

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 17, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2005AP651**

**Cir. Ct. No. 2004CV1139**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN EX REL. ISMAEL SAUCEDO,**

**PETITIONER-APPELLANT,**

**v.**

**DAVID H. SCHWARZ, ADMINISTRATOR, AND DIVISION OF  
HEARINGS AND APPEALS,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Racine County:  
CHARLES H. CONSTANTINE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Ismael Saucedo appeals from a circuit court order affirming a decision of the administrator of the Division of Hearings and Appeals (the Division) revoking Saucedo's probation. We affirm the circuit court's order.

¶2 The material facts are undisputed. On June 7, 2002, Saucedo was convicted of four counts of failure to support a child. He was sentenced on the same day to consecutive sentences of two years in prison for each count. The sentences were stayed, and he was placed on concurrent five-year terms of probation.

¶3 Saucedo was released from the county jail on June 11, 2002. He should not have been released at that time because the state of Indiana had issued a warrant for his apprehension. Because he was released prematurely, Saucedo had not yet met with a Wisconsin probation agent and signed rules of probation, and he had not been informed who his agent was.

¶4 Upon his release and without reporting to a Wisconsin agent, Saucedo returned to the state of Indiana, where he was on probation.<sup>1</sup> Upon his return to Indiana, Saucedo failed to turn himself in to probation authorities, despite being directed to do so by his Indiana agent. He was subsequently taken into custody in Indiana on June 14, 2002, on an Indiana probation warrant. At the time of his arrest, he was driving a motor vehicle without a license.

¶5 Saucedo's Indiana probation was subsequently revoked, and he was incarcerated in Indiana. The state of Indiana released Saucedo to parole supervision on November 29, 2003, and he was returned to Wisconsin.

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<sup>1</sup> Saucedo was on either probation or parole in Indiana when he was convicted and released in this case. For purposes of this decision, the distinction is irrelevant. We will simply refer to Saucedo's Indiana supervision as probation, as did the administrative law judge (ALJ) and the Indiana probation agent who testified at the revocation hearing.

¶6 Revocation proceedings were commenced against Saucedo upon his return. The Department of Corrections (DOC) alleged that he violated his rules and conditions of probation by failing to report to his agent upon release from jail, failing to inform his agent of his whereabouts, traveling to Indiana without his agent's permission or a valid travel permit, and operating a motor vehicle without a valid driver's license or permission from his agent.<sup>2</sup>

¶7 A revocation hearing was held on February 5, 2004. The administrative law judge (ALJ) issued a decision revoking Saucedo's probation on February 17, 2004. Based upon Saucedo's admissions, the ALJ found that he failed to report to a Wisconsin probation agent upon his release from jail on June 11, 2002, that he traveled to Indiana without a travel permit or permission of an agent, and that he drove a motor vehicle without a license on June 14, 2002, when he was arrested in Indiana. The ALJ determined that these acts constituted violations of the standard rules of probation supervision in Wisconsin and Saucedo's court-ordered conditions of probation. The ALJ found incredible Saucedo's claim that he went to Indiana to turn himself in to probation authorities there.

¶8 The ALJ's decision was upheld by the administrator of the Division on March 12, 2004. The administrator noted that when Saucedo was placed on probation on June 7, 2002, the circuit court ordered him to obey all rules and regulations while on probation. The administrator concluded that even without formally receiving probation rules, Saucedo should have known that he had a

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<sup>2</sup> The notice of violation also alleged that Saucedo fled from police and probation authorities in Indiana. However, the ALJ found that this allegation was not proved.

fundamental obligation to make himself available for supervision and to avoid any violations of the law. The administrator also determined that Saucedo drove a motor vehicle knowing that he did not have a valid driver's license.

¶9 Subsequently, Saucedo filed a petition for a writ of certiorari, seeking circuit court review of the administrator's decision. The circuit court upheld the decision, and this appeal ensued.

