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December 26, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2018AP670

Michael V. Petty v. Brian Hayes, Administrator, Division of
Hearings and Appeals (L.C. #2017CV489)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Michael V. Petty, pro se, appeals from an order dismissing his petition for writ of certiorari and asks this court to reinstate his supervision, contrary to the Wisconsin Division of Hearing and Appeals (DHA) decision on revocation. Petty argues that DHA failed to establish a lack of reasonable alternatives to revocation. Based upon our review of the briefs and the record,

we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We affirm.

In August 1997, Petty was convicted of four counts of burglary in Ozaukee County case No. 1996CF212, and the court imposed eight years of imprisonment on count one and placed Petty on probation for counts two through four. That same day, Petty was also convicted of burglary in Ozaukee County case No. 1997CF27 and sentenced to ten years of imprisonment consecutive to the prior case. In June 1998, Petty was again convicted of burglary, and the court imposed a consecutive term of five years in prison.

In September 2012, Petty was released on parole in all three cases. In November 2013, Petty was convicted of criminal disorderly conduct for using an ATM card without permission and sentenced to one year of probation. In 2015, Petty possessed heroin and stolen property, gave false information to his agent, and broke into a church to steal a safe. Petty was not revoked for this behavior; he was permitted to enter an alternative to revocation agreement (ATR).²

In 2016, Petty committed the actions that are the subject of this case. His agent sought revocation, and a hearing was held before an administrative law judge (ALJ) in March 2017. Petty stipulated to smoking crack cocaine daily, entering a garage without permission, and

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² Petty claims he “neither enrolled in nor participated in an alternative to revocation program during his community supervision.” Petty agreed to participate in the Safe Streets Program as an ATR. Petty testified that he was never accepted into the Safe Streets Program as the program’s director instead recommended a grievance group as Petty’s wife had recently passed away. Petty was instead given alcohol and drug abuse (AODA) counseling while he was on parole.

consuming alcohol, all violations of the terms of his extended supervision. Based on a review of the evidence, the ALJ also concluded that Petty violated his conditions of supervision by throwing a rock through a pizza place window, entering a pizza place after hours and without permission, and stealing four bottles of liquor.

Prior to the hearing, Petty's parole agent completed a revocation summary and indicated that Petty "has already been offered an ATR and completed Intensive Outpatient AODA counseling." At the hearing, Petty's parole officer testified that ATRs had been discussed and "we felt that ... offering him formal and informal counselling was not appropriate because he had already been offered treatment and because he had already had the ATR and counselling ... [and] the counselling was found to be ineffective."

After considering Petty's risk to the public, his need for treatment, and the seriousness of his violations, the ALJ concluded that "alternatives to revocation are inappropriate." The ALJ further held that "[t]here is an undeniable nexus between his current Burglary violation and his original burglary offenses. This demonstrates that he is not sufficiently deterred from engaging in such conduct and that he remains a high risk of engaging in such behavior." According to the ALJ, "confinement is necessary to protect the public from further criminal activity and that it would unduly depreciate the seriousness of the violations if supervision were not revoked."

Petty appealed the ALJ's decision to Administrator Brian Hayes, who affirmed. Petty then filed a petition for writ of certiorari in the circuit court. After briefing on the merits, the court affirmed DHA's decision in an oral ruling and dismissed the petition for writ of certiorari.³

Our review in a certiorari action is limited to the actions of DHA and the record 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 “(1) whether the committee stayed within its jurisdiction, (2) whether it acted according to law, (3) whether the action was arbitrary, oppressive or unreasonable and represented the committee's will and not its judgment, and (4) whether the evidence was such that the committee might reasonably make the order or determination in question.” *Id.* “An agency's decision is not arbitrary and capricious and represents its judgment if it represents a proper exercise of discretion.” *Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (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 rationale founded upon proper legal standards.’” *Id.* (citation omitted). We may not substitute our judgment for that of DHA; we inquire only whether the substantial evidence supports its decision. *Id.*

We conclude that DHA's decision to revoke Petty's parole was reasonable and supported by substantial evidence in the record. “The ultimate question in revocation proceedings is

³ We note, as did the State, that the transcript from the circuit court's oral ruling on March 28, 2018, is not included in the record. The appellant, Petty, bears the burden to ensure that the record is complete and that it includes all documents pertinent to the issues raised on appeal. *See Schaidler v. Mercy Med. Ctr. of Oshkosh, Inc.*, 209 Wis. 2d 457, 469, 563 N.W.2d 554 (Ct. App. 1997). Where the record is incomplete, we must assume that the omitted material supports the circuit court's decision. *See State Bank of Hartland v. Arndt*, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986).

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 (1978) (citation omitted). “Violation of a rule or condition is both a necessary and a sufficient ground for revocation of supervision.” WIS. ADMIN. CODE § HA 2.05(7)(b)3. (Mar. 2017). Revocation is appropriate where the ALJ determines that:

- a. Confinement is necessary to protect the public from further criminal activity by the client; or
- b. The client is in need of correctional treatment which can most effectively be provided if confined; or
- c. It would unduly depreciate the seriousness of the violation if supervision were not revoked.

Id.; *State ex rel. Plotkin v. DHSS*, 63 Wis. 2d 535, 544, 217 N.W.2d 641 (1974). DHA is required to consider alternatives to revocation that are “available and feasible,” but it is not required to try alternatives before determining that revocation is appropriate. *Van Ermen v. DHSS*, 84 Wis. 2d 57, 67, 267 N.W.2d 17 (1978).

Petty argues that DHA failed to establish that there were no reasonable alternatives to revocation. We disagree. Petty was convicted of multiple burglaries and was incarcerated for a substantial amount of time. When he was released on supervision, his wrongful behavior continued: Petty possessed heroin and stolen property, gave false information to his agent, and broke into a church to steal a safe. He was not revoked at that time. Petty agreed to complete the Safe Streets ATR but, instead, enrolled in Options Treatment Program, an intensive outpatient AODA treatment. Despite these measures, Petty’s criminal behavior continued.

Before the ALJ, Petty stipulated to smoking crack cocaine daily, entering a garage without permission, and consuming alcohol. The ALJ also found that Petty violated the terms of his supervision when he broke into a pizza place and stole four bottles of liquor. Petty's conduct indicates that the ATR imposed in 2015 was not an effective means of deterring Petty from drug and alcohol abuse or committing burglary. We conclude that the record establishes that the *Plotkin* analysis was applied in this case and supports DHA's reasonable conclusion that an alternative to revocation was inappropriate.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals