COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1174

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

STATE OF WISCONSIN EX REL. DENNIS VAN STRATEN,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ, DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Dennis Van Straten, pro se, appeals the circuit court's denial of certiorari relief from parole revocation proceedings. Van Straten argues that (1) he was wrongfully deprived of his right to a preliminary revocation hearing; (2) the administrative law judge miscategorized his offense, resulting in

an excessive sentence; (3) the ALJ failed to consider alternatives to revocation; and (4) Wisconsin lost jurisdiction because it failed to transport him in a timely fashion. We affirm the order.

The scope of certiorari review is limited to the record and includes the agency's jurisdiction, theory of law, whether the agency action was arbitrary, and whether the evidence was such that the order could reasonably be made. ***Coleman v. Percy,*** 96 Wis.2d 578, 588, 292 N.W.2d 615, 621 (1980).

Van Straten states that he was living in Florida on parole from Wisconsin pursuant to an Interstate Compact Agreement when he was arrested for possession of cannabis with intent to deliver.[1] He reached a plea agreement on the charge and a judgment of conviction was entered, resulting in a thirteen-month sentence. After he served his sentence, Van Straten was brought to Wisconsin where his parole was revoked.

Van Straten first argues that he was denied a preliminary revocation hearing in violation of his due process and equal protection rights. We conclude that under the circumstances presented here, no preliminary revocation hearing was required. WISCONSIN ADM. CODE § DOC 331.04(2)(d), provides for a preliminary hearing for parolees who face revocation of their status, except if

[1] We observe that, contrary to RULE 809.19(1)(d) and (e), STATS., Van Straten has made no record citations as required in his statement of the case and argument. *See* ***Tam v. Luk,*** 154 Wis.2d 282, 291 n.5, 453 N.W.2d 158, 162 n.5 (Ct. App. 1990). Attaching exhibits to the brief does not dispense with the necessity of record citation. The State has declined to include a statement of the case in its response brief. *Cf.* RULE 809.19(3), STATS. (A statement of the case is optional in a response brief.). A reviewing court need not sift the record for facts to support appellant's contentions. *See* ***Keplin v. Hardware Mut. Cas.,*** 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964). We also observe that several of the arguments, particularly the constitutional arguments, are undeveloped and lacking appropriate legal citation. *See* ***In re Balkus,*** 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 n.5 (Ct. App. 1985).

"[t]here has been an adjudication of guilt by act for the same conduct that is alleged to be a violation of the supervision …." The revocation hearing request specifically refers to the Florida judgment of conviction for possession of cannabis with intent to deliver. Because there was an adjudication of guilt, Van Straten was not entitled to a preliminary revocation hearing and no due process or equal protection violations are implicated.

Van Straten next argues that the conviction does not comport with the ***Plotkin*** analysis. Under this analysis, violation of supervision can be a necessary and sufficient ground for revocation. ***State ex rel. Plotkin v. DHSS,*** 63 Wis.2d 535, 544-45, 217 N.W.2d 641, 645 (1974). The ALJ based the revocation on the Florida conviction alone. Van Straten contends revocation should not be the disposition unless it is found that confinement is necessary to protect the public from further criminal activity by the offender, or the offender is in need of correctional treatment which can be most effectively provided if confined or it would unduly depreciate the seriousness of the violation if supervision were not revoked. Here, the ALJ specifically considered that the disposition imposed was necessary to protect the public from further criminal activity and to avoid unduly deprecating the seriousness of the offense. The record discloses a consideration of appropriate factors.

Van Straten also contends that the crime of possession with intent to deliver should not be considered "a category three" offense that includes only delivery of a controlled substance. Van Straten fails to demonstrate reversible error. Wisconsin treats delivery of a controlled substance the same way it treats possession with intent to deliver. *See* §§ 961.41(1) and 961.41(1m), STATS. The ALJ took into consideration the nature and severity of the underlying criminal convictions, the nature and severity of his violation, the reincarceration guidelines

enacted by the department and the fact that the client spent almost one year in custody in Florida prior to his return to Wisconsin. The ALJ stated:

> This disposition places him at the lower range of the third reincarceration category (75%) and gives him credit for the time served in Florida as allowed by the Florida court. In the final analysis, I am satisfied that reincarceration for this aggregate period of seven years is sufficient to emphasi[ze] the seriousness of the violation and to encourage the client's avoidance of such conduct in the future. Any lesser period of reincarceration would unduly deprecate the seriousness of the client's violation and would subject the public to an unreasonable risk of further criminal behavior.

We conclude that the ALJ's decision is consistent with applicable legal principles and reasonable under the facts of record.

Van Straten further contends that the ALJ erred when he stated that he would not consider defensive matters as to the Florida conviction. This was not error. The ALJ stated that he would base his finding of the violation on the judgment of conviction in Florida and not retry that case. Van Straten had pled to the charge, and the conviction constituted sufficient ground for revocation. The ALJ stated that other unproven allegations of misconduct would be disregarded.