¶10 On appeal from an order entered on certiorari, we review the agency's decision, and our scope of review is identical to that of the circuit court. *State ex rel. Staples v. DHSS*, 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987). Our scope of review is limited to the following issues: (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 rather than its judgment; and (4) whether the evidence was such that the Division might reasonably make the decision in question. *Von Arx v. Schwarz*, 185 Wis. 2d 645, 655, 517 N.W.2d 540 (Ct. App. 1994).

¶11 At the revocation hearing, the State has the burden of establishing an alleged probation violation by a preponderance of the evidence. *Id.* However, on an appeal challenging the revocation decision, the probationer bears the burden of proving that the decision was arbitrary and capricious. *Id.* A decision is not arbitrary or capricious if it represents a proper exercise of discretion. *Id.* at 656. Discretion is properly exercised if the decision maker engages in a reasoning process based on the facts of record and reaches a conclusion based on a logical rationale and founded on proper legal standards. *Id.* This court may not substitute its judgment for the Division's decision to revoke a probationer, and must uphold that decision if it is supported by substantial evidence, even if the evidence would

also support a contrary determination. *Id.* Substantial evidence is evidence that is relevant, credible, probative, and of a quantity that a reasonable factfinder would consider sufficient to support a conclusion. *Id.*

¶12 Saucedo contends that he was revoked without due process because he did not have advance notice of the conditions of probation whose violation led to his revocation, and his violations were of a noncriminal nature. He relies on the fact that he did not receive and sign probation rules until June 26, 2002, after the acts which led to his revocation occurred.

¶13 We conclude, as did the circuit court, the administrator, and the ALJ, that Saucedo's revocation complied with due process requirements. "When probation is revoked based on a condition not formally given, the record must be closely examined to determine whether adequate notice was given to constitute fair warning." *G.G.D. v. State*, 97 Wis. 2d 1, 10-11, 292 N.W.2d 853 (1980). Certain conditions of probation are so basic that knowledge of them will be imputed to the probationer. *Id.* at 10. Knowledge of the criminal law is one of these conditions. *Id.*

¶14 Although Saucedo did not meet with a probation agent and sign the rules of probation before he left Wisconsin, this was because he chose to leave the state without first contacting probation authorities and meeting with an agent. He also chose to operate a motor vehicle without a driver's license. By doing so, he violated standard rules of probation as alleged in the DOC notice of violation. These rules required him to report to his probation agent and inform the agent of his whereabouts, and prohibited him from leaving the state without permission of the agent. These rules also prohibit a probationer from violating the law, which includes federal and state law and municipal and county ordinances.

¶15 Regardless of whether Saucedo signed formal rules of probation in this case before June 26, 2002, he was aware that he was on probation in Wisconsin, having been present when he was placed on probation by the circuit court. The judgment of conviction itself specified that Saucedo was required to obey all rules and regulations while on probation. Saucedo therefore should have known that he was required to contact probation authorities and let them know his whereabouts, and could not simply leave the state without permission. Because such conditions are basic to being on probation, knowledge of them was reasonably imputed to Saucedo, as was knowledge that leaving the state without permission could lead to revocation.<sup>3</sup>

¶16 Imputing knowledge of the rule that he had to report to probation authorities and seek permission to leave the state was reasonable in light of Saucedo's prior experience on probation in Indiana, his knowledge that Indiana authorities had placed a hold on him for violating probation, and his failure to report to authorities in Indiana after he arrived there, despite knowing that he was supposed to turn himself in to his Indiana agent. These facts permit the inference that Saucedo understood that a person on probation is required to report to probation authorities, and that he chose to violate the reporting requirement. Similarly, knowledge that a probationer is not permitted to violate the law, including noncriminal laws, is so basic as to be imputed to the probationer. Consequently, even if driving without a license does not rise to the level of a

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<sup>3</sup> Under *G.G.D. v. State*, 97 Wis. 2d 1, 10, 292 N.W.2d 853 (1980), knowledge that a person may not violate the criminal law is so basic that it may be imputed to a probationer. However, contrary to what Saucedo seems to be arguing, in *G.G.D.*, the supreme court did not indicate that knowledge of the criminal law is the only knowledge that may ever be imputed to a probationer.

criminal offense in Indiana, knowledge of the requirement that he not break the law by operating a motor vehicle without a license could reasonably be imputed to Saucedo. Saucedo's due process rights therefore were not violated when he was revoked.

