

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 22, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2004AP1065**

**Cir. Ct. No. 2003CV1008**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN EX REL. DWAYNE G. THOMAS,**

**PETITIONER-APPELLANT,**

**V.**

**DAVID M. SCHWARZ, ADMINISTRATOR, DIVISION OF HEARINGS &  
APPEALS,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Waukesha County:  
LEE S. DREYFUS, JR., Judge. *Affirmed.*

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

¶1 NETTESHEIM, J. Dwayne G. Thomas appeals pro se from a trial court order denying his writ of certiorari and upholding Administrator David

Schwarz's determination that the Division of Hearings and Appeals (Division) had properly revoked Thomas's probation. Thomas's probation was revoked based on his violation of the terms of his probation while he was living and being supervised in Arizona. Thomas raises a threshold argument that the Department of Corrections (DOC) lacked jurisdiction to commence the probation revocation proceeding. He also contends that double jeopardy barred the revocation proceeding because he had already been disciplined in Arizona for the same violations. Alternatively, Thomas argues that there is insufficient evidence to support certain of the alleged violations and, as such, the matter should be remanded back to the Division for reconsideration of the probation revocation decision. We reject Thomas's arguments and affirm the order denying the writ of certiorari.

### ***FACTS***

¶2 Thomas was convicted of robbery by force while concealing his identity, as a party to the crime. He was placed on probation for twenty years under an imposed and stayed prison term of fifteen years. As conditions of probation, Thomas was ordered to serve a period of confinement in the county jail and to pay restitution. Upon his release from the county jail, Thomas was issued a permit allowing him to travel to Scottsdale, Arizona to be with his wife and five children. At that time, Thomas was also serving a period of probation in Arizona.<sup>1</sup> Wisconsin attempted to enter into an Interstate Compact with Arizona; however, Arizona would not accept the transfer of Thomas's probation unless he addressed

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<sup>1</sup> Although the judgment of conviction is not included in the appellate record, we assume that Thomas's Wisconsin probation was to be served concurrent with his Arizona probation.

an open felony forgery warrant from Iowa. Therefore, Thomas's Wisconsin probation agent, David Gaydos, told Thomas to travel to Iowa to clear up the open warrant. Thomas failed to do so.

¶3 After arriving in Arizona, Thomas was immediately placed on intensive probation supervision and ordered to turn over all of his payroll checks to his Arizona probation agent. After deducting supervision fees, court costs and restitution payments related to Thomas's Arizona probation, the agent then would issue a check for the balance to Thomas. After nine months, Thomas was given permission to move to Mesa, Arizona, and he was no longer required to turn his checks over to his agent. However, he was still obligated to make his restitution payments.

¶4 On April 23, 2002, Gaydos reported that Thomas's Arizona agent had contacted him and advised that Thomas had tested positive for THC and had been placed in an AODA Outpatient Treatment program. On May 6, 2002, Gaydos reported that Thomas's Arizona agent had again contacted him, advising that Thomas had failed another drug test and also had failed to report for a scheduled probation appointment. Gaydos then left a message on Thomas's home telephone ordering Thomas to contact him within twenty-four hours to make arrangements to return to Wisconsin. Gaydos also mailed a letter to the same effect to Thomas's last known address. According to Gaydos, Thomas's Arizona agent later told him that Thomas had stopped attending his AODA treatment and had absconded from his Arizona probation as well. Thomas's last restitution payment in Arizona was made on April 25, 2002. On September 2, 2002, Thomas was arrested for a probation violation and was subsequently returned to Wisconsin.

¶5 On October 10, 2002, Gaydos filed a request with the Division for a hearing to revoke Thomas's probation. In support, Gaydos alleged that Thomas had violated the terms of his probation by: (1) failing to make monthly payments towards his Wisconsin restitution; (2) consuming marijuana; (3) failing to report to his Arizona probation agent as directed, resulting in his whereabouts being unknown from April 10, 2002, until his arrest on September 2, 2002; and (4) failing to attend AODA treatment.

¶6 Following a hearing, an administrative law judge (ALJ) issued a written decision on November 21, 2002, revoking Thomas's probation. Thomas responded with an administrative appeal to Schwarz, the administrator of the Division. On November 29, 2002, Schwarz sustained the ALJ's decision. On April 23, 2003, Thomas filed a writ of certiorari with the circuit court seeking review of Schwarz's decision. Following briefing by the parties, the circuit court issued a written decision sustaining Schwarz's ruling and denying Thomas's writ of certiorari.

