COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3311

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

STATE OF WISCONSIN EX REL. CLARENCE PELTON,

PETITIONER-APPELLANT,

V.

DIVISION OF HEARING AND APPEALS, DIVISION OF PROBATION AND PAROLE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Clarence E. Pelton appeals from a circuit court order quashing his writ of certiorari. We conclude that there was sufficient evidence to support the conclusion that Pelton had violated a term of his probation, that the Department of Corrections did not exceed its jurisdiction in imposing a

no-contact provision on Pelton forbidding him to contact his wife, and that the Department acted within the law in revoking Pelton's probation. We reject Pelton's arguments to the contrary and affirm.

BACKGROUND

In June 1995, Pelton was on three concurrent terms of probation.[1] Condition 15N of his rules of probation read: "You shall have no contact with Dawn Pelton [Pelton's wife] in any manner. This includes in person, by phone, by mail, or through a 3rd party."

On June 9, 1995, Pelton was served with a notice of violation, and on July 6 and October 4, 1995, hearings were conducted. Among the witnesses who testified to Pelton and Dawn's contact despite the no-contact order were Richard Riley, Pelton's work supervisor; Debbie Peterson, a neighbor; and Penny Pelton, Pelton's step-mother. Riley's testimony went directly to the charged violation, alleged to have occurred on May 17, 1995, while the other witnesses offered general evidence tending to show a pattern of violations.

Pelton's probation was revoked by the Department of Corrections. Pelton appealed to the administrator of the Division of Hearings and Appeals, who affirmed. He then appealed to the circuit court, which affirmed. He now appeals to us.

[1] His underlying convictions were for second-degree sexual assault of a child, contrary to § 948.02(2), STATS., and two counts of felony bail jumping, contrary to § 946.49(1)(b), STATS.

STANDARD OF REVIEW

Judicial review of certiorari actions is limited to determining whether the administrative tribunal kept within its jurisdiction; whether it proceeded on a correct theory of law; whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and whether the evidence was such that the tribunal might reasonably make the determination in question. ***State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment***, 131 Wis.2d 101, 120, 388 N.W.2d 593, 600-01 (1986). As to this last question, the test is whether reasonable minds could arrive at the same conclusion reached by the administrative tribunal. ***Id.*** at 120, 388 N.W.2d at 600. A reviewing court on certiorari does not weigh the evidence presented to the tribunal. ***Van Ermen v. DHSS***, 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978). Our inquiry is limited to whether any reasonable view of the evidence supports the tribunal's decision. *See* ***State ex rel. Jones v. Franklin***, 151 Wis.2d 419, 425, 444 N.W.2d 738, 741 (Ct. App. 1989).

ANALYSIS

Sufficiency of the Evidence

We reject Pelton's argument that there was insufficient evidence from which to conclude that Pelton violated the terms of his probation. Pelton's work supervisor, Richard Riley, stated that Pelton contacted Dawn by phone. Although Pelton attempted to undercut Riley's credibility, the hearing examiner rejected this attempt and specifically found that Riley's testimony was clear and convincing and that Riley had no reason to lie. Riley's testimony was buttressed by that of Debbie Peterson, a neighbor, who testified that Dawn came to her crying and complaining of Pelton's recent ill-treatment during a time when the no-contact

provision was in effect, as well as by evidence from Penny Pelton, Pelton's step-mother.

Because we do not weigh the evidence, we do not consider Pelton's arguments about the witnesses' feelings toward him or their reliability. We conclude that a reasonable view of the evidence supports the tribunal's decision.

Jurisdiction of the Department

Pelton argues that the department exceeded its jurisdiction when it forbade him to contact his wife as a condition of probation. We reject this argument. Under § 973.10(1), STATS., when he was on probation, Pelton was under "the control of the department under conditions set by the court and rules and regulations established by the department." Under WIS. ADM. CODE § DOC 328.04(3)(L), Pelton was required to "[f]ollow any specific rules that may be issued by an agent."

Pelton argues, however, that his constitutionally protected rights of association were violated by forbidding him to contact his own wife. We disagree.

The constitutionality of a condition of probation is a question of law which this court reviews without deferring to the circuit court. ***State v. Miller***, 175 Wis.2d 204, 208, 499 N.W.2d 215, 216 (Ct. App. 1993). The freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the First Amendment. ***Board of Dirs. of Rotary Int'l v. Rotary Club***, 481 U.S. 537, 545 (1987). Further, the right to marry is constitutionally protected. *See* ***Loving v. Virginia***, 388 U.S. 1 (1967).

Nevertheless, a probationer's freedom of association may be restricted to further legitimate probation objectives. *See* ***Edwards v. State***, 74

Wis.2d 79, 81-85, 246 N.W.2d 109, 110-11 (1976). Thus, in ***Edwards***, a probationer was prohibited from associating with her co-defendant fiance. ***Id.*** at 80-81, 246 N.W.2d at 109-110. Because Pelton's prior treatment of Dawn made it rational to infer that he would again treat her in a manner incompatible with the lawful behavior required of a probationer, the condition was reasonably related to his rehabilitation. *See* ***id.*** at 85, 246 N.W.2d at 112.

Revocation Proceedings

Pelton argues that his due process rights were violated by the manner in which the revocation hearing was conducted. *See* ***Morrissey v. Brewer***, 408 U.S. 471 (1972) (due process requirements for revocation of parole); ***Gagnon v. Scarpelli***, 411 U.S. 778, 782 (1973) (same requirements apply to revocation of probation). Pelton argues that, until the second half of the hearing, which was held in October, he failed to receive Riley's statement to authorities concerning a particular call Pelton made to Dawn. Therefore, he contends that he was effectively denied the right to cross-examine Riley. We disagree. Riley was a witness at the July 6 hearing. At that time, he testified to essentially all the details that later became available through the statement. Further, Pelton sought no continuance, asked for no break, and made no objection on the record to the timing of receiving Riley's statement. He has therefore waived this issue. *See* ***Gebhardt Bros., Inc. v. Brimmel***, 31 Wis.2d 581, 583, 143 N.W.2d 479, 480 (1966). Put another way, the objecting party must give the tribunal an opportunity to correct its errors. *See* ***Herkert v. Stauber***, 106 Wis.2d 545, 560, 317 N.W.2d 834, 841 (1982).

Pelton also argues that the hearing examiner appeared to be biased against him. We disagree. We have examined the record and conclude that the

hearing examiner gave no evidence of bias. The fact that the hearing examiner ruled against Pelton is not evidence of bias.

Pelton further argues that the department failed to consider alternatives to revocation. *See* ***State ex rel. Plotkin v. DHSS***, 63 Wis.2d 535, 544-45, 217 N.W.2d 641, 645-46 (1974). This is untrue. On the record, the revocation summary recites that Pelton was offered a disposition of four months in the Rock County Jail as an alternative to probation, and had previously been offered alternatives within the community, but had failed to make use of them, and also that Pelton frequently violated his probation. The report concludes that Pelton did not take seriously the privilege of community supervision and that revocation was the only feasible alternative.

By the Court.—Order affirmed.

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