¶17 Saucedo's next argument is that alternatives to revocation were not given the consideration required by *State ex rel. Plotkin v. DHSS*, 63 Wis. 2d 535, 545, 217 N.W.2d 641 (1974), and that an alternative to revocation was warranted. However, a review of the record establishes that the DOC and the ALJ considered alternatives to revocation, and reasonably rejected them.

¶18 When a probationer violates a condition of probation, revocation may be ordered if the revoking officer or agency determines that confinement is necessary to protect the public from further criminal activity by the probationer, that the offender is in need of correctional treatment that can most effectively be provided in a confined setting, or that failure to revoke would unduly depreciate the seriousness of the violation. *Id.* at 544. Alternatives to revocation, including reviewing conditions and issuing warnings, are required to be considered. *Id.* at 545.

¶19 The DOC's revocation summary and the testimony of Mark Cacciotti, a Wisconsin probation agent who testified at the revocation hearing, indicate that probation authorities considered electronic monitoring, treatment in the community, the imposition of conditional jail time, and the transfer of Saucedo's supervision to Indiana. The DOC rejected these alternatives based upon Saucedo's prior failure to comply with supervision in Indiana. The DOC noted that Saucedo was convicted in this case after absconding from supervision in Indiana and, despite being given probation by the Wisconsin court to assist him in

supporting his child, he left Wisconsin immediately upon his release. It also considered that he failed to report to Indiana authorities after returning there, and was apprehended only upon his arrest for driving without a license. Based upon this history, the DOC concluded that Saucedo was unwilling to cooperate with supervision, that a confined setting was necessary to meet his treatment needs, and that failure to revoke would unduly depreciate the seriousness of the violations.

¶20 Like the DOC, the ALJ considered and rejected alternatives to revocation. The ALJ rejected Saucedo's claim that he returned to Indiana intending to turn himself in, noting that he did not meet with his Indiana agent despite opportunities to do so. Under these circumstances, the ALJ reasonably concluded that anything less than revocation would unduly depreciate the seriousness of Saucedo's disregard of probation in both Wisconsin and Indiana. The administrator reasonably upheld this determination. No basis therefore exists to conclude that Saucedo's revocation was arbitrary or unreasonable, or that alternatives to revocation were not adequately considered.<sup>4</sup>

¶21 Saucedo's final argument is that he is entitled to additional sentence credit for the time he spent in custody in Indiana between June 14, 2002, and November 29, 2003, when he was released from the Indiana prison and transported back to Wisconsin. He contends that he is entitled to credit for this period because Wisconsin placed a probation hold on him when he was apprehended in Indiana.

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<sup>4</sup> Saucedo contends that the DOC did not consider his behavior and the rehabilitative services he received while incarcerated in Indiana. However, it was within the discretion of the DOC to consider Saucedo's prior conduct on supervision as the basis for deciding whether his probation should be continued or revoked.



¶22 Although the parties dispute whether or when a probation hold or apprehension warrant was issued by Wisconsin authorities, we find it unnecessary to resolve this issue. Assuming *arguendo* that an apprehension warrant or probation hold was issued by Wisconsin on June 14, 2002, Saucedo is not entitled to additional credit.

¶23 Dual sentence credit is not permitted when a defendant has already received credit against a sentence that has been, or will be, separately served. *State v. Jackson*, 2000 WI App 41, ¶19, 233 Wis. 2d 231, 607 N.W.2d 338. Saucedo received credit on his Indiana sentence for the period between June 14, 2002, and November 29, 2003. Because he received credit on the prior Indiana sentence, he is not entitled to the same credit on his Wisconsin sentences, which he began serving after revocation of his Wisconsin probation. *See id.*, ¶20.

*By the Court.*—Order affirmed.

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