¶7 Thomas appeals.

### ***DISCUSSION***

¶8 Review of a probation revocation pursuant to a writ of certiorari is limited to the following questions:

(1) whether the division kept within its jurisdiction; (2) whether the division acted according to law; (3) whether the division's actions were arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the division might reasonably make the order or determination in question.

*Von Arx v. Schwarz*, 185 Wis. 2d 645, 655-56, 517 N.W.2d 540 (Ct. App. 1994). “The evidentiary test on certiorari review is the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion that the ALJ reached.” *George v. Schwarz*, 2001 WI App 72, ¶10, 242 Wis. 2d 450, 626 N.W.2d 57. “The facts found by the ALJ are conclusive if supported by ‘any reasonable view’ of the evidence, and we may not substitute our view of the evidence for that of the ALJ.” *Id.*

¶9 At the revocation hearing, the State has the burden of proving the alleged violation or violations by a preponderance of the evidence. *See State ex rel. Thompson v. Riveland*, 109 Wis. 2d 580, 585, 326 N.W.2d 768 (1982). On the probationer’s appeal, the burden switches to the probationer to prove by the same standard that the decision was arbitrary and capricious. *State ex rel. Solie v. Schmidt*, 73 Wis. 2d 76, 79-80, 242 N.W.2d 244 (1976).

¶10 We turn first to Thomas’s threshold argument that the Division did not have jurisdiction to revoke his probation. *See State ex rel. Cox v. DHSS*, 105 Wis. 2d 378, 380, 314 N.W.2d 148 (Ct. App. 1981) (our review of a revocation decision includes whether the department kept within its jurisdiction and acted according to law). Specifically, Thomas contends that because Arizona had not entered into an interstate compact with Wisconsin at the time of his probation violations, the DOC did not have jurisdiction over him at the time of his alleged violations and that this lack of jurisdiction deprived the DOC of the ability to seek revocation of Thomas’s probation. On a related theme, Thomas also argues that the DOC lost jurisdiction to seek revocation of his probation because, contrary to the DOC rules, Gaydos did not set up a supervision plan and communicate with Thomas while he was in Arizona.

¶11 Thomas does not advise whether his jurisdictional challenge travels to subject matter jurisdiction, personal jurisdiction, or competency to proceed by the DOC. If Thomas is raising a personal jurisdiction or competency to proceed challenge, we reject these arguments on two grounds. First, it was the Division, not the DOC, that litigated this revocation proceeding. The DOC was merely the entity that requested the hearing and invoked the Division's jurisdiction. A party's standing to commence an action is not assessed in terms of jurisdiction. Second, even assuming that the DOC's "jurisdiction" was a proper argument, the issue is waived because Thomas never raised this issue during the course of the administrative proceedings or before the circuit court. *See Santiago v. Ware*, 205 Wis. 2d 295, 322-27, 556 N.W.2d 356 (Ct. App. 1996).

¶12 If Thomas is raising a subject matter jurisdiction challenge, he cannot be held to waiver because such jurisdiction cannot be waived and may be raised for the first time on appeal. *See State ex rel. Skinkis v. Treffert*, 90 Wis. 2d 528, 531, 280 N.W.2d 316 (Ct. App. 1979). Criminal subject matter jurisdiction is the power of a court to inquire into the charged crime, to apply the applicable law and to declare the punishment. *State v. Aniton*, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994). The court's subject matter jurisdiction derives from the law, *id.*, and is absent only where the complaint does not charge an offense known to law. *Id.* We are offered no argument, nor can we think of any sound reason, why the same principle should not apply to an administrative agency's subject matter jurisdiction.

¶13 Although Thomas casts his argument in terms of the DOC's jurisdiction, it is not the DOC that conducted the revocation proceeding. Rather, it was the Division that conducted the proceeding based on the DOC's request for a hearing. Therefore, we analyze the question in terms of the Division's subject

matter jurisdiction. Pursuant to WIS. ADMIN. CODE § DOC 331.04 (June 1998)<sup>2</sup> and WIS. STAT. § 973.10(2) (2003-04),<sup>3</sup> the Division has the authority to conduct a probation revocation hearing. These same authorities confer authority on the administrator to review the Division's determination. Therefore, assuming Thomas's challenge goes to subject matter jurisdiction, we reject the argument.

