COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP574 **Cir. Ct. No. 2004CV1615**

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

STATE OF WISCONSIN EX REL. MICHAEL CORNWELL,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ, ADMINISTRATOR, DIVISION OF HEARINGS AND APPEALS,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Michael Cornwell appeals from an order affirming the revocation of parole. He claims he was denied due process of law because revocation was based on his failure to cooperate with his parole agent and he never

had notice of that charge. He also argues that the evidence was insufficient for revocation and that requiring his compliance with sexual offender rules violates double jeopardy, ex post facto law and due process constitutional protections. We reject his claims and affirm the circuit court's order.

¶2 In 1985, Cornwell was convicted of kidnapping and endangering safety by conduct regardless of life. A related first-degree sexual assault charge was dismissed. On March 29, 2000, Cornwell was released from prison on parole. On January 7, 2004, Cornwell signed an alternative to revocation agreement and thereby acknowledged having violated rules of parole by maintaining an unapproved intimate relationship, failing to reside at his designated residence, permitting an adult to reside overnight at his residence, having unsupervised contact with minors, consuming alcohol, and falsifying a travel permit application. On January 9, 2004, Cornwell signed a new set of rules for community supervision, including standard sex offender rules. The sex offender rules provided that Cornwell was not to possess "nor view any sexually explicit material—visual, auditory, nor computer-generated—without prior agent approval."

¶3 The next month, Cornwell's computer was seized by his parole agent during a home visit when it was discovered that the computer harbored sexually explicit materials. Cornwell was placed in custody and served with notice of parole violations and request for revocation. The notice included the six previous

violations that Cornwell admitted in January 2004 and an allegation that between January 14 and February 13, 2004, he possessed sexually explicit material.[1]

¶4 The revocation hearing focused on the sexually explicit materials found on Cornwell's computer. Cornwell's position was that he did not intentionally acquire and save such material and that it was inadvertently downloaded to his computer by "spam" e-mails and the practice of "looping or mousetrapping." He had a computer expert testify about the deceptive practices of pornographic websites and how an individual can unknowingly open an unwanted e-mail causing pornography to download to the last file legitimately downloaded. The administrative law judge of the Division of Hearings and Appeals acknowledged that people can erroneously open pornographic e-mails and be the victim of "looping or mousetrapping." However, the ALJ found that because the materials on Cornwell's computer were saved in his "My Music" folder, Cornwell, even if the victim of unwanted e-mails, intentionally downloaded the pornographic images to the music folder on his computer. The ALJ noted that Cornwell's expert had not offered a specific plausible explanation as to how the materials could have inadvertently downloaded into saved music files. The ALJ went on to indicate that even if Cornwell did not intentionally download pornography, he knew he was having a problem with unwanted pornography in January and February of 2004 and failed to tell his agent. The ALJ found that Cornwell had been warned about having such materials and his failure to tell his agent about the problem demonstrated his unwillingness to be honest with his agent about his activities.

[1] There was also an allegation that Cornwell had been terminated from his sex offender treatment group but it was dismissed for lack of evidence.

¶5 Cornwell first takes issue with the last portion of the ALJ's decision. He argues that the ALJ found him guilty for "failing to tell his agent" and failure to cooperate with his agent and that he did not have notice of such charges. He claims he was denied his due process rights to a fair opportunity to defend himself against an allegation of failing to cooperate. He also contends the ALJ's reliance on his failure to cooperate demonstrates that the revocation is based on the ALJ's will and not substantial evidence of the rule violation.

¶6 When an appeal is taken from a circuit court order on administrative review, we review the decision of the agency, not the circuit court. *See* ***Hoell v. LIRC***, 186 Wis. 2d 603, 612, 522 N.W.2d 234 (Ct. App. 1994). Our review of the decision of the Division of Hearings and Appeals is limited to the following questions: (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 so as to represent its will and not its judgment; and (4) whether the evidence was such that the division might reasonably make the determination in question. ***Von Arx v. Schwarz***, 185 Wis. 2d 645, 655, 517 N.W.2d 540 (Ct. App. 1994). "At the revocation hearing the State has the burden of proving the alleged probation violation by a preponderance of the evidence. On appeal challenging a revocation decision, however, the probationer bears the burden of proving that the decision was arbitrary and capricious." ***Id.*** (citations omitted). If substantial evidence supports the division's determination, it must be affirmed. ***Id.*** at 656.

¶7 We disagree with Cornwell's contention that his parole was revoked on an unnoticed charge of failure to cooperate with his agent. The revocation was based on his possession of sexually explicit materials. In his argument, Cornwell has taken the ALJ's additional comments out of context and attempted to fashion

them into a separate ground for revocation. The ALJ's reference to Cornwell's failure to disclose a problem with unwanted pornography on his computer was the evidence the ALJ found to be indicative of a consciousness of guilt. Cornwell's nondisclosure and uncooperativeness was also found to be a factor justifying revocation of parole since it related to the ability to safely supervise Cornwell. Because the failure to cooperate was not an independent reason for revocation, there was no due process violation of inadequate notice.

¶8 We turn to Cornwell's contention that there was not sufficient evidence that he intentionally possessed sexually explicit material. An agent with the Sex Offenders Unit of the Department of Corrections testified that he examined Cornwell's computer for the purpose of determining if it contained sexually explicit materials. It was a function he had performed many times in his employment with the department. In addition to short video clips of sexually explicit materials found on Cornwell's computer, there was a downloaded program for a paid internet service to use a phone line for sexually explicit material. The agent opined that the pornography found in saved music files on Cornwell's computer had been intentionally saved because files which inadvertently download would usually be saved in a temporary internet folder. He explained that an individual would have to "right click" and use the "save as" function to download material to another folder. Cornwell's expert agreed that if files were being downloaded inadvertently, the files would normally be placed in a temporary internet folder. He did not know how the files inadvertently downloaded to the "My Music" folder. Although Cornwell argues that his expert was better, the ALJ did not reject the testimony of Cornwell's expert. The ALJ acknowledged that it was possible that Cornwell was the victim of "looping." Yet the location of the sexually explicit materials in the "My Music" folder was

unusual enough to support a finding that the materials had been deliberately placed there. The ALJ's finding that Cornwell's possession of the material was intentional is supported by substantial evidence.

¶9 Cornwell's final claim is that the sexual offender rules should not have been imposed as a condition of his parole because he was not convicted of a sexual offense. He claims the imposition of the sexual offender rules and classification violates the prohibition against double jeopardy by imposing additional punishment, that it constitutes the imposition of an ex post facto law, and that he was denied due process by not having the opportunity to be heard on the decision to characterize him as a sex offender. Cornwell raises these issues for the first time on appeal. We generally will not review an issue which is raised for the first time on appeal. *See* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992); ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). The issues are waived because they were not raised in the administrative proceeding.[2] *See* ***Santiago v. Ware***, 205 Wis. 2d 295, 324, 556 N.W.2d 356 (Ct. App. 1996). We do not address them.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

[2] Cornwell contends that he raised the issues at the administrative stage when he questioned his parole agent about the decision to place Cornwell in sexual offender treatment and impose the sexual offender rules. The questions asked of the agent were not sufficient to raise the constitutional claims.