COURT OF APPEALS
DECISION
DATED AND FILED

May 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3023

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

STATE EX REL. BERNIE J. CUDNOHOSKY,

PETITIONER-APPELLANT,

v.

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

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed.*

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

HOOVER, J. Bernie Cudnohosky appeals an order denying his petition for a writ of certiorari and affirming revocation of his parole. On appeal

he claims that the "department"[1] did not act according to law when it based its decision to revoke in part upon conduct that occurred prior to his parole. He also contends that if revocation cannot be premised upon pre-parole conduct, then the other basis relied upon, refusal to talk to his agent about such conduct, is insufficient to support revocation where no consideration was given to revocation alternatives. We conclude that Cudnohosky's refusal to discuss with his agent conduct relevant to his parole is a sufficient rule violation upon which to predicate revocation. We also reject Cudnohosky's assertion that the division did not consider alternatives to revocation. We therefore affirm the trial court's order denying the petition for writ of certiorari.

Cudnohosky was convicted in 1978 of two counts of first-degree sexual assault and was sentenced to a total of twenty years in prison. He was twice paroled and twice revoked because of conduct similar to that which led to his convictions.[2] Cudnohosky's mandatory release date was in December 1994 but, although paroled,[3] he remained in custody as a result of the filing of a Sexually Violent Person commitment petition.[4] The ch. 980, STATS., action was

[1] The order revoking Cudnohosky's parole was issued by the Division of Hearings and Appeals after a hearing before an administrative law judge. Cudnohosky appealed the ALJ's decision and order, which was sustained by the division's administrator. *See* § 304.06(3), STATS.

[2] He evidently found his youthful victims by soliciting baby-sitting services, although our independent review of the record does not confirm that he employed such a scheme to meet his original child-victims. The Division of Hearings and Appeals stated, however, that "This conduct is of extreme concern because the client's solicitation of babysitting [sic] services is what led to the sexual assaults for which the client is on parole." Cudnohosky does not expressly dispute the division's historical observation. The division also noted that Cudnohosky did not have children and therefore had no legitimate need to hire a baby-sitter.

[3] Section 302.11(1), STATS., provides in pertinent part that "each inmate is entitled to mandatory release on parole by the department."

[4] Section 980.02, STATS.

later dismissed for failure to timely prosecute, and Cudnohosky was ultimately released from custody on July 9, 1996. It was later discovered that two days before his release and before he had signed his rules of supervision, Cudnohosky telephoned a twelve-year-old girl who had placed a classified advertisement seeking employment as a baby-sitter.

Cudnohosky received and acknowledged receipt of his parole rules on July 12, 1996. Rule four requires parolees to inform their agents of their activities as the agent directs. Pursuant to rule five, parolees must provide their agents with any relevant information upon request. Rule thirteen requires parolees to provide true and correct information verbally and in writing, in response to inquiries by their agents. It is undisputed that Cudnohosky was aware of his obligation to respond to his agent's request for relevant information. On August 5, 1996, Cudnohosky refused to discuss with his agent the allegation that he had called the twelve-year-old girl while still in custody. Cudnohosky's parole was revoked on the basis that the July 7 telephone call and his refusal to discuss the same with his agent each constituted a violation of his parole rules.

Cudnohosky argues that he was not apprised of any rules of supervision until several days after placing the telephone call to the twelve-year-old girl and thus a revocation based on such pre-parole conduct would be arbitrary, capricious and contrary to law. He relies by analogy upon foreign cases that hold probation revocation must be based on conduct occurring subsequent to the grant of probation. The State responds that under § 302.11, STATS., a person who receives a mandatory release is released on parole. Therefore, Cudnohosky was on parole when he reached his mandatory release date on December 16, 1994, over seven months before he telephoned the twelve-year-old. Moreover, the State implicitly contends Cudnohosky's assertion that he did not know his conduct

constituted a violation of parole is spurious given the nature of his earlier parole violations.

