inconsistencies in the evidence and that the ALJ therefore misused his discretion in relying on Sikora's testimony. In a related argument, he contends that the evidence was insufficient to support findings that he committed the alleged violations.

The State has the burden of establishing an alleged probation violation by a preponderance of the evidence at the revocation hearing. *See* ***Von Arx***, 185 Wis.2d at 655, 517 N.W.2d at 544. However, on appeal the

probationer bears the burden of proving that the decision was arbitrary and capricious. *See* ***id.*** A decision is not arbitrary or capricious if it represents a proper exercise of discretion. *See* ***id.*** at 656, 517 N.W.2d at 544. Discretion is properly exercised if the decision maker engages in a reasoning process based on the facts of record and reaches a conclusion based on a logical rationale and founded on proper legal standards. *See* ***id.*** This court may not substitute its judgment for the Division's decision to revoke a probationer, and it must uphold that decision if it is supported by substantial evidence, even if the evidence would also support a contrary determination. *See* ***id.*** Substantial evidence is evidence that is relevant, credible, probative and of a quantity that a reasonable fact finder would consider sufficient to support a conclusion. *See* ***id.***

As the fact finder, the ALJ had the authority to determine the weight and credibility of the testimony and to resolve inconsistencies between witnesses' testimony. *See* ***State v. Daniels***, 117 Wis.2d 9, 17, 343 N.W.2d 411, 415 (Ct. App. 1983). The ALJ found that the violations by Ingram were established based upon the testimony of Sikora. In his written decision he found Sikora's testimony to be "truthful, reliable, substantial and compelling." He also explained why he discounted the testimony of certain other witnesses and why he determined that the testimony of other witnesses was not determinative of the issues.[2] Contrary to Ingram's argument, the ALJ thus adequately set forth the reasons for his decision. In addition, because Sikora's testimony was not incredible as a matter of law and

[2] Ingram contends that the ALJ relied on an erroneous view of the evidence when he stated that Ingram denied being at the Sikora residence. Ingram states that he never denied being at the residence and that his written statement proves this. However, Ingram's probation agent, Mark Cacciotti, testified that when questioned about the incident Ingram initially denied being at the residence, but that Cacciotti did not write this down in the written statement he subsequently took from Ingram. The ALJ was entitled to believe Cacciotti's testimony and to rely on it as a basis for determining that Ingram was incredible.

because it supported the ALJ's findings that Ingram made threats to injure Sikora, her dog and Ingram's wife, substantial evidence supports the decision of both the ALJ and the Division.

Ingram also contends that the ALJ exceeded his authority by finding that Ingram made threats to harm Diane Ingram and Sikora's dog in a telephone call to Sikora on September 9, 1996, even though the charges made against him by probation authorities were all based upon his visit to Sikora's residence on September 6, 1996. This argument fails for several reasons. First, the "Notice of Violation and Receipt" served on Ingram alleged that he made the threats to injure Sikora, her dog and Diane Ingram "on or about" September 6, 1996, and did not allege that the threats concerning the dog or Diane Ingram took place in person rather than over the telephone. In addition, the "Final Revocation Hearing Notice" and the "Revocation Hearing Request" informed Ingram that he could have access to the evidence in the case, which included Sikora's written statement clarifying that the threat to her dog took place during a telephone conversation on September 9, 1996.

At the hearing, Ingram was able to question Sikora about the alleged threats and to present his own witnesses. Moreover, the original revocation hearing was continued from October 30, 1996 to December 11, 1996, with the supplementary written questioning of Sikora occurring between those dates. If Ingram was surprised by Sikora's testimony that some of the threats were made by telephone on September 9, 1996, rather than in person on September 6, 1996, he had ample time to prepare evidence and argument to rebut that testimony. Most importantly, Ingram fails to demonstrate that he was prejudiced in any manner by the fact that initial charging documents did not clarify that two of the three threats took place in a telephone conversation rather than in person on September 6, 1996.

The ALJ and the Division therefore did not exceed their authority in considering these matters.

Because Ingram has shown no basis to disturb the Division's decision upholding the revocation ordered by the ALJ, the trial court's order quashing the writ of certiorari and affirming the Division's decision must be affirmed.

By the Court.—Order affirmed.

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