

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 24, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 99-1001

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN EX REL. TRAVIS TUCKER,

PETITIONER-APPELLANT,

v.

**STATE OF WISCONSIN DIVISION OF HEARINGS AND
DEPARTMENT OF CORRECTIONS,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Racine County:
ALLAN B. TORHORST, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Travis Tucker appeals from an order of the circuit court affirming on certiorari review the decision of the Department of Corrections (DOC) revoking his parole. He argues on appeal that there was insufficient

evidence in the record to affirm the decision of the DOC. Because we conclude that there was sufficient evidence, we affirm.

¶2 Tucker argues on appeal that the evidence in this case did not support the DOC's decision to revoke his parole. Tucker was convicted of first-degree intentional homicide and sentenced to life in prison. He was paroled in November 1994. In September 1996, he was arrested for an incident that occurred in a bar. Apparently Tucker got into a dispute with the bar owner when he pulled out what appeared to be a gun and pointed it at the bar owner's head. When Tucker was arrested, the police found a starter pistol in his possession. A starter pistol is not a firearm. In January 1997, an administrative law judge determined that Tucker had violated his conditions of parole and that revocation was appropriate and necessary. Both the DOC and the circuit court upheld this determination. Tucker appeals.

¶3 On review of a parole revocation by certiorari, this court is limited to the following questions: "(1) [w]hether the board kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question." *State v. Goulette*, 65 Wis. 2d 207, 215, 222 N.W.2d 622 (1974). When the court considers whether the evidence was such that the DOC might reasonably have made the order or determination in question, the court's inquiry is limited to whether there was substantial evidence to support the DOC's decision. See *Van Ermen v. DHSS*, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978).

¶4 Tucker raises a number of issues in support of his argument that the DOC's decision was not supported by substantial evidence. Tucker's parole was revoked on four grounds: (1) he had consumed alcohol; (2) he had in his possession a starter pistol; (3) he pointed what appeared to a handgun at another person; and (4) he became verbally hostile and yelled at the arresting officers. All of these actions violated his rules of parole. Tucker argues that there was insufficient evidence to find that he had violated on the second, third and fourth grounds. He admits that he consumed alcohol, but argues that this violation was not serious enough to warrant parole revocation. We conclude that the evidence was such that the DOC might reasonably have reached the determination it did and therefore affirm.

¶5 The first reason Tucker's parole was revoked was that he consumed alcohol. Tucker admits in his brief that he consumed alcohol. The evidence at his hearing also established that he consumed alcohol. One of the officers involved in Tucker's arrest testified that he smelled a strong odor of alcohol on Tucker's breath. There was testimony that Tucker had a beer at the bar. There was sufficient evidence at the revocation hearing to support the finding that Tucker had violated his parole by consuming alcohol.

¶6 Tucker next argues that there was no evidence to support the finding that he violated the rules of his parole by being in possession of a weapon. Tucker contends that a starter pistol is not a gun under Wisconsin law, and, therefore, he cannot have violated the rule. However, Tucker was charged with violating two rules as a result of this conduct. One of these rules states that the person shall avoid all conduct "which is not in the best interest of the public welfare." The act of carrying and threatening someone with an object which has all the earmarks of an operable weapon does not serve the best interest of the public welfare. We

conclude that there was sufficient evidence in the record to support the finding that Tucker violated this rule of his parole.

¶7 Tucker also challenges the evidence establishing that he pointed a weapon at the bar owner. Tucker argues that the testimony was inconsistent on this issue and that these inconsistencies render the bar owner's testimony incredible. He asserts that no one but the bar owner saw the pistol. He also asserts that the bar owner's description of the gun did not match that of the starter pistol actually found on him. We conclude that there was sufficient evidence to support the finding that Tucker pointed a weapon at the bar owner.

¶8 The bar owner testified that Tucker pointed a gun at him. Tucker offered testimony of other witnesses who said they did not see Tucker do this. It was up to the finder of fact to determine which of these witnesses was more plausible. Further, the ALJ found that the starter pistol was small enough to be concealed in Tucker's hand so that no one else would have seen it. The ALJ concluded that it was possible that Tucker pulled out the pistol and pointed it at the bar owner while it remained completely concealed in his hand. The ALJ concluded: "By handling it in such a manner, none of the bar patrons would necessarily have seen it and no visible stir would have resulted." This is a reasonable inference to have drawn from the testimony. There was sufficient evidence to support the DOC's determination that Tucker pointed what appeared to be a gun at the bar owner.

¶9 Tucker also challenges this evidence on the basis of two inconsistencies in the bar owner's testimony. He argues that the bar owner testified that the starter pistol was not the weapon Tucker pointed at him. He also argues that the bar owner testified that he called the police to say there was person

with a weapon in his bar. The police testified that they had been sent to the bar because there was an unwanted person. Tucker argues that these two statements are inconsistent and affect the credibility of the bar owner's testimony. We disagree.

¶10 The starter pistol was found on Tucker when he was arrested. It is possible that he had another weapon and discarded it before being arrested. It is also possible, and certainly reasonable, that the bar owner was confused by the size of the weapon being pointed at him. The second alleged inconsistency is minor, and may not even be an inconsistency at all. Either the police dispatcher or the bar owner could have been mistaken about what the bar owner said when he called the police. Moreover, it is not unreasonable to describe a person brandishing a weapon as an unwanted person. These different statements do not make the bar owner's testimony incredible and do not affect the determination that Tucker pointed what appeared to be a weapon at the bar owner.

¶11 Tucker also challenges the evidence that he was hostile towards the police. The evidence, however, shows that he was. One of the officers testified that at the time of his arrest, Tucker made several threats to sue for false arrest, was loud and repetitive, and used profane language. There is sufficient evidence to establish that he violated this parole rule.

¶12 Tucker further argues that the parole agent did not consider alternatives to revocation. He is simply wrong. The agent testified that she had considered alternatives but rejected them as inappropriate in Tucker's case. Tucker also argues that she recommended revocation on the grounds that he had used a gun in this incident. This is a mischaracterization of her testimony. She did not testify that she recommended that Tucker be revoked because of her belief

that a starter pistol was a weapon. She testified that she recommended that his probation be revoked because of his conduct. It was the fact that Tucker brandished what appeared to be a weapon which led to her determination. For all these reasons, we affirm the decision of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