Next, Van Straten argues that he was denied constitutional rights because the parole agent refused to consider alternatives to revocation. We disagree. The record discloses that alternatives to revocation and reincarceration were considered and rejected. In her report, the agent rejected probation due to Van Straten's marginal cooperation in Wisconsin and manipulation of the agent while on supervision in Florida. The agent concluded that correctional treatment was needed that would be most effectively provided in confinement. Further, she concluded that the seriousness of the offense would be unduly deprecated if supervision were not revoked. Although she testified that she considered no

alternatives to revocation, in context with her report it is clear that she considered no alternatives to revocation were acceptable. The record supports the ALJ's decision.

Finally, Van Straten argues that the delay in his extradition proceedings to return him to Wisconsin violated his constitutional rights and statutory rights under § 976.03, STATS. We disagree. With respect to his constitutional argument, ***Moody v. Daggett,*** 429 U.S. 78, 86-87 (1976), is instructive. There, the United States Supreme Court recognized that when a parolee's custody derives from another conviction rather than from a parole violation, the consequent liberty loss "attended upon parole revocation" and protected in ***Morrissey v. Brewer,*** 408 U.S. 471 (1972), is not yet triggered.

In ***United States v. Scott,*** 850 F.2d 316 (7th Cir. 1988), the United States Court of Appeals for the Seventh Circuit concluded that the thirteen-month delay between a probationer's[2] arrest and a revocation hearing did not violate due process. The probationer had been serving a sentence on another charge while awaiting his revocation hearing. ***Id.*** at 320. The reason the probationer was in custody was a relevant factor in determining that he had not been denied his constitutional right to a prompt revocation hearing. ***Id.*** at 320-21. We conclude that Van Straten's constitutional argument is without merit.

[2] "[T]here was no 'difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation ….'" ***United States. v. Scott,*** 850 F.2d 316, 319 (7th Cir. 1988) (quoting ***Gagnon v. Scarpelli***, 411 U.S. 778, 782 (1973)).

We also reject his statutory argument. The record[3] indicates that Van Straten was not transferred to Wisconsin pursuant to § 976.03, STATS., but rather pursuant to the Interstate Compact on Out of State Parolee Supervision--Wisconsin Statutes, § 304.13(3), STATS., that provides:

> All legal requirements to obtain extradition of fugitives from justice are expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state; provided, however, that if at the time when a state seeks to retake a probationer or parolee there should be pending against that person within the receiving state any criminal charge, or that person should be suspected of having committed within such state a criminal offense, that person shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

[3] Van Straten contends that for over two years he has attempted unsuccessfully to obtain the record of the extradition proceedings. He claims that it would show that around April 30, 1995, he appeared before Judge Futch where an extradition hearing was held and he signed a waiver of extradition. Van Straten states that he agreed to enter a plea in Florida and to a sentence of 13 months to be served concurrently with the parole violation in Wisconsin, based upon his understanding that he would be immediately returned to Wisconsin. He claims he later learned that Wisconsin was not going to proceed with revocation until disposition on the Florida charge had taken place. Assertions of fact outside the record may not be considered. ***Jenkins v. Sabourin,*** 104 Wis.2d 309, 313-14, 311 N.W.2d 600, 603 (1981).

After briefs were filed, Van Straten moved this court for an order supplementing the record with a copy of a "Response to Order to Show cause on Petition for Writ of Habeus [sic] Corpus" in proceedings Van Straten initiated against Florida in the United States District Court for the Southern District of Florida and signed by an assistant attorney general for the State of Florida. Van Straten argues that this document is relevant to show how Florida stands on his extradition. We deny his motion for two reasons. First, the document does not contain new evidence; it merely reiterates that Van Straten contends he waived extradition to Wisconsin. Because Florida officials did not contact officials in Wisconsin in a timely manner, he served his entire sentence in Florida, and sought to have his Florida conviction set aside. Because this document is a responsive pleading in a habeas corpus proceeding, it is not evidence. Second, we are bound by the record as it comes to us. ***In re: Eberhardy,*** 102 Wis.2d 539, 571, 307 N.W.2d 881, 895 (1981). Because there is no indication that this document was before the ALJ, it is not part of the record we review on appeal from those proceedings.

Thus, under § 304.13(3), STATS., the sending state may retake the parolee charged with a crime, but only with the consent of the receiving state. Here, the record indicates that Florida consented to Wisconsin retaking Van Straten after he was charged with the crime. The record also indicates, however, that the Wisconsin parole agent was not aware that Van Straten was available to return to Wisconsin. The agent stated that after she was advised he was arrested, her supervisor and regional chief decided to extradite him following his incarceration in Florida. She testified that "it needs to be made known to the State of Wisconsin that you're available to go back to Wisconsin and that was never done."

Van Straten's real complaint appears that he was not able to serve the sentence for the Florida charge concurrently with his Wisconsin sentences. He has failed to offer persuasive authority that he has a right to do so. Van Straten further fails to demonstrate that the revocation proceedings exceeded the agency's jurisdiction, proceeded on an incorrect theory of law, were arbitrary or unsupported by the facts of record. As a result, his arguments are rejected.

By the Court.—Order affirmed.

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