We review the division's decision, not the trial court's. ***State ex rel. Macemon v. McReynolds***, 208 Wis.2d 594, 596, 561 N.W.2d 779, 780 (Ct. App. 1997). Our certiorari review is limited to: (1) whether the tribunal kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence provides reasonable support for the decision. ***Van Ermen v. DHSS***, 84 Wis.2d 57, 63, 267 N.W.2d 17, 20 (1978). An agency's decision is not arbitrary and capricious and represents its judgment if it expresses a proper exercise of discretion. ***Von Arx v. Schwarz***, 185 Wis.2d 645, 656, 517 N.W.2d 540, 544 (Ct. App. 1994). A proper exercise of discretion contemplates a reasoning process based on the facts of record and a conclusion based on a logical explanation founded upon a proper legal standard. ***Id***. If there is substantial evidence to support the division's decision, we must affirm it even though there is evidence that may support a contrary determination. ***Id***. Substantial evidence is evidence that is relevant, credible, probative and of a quantum upon which a reasonable fact-finder could base a conclusion. ***Id***.

The Department of Corrections has the burden of proving an alleged violation by a preponderance of the evidence. *See* ***id***. at 655, 517 N.W.2d at 544. The revoking agency must also "exercise its discretion by at least considering whether alternatives are available and feasible." ***Van Erman***, 84 Wis.2d at 67, 267 N.W.2d at 21-22.

We deem it unnecessary to address Cudnohosky's contention that he should not have been revoked for conduct that occurred before he claimed to know

he was on parole and subject to rules of supervision because there is a narrower, dispositive ground upon which to affirm the decision.[5] It is undisputed that at the time his agent attempted to discuss the telephone call with him, Cudnohosky knew he was on parole and subject to the requirement that he provide his agent with relevant information upon request. Cudnohosky also concedes that he refused to discuss the July 7, 1996, telephone call with his agent when directed to do so. He suggests, however, that he was not subject to revocation for refusing to discuss conduct that occurred before he was paroled. He further contends that even if his silence regarding pre-parole conduct is a violation of the rules of supervision, the division acted improperly by revoking parole because it did not consider alternatives to revocation as it is required to do. We are unpersuaded.

In evaluating Cudnohosky's proposition that he cannot be revoked for refusing to discuss pre-parole conduct, we first consider the purposes of parole and the parameters placed upon the revocation decision consistent with these intentions.

> Parole and probation are intended to foster the reintegration of the individual into society at the earliest opportunity. The ultimate question in revocation proceedings is whether the parolee remains a "good risk"; whether his rehabilitation can be successfully achieved outside prison walls or will be furthered by returning him to a closed society.

State ex rel. Flowers v. DHSS, 81 Wis.2d 376, 385, 260 N.W.2d 727, 732 (1978) (citation omitted). In making this determination, the department is concerned with

[5] The court of appeals is not required to address each issue raised and each form of relief requested. An appellate court should decide cases on the narrowest possible grounds. ***State v. Castillo***, 213 Wis.2d 488, 492, 570 N.W.2d 44, 46 (1997).

threats to the safety of the general community, and with any behavior inimical to the parolee's rehabilitation. ***Id***.

> [T]he revocation decision requires wide-ranging consideration of intangible non-legal factors irrelevant to a criminal prosecution. This court has recognized that:
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> "'. . . an agency whose delicate duty is to decide when a convicted offender can be safely allowed to return to and remain in society is in a different posture than the court which decides his original guilt. To blind the authority to relevant facts in this special context is to incur a risk of danger to the public . . . .'" ***State ex rel. Struzik*** [***v. H&SS Dept.***], 77 Wis.2d 216, 223, 252 N.W.2d 660, 663 [1977)], *quoting*, ***In re Martinez***, 463 P.2d 734 (In Bank, 1970) ….

Id. at 385, 260 N.W.2d at 733.

Based upon the foregoing, we perceive that the pertinent question is not when the conduct to be discussed occurred in relation to the commencement of parole, but whether the conduct is relevant to achieving the purposes of parole. As the ***Struzik*** court implied, the serious concerns with which parole revocation decisions are involved require the department to consider the circumstances from a common sense rather than a hypertechnical perspective. Arbitrarily confining the department's historical consideration of an alleged violation to the point in time when parole commenced is inconsistent with and, as here, counterproductive to its responsibility to attempt rehabilitation and protect society.