¶14 Thomas next argues that the DOC violated its own policies and procedures by seeking revocation of his probation when he had already been disciplined in Arizona for two of the four alleged violations—consuming marijuana and failing to report to his Arizona agent. *See State ex rel. Meeks v. Gagnon*, 95 Wis. 2d 115, 119, 289 N.W.2d 357 (Ct. App. 1980) (a governmental agency must follow its own regulations). In support of his argument, Thomas cites to WIS. ADMIN. CODE § DOC 303.01, which provides, “The department may not discipline an inmate for an incident for which the inmate was disciplined in another jurisdiction.” The note to § DOC 303.01 observes, “It is the Department's policy and practice not to impose discipline on an inmate if the inmate has been subjected to a formal due process procedure in another jurisdiction for the same actions.”

¶15 We reject Thomas's argument for two reasons, both of which rest on the inadequate state of the record regarding the Arizona proceeding. First, while Thomas asserts that he was punished in Arizona for consuming marijuana and failing to report to his probation agent, the record does not contain any evidence of

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<sup>2</sup> All subsequent references to the Wisconsin Administrative Code are to the May 2003 version unless otherwise noted.

<sup>3</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

the nature and extent of the Arizona proceeding. The sole reference to the Arizona proceeding is Gaydos's testimony that "in talking to Arizona Corrections, they revoked the probation for just a short amount of time ... and allowed him to discharge." This brief reference does not allow us to conclude that the Arizona proceeding constituted the "formal due process procedure" contemplated by the note to WIS. ADMIN. CODE § DOC 303.01.

¶16 Second, Gaydos's testimony also does not permit us to conclude that Thomas received "discipline" as a result of the Arizona proceeding. On the one hand, the fact that Thomas was "revoked ... for just a short amount of time" and was ordered to pay court costs and serve twenty-four hours of community service smacks of "discipline." On the other hand, the end result of the proceeding was Thomas's discharge from the Arizona probation—hardly a form of discipline. In short, the record depicts the Arizona result as a mixed bag, which we cannot confidently label as "discipline" within the meaning of the note to WIS. ADMIN. CODE § DOC 303.01.

¶17 In summary, Thomas failed to demonstrate both that the Arizona proceeding was a "formal due process procedure" and that the proceeding resulted in "discipline" pursuant to WIS. ADMIN. CODE § DOC 303.01. Thus, Thomas failed to present sufficient evidence in support of his defense that the DOC failed to follow its own policies when it sought to revoke his Wisconsin probation.

¶18 Thomas additionally raises a double jeopardy challenge to his Wisconsin revocation based on those violations for which he was already disciplined in Arizona. We reject Thomas's argument. First, as noted, there is insufficient evidence for us to conclude that the Arizona proceeding imposed punishment sufficient to constitute "jeopardy" for purposes of double jeopardy



law. Second, and more importantly, “it is well established that revocation is not considered punishment for double jeopardy purposes.” *State v. Schreiber*, 2002 WI App 75, ¶14, 251 Wis. 2d 690, 642 N.W.2d 621. The double jeopardy clause applies only to criminal prosecutions; it does not apply to probation revocation proceedings. *Thompson v. Reivitz*, 559 F. Supp. 554, 558 (E.D. Wis. 1983) (addressing a second revocation proceeding based on the same occurrences as the first revocation proceeding), *aff’d*, 746 F.2d 397 (7<sup>th</sup> Cir. 1984).

¶19 Thomas’s next argument challenges the sufficiency of the evidence to support the finding that he violated the terms of his probation by failing to make restitution payments. In a written statement dated September 27, 2002, Thomas stated, “I never sent my Wisconsin agent any money toward restitution because I was paying \$135.00 towards my Arizona case per month. I couldn’t afford to pay both.”<sup>4</sup> When asked at the revocation hearing why he never made the \$100 monthly restitution payments, which were supposed to start on January 13, 2000, Thomas replied, “I just didn’t have it.” However, the ALJ’s decision states:

Mr. Thomas acted as described in the four allegations. I base this finding on Mr. Thomas admitting to these actions on the record at hearing.... Mr. Thomas testified that he could not afford to make his restitution payments after paying his bills ....

Mr. Thomas’ explanations for his behavior do not excuse the violations. He did not make a single restitution payment from the time he was placed on probation until his arrest on September 2, 2002.

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<sup>4</sup> Although Thomas does not challenge the sufficiency of the evidence underlying the second and third allegations, we nevertheless note that he admits in his statement: “I failed a drug test in March 2002 because I had smoked some marijuana.... When I stopped going to treatment I stopped reporting to my Arizona Agent. I failed to report to him in May, June & July of 2002.”

Now on appeal, Thomas contends that he believed his payment of the Arizona restitution resulted in all of his financial obligations being met. However, his testimony at the revocation hearing that he “couldn’t afford to pay both”—the Arizona and Wisconsin restitution—belies this statement. Thomas was making his Arizona payments up until May 2002 when he absconded from supervision. During that time, he did not indicate to his Wisconsin agent that he was unable to contribute even a small amount to his Wisconsin restitution obligation.

¶20 The ALJ found that Thomas’s explanations for his failure to make any restitution payments were insufficient to excuse the violation. The facts found by the ALJ are conclusive if supported by “any reasonable view” of the evidence, and we may not substitute our view of the evidence for that of the ALJ. *George*, 242 Wis. 2d 450, ¶10. We conclude that a reasonable view of the evidence is that Thomas failed to comply with the restitution requirements of his probation.

¶21 Finally, Thomas contends that the circuit court erred in failing to remand this case, given the court’s ruling that the fourth allegation—failing to attend AODA treatment—was not supported by any evidence that AODA treatment had ever been ordered by Thomas’s Wisconsin agent. Thomas contends that without the AODA violation, the DOC or the Division might have considered an alternative to revocation. We conclude that the evidence indicates otherwise.

¶22 In addressing alternatives to revocation, Gaydos, Thomas’s Wisconsin agent, testified that there may be alternatives to revocation for a person who fails to report to a probation agent. However, Gaydos decided against alternatives in Thomas’s case. He explained:

[M]y department views absconding or failing to report as cutting to the very heart of supervision, because there is no supervision if someone’s not reporting in to an agent.

....

[The department's] number one concern is community safety and, with [Thomas's] failing to report back to ... Iowa to clear up the warrant, his failing to report back to our state when we asked him to, in a letter by myself and in a phone message that I placed, and ... his failure to report to his agent in Arizona were serious enough to warrant revocation in this case.

In addition, the ALJ's decision states:

Mr. Thomas is on supervision for a serious felony offense. Unfortunately, the withheld 15-year prison sentence did not compel him to comply with the rules of supervision. Mr. Thomas argues that he has not been charged with any new crimes and that his rule violations are not serious. However, absconding or not advising the agent of one's whereabouts is, in fact, a serious violation that often goes to the heart of supervision. The Wisconsin Supreme Court stated that "[i]f the agent does not know where the probationer is there can hardly be any supervision." *State ex rel. Shock v. Department of Health and Social Services*, 77 Wis. 2d 362, 253 N.W.2d 55 (1977). I find that the violations warrant revocation and that it would unduly depreciate the seriousness of the violations if probation were not revoked.

¶23 In support of his remand argument, Thomas cites to *Snajder v. State*, 74 Wis. 2d 303, 246 N.W.2d 665 (1976), where the court held, "The department should determine whether the single violation under the facts present here is sufficient to warrant revocation." Here, there remain three of the four violations. Gaydos testified that Thomas's failure to make contact as instructed was "serious enough to warrant revocation." While Gaydos and the ALJ referenced Thomas's failure to attend AODA treatment, the core concern of both was Thomas's blatant disregard of his probation obligations by failing to communicate with his agent and by absconding from his supervision. Based on the testimony at the revocation hearing and the decision of the ALJ, we conclude that even absent the AODA

treatment violation, Gaydos would have nonetheless recommended revocation and the ALJ would have adopted that recommendation.

### ***CONCLUSION***

¶24 We conclude that: (1) Thomas waived his claim that the DOC did not have personal jurisdiction or the competency to initiate the probation revocation proceeding; (2) the Division, Schwarz and the circuit court all had subject matter jurisdiction to adjudicate this matter; (3) Thomas failed to present sufficient evidence in support of his defense that the DOC failed to follow its own policies; (4) the Wisconsin revocation did not violate Thomas's double jeopardy protections; (5) the evidence supports the finding that Thomas had failed to pay restitution as required by his Wisconsin probation; and (6) the trial court did not err in failing to remand Thomas's case.

¶25 We affirm the order denying Thomas's writ of certiorari.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.