COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0767

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

JAMES GASPARDO,

PLAINTIFF-RESPONDENT,

V.

DAVID SCHWARZ, ADMINISTRATOR OF THE DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 BROWN, P.J. The question presented is to what extent the Department of Corrections (DOC) must consider alternatives to prison before recommending revocation of probation. Here, James Gaspardo's probation was revoked after he violated his conditions of probation by driving while intoxicated.

The circuit court reversed, agreeing with Gaspardo's contention that the DOC never considered sending him to alcohol boot camp, which he had been told would be the consequence of his drinking. We conclude that the DOC, after specifying boot camp as a consequence in Gaspardo's probation plan, was bound to consider that alternative and explain why it was rejected. We affirm the circuit court's order reinstating Gaspardo's probation.

¶2 The facts of this case are as follows. In May 1997, Gaspardo was convicted of criminal damage to property and disorderly conduct, both as a repeater. The circuit court imposed and stayed a three-year prison sentence on each count and placed Gaspardo on probation for three years. Among the conditions of probation were that Gaspardo "avoid all conduct which is in violation of federal or state statute," not drive a car, not possess or consume alcohol and keep his probation agent informed of his whereabouts. Additionally, the probation supervision rules stated: "You shall complete AODA [alcohol and other drug abuse] boot camp if you do drink or have any drug use." On November 5, 1997, Gaspardo, while intoxicated, drove a car into a pole. Gaspardo refused to speak to the sheriff's deputy who arrived on the scene. When he finally did, the deputy smelled alcohol on his breath and Gaspardo would only identify himself as "Jim." At the hospital, Gaspardo was combative with personnel and had to be restrained in order to be treated. To top it off, Gaspardo threw a urine bottle across the emergency room and threatened to kill the sheriff's deputies. Because Gaspardo's behavior that night violated several of his conditions of probation, the DOC recommended revocation of his probation. After a revocation hearing, the administrative law judge (ALJ) issued a written decision revoking Gaspardo's probation. The decision to revoke was affirmed by the Division of Hearings and Appeals (the division). On writ of certiorari, the circuit court reversed, finding

that the DOC and the division had failed to sufficiently consider alternatives to revocation. The circuit court stated:

> [T]he Court feels that the fact that there was an expressed provision calling for a specific consequence for a specific act that was not considered … [and] that, at very least, an individual … has a right to rely on the written express words of a probation plan. The fact that nothing is specifically said about the Boot Camp or the DACC program would indicate to this Court that they were not considered and were not even in the mind of those who have had the opportunity to conduct the revocation proceeding.

¶3 Our review is of the division's decision, not that of the circuit court. *See* ***State ex rel. Warren v. Schwarz***, 211 Wis. 2d 710, 717, 566 N.W.2d 173 (Ct. App. 1997), *aff'd*, 219 Wis. 2d 615, 579 N.W.2d 698 (1998). And on certiorari, our review is limited to: "(1) whether the tribunal stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will, not its judgment; and (4) whether the evidence was such that it might reasonably make the decision that it did." ***Id.***

¶4 Here, Gaspardo's challenge—that the division failed to establish that there was no reasonable alternative to revocation—involves the third inquiry. We review this prong on an erroneous exercise of discretion standard. *See* ***Van Ermen v. DHSS***, 84 Wis. 2d 57, 65, 267 N.W.2d 17 (1978). The duty of the division in exercising this discretion is set forth in the ABA guidelines adopted in ***Plotkin v. DHSS***, 63 Wis. 2d 535, 544-45, 217 N.W.2d 641 (1974). *See* ***Warren***, 211 Wis. 2d at 724. Among other things, the ***Plotkin*** standards require the division to consider alternatives to revocation. Because the division's decision is discretionary, however, we need only satisfy ourselves that the decision was made

based on "facts that are of record or that are reasonably derived by inference from the record" and that the conclusion is "based on a logical rationale founded upon proper legal standards." ***Van Ermen***, 84 Wis. 2d at 65.

