COURT OF APPEALS
DECISION
DATED AND FILED

April 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP96 **Cir. Ct. No. 2013CV2633**

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

STATE OF WISCONSIN EX REL. JERMAINE MCADORY,

PETITIONER-APPELLANT,

V.

WAYNE WIEDENHOEFT , DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

Before Kessler and Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Jermaine McAdory appeals a circuit court order affirming the decision of the Administrator of the Department of Administration, Division of Hearings and Appeals (the Division). McAdory sought *certiorari* review of the Division's revocation of his extended supervision. The circuit court

denied relief. On appeal to this court, he argues: (1) the Administrator lacks authority over him because he has already completed his sentences; and (2) the evidence does not support the revocation decision. We reject his contentions and affirm.

BACKGROUND

¶2 McAdory pled guilty in March 2000 to burglary of a building or dwelling, and the circuit court imposed two years of initial confinement and five years of extended supervision. He pled guilty in December 2002 to delivery of cocaine, and the circuit court imposed twenty months of initial confinement and twenty-eight months of extended supervision. McAdory was released to extended supervision in both matters but the record reflects that his extended supervision was revoked on multiple occasions. In February 2012, he began serving his most recent period of extended supervision.

¶3 Police took McAdory into custody on September 10, 2012, based on allegations that he had assaulted two people that day. His supervising agent sought revocation of his extended supervision on behalf of the Department of Corrections, alleging that McAdory violated the rules of his supervision by: (1) verbally threatening a neighbor, Y.S., in June 2012; (2) physically assaulting a family member, W.L., in June 2012; (3) absconding from supervision on July 17, 2012; (4) physically assaulting another family member, T.R., on September 10, 2012; and (5) physically assaulting S.F. on September 10, 2012, when she attempted to intervene in the dispute between McAdory and T.R. McAdory demanded a hearing.

¶4 At the outset of the revocation hearing, McAdory stipulated to the allegation that he had absconded from supervision, and the administrative law

judge (ALJ) accepted the stipulation. The Department of Corrections then presented evidence to support the remaining claims. The ALJ found the evidence insufficient to support the allegations concerning Y.S. and W.L. The ALJ concluded, however, that the Department of Corrections proved the allegations concerning T.R. and S.F. The ALJ found credible S.F.'s testimony about the events of September 10, 2012, and the ALJ further credited the testimony of the officers who arrested McAdory on September 10, 2012. The ALJ found that the officers' testimony and reports, coupled with the photographs of S.F.'s injuries, all corroborated S.F.'s description of the assaults. Although McAdory testified and denied assaulting S.F. and T.R., the ALJ rejected McAdory's testimony as incredible and in conflict with S.F.'s reliable and forthright account.

¶5 The ALJ concluded that the three proven allegations warranted revocation of McAdory's extended supervision and ordered McAdory to serve all of the available reconfinement time remaining on his bifurcated sentences, specifically, two years, ten months and twenty-three days for his 2000 conviction, and ten months and two days for his 2002 conviction. McAdory appealed the ALJ's decision and order to the Administrator of the Division of Hearings and Appeals. The Administrator affirmed, and McAdory next sought *certiorari* review in the circuit court. The circuit court affirmed in turn, and this appeal followed.

DISCUSSION

¶6 *Certiorari* review of a revocation order of the Department of Administration, Division of Hearings and Appeals, "'is limited to four inquiries: (1) whether the [Division] acted within the bounds of its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will, not its judgment; and (4) whether the

evidence was sufficient that the [Division] might reasonably make the determination that it did.'" ***State ex rel. Tate v. Schwarz***, 2002 WI 127, ¶15, 257 Wis. 2d 40, 654 N.W.2d 438 (citation omitted). This court reviews the Division's decision, not the decision of the circuit court. *See* ***State of Wis.–Dep't of Corrections v. Schwarz***, 2004 WI App 136, ¶5, 275 Wis. 2d 225, 685 N.W.2d 585, *rev'd on other grounds*, 2005 WI 34, 279 Wis. 2d 223, 693 N.W.2d 703.

