COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP486 **Cir. Ct. No. 2013CV4357**

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

STATE OF WISCONSIN EX REL. CHRISTOPHER GREEN,

PETITIONER-APPELLANT,

V.

BRIAN HAYES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Affirmed*.

Before Curley, P.J., Kessler, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Christopher Green, *pro se*, appeals an order of the circuit court, affirming the decision of the Division of Hearings and Appeals, which affirmed an administrative law judge's revocation of Green's extended

supervision and ordered him reconfined for the entire time remaining.[1] We discern no error in the Division's decision, so we affirm.

BACKGROUND

¶2 Green was convicted of armed robbery and substantial battery in 2005. He was sentenced to four years' initial confinement and six years' extended supervision, and released to extended supervision in July 2008. In 2012, the Department of Corrections sought to revoke Green's extended supervision based on three allegations: that Green, as party to a crime, took money from the Grant Street Market with the use of a firearm and without the owner's permission (*i.e.*, that Green had committed armed robbery as party to a crime); that Green possessed a firearm despite being a convicted felon and on extended supervision; and that Green failed to stop when so ordered by police.

¶3 An administrative law judge held an evidentiary hearing in January 2013. Green appeared and was represented by counsel. The administrative law judge determined that all three violations were substantiated. The administrative law judge then revoked Green's extended supervision and ordered him reconfined for the entire length of time remaining on his sentence—approximately six years. Green appealed to the Division of Hearings and Appeals, which affirmed the administrative law judge's decision.

[1] We have substituted Brian Hayes for Wayne Wiedenhoeft as the respondent Administrator of the Division. *See* WIS. STAT. § 803.10(4)(a) (2013-14) (automatic substitution of successive public officers); *see also* ***Dairyland Greyhound Park, Inc. v. Doyle***, 2006 WI 107, ¶1 n.1, 295 Wis. 2d 1, 719 N.W.2d 408.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶4 Green then sought *certiorari* review from the circuit court. While Green complained that the Division did not act according to the law and that its decision was arbitrary and capricious, the circuit court noted that all of Green's arguments except for one actually related to the sufficiency of the evidence presented at the revocation hearing. In his reply brief in the circuit court, Green challenged the length of the reconfinement sentence.

¶5 The circuit court explained, in considerable detail, the proffered evidence sustaining the determination that Green had committed the armed robbery and possession of a firearm by a felon. The circuit court also concluded there was insufficient evidence to substantiate the allegation that Green had failed to stop when so ordered by police. The circuit court noted, however, that the other two violations were "serious enough by themselves" to warrant revocation for the entire time remaining on the sentence, so the Division's error in concluding the third violation was substantiated was not prejudicial. The circuit court also explained why Green was not entitled to any credit for the four years he spent on extended supervision prior to revocation. Accordingly, the circuit court affirmed the decision of the Division. Green appeals.

DISCUSSION

¶6 Review of extended supervision revocation is obtained by writ of *certiorari* to the circuit court. *See* ***State ex rel. Washington v. Schwarz***, 2000 WI App 235, ¶16, 239 Wis. 2d 443, 620 N.W.2d 414. In an appeal from the circuit court's order affirming or reversing the decision of an administrative agency, we review the agency's decision, not the circuit court's. *See* ***Mineral Point Unified Sch. Dist. v. WERC***, 2002 WI App 48, ¶12, 251 Wis. 2d 325, 641 N.W.2d 701.

¶7 "Judicial review on certiorari is limited to whether the agency's decision was within its jurisdiction, the agency acted according to law, its decision was arbitrary or oppressive and the evidence of record substantiates the decision." ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 385, 585 N.W.2d 640 (Ct. App. 1998). This is the standard of review applied by the circuit court and independently by this court. *See* ***id.*** at 386-86.

I. Lack of Jurisdiction/Separation of Powers

¶8 On appeal, Green claims the Division, part of the executive branch, impermissibly intruded into the judiciary's realm by imposing a reconfinement sentence. Only the judicial branch, Green argues, may modify a sentence.

¶9 "It is settled that sentencing in Wisconsin is an area of shared powers … 'and has never been thought of as the exclusive constitutional province of any one Branch.'" ***State v. Horn***, 226 Wis. 2d 637, 645-46, 594 N.W.2d 772 (1999) (citations omitted). The legislature determines the scope of the circuit court's sentencing discretion, the circuit court fashions a sentence within that scope, and the executive branch administers the sentence. *See* ***id.*** at 648; *see also* ***State ex rel. Johnson v. Cady***, 50 Wis. 2d 540, 545, 185 N.W.2d 306 (1971) (any right to probation or parole is a right created by the legislature and vested in the executive for administration).

¶10 WISCONSIN STAT. § 302.113(9)(am) expressly authorizes the Division to revoke a term of extended supervision if a condition thereof is violated. Thus, the Division did not act beyond its jurisdiction or in violation of the separation of powers by revoking Green's extended supervision.

II. Sufficiency of the Evidence

¶11 When considering a revocation decision, our review is limited to whether there is substantial evidence to support the revocation. *See* ***Washington***, 239 Wis. 2d 443, ¶17; *see also* ***Von Arx v. Schwarz***, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994). "'Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion.'" ***Von Arx***, 185 Wis. 2d at 656 (citation omitted). The agency is presumed to have had before it information which warranted the revocation. *See* ***Johnson***, 50 Wis. 2d at 550. The agency's determination is conclusive unless the prisoner shows by a preponderance of the evidence that the decision was arbitrary and capricious. *See* ***id.***

¶12 Green's entire argument on appeal regarding sufficiency of the evidence is that "[t]he evidence does not support the decision of the A. L. J., and having the evidence standard so low, when one's liberty or life is at stake, is unconstitutional, and a denial of due process." The constitutional argument is undeveloped and we need not consider it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Further, the evidence presented is more than adequate to sustain the Division's determination that the armed robbery and the possession of a firearm allegations were substantiated.[2]

[2] As noted, the standard of review calls for us to review the agency's decision—which found all three allegations against Green substantiated—and not the circuit court's decision, which concluded there was not enough evidence to substantiate the allegation that Green had failed to stop when so instructed by police. However, we conclude it is not necessary for us to discuss whether the third allegation was substantiated.

¶13 The victim of the alleged armed robbery, the owner of the Grant Street Market, testified at the evidentiary hearing. He said that on August 15, 2012, two African-American males came into the store wearing masks and carrying guns. One was tall and skinny, wearing a grey t-shirt and black jeans, and the other was shorter and heavier, wearing a white t-shirt and black jeans. The taller man pointed a gun at the victim, demanding money and threatening to shoot him. The taller man took about $350 from the register and gave it to the shorter man, then demanded the victim's wallet and another box containing cash. After handing over those items, the victim pulled out his own gun and fired shots at the robbers. The victim believed he shot the shorter man, who limped away from the scene while the taller man fled in a car.

¶14 One of the responding officers testified that, while on his way to respond to the armed robbery call, he encountered a male subject who matched the description of one of the robbers running down the street. The officer pursued and arrested the individual and identified him as Green. Green had a gunshot wound to his upper left thigh. Another officer recovered $358 in cash approximately five feet from where Green was arrested. Folded inside the cash was a receipt from the Grant Street Market.

¶15 According to police reports introduced at the hearing, two other perpetrators identified Green as having a role in the robbery. Rontrell Washington, the taller robber, told police that Green was his accomplice. Kenny Brown, the driver of the getaway car, admitted that he dropped Green and Washington off at the Grant Street Market.

¶16 Green denied being inside the store, claiming he was shot as he walked past the outside of the store. Green also argued that the victim's testimony

was conflicting—his description of the clothes worn by the robbers was different from the description he had given in statements to police. Green also pointed out that the victim had been unable to identify either robber in a photo lineup, and he points out that no gun was found on him.

¶17 The administrative law judge found the victim credible, and Green's testimony to be "entirely unbelievable." The Division agreed. We defer to these credibility determinations. *See* ***Washington***, 239 Wis. 2d 443, ¶26. The Division assigned no importance to the inconsistency of the clothing description, attributing it merely to the passage of time. The Division further pointed out that the victim's inability to identify a perpetrator from the photo arrays is wholly consistent with his statement that the robbers were wearing masks and hats, and that he did not see their faces.

¶18 The Division's findings are reasonable. *See* ***id.*** The circumstantial evidence of Green walking away from the direction of the crime scene, with a gunshot wound, five feet from the amount of money taken by the taller man and given to the shorter man, and with a receipt from the victimized store is more than a sufficient quantum upon which to conclude the armed robbery allegation was substantiated.

¶19 Green protested that there was no evidence that he possessed a firearm, since none was recovered from him at the time of his arrest. However, the victim testified that both robbers had guns, and both suspected weapons were ultimately recovered. Accepting the Division's determination that the victim was credible, the testimony that both robbers had guns, and the conclusion that Green was one of those robbers, there is sufficient evidence substantiating the allegation that Green possessed a firearm, despite being a convicted felon. Green has not

demonstrated by any evidence, much less a preponderance of the evidence, that the Division's decision was arbitrary and capricious. *See* ***Johnson***, 50 Wis. 2d at 550.

III. Right to Confrontation

¶20 Green next argues that he "was prohibited from confronting the witnesses against him. Yet, the statement from these witnesses, is referred to by the A. L. J. in his decision and order to revocate." This argument appears to be raised for the first time on appeal; we do not consider such arguments. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). Moreover, the above quote is Green's entire argument about confrontation. We also do not consider undeveloped arguments. *See* ***Pettit***, 171 Wis. 2d at 646.

IV. Sentence Credit

¶21 Finally, Green argues that he should have received credit against his six-year reconfinement sentence for the four years he already served on extended supervision prior to his revocation. As the circuit court explained, however, that is not how a reconfinement sentence is calculated. When a person's extended supervision is revoked, the person shall be "returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence." *See* WIS. STAT. § 302.113(9)(am). The time remaining on the bifurcated sentence starts with the total length of the sentence. *See* ***id.*** Subtracted from that length of time is "time served by the person in confinement under the sentence before release to extended supervision" and "all time served in confinement for previous revocations of extended supervision under the sentence."

See ***id.*** There is no provision for an award of credit for time already spent on extended supervision.[3]

¶22 Green attempts to construct an argument that he should not have to serve more than ten years total, asserting that under WIS. STAT. § 302.113(3)(c)-(d), "[n]o extension of a term of confinement in prison … may require an inmate to serve more days in prison than the total length of the bifurcated sentences…. If the term of confinement in prison portion of a bifurcated sentence is increased … the term of extended supervision is reduced so that the total length of the bifurcated sentence does not change." That subsection, however, deals solely with penalties imposed by an institution's warden or superintendent for rules violations, not sentence credit. *See* § 302.113(3)(a).

¶23 Green also argues that a person released to extended supervision remains in the legal custody of the Department of Corrections, *see* WIS. STAT. § 302.113(8m)(a), and an offender is entitled to sentence credit for all days spent in custody, *see* WIS. STAT. § 973.155(1)(a), so he should get credit for the time he spent on extended supervision. However, the custody referred to in § 973.155(1)(a) requires confinement—that is, physical custody, not just legal custody. *Cf.* ***State v. Martinez***, 2007 WI App 225, ¶¶17-18, 305 Wis. 2d 753, 741 N.W.2d 280 (defendant not entitled to Wisconsin sentence credit for time served on federal sentence because he was on parole in Wisconsin case when incarcerated on the federal sentence); ***State v. Rohl***, 160 Wis. 2d 325, 331-32, 466 N.W.2d 208 (Ct. App. 1991) (defendant on parole in Wisconsin not entitled to credit for period

[3] The administrative law judge did, however, award some credit for various time periods, which appear to have been probation holds or alternatives to revocation.

of confinement in California). Green is not entitled to sentence credit for time served on extended supervision because he was not confined.[4] The Division did not err in refusing to grant such credit.

By the Court.—Order affirmed.

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

[4] Also unavailing is Green's argument that "imprisonment" includes parole and extended supervision. *See* WIS. STAT. § 304.078(1)(a). That definition applies solely to that section, which deals with the restoration of civil rights to convicted persons.