The division quotes with persuasive effect ***State v. Evans***, 77 Wis.2d 225, 231, 252 N.W.2d 664, 666-67 (1977):

> The theory of probation contemplates that a person convicted of a crime who is responsive to supervision and guidance may be rehabilitated without placing him in prison. This involves a prediction by the sentencing court society will not be endangered by the convicted person not being incarcerated. This is a risk that the legislature has

> empowered the courts to take in the exercise of their discretion. To be effective, there must be adequate supervision to guide the probationer into useful and productive activities and away from further criminal activity and to insure that society's interest in its own safety is not jeopardized.
>
> If the convicted criminal is thus to escape the more severe punishment of imprisonment for his wrongdoing, society and the potential victims of his anti-social tendencies must be protected. Supervision must be such as to most likely assure such result. The probation officer cannot maintain a personal surveillance over each probationer placed under his charge. He must depend on reports from others, oftentimes anonymous, which the officer must check out. One of the ways is to confront the probationer with the information and discuss it with him, or to ask the probationer about his activities, associations, and whereabouts at particular times. *If the probationer refuses to discuss his activities or answer specific questions, such refusal under the probation agreement may be grounds for revocation*. (Emphasis added.)

The division heard testimony that Cudnohosky knew his failure to discuss the telephone call constituted a parole violation that could result in revocation. The division found that the refusal to discuss the telephone call was "a significant violation" in light of the similarity of the alleged conduct to that which resulted in both his convictions and prior revocations. It found that Cudnohosky had no legitimate reason to hire a baby-sitter. The division inferred that Cudnohosky telephoned the twelve-year-old for the purpose of illicit child enticement and in anticipation of his release from custody in two days. This inference is amply sustained by the circumstantial evidence of the nature of Cudnohosky's crimes, his historical method of procedure, his lack of a need for baby-sitting services and the immediacy of his release. Cudnohosky's failure to cooperate with his parole officer impeded the latter's ability to fully investigate and reevaluate both Cudnohosky's further rehabilitative needs and the degree of

danger he posed to the community. Viewed in context, we agree with the division that the violation was significant and thus, under ***Evans***, merited revocation.

Next, Cudnohosky contends that:

> [T]he record is devoid of any evidence that alternatives to revocation were considered, discussed, or contemplated. … There is no indication that there was any other misconduct by the appellant, or that additional supervision or other alternatives could not have successfully been employed to prevent a recurrence of any unacceptable behavior.

He does acknowledge, however, that we may examine the record ab initio to determine whether there are sufficient circumstances upon which to affirm the revocation. *See* ***Van Ermen***, 84 Wis.2d at 67, 267 N.W.2d at 22. We conclude that the division did consider whether alternatives to incarceration were available and that, in any event, the record supports the decision to revoke parole.

The division expressly found "that appropriate alternatives to revocation do no[t] exist." It based this finding upon an abbreviated reference to Cudnohosky's "original offenses, (First-Degree Sexual Contact - two counts) and the client's intervening conduct …." The division's administrative law judge later observed, however, that "[e]ven after incarceration, two parole revocations, and treatment at the Mendota Mental Health Institute[6] and Wisconsin Resource Center, Mr. Cudnohosky seems unable or willing [sic] to change his behavior." Contrary to Cudnohosky's contention that the division failed to consider alternatives to revocation, this statement implicitly expresses the division's determination that

[6] It appears from the division's findings of fact that Cudnohosky was placed at Mendota Mental Health Institute on three occasions.

there were no viable alternatives to revocation. Despite repeated efforts at treatment and

> [s]eventeen years, 7 months and 7 days [after the original assaults], after having served 15 years, 10 months and 7 days of his original sentence, and after having been twice revoked for engaging in inappropriate conversations with juvenile girls, conversations that were sometimes initiated in reference to babysitting, [sic] Mr. Cudnohosky was still doing the same thing. … initiat[ing] conversation with juvenile girls even as a convicted sex offender ….

This is a sufficient and, indeed, appropriate response to Cudnohosky's argument at the administrative hearing that insufficient consideration was given to potential community treatment options. The division could reasonably conclude from this history that Cudnohosky's improper conduct could not be treated or controlled and that confinement was thus the only option available to protect the public. *See* ***Van Ermen***, 84 Wis.2d at 68, 267 N.W.2d at 22.

In summary, we conclude that Cudnohosky's refusal to discuss a telephone call he allegedly initiated with a twelve-year-old girl was, under the circumstances of this case, a sufficient violation of his rules of supervision to warrant parole revocation. We are also satisfied that these same circumstances justify the division's considered determination that the only available appropriate response to Cudnohosky's unreformed conduct was incarceration. We therefore affirm the order denying the petition for certiorari.

By the Court.—Order affirmed.

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