¶7 On appeal, McAdory asserts he has passed his maximum discharge date for his two consecutive sentences but the numerous revocations of his extended supervision have served to "add[] on additional time to [his] sentences[,] pushing [his] discharge dates back years at a time in the process." McAdory fails to understand the statutory scheme that governs him as a convicted offender serving determinate sentences imposed under Wisconsin law. In his view, the Division and the Department of Corrections have acted unlawfully by maintaining control over him for a period that exceeds the length of the original bifurcated consecutive sentences. McAdory is wrong.

¶8 WISCONSIN STAT. § 302.113(9)(am) (2013-14)[1] explains the consequences faced by an offender after revocation of his or her extended supervision. Under this statute, the Division shall, following an offender's revocation, "order the person to be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence." *See* ***id.***; *see also* § 302.113(9)(ag). The phrase "time remaining on the bifurcated sentence" is statutorily defined as "the total length of the bifurcated sentence, less

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

time served by the person in confinement under the sentence before release to extended supervision ... and less all time served in confinement for previous revocations of extended supervision under the sentence." *See* § 302.113(9)(am). Thus, following revocation of extended supervision, a person may be imprisoned for any portion of the total bifurcated sentence that the person has not already served in confinement. The time that the person has spent on extended supervision does not count in determining how much reconfinement time is available. *See* ***id.***

¶9 Because time spent on extended supervision is irrelevant when determining how much reconfinement time is available upon revocation, the statutory scheme permits a convicted offender whose extended supervision is revoked to serve a sentence that spans a longer period than the combined total of initial confinement and extended supervision imposed at the original sentencing. As one authority explains:

> [s]uppose, for example, that a person is convicted of a new Class G felony (for which the maximum initial term of confinement is five years and the maximum initial term of E[xtended] S[upervision] is five years) and that the [circuit court] judge imposes the maximum penalties. Assume that after serving five years in prison and four years on extended supervision, the ES is revoked. Upon the offender's return to court for sentencing after revocation, the judge has the full length of the original ES term (five years) to work with in fashioning a remedy.[2] The court might decide that the offender must be confined for two of

[2] When Wisconsin implemented the second phase of determinate sentencing, the legislature gave circuit court judges the power to select the amount of reconfinement to impose after revocation of extended supervision. *See* ***State v. Brown***, 2006 WI 131, ¶31, 298 Wis. 2d 37, 725 N.W.2d 262. Currently, the division of hearings and appeals in the department of administration decides how much reconfinement time to impose when, as here, the offender requested a hearing to challenge the revocation recommendation. *See* WIS. STAT. § 302.113(9)(ag).

> those five years. When those two years have been served, the defendant returns to ES status for ... "the remaining extended supervision portion of the bifurcated sentence." This phrase means the total length of the bifurcated sentence (10 years in the example) minus time already spent in confinement (seven years in the example) for a total remaining ES portion of three years. If the defendant serves out this disposition without additional revocation problems, the defendant will have spent a total of seven years in confinement and seven years on ES before being discharged.

Michael B. Brennan, Thomas J. Hammer, and Donald V. Latorraca, *Fully Implementing Truth-in-Sentencing*, WISCONSIN LAWYER, Nov. 2002, at 10, 48-49 (footnote added, footnotes in original omitted).