¶5 In this case, neither the DOC nor the division gave an explanation as to why boot camp was not a feasible alternative to revocation for Gaspardo. In the probation plan, the DOC included the restriction that Gaspardo not drink alcohol and further stated that he "shall complete AODA boot camp if [he does] drink." Then, in the recommendation for revocation, Gaspardo's agent wrote the following in a section entitled "ALTERNATIVES CONSIDERED":

> The following alternatives were considered in a case conference review with [the agent's supervisor] on 11/10/97. Formal or informal counseling with warnings and amended rules was considered but would be inappropriate due to the seriousness of this violation. Electronic monitoring is not an option at this point and time as it does not confine Mr. Gaspardo. He would still be able to involve himself in the behaviors of this violation. Treatment programs were considered but at this point this agent and Supervisor … feel that Mr. Gaspardo poses too much of a risk to the community to provide treatment within the community. Any halfway house or treatment facilities within the community are unable to confine Mr. Gaspardo, therefore he would be able to consume alcohol and operate a motor vehicle putting the community at risk once again. This agent feels that the only option at this time is revocation of Mr. Gaspardo's probation resulting in Mr. Gaspardo beginning his Wisconsin State Prison term with treatment being addressed while confined in the adult prison system.

The recommendation is dated December 8, 1997. On December 19, Gaspardo's attorney wrote to the agent requesting that the agent refer Gaspardo to the Drug and Alcohol Correctional Center and to the boot camp "also as a formal alternative to the revocation of probation." The ALJ's decision contained the following language regarding those alternatives:

> The client was warned early on by his agent that he should remain free of any alcohol or drug use. The agent told him that if he used alcohol that he would be referred to boot camp. The client argues that as an alternative to revocation he should be allowed to attend boot camp or the Drug and Alcohol Correctional Center, as his violations were alcohol-related. However, alternatives to revocation are not viable and feasible. The client is on supervision for aggressive and habitual conduct.… This conduct put the public and the client himself at great risk for serious personal injury or death. Under these circumstances, alternatives are not viable and feasible, and revocation is necessary to protect the public safety and to prevent the undue depreciation of the seriousness of his violations.

When Gaspardo appealed to the division, the administrator sustained the ALJ's decision, stating:

> [a]lthough the department had earlier warned Mr. Gaspardo that he would be placed in the AODA Boot Camp if he violated his rules of supervision by drinking, that warning did not prevent the department from implementing a greater sanction if warranted by the circumstances. Considering the totality of the circumstances surrounding Mr. Gaspardo's arrest, I agree that neither the Boot Camp program nor the DACC program is a viable alternative to revocation of supervision. Mr. Gaspardo's violations show that he is a danger to others and that he is not a good risk for continued community supervision.

¶6 While we acknowledge that Gaspardo did more than just drink here, we are at a loss to understand why the boot camp and DACC were rejected in so summary a fashion. Our understanding of both DACC and AODA boot camp is that they are not community based; they are confined settings, though perhaps low security. The agent's recommendation, the ALJ's decision and the administrator's decision on appeal all emphasize the need to remove Gaspardo from the community. But not one of them addresses why removal to a setting such as the boot camp would not accomplish that end. We realize that the division's duty to consider alternatives does not require it to consider any and all alternatives.

Furthermore, we understand that our review is limited. But we may "examine the record *ab initio* to see if it supports the [division]." ***Id.*** at 67. Nothing in this record, nor reasonable inferences drawn from its contents, supports the conclusion that the AODA boot camp was outside the realm of possibilities for Gaspardo. In its decisions, the division's emphasis is on the need to confine Gaspardo; but nowhere are we told why confinement at the boot camp or DACC would be insufficient. In short, the decision was arbitrary.

¶7 We emphasize that the facts of this case are unique and drive the result. The DOC itself set up boot camp as a consequence for drinking. While such a plan does not bind the DOC to send Gaspardo to boot camp—perhaps there are unstated reasons why confinement at the boot camp was inappropriate—it does oblige the DOC to at least discuss why the planned option is no longer feasible. Decency, logic and fairness require as much.

¶8 At oral argument, we asked the parties to address the appropriate remedy—affirmance of the circuit court order reinstating Gaspardo's probation or remand for discussion of the feasibility of boot camp and DACC. Remand may be appropriate in cases where new evidence becomes available, *see* ***State ex rel. Leroy v. DHSS***, 110 Wis. 2d 291, 295-96, 329 N.W.2d 229 (Ct. App. 1982), or where the record does not reveal whether the DOC and the division complied with procedural rules, *see* ***State ex rel. Lomax v. Leik***, 154 Wis. 2d 735, 741, 454 N.W.2d 18 (Ct. App. 1990). However, remand to allow the record to be shored up with additional discussion in support of revocation violates the concepts of due process and fair play. *See* ***Leroy***, 110 Wis. 2d at 295. Thus, rather than remand, we affirm the circuit court's order reinstating Gaspardo's probation.

By the Court.—Order affirmed.

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