

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 9, 2001

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.

No. 00-3378

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

PETER P. GRANDAW,

PLAINTIFF-APPELLANT,

V.

DAVID H. SCHWARZ,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County:
WILLIAM C. GRIESBACH, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Peter Grandaw appeals from a circuit court order affirming his parole revocation. Grandaw, whose parole was revoked because he sexually assaulted two women, seeks a new revocation hearing on grounds that he was denied due process at the hearing because (1) the administrative law judge (ALJ) required Grandaw to sit next to her, making private communication between

Grandaw and his attorney difficult; (2) Grandaw was not allowed to cross-examine witnesses about an incident that occurred weeks after the assaults; and (3) the transcript is incomplete since the tape recording of the hearing was at times inaudible. We affirm the order.

BACKGROUND

¶2 Grandaw was on parole for several crimes when his parole agent sought to revoke his parole because Grandaw had nonconsensual sexual contact with a seventeen-year-old girl and a sixteen-year-old girl. Grandaw contested the revocation on grounds that he did not have sexual contact with either of the girls, although he acknowledged that he knew both of them socially.

¶3 The girls' allegations came to the attention of law enforcement on December 27, 1999. On that date, police were called to Grandaw's apartment where both of the girls and several other individuals were involved in a physical altercation with Grandaw.

¶4 One girl, Charleen A., told police that the physical altercation occurred after she and several other individuals went to Grandaw's apartment to talk with him about sexual contact that Grandaw had with her in November. In a written statement, she explained that one night she and Grandaw were sleeping at a friend's house. She took some cold medication to help her sleep. When she woke up in the morning, Grandaw told her that he had had sexual intercourse with her as she slept. Charleen said that although she did not remember the assault, she felt physical soreness consistent with having been sexually assaulted.

¶5 The second girl, Kari K., indicated in a written statement to police that Grandaw had sexual contact with her one night in December at a party.

Grandaw took Kari to his apartment to retrieve her cigarettes. She stated that she felt sick from the alcohol she had consumed and, at Grandaw's suggestion, rested in his bed. At one point, Grandaw entered the room, took off Kari's pants and told her that he wanted to have sexual intercourse. Although she said no, Grandaw proceeded to have sexual intercourse with her.

¶6 Grandaw told police that the sexual assaults never occurred. At his parole revocation hearing, Grandaw's theory of defense was that the girls' stories were incredible. Counsel argued that it was unbelievable "that two girls [who] were involved in a break in [at Grandaw's] home where he was beaten and hospitalized, [on that] very night would claim that each of them had been separately raped by [Grandaw]." Grandaw also introduced testimony that Kari had subsequently tried to bargain with Grandaw's girlfriend, suggesting that the girls would drop their sexual assault complaints if Grandaw would drop his battery complaint.

¶7 The ALJ found that the girls were credible and that the assaults had occurred. The ALJ concluded that Grandaw had violated the rules of his parole and that, due to the gravity of the violations, there was no alternative to revocation. Grandaw was ordered reincarcerated for a total of one year, ten months and seven days. Grandaw appealed, and the Department of Administration, Division of Hearings and Appeals (department) affirmed the ALJ's decision. Grandaw sought review in the circuit court through a writ of certiorari. The circuit court affirmed the revocation, and this appeal followed.

LEGAL STANDARDS

¶8 A parolee has a right to an administrative hearing before parole is revoked. *See* WIS. STAT. § 304.06(3).¹ However, the revocation of parole or probation is not, as a constitutional matter, a stage of a criminal prosecution.² *See Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). Revocation is a civil proceeding in Wisconsin. *State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 502, 513, 563 N.W.2d 883 (1997). Parolees are therefore not entitled to the full panoply of rights accorded persons subject to criminal process. *See id.* It is well settled, however, that parolees are entitled to due process of law before parole may be revoked, because revocation may entail a substantial loss of liberty. *See id.* at 513-14.

¶9 The minimum requirements of due process for revocation include: (1) written notice of the claimed violation(s) of parole; (2) disclosure to the parolee of evidence against him or her; (3) the opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the ALJ specifically finds good cause for not allowing confrontation); (5) a neutral and detached hearing body, members of which need not be judicial officers or lawyers; and (6) a written statement by the fact finder regarding the evidence relied on and the reasons for revoking parole.

¹ All statutory references are to the 1999-2000 version unless otherwise indicated.

² Because the review process for both probation and parole is identical, and the due process rights of probationers and parolees are substantially equivalent, we rely on both probation and parole cases in our analysis. *See State ex rel. Macemon v. Christie*, 216 Wis. 2d 337, 342 n.3, 576 N.W.2d 84 (Ct. App. 1998) (review process is identical); *State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 502, 513 n.4, 563 N.W.2d 883 (1997) (the due process rights of probationers and parolees are substantially equivalent).

See id. at 514-15. Thus, there can be no revocation unless the parolee has been provided a reasonable opportunity to explain the accusation of parole violation. *See id.* at 515.

¶10 Appellate review of a revocation is limited to four inquiries: (1) whether the department acted within the bounds of 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 sufficient that the department might reasonably make the determination that it did. *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 628-29, 579 N.W.2d 698 (1998).

¶11 Because Grandaw alleges due process violations, this decision requires an examination of the second inquiry: whether the department acted according to law. *See id.* at 629. This presents a question of law that we review de novo. *See id.*

DISCUSSION

¶12 On appeal, Grandaw does not challenge the sufficiency of the evidence presented at the hearing. Instead, he seeks a new hearing on grounds that he was denied due process at the hearing because (1) the ALJ required Grandaw to sit next to her, making private communication with his attorney difficult; (2) Grandaw was not allowed to cross-examine witnesses about an incident that occurred weeks after the assaults; and (3) the transcript is incomplete since the tape recording of the hearing was at times inaudible. We conclude that Grandaw was not denied due process and, therefore, affirm the order.

I. Seating arrangements at the hearing

¶13 Grandaw objected to the seating arrangement. Grandaw's counsel explained he was concerned that any conversation that he had with his client would be heard by the ALJ because she had directed Grandaw to sit to her immediate right. The ALJ declined to change the seating arrangement, explaining that she had directed Grandaw to sit on her right because witnesses would be coming to testify. The ALJ explained:

I prefer that there be a certain amount of distance between your client and the witnesses regardless of who calls them. ... If there is anything you wish to talk to your client about that you are afraid may be picked up by the record, I am more than happy to pause the record. If you want to take a break to speak to your client ... I am willing to accommodate that.

¶14 Grandaw contends that the seating arrangement denied him his constitutional right to consult with his attorney and, therefore, he was denied due process at the hearing. We disagree. Although Grandaw was perhaps precluded from speaking loudly with his attorney, nothing in the record suggests that he could not whisper or pass notes to his attorney. Moreover, the ALJ specifically told Grandaw that she would recess and allow Grandaw and his attorney an opportunity to consult privately. Grandaw never sought a recess and never again indicated that he had any problem communicating with his attorney during the hearing. We conclude that Grandaw was not denied due process by the seating arrangement at the hearing.

II. Exclusion of testimony concerning the physical altercation at Grandaw's apartment

¶15 Grandaw argues that he was denied due process because the ALJ would not allow testimony about the specific details of the December 27 physical altercation at Grandaw's apartment. The ALJ stated, "With regards to what happened on that evening ... the alleged battery that was in the police reports, I really didn't want to go into that in a whole lot of detail because it has nothing to do with what happened." Later, Grandaw asked Kari about her written statement that Grandaw had hit himself in the head with a beer bottle the night of the physical altercation. The ALJ refused to allow Kari to answer, again indicating that testimony concerning the actual events at Grandaw's apartment were irrelevant to whether there were sexual assaults in late November and mid-December.

¶16 Grandaw contends that his inability to cross-examine the girls about the December 27 events denied him the right to present a defense. We disagree. Grandaw's defense was that the sexual assaults never happened, and that the girls fabricated the assaults to protect themselves and their friends from getting in trouble for the December 27 incident. The ALJ acknowledged that she was aware of the December 27 incident and Grandaw's defense. We agree with the ALJ that the specific events that occurred in the apartment are irrelevant to Grandaw's defense. It was undisputed that Grandaw was battered, that there was a police investigation of the battery, and that the girls first offered their sexual assault statements to law enforcement at that time.

¶17 Additionally, the ALJ did not prohibit Grandaw from asking the girls about their motive to lie. For example, Grandaw questioned Kari about statements she made to Grandaw's girlfriend suggesting that everyone should drop their

respective charges. Grandaw also offered his girlfriend's testimony that Kari had been trying to encourage everyone to drop their charges.

¶18 Finally, even if Grandaw's attempt to ask the girls questions about their statements to police could arguably be relevant to their credibility, the ALJ, like a trial court, had discretion to disregard relevant testimony if its probative value was substantially outweighed by the danger of confusion of the issues or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *See* WIS. STAT. § 904.03.³ Based on the record, and the fact that Grandaw was not prohibited from asking the girls about the sexual assaults and their motivations to lie, we conclude that Grandaw was not denied the right to present a defense.

III. Inaudible portions of the hearing tape

¶19 Grandaw argues that because certain words on the audio tape of the hearing are inaudible, he has been denied a meaningful right to appeal his revocation. He contends, "It is simply not possible to say that the inaudible portions of the transcript relate only to minor matters. They go directly to the heart of the state's case."

¶20 When an appellant challenges the adequacy of a circuit court transcript, appellate courts must determine as a matter of law whether the transcript is sufficient to serve its necessary purpose on appeal. *See State v. Perry*,

³ Although the rules of evidence at administrative hearings are not strictly adhered to, *see State ex rel. Flowers v. DH&SS*, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978), we see no reason why an ALJ would not have at least as much discretion as a trial court to exclude relevant evidence on this basis.

136 Wis. 2d 92, 97, 401 N.W.2d 748 (1987). Whether a particular transcript is sufficient for an appeal is dependent upon the nature of the case; the nature of the claim of error; the passage of time from the date a transcript originally was, or should have been, prepared; and whether the trial was to the court or to a jury. *Id.* at 98.

¶21 Both parties argue that *Perry* should control our analysis, even though the transcript at issue here is that of a parole revocation. We agree. Applying *Perry* here, we conclude that the inaudible portions of the transcript did not deny Grandaw a meaningful right to appeal his revocation.

¶22 First, Grandaw is not contesting the sufficiency of evidence that he sexually assaulted the girls. Consequently, there is no need for any court to review the testimony, including that which may be inaudible on the tape, to evaluate the sufficiency of the evidence. Second, Grandaw has not alleged that he was unable to prepare an appellate defense because he could not recall the testimony, or that the ALJ was unable to hear the testimony in full. Instead, Grandaw's argument appears to be that because an appellate court cannot read every word that was spoken at the hearing, he has automatically been denied a meaningful right to appeal his conviction. Given the two substantive issues Grandaw appealed, the seating arrangements and his inability to fully cross-examine the girls about the physical altercation, we are unconvinced that the inaudible portions of the tape denied Grandaw a meaningful right to appeal his conviction.

By the Court.—Order affirmed.

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