¶10 McAdory believes that the statutory scheme violates his right to be free from double jeopardy and leads to unlawful detention. Again, he is wrong. The prohibition against double jeopardy affords a convicted person protection against multiple punishments for the same crime. ***State ex rel. Ludtke v. DOC***, 215 Wis. 2d 1, 13, 572 N.W.2d 864 (Ct. App. 1997). As we long ago explained in the context of discussing indeterminate sentences that allowed for the possibility of parole: "'service in prison of time successfully served on parole and forfeited through revocation does not constitute punishment within the meaning of the double jeopardy clause.'" ***Id.*** at 14 (citation omitted). Rather, "[t]he possibility that [a] maximum discharge date will be extended is part of the parole ... system to which a prisoner's sentence is subject. That possibility does not arise out of a new sentence. It is part of the conditions which attached to the original sentence." ***State ex rel. Bieser v. Percy***, 97 Wis. 2d 702, 709, 295 N.W.2d 179 (Ct. App. 1980). Moreover, "'the denial of credit for time served on parole when a parole violator is returned to prison does not amount to an extension of the parolee's sentence, but rather is potentially a part of the original sentence, and hence not invalid for violation of the double jeopardy inhibition.'" ***Id.*** at 709-10 (citation,

brackets, and one set of quotation marks omitted). Accordingly, we reject McAdory's claim that the Division acted unlawfully by revoking his extended supervision and ordering him reconfined.[3]

¶11 McAdory also claims that the evidence presented at the administrative hearing was insufficient to sustain the revocation decision. We consider his claims pursuant to a demanding standard. "The evidentiary test on *certiorari* review is the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion that the ALJ reached." ***George v. Schwarz***, 2001 WI App 72, ¶10, 242 Wis. 2d 450, 626 N.W.2d 57 (italics added). We will not substitute our view of the credibility of the witnesses or the weight of the evidence for that of the administrative factfinder. *See* ***State ex rel. Washington v. Schwarz***, 2000 WI App 235, ¶26, 239 Wis. 2d 443, 620 N.W.2d 414.

¶12 McAdory first challenges the finding that he absconded from supervision. He tells us he failed to report to his supervising agent after July 17, 2012, because he had a "conflict" with the agent and her supervisor. He does not dispute, however, that his rules of supervision required him to report to his agent and inform her of his activities. Further, the record of the revocation hearing reveals he repeatedly acknowledged through counsel that he absconded, and he personally admitted on direct examination that, by absconding, he prevented his

[3] McAdory points to provisions in WIS. STAT. § 302.113(3)(c) that he claims limit the authority of the Department of Corrections to extend his sentences. McAdory misunderstands both the meaning and the scope of the authority that he cites. Section 302.113(3)(c) governs the authority of a prison warden or superintendent to extend an inmate's period of confinement in prison based on violations of prison rules. The subsection has no application to the facts of the instant appeal. McAdory's reliance on the text of § 302.113(3)(d)—which he incorrectly identifies as WIS. STAT. § 302.113(7)—is similarly misplaced.

agent from supervising him. Any violation of a condition of supervision, including a failure to report as required, is sufficient grounds for revocation. *See* ***State ex rel. Cutler v. Schmidt***, 73 Wis. 2d 620, 622, 244 N.W.2d 230 (1976). For this reason alone, the evidence is sufficient to support revocation here.

¶13 Nonetheless, for the sake of completeness, we briefly address McAdory's second challenge to the sufficiency of the evidence, namely, his bare-bones allegation that the evidence is insufficient to support revocation because witnesses to the events of September 10, 2012, gave statements that are "not consistent." This claim too must fail.

¶14 The ALJ considered the testimony of S.F. and concluded that it was credible. Although McAdory evidently believes that S.F.'s testimony was inconsistent with other evidence and should have been rejected, that decision rested with the factfinder. *See* ***Washington***, 239 Wis. 2d 443, ¶26. Based on the evidence that the ALJ deemed credible, coupled with McAdory's stipulation that he absconded for a period of nearly two months, the record amply supports the finding that McAdory violated the conditions of his extended supervision and earned revocation of his extended supervision.[4]

By the Court.—Order affirmed.

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

[4] In circuit court proceedings, McAdory complained about violations of due process during the administrative hearing, and he suggested that his mental health needs were not properly addressed during his periods of community supervision. McAdory has not briefed these issues on appeal. We deem them abandoned and do not address them. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344, 516 N.W.2d 463 (Ct. App. 1994).