COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0370 **Cir. Ct. No. 00-CV-1047**

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

STATE OF WISCONSIN EX REL. LEE A. KNOWLIN,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ, ADMINISTRATOR, DIVISION OF HEARINGS AND APPEAL, DEPARTMENT OF ADMINISTRATION,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed*.

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Lee A. Knowlin has appealed pro se from an order dismissing his petition for a writ of certiorari challenging his probation revocation. We affirm the order.

¶2 Knowlin was convicted on October 24, 1995, of one count of uttering in Racine county circuit court case no. 93-CF-854. The trial court sentenced Knowlin to six years in prison, consecutive to another Racine county circuit court case, but stayed the sentence and placed Knowlin on eight years of probation. The judgment of conviction specified that Knowlin was required to obey all rules and regulations while on probation.

¶3 Knowlin remained incarcerated for other offenses after October 24, 1995. On February 20, 1999, he was released from the John C. Burke Correctional Center, pursuant to a discharge notice issued by the Wisconsin Department of Corrections. The discharge notice specified that it pertained to Racine county circuit court case no. 85-CF-479.

¶4 Evidence in the record indicates that at the time of his release, Knowlin was told by the assistant superintendent at the institution that he was being discharged from his sentence and was not being released to probation. It is undisputed that Knowlin was not contacted by a probation agent or asked to sign new rules of supervision at the time of his release, nor did Knowlin contact probation authