COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2821 **Cir. Ct. No. 2012CV558**

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

STATE OF WISCONSIN EX REL. ANDREW M. OBRIECHT,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Dane County: FRANK D. REMINGTON, Judge. *Affirmed.*

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Andrew Obriecht appeals the circuit court's order that denied Obriecht's petition for certiorari review of the decision of the Division of Hearings and Appeals (DHA) to revoke Obriecht's supervision in multiple

criminal cases.[1] Obriecht contends that: (1) he was denied due process at the revocation hearing; (2) his rules of supervision were vague and overbroad; (3) DOC lacked jurisdiction to revoke his supervision as to some of his convictions; and (4) the evidence was insufficient to support revocation. For the reasons that follow, we affirm.

¶2 The Department of Corrections (DOC) initiated revocation of Obriecht's supervision based on allegations of multiple rule violations.[2] Following a revocation hearing before an administrative law judge (ALJ), DHA revoked Obriecht's supervision. Following an unsuccessful administrative appeal, Obriecht sought certiorari review in the circuit court. The circuit court denied Obriecht's petition and motion for reconsideration. Obriecht appeals.

¶3 In an appeal of an order denying a petition for certiorari review of a revocation decision, we review the decision of the agency, not the circuit court. ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 385-86, 585 N.W.2d 640 (Ct. App. 1998). Our review is limited to whether: (1) the agency stayed within its jurisdiction; (2) the agency acted according to law; (3) the agency's action was arbitrary, oppressive, or unreasonable; and (4) the agency might reasonably make the decision it did based on the evidence. ***State ex rel. Riesch v. Schwarz***, 2005 WI 11, ¶13, 278 Wis. 2d 24, 692 N.W.2d 219. This inquiry includes consideration

[1] It appears from the record that Obriecht was on extended supervision in one case and parole in several other cases at the time of revocation. For ease of reading, this opinion uses the term "supervision" to refer to both extended supervision and parole.

Additionally, we note that Obriecht has also appealed the circuit court's order denying reconsideration. However, Obriecht raises no arguments in his briefs related to the reconsideration order.

[2] DOC alleged eight rule violations; the ALJ found that Obriecht violated four rules.

of whether due process was afforded. *See* ***State ex rel. Curtis v. Litscher***, 2002 WI App 172, ¶15, 256 Wis. 2d 787, 650 N.W.2d 43.

¶4 Obriecht argues that he was denied due process at the revocation hearing based on the following: (1) the ALJ ordered Obriecht's counsel to cease cross-examination of the minor victim of the sexual assault underlying the revocation proceedings; (2) the hearing room was arranged so that the victim testified without a direct view of Obriecht; (3) the ALJ admitted excerpts of recorded jail phone calls into evidence; (4) DOC amended its witness list two days prior to the hearing to include the victim; (5) DOC failed to obtain an extension of the time to hold the revocation hearing; and (6) DOC's notice of rule violations did not specifically state that Obriecht acted without agent approval. We discern no due process violation.

¶5 Obriecht contends first that he was denied his right to cross-examine an adverse witness when the ALJ limited Obriecht's counsel's questioning of the victim. *See* ***Morrissey v. Brewer***, 408 U.S. 471, 488-89 (1972) (minimum requirements of due process at revocation proceedings include the right to confront and cross-examine adverse witnesses). He also contends that he was denied his right of confrontation because the witness testified by video-conference, and Obriecht was situated in the hearing room such that the victim could not view him while she testified.

¶6 Revocation is an informal procedure that does not implicate the full panoply of rights that apply in criminal proceedings. ***Id.*** at 480. While minimal due process required at revocation proceedings includes the right to confront and cross-examine adverse witnesses, that right may be limited if the hearing officer specifically finds good cause for not allowing confrontation. ***Id.*** at 489.

Moreover, "the failure to make a specific finding of good cause is harmless where good cause exists, its basis is found in the record, and its finding is implicit in the ALJ's ruling." ***State ex rel. Simpson v. Schwarz***, 2002 WI App 7, ¶16, 250 Wis. 2d 214, 640 N.W.2d 527 (WI App 2001).

¶7 Here, Obriecht was afforded the opportunity to cross-examine the minor victim. Obriecht's counsel was able to elicit from the victim that she had given inconsistent reports of her interactions with Obriecht. When Obriecht's counsel continued to question the victim about statements she made to police, the ALJ interrupted and stated that the victim already admitted that she made inconsistent statements and that Obriecht's counsel could use the police reports in his argument.[3] The ALJ pointed out that Obriecht was putting the victim in a difficult position by going through all of the police reports. Obriecht's counsel then stated he would stop if so directed, and it appears the ALJ directed counsel to stop.

¶8 While the ALJ did not make a specific finding of good cause to limit the cross-examination, the record makes clear that good cause existed based on the fact that the cross-examination was becoming repetitive and uncomfortable for the minor victim. The ALJ clearly relied on its determination that the record had already been established, the victim did not dispute that she made inconsistent statements, and the questioning was becoming difficult for the victim. Accordingly, the limitation on cross-examination did not violate Obriecht's due process rights.

[3] The transcript indicates that it was the DOC agent that interrupted the cross-examination, but both Obriecht and the State indicate that it was the ALJ.

¶9 As to the arrangement of the room during the revocation hearing, the record establishes that at one point the ALJ asked the victim to identify Obriecht. The victim stated that she could not see him. The ALJ noted that Obriecht was chained to the floor, and asked the deputy to move him for a moment so that the victim could identify him. The victim was then able to view and identify Obriecht.

¶10 While Obriecht contends that his right to confrontation was violated because the victim could not personally view him during her testimony, he does not develop an argument that due process required that the minor victim view Obriecht during her entire testimony at the revocation proceedings. We note again that "[a]n individual on [supervision] is not entitled to the full range of constitutional rights accorded citizens." *See* ***State ex rel. Ludtke v. DOC***, 215 Wis. 2d 1, 12, 572 N.W.2d 864 (Ct. App. 1997). For example, the Wisconsin Administrative Code explicitly permits appearances by telephone or video-conference at revocation proceedings. *See* WIS. ADMIN. CODE § HA 2.05(6)(a). Moreover, Obriecht had an opportunity to object to the arrangement of the room during the hearing but did not, and thus waived the objection. *See* ***Saenz v. Murphy***, 162 Wis. 2d 54, 63, 469 N.W.2d 611 (1991), *overruled on other grounds by* ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, ¶¶29-31, 234 Wis. 2d 626, 610 N.W.2d 821 (explaining that an exception to the waiver rule exists for issues that present only a question of law). Finally, we note that Obriecht's counsel was able to cross-examine the victim, as outlined above. We discern no due process violation of Obriecht's right to confrontation based on the arrangement of the room during the hearing.

¶11 Next, Obriecht contends that the ALJ erred by admitting excerpts of jail phone calls rather than the entire recordings, citing the evidentiary rule of

completeness. *See* ***State v. Sharp***, 180 Wis. 2d 640, 653-54, 511 N.W.2d 316 (Ct. App. 1993). Obriecht also contends that DHA violated its own rules and Obriecht's due process rights by failing to disclose the audio recordings or a full transcript of the recordings to Obriecht prior to the revocation hearing.

¶12 At the revocation hearing, Obriecht's counsel objected to admission of the transcripts of the phone calls. Counsel argued that Obriecht had not been provided the audio recordings and that the edited portions in the transcripts were taken out of context. DOC stated that the transcripts were verbatim transcripts of certain portions of the phone calls. The ALJ then allowed the transcripts into evidence. In light of the relaxed evidentiary rules at revocation hearings, *see* WIS. ADMIN. CODE § HA 2.05(6), and the fact that it is undisputed that Obriecht received advance disclosure of the edited transcripts that were admitted into evidence, we discern no due process violation.

¶13 Obriecht also asserts that DOC erred by amending its witness list to include the testimony of the victim less than five days before the hearing. *See* WIS. ADMIN. CODE § HA 2.05(2). Obriecht asserts that he had prepared to challenge the victim's written statements but not her live testimony. However, Obriecht does not dispute that he was given timely notice of the victim's allegations, and does not explain how the shortened notice of the victim's personal appearance affected his ability to prepare a defense to those allegations. *See* ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 395, 260 N.W.2d 727 (1978) (shortened notice of revocation hearing not prejudicial because Flowers had timely notice of allegations and an opportunity to prepare his defense). Again, we discern no due process violation on this record.

¶14 Obriecht also asserts that DOC should have requested an adjournment when the revocation hearing was unable to be held within 50 days of Obriecht's detention under WIS. ADMIN. CODE § HA 2.05(4). However, Obriecht acknowledges that the 50-day deadline is advisory, not mandatory. *See* ***State ex rel. Jones v. Division of Hearings and Appeals***, 195 Wis. 2d 669, 672-73, 536 N.W.2d 213 (Ct. App. 1995). Accordingly, the failure to obtain an adjournment was not a due process violation.

¶15 Obriecht's final due process challenge is that the written notice of rule violations was insufficient because it did not specifically allege that Obriecht acted without agent approval. However, the record establishes that Obriecht was subject to standard sex offender rules as a condition of his supervision, including that Obriecht refrain from pursuing sexual relationships or having contact with minors without agent approval. The notice of violation alleged that Obriecht pursued a sexual relationship and had sexual intercourse with a minor. Obriecht does not cite any authority for the proposition that the notice of violation had to detail each element that had to be proven to establish a violation; clearly, Obriecht had notice of the rules he was alleged to have violated and the terms of those rules. We determine this notice was sufficient to satisfy due process.

¶16 Next, Obriecht contends that the rules of his supervision were vague and overbroad. He argues that his rules prohibited him from entering into a "dating" relationship without agent approval, and argues that the term "dating" was insufficient to give him notice of what conduct was prohibited. We disagree. We have held that a prohibition on "dating" as a rule of supervision is sufficiently clear to satisfy constitutional standards. *See* ***State v. Koenig***, 2003 WI App 12, ¶¶13-14, 259 Wis. 2d 833, 656 N.W.2d 499 (WI App 2002).

¶17 Obriecht also contends that DOC lacked jurisdiction to revoke his supervision as to counts two through seven in case 1998CF271. Obriecht argues that the judgment of conviction establishes that the circuit court stayed the sentences pending appeal, and did not lift the stay until after the revocation. Obriecht argues that DOC lacked jurisdiction to revoke supervision as to those counts because Obriecht was not serving a term of supervision as to those counts when he violated the rules of his supervision. However, under WIS. STAT. § 304.072(3),[4] DOC "preserves jurisdiction over a probationer, parolee or person on extended supervision if it commences an investigation, issues a violation report or issues an apprehension request concerning an alleged violation prior to the expiration of the probationer's, parolee's or person's term of supervision." In ***DOC v. Schwarz***, 2005 WI 34, 279 Wis. 2d 223, 693 N.W.2d 703, the supreme court held that the phrase "'term of supervision' was intended to apply to all parole violations that occur before the offender's date of discharge from his or her entire sentence." ***Id.***, ¶36. The court explained that it "conclude[d] that the legislature intended to promote offender accountability." ***Id.*** Here, it is undisputed that Obriecht was not discharged from his entire sentence at the time of his violations. Accordingly, DOC had authority to revoke his supervision.

¶18 Finally, Obriecht contends that DOC did not prove that Obriecht violated the rules of his supervision. *See* WIS. ADMIN. CODE § HA 2.05(6)(f); *see also* ***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."). Specifically, Obriecht

[4] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

asserts that DOC presented no evidence that Obriecht did not have agent approval to date the victim.

¶19 "On appeal challenging a revocation decision, … the [appellant] bears the burden of proving that the decision was arbitrary and capricious." ***Id.*** "If substantial evidence supports the division's determination, it must be affirmed even though the evidence may support a contrary determination. 'Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion.'" ***Id.*** at 656 (quoted source omitted).

¶20 Here, the victim testified at the revocation hearing that she was sixteen years old, and that Obriecht had sexual intercourse with her. The ALJ found that the victim was credible and that the sexual intercourse had occurred. Obriecht points to no evidence that his agent did, in fact, provide prior approval for that behavior. We conclude that the evidence at the hearing was sufficient to support the factual inference that Obriecht did not have approval. Obriecht has not carried his burden to show that the decision was arbitrary and capricious.

By the Court.—Orders affirmed.

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