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DISTRICT IV

July 12, 2016

To:

Hon. Richard G. Niess
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You are hereby notified that the Court has entered the following opinion and order:

2014AP1207 State of Wisconsin ex rel. Daryl O. Norris v. David H. Schwarz (L.C. # 2013CV2083)

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

Daryl Norris appeals an order affirming a decision revoking his extended supervision. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm.

Norris first argues that the requirement that he undergo sex offender treatment as a condition of supervision violated his right to due process because he was not convicted of a sex crime. Norris was convicted only of recklessly endangering safety. The respondent administrator does not respond to Norris's constitutional due process argument or his supporting case law, but responds only with a case discussing the requirements for conditions of supervision

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

to be acceptable under state statute. That is not an effective rebuttal because statutes cannot alter constitutional requirements or relieve the state from compliance with them.

However, we conclude that it is not necessary for us to address Norris's due process argument. Although the initial decision by the administrative law judge (ALJ) placed considerable emphasis on the seriousness of Norris's refusal to follow the sex offender rules, the division administrator's decision reviewing the ALJ placed less emphasis on that component. The administrator expressly stated that Norris was not being revoked in relation to sex offender treatment, but instead was being revoked for his refusal to participate in *any* programming, in violation of an alternative-to-revocation agreement that Norris had signed, and for disruptive conduct at the jail. Accordingly, we are satisfied that even if Norris is correct that he could not have been properly revoked for refusing to accept sex offender treatment, that would not be a basis for us to reverse the administrator's decision.

Norris next argues that the imposition of sex offender treatment rules was a violation of the plea agreement that dismissed the sex offense charges. However, even if this is true, it does not appear that this would lead to reversal of the revocation decision, for the reasons we discussed on the prior issue.

Norris next argues that Department of Corrections officials retaliated against him in various ways in response to his attempt to obtain review of his being classified as a sex offender, and that this retaliation violated Norris's First Amendment rights. This case is a certiorari review of an administrative decision. Our review is limited to the record brought up by the writ. ***State ex rel. Richards v. Leik***, 175 Wis. 2d 446, 455, 499 N.W.2d 276 (Ct. App. 1993). Norris's First

Amendment argument relies on facts that are outside that record, and therefore cannot be addressed in the context of certiorari.

Finally, Norris argues that the revocation process failed to comply with certain due process requirements. He argues that he was not given a sufficient opportunity to be heard because the ALJ did not allow him to do certain things during the hearing, but it appears that these were mainly proper efforts by the ALJ to limit the hearing to relevant matters. He argues that the ALJ was biased because of various rulings and statements, but none of these rise to the level that would be a due process violation.

Norris argues that he was denied the due process right to confront and cross-examine witnesses because the jailer who made the report about Norris's disruption there was not present as a witness. Instead, the ALJ relied on the deputy's report. In doing so, the ALJ concluded that the report was admissible hearsay because police reports are business records of a public agency and are highly trustworthy. Norris argues that the ALJ failed to make the required finding of good cause for not producing the witness. However, Norris fails to acknowledge that in the case he cites we concluded that failure to make such a finding does not require automatic reversal, and that a balancing test might be the appropriate way to address the issue. ***State ex rel. Simpson v. Schwarz***, 2002 WI App 7, ¶¶16, 20, 250 Wis. 2d 214, 640 N.W.2d 527. Norris does not attempt to apply such a test here, and therefore we conclude the argument is not sufficiently developed to result in reversal.

IT IS ORDERED that the order appealed from is summarily affirmed under WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals