COURT OF APPEALS
DECISION
DATED AND FILED

March 3, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP907 **Cir. Ct. No. 2014CV121**

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

STATE OF WISCONSIN EX REL. TORRENCE HARRIS,

PETITIONER-RESPONDENT,

V.

BRIAN HAYES, ADMINISTRATOR, DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County: BRIAN A. PFITZINGER, Judge. *Reversed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. The Wisconsin Division of Hearings and Appeals and its administrator Brian Hayes (collectively, the Division) appeal from a circuit court order that reversed, on certiorari review, the Division's decision not to

reopen an administrative proceeding in which it had revoked the extended supervision of Torrence Harris. The Division determined that Harris had failed to demonstrate by clear and convincing evidence that there was newly discovered evidence that would have led to a different result at Harris's revocation proceeding.

¶2 Applying the certiorari standard of review to the Division's decision, we conclude that the Division acted within its jurisdiction, according to law, and in a rational manner by applying the correct legal test, and that there was substantial evidence before the Division from which reasonable minds could have reached the same conclusion as it did. *See generally* ***George v. Schwarz***, 2001 WI App 72, ¶10, 242 Wis. 2d 450, 626 N.W.2d 57. Accordingly, we reverse the circuit court and reinstate the Division's decision not to reopen Harris's revocation proceeding.

BACKGROUND

¶3 The Department of Corrections sought to revoke Harris's extended supervision on two drug cases and an escape case based on multiple allegations, including that Harris had phone, text, and in-person contact over a period of several months with Rosalind Metcalf—a woman with whom his rules of probation prohibited him from having any contact; that he eventually shot Metcalf; and that he subsequently lied to his supervision agent about having contact with Metcalf. Harris eventually acknowledged having phone, text and in-person contact with Metcalf, but denied shooting her. Harris alleged that Metcalf had fabricated the shooting incident because Harris was the key witness in an arson case against Metcalf.

¶4 At the revocation hearing, Metcalf testified that Harris had shot her and denied any involvement in the arson, although she was at that time facing several criminal charges relating to it. After the hearing, Metcalf submitted a letter with additional allegations about the shooting, but the administrative law judge declined to consider it at Harris's request.

¶5 The administrative law judge found Metcalf's testimony that Harris had shot her to be credible because she had identified him as her assailant to a police officer she flagged down immediately after being shot, and it was not plausible that she had arranged to get herself shot just to incriminate Harris. The ALJ noted that the arson issue was a red herring because, if anything, the arson would have provided Harris with motivation to retaliate against Metcalf, thus strengthening the conclusion that Harris had in fact shot Metcalf.

¶6 After the Division revoked Harris's supervision, Metcalf entered a plea on the arson charge, and admitted at her sentencing hearing that she had started a fire at the residence where Harris had been staying with his children and their mother. Harris then sought to reopen his revocation hearing on the basis of newly discovered evidence, citing both Metcalf's admission and her letter.

DISCUSSION

¶7 The Division properly evaluated Harris's motion to reopen his revocation hearing according to the five-part test set forth in ***State ex rel. Booker v. Schwarz***, 2004 WI App 50, 270 Wis. 2d 745, 678 N.W.2d 361. The test requires: (1) that the newly discovered evidence came to the offender's knowledge after the revocation hearing; (2) the offender was not negligent in failing to seek the evidence earlier; (3) the evidence was material to an issue at the hearing; (4)

the evidence was not merely cumulative; and (5) the evidence makes it reasonably probable that a different result would be reached at a new hearing. ***Id.***, ¶12.

¶8 First, Metcalf's excluded letter does not constitute newly discovered evidence because it was produced during the original revocation proceeding, rather than coming to Harris's attention after the proceeding.

¶9 Next, the Division concluded that it was not reasonably probable that Metcalf's subsequent admission to the arson would result in a different result at a new hearing because the ALJ had already considered the possibility that Metcalf had actually committed the arson, and had specifically noted that if that was true, it would *strengthen* not weaken the likelihood that Harris had shot Metcalf, because it provided the motive for him to have done so. Additionally, the Division noted that the administrator on Harris's appeal had explicitly determined that Metcalf was credible with respect to the shooting "despite the arson." We are satisfied that reasonable minds could come to the same conclusion about the likely result at a new hearing, based upon the evidence before the Division.

¶10 Because we conclude that the Division was acting within its authority, according to law, rationally, and based upon the evidence in the record, we reverse the order of the circuit court, which has the effect of reinstating the Division's decision.

By the Court.—Order reversed.

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