COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1477 **Cir. Ct. No. 2015CV1141**

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

STATE OF WISCONSIN EX REL. OLTON DUMAS,

PETITIONER-APPELLANT,

V.

DENISE SYMDON AND BRIAN HAYES,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Rock County: DANIEL T. DILLON, Judge. *Affirmed*.

Before Lundsten, P.J., Blanchard, and Kloppenburg, JJ.

¶1 PER CURIAM. Olton Dumas, pro se, appeals a circuit court order denying his petition for certiorari review of a probation revocation. The circuit court upheld a decision of the Division of Hearings and Appeals (the division) that sustained the decision of an Administrative Law Judge (ALJ) revoking Dumas's probation. We reject his arguments and affirm.

BACKGROUND

¶2 Dumas has been incarcerated seven times since 1978 due to various convictions, probation revocations, and other arrests. After his most recent release from custody, Dumas was instructed to report to a Department of Corrections (Corrections) agent, Chloe Moore. He never reported. Instead, he was arrested almost two months later on suspicion that he stabbed S.S. According to police reports, Dumas violently kicked the inside of the squad car after being taken into custody, and officers found cocaine and a crack pipe when searching Dumas. According to Corrections records, Dumas provided and signed a statement to Rock County jail liaison Victoria Tucker, in which he admitted failing to report, using drugs, possessing a crack pipe, and kicking the car door during his arrest. He denied stabbing S.S.

¶3 Based on these incidents, Corrections sought to revoke Dumas's probation, alleging six violations of the terms of his extended supervision: (1) failing to report to Agent Moore between his release and his re-arrest; (2) consuming cocaine; (3) consuming alcohol; (4) possessing a crack pipe; (5) failing to cooperate with officers; and (6) stabbing S.S. A revocation hearing was held on August 10, 2015.

¶4 S.S. and Agent Moore both testified at the hearing. S.S. identified Dumas as the person who stabbed him and testified that he and Dumas were

consuming drugs and alcohol on the day of the stabbing. Agent Moore testified that Dumas had failed to report to her and summarized the statement prepared by Tucker as well as the police reports.

¶5 In a written decision, the ALJ found that all six allegations were proven by a preponderance of the credible evidence. The ALJ concluded that revocation was necessary and ordered Dumas to be confined for two years, ten months, and nine days. Dumas appealed to the division administrator, who sustained the ALJ's decision.

¶6 Dumas then filed a petition for a writ of certiorari challenging his revocation and arguing that various actions by Corrections had violated his rights. He named the division administrator as well as Denise Symdon, an administrator at Corrections. Symdon filed a motion to quash on two grounds: first, Symdon was not the final decision maker in the revocation, and second, Dumas's petition was not timely as to Corrections.

¶7 The circuit court construed Dumas's filing as a petition for a writ of certiorari to overturn the revocation and concluded that the administrator of the Division of Hearings and Appeals was the only proper respondent. The court denied Dumas's petition, finding that it was not timely filed as to that respondent. In the alternative, the court concluded that the petition was without merit. Dumas filed this appeal, asking us to reverse the order denying the writ of certiorari and instead grant it in his favor.

DISCUSSION

¶8 We understand Dumas to be making two main arguments in his opening brief. First, he argues that his petition was timely as to the Administrator

of the Division of Hearings and Appeals. The State agrees. We therefore need not address this argument.[1]

¶9 Second, Dumas argues that his petition should be granted because of several alleged errors in the revocation proceeding. Dumas asks us to conclude that Corrections did not carry its burden of establishing proper grounds for revocation, and that Dumas should be released. *See* ***State ex rel. Gibson v. DHSS***, 86 Wis. 2d 345, 353, 273 N.W.2d 395 (Ct. App. 1978) (explaining that a remand to present new evidence in support of revocation is "'a second kick at the cat'" that violates due process) (quoted source omitted).

¶10 Our review in a certiorari action is limited to the record created before the administrative agency. ***State ex rel. Whiting v. Kolb***, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). We will consider only whether (1) the division stayed within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) the evidence was such that the division might reasonably make the order or determination in question. ***Id.***

[1] In his reply brief, Dumas adds the argument that Symdon was a proper respondent and that his action against her was timely. We do not address arguments raised for the first time in a reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661. Nonetheless, we note that the relief Dumas seeks against Symdon is to bar Corrections from introducing his statement because he alleges that it was inaccurately transcribed. This argument mirrors his contention that the ALJ should not have considered his statement, which we address as part of our review of the merits of Dumas's certiorari petition. To the extent Dumas had any other claims against Symdon, they are deemed abandoned. *See* ***State ex rel. Garel v. Morgan***, 2000 WI App 223, ¶1, n.2, 239 Wis. 2d 8, 619 N.W.2d 285 (Ct. App. 2000).

A. Challenges To Prehearing Procedures

¶11 Dumas begins by making a number of arguments challenging the prehearing practices and prehearing submissions by Corrections. Dumas argues that he was prejudiced by Corrections' prehearing submission of exhibits indicating that he stabbed S.S. Specifically, he points out that one of the police reports states that S.S. initially identified his assailant as "Arthur Dumas." He contends that S.S.'s subsequent identification of him as the assailant indicates that impermissibly suggestive procedures must have been used, and argues that the fact-finding process was corrupted by the prehearing submission of any exhibits reflecting that Dumas was the assailant.

¶12 We disagree that the fact-finding process was corrupted by the prehearing submission of exhibits. The ALJ considered the reference to "Arthur Dumas" in the initial police report and determined that this disparity did not undermine the reliability of S.S.'s testimony that Dumas was his assailant. The stabbing occurred at Dumas's home, S.S. testified that he had known Dumas for years, and immediately after being stabbed S.S. gave officers the last name of his attacker ("Dumas"), along with a common first name that sounds similar to the less common "Olton." The disparity in first names is, at best, minor and in any event goes to the weight, not admissibility of S.S.'s testimony. We see no error in the ALJ's decision to rely on S.S.'s testimony as credible evidence supporting revocation. *See* ***State ex rel. Washington v. Schwarz***, 2000 WI App 235, ¶26, 239 Wis. 2d 443, 620 N.W.2d 414 (we defer to the ALJ's decisions regarding credibility and the weighing of evidence).

¶13 Dumas also argues that the ALJ should have held a hearing to determine his competency before proceeding with the revocation. *See* ***State ex rel.***

Vanderbeke v. Endicott, 210 Wis. 2d 502, 523, 563 N.W.2d 883 (1997) ("a probationer has a due process right to a competency determination when during the probation revocation proceeding the administrative law judge has reason to doubt the probationer's competency"). Dumas points to his statement to Agent Tucker in which he said, "I was having a lot of psychological stuff going on in my head." We disagree that this isolated remark, intended as an excuse for why Dumas had failed to report to Agent Moore, gave the ALJ reason to doubt Dumas's competency.

¶14 Dumas's final arguments about the prehearing procedures are that the division's practice of conducting prehearing conferences creates the appearance of impropriety and resulted in a biased decision from the ALJ. Dumas points to no legal authority to suggest that prehearing conferences are impermissible. To the extent that Dumas is making any other arguments about the prehearing procedures, we reject them as undeveloped. *See* ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999) ("A party must do more than simply toss a bunch of concepts into the air with the hope that either the [circuit] court or the opposing party will arrange them into viable and fact-supported legal theories.").

B. Challenges To The Hearing And The Decision

¶15 We now turn to Dumas's challenges to the ALJ's decision to revoke his probation. Dumas argues that the ALJ erred in relying on S.S.'s testimony. He makes much of the disparity in S.S.'s initial identification of Dumas as "Arthur," but as discussed above, we agree with the ALJ that this was not at all significant to S.S.'s credibility.

¶16 Dumas also argues that he was denied the right to effectively cross-examine S.S. because he believes that Agent Moore "intentionally suppressed or concealed other statements made by S.S." But his argument relies on portions of the hearing transcript that reveal effective cross-examination of S.S. and Agent Moore, as opposed to any intentional suppression or concealment by Agent Moore. His reply brief speculates that Agent Moore must have had some other undisclosed communications with S.S, but other than the tenuous argument that S.S. initially identified "Arthur Dumas" as his assailant, there is no factual basis for this speculation. In any event, the ALJ was well aware of S.S.'s shortcomings as a witness, specifically noting that S.S. had not been completely truthful with Corrections and that "his unabashed involvement in criminal activity [is] morally inexcusable." Nonetheless, the ALJ gave specific reasons for determining that S.S.'s testimony was credible. Dumas does not explain how more extensive cross-examination of S.S. would have changed this determination.

¶17 The last set of arguments we see relate to the ALJ's reliance on hearsay evidence, specifically Dumas's statement taken by Agent Tucker and the police reports from his arrest. Dumas argues that these were unreliable hearsay and that the failure to call the Corrections agent who prepared his statement and the officers who prepared the police reports means that he was denied his right to cross examine witnesses.

¶18 We reject Dumas's arguments that the ALJ's consideration of this evidence is a basis for granting his petition. At the outset, hearsay is admissible at a revocation hearing, *see* WIS. ADMIN. CODE § HA 2.05(6)(d) (through July 2017), as are police reports. *See* WIS. ADMIN. CODE § HA 2.05(1)(d) (through July 2017). The admission of this evidence is subject to the requirement that a decision

to revoke may not be based entirely on unreliable hearsay. ***State ex rel. Thompson v. Riveland***, 109 Wis. 2d 580, 583, 326 N.W.2d 768 (1982).

¶19 Here, Dumas cannot establish that the decision to revoke was based entirely on unreliable hearsay. Instead, as discussed above, four of the grounds for revocation were supported by in-person testimony that was based on personal knowledge. Specifically, Agent Moore testified that Dumas had failed to report (Ground 1), and S.S. testified that Dumas had used drugs and alcohol, and stabbed him (Grounds 2, 3, and 6). The remaining two grounds—possessing a crack pipe (Ground 4) and failure to cooperate (Ground 5)—were supported by both Dumas's statement and police reports.

¶20 Dumas argues in conclusory fashion that his statement and the police reports were "perjured," were not records kept in the ordinary course of business, and lacked any indicia of reliability. The division determined that there was nothing in the record that would call the reliability of these documents into question.

¶21 Our own review of the record indicates that Dumas attempted to call into question the reliability of his statement by asking Agent Moore to compare the signature on the statement to his signature on a different document. The ALJ determined that the inconsistency between the signatures did not undermine the reliability of the statement and that it was corroborated by other evidence including the testimony of S.S. and the police report.

¶22 In his brief to this court, Dumas argues that the ALJ "specifically found that it was necessary for Agent Tucker to be present to testify at the revocation hearing." Dumas mischaracterizes the ALJ's email, which stated that "It may be prudent to have the agent who took his statement be available to testify

at the hearing." The record shows that Corrections did in fact have Tucker available to testify at the hearing. However, Corrections stated that it was not necessary to call her in order to satisfy its burden of proof, and the division ultimately agreed. An argument that relies on mischaracterizations of the administrative record does not help convince us that the division erred, and Dumas has not developed any other argument on this issue. We therefore conclude that the division did not err in determining that Dumas's statement was reliable evidence.

¶23 Regarding the police reports, our review of the record indicates that Dumas objected to the introduction of the police reports on the ground that he had the right to confront these witnesses. A probationer facing revocation has a right to confront witnesses unless the ALJ specifically finds good cause. ***Morrissey v. Brewer***, 408 U.S. 471, 489 (1972). Here, the ALJ deferred the "good cause" finding during the hearing, stating that such a finding would be based on the entire record and that the written decision would reflect whether the police reports were sufficient. In the written decision, the ALJ relies on the police reports to the extent they were corroborated by other evidence, but does not as far as we can tell make a specific finding of good cause for considering the police reports without allowing Dumas to confront the officers who wrote them.

¶24 The State argues that the reports were official records that bore substantial indicia of reliability and were reasonable substitutes for the officers' testimony. *See* ***Egerstaffer v. Israel***, 726 F.2d 1231, 1234 (7th Cir. 1984) ("[I]f the proffered evidence itself bears substantial guarantees of trustworthiness, then the need to show good cause vanishes."). This argument falls short because our supreme court has declined to follow the Seventh Circuit's lead and instead has held that the ALJ must make the finding of good cause even where the evidence is

reliable. *See* ***State ex rel. Simpson v. Schwarz***, 2002 WI App 7, ¶15, 250 Wis. 2d 214, 640 N.W.2d 527. However, the court also explained that failing to do so is harmless error "where good cause exists, its basis is found in the record, and its finding is implicit in the ALJ's ruling." ***Id.***, ¶16. But neither party has developed a harmless error argument that addresses each of these three factors.

¶25 Instead, the State makes a broader harmless error argument, contending that even if the ALJ committed any error in considering Dumas's statement and the police reports, the error is harmless because the grounds for revocation that were established by in-person testimony, standing alone, were sufficient to warrant revocation. *See* ***Simpson***, 250 Wis. 2d 214, ¶16 (an error is harmless if there is no reasonable possibility that it contributed to the outcome). In his reply brief, Dumas does not challenge the State's harmless error analysis. Instead, he argues that the division's revocation decision "was based entirely upon inadmissible evidence." This argument plainly fails because S.S. and Agent Moore both testified from personal knowledge that Dumas committed four probation violations.

¶26 We agree that the error, if any, in considering the police reports was harmless because the record shows that the division would have revoked his probation based solely on these four violations. Specifically, the ALJ found that revocation was necessary in light of the severity of three of Dumas's current violations: absconding from supervision (Ground 1), using drugs (Ground 2), and stabbing S.S. (Ground 6). As explained above, each of these three violations was established through testimony of witnesses with personal knowledge. Accordingly, Dumas has not shown that there is a reasonable possibility of a different outcome if the ALJ had excluded the police reports from consideration.

CONCLUSION

¶27 Because Dumas has not demonstrated a reasonable possibility that any error in the division's decision to revoke his probation affected the outcome, we affirm the district court decision denying his petition for a writ of certiorari.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2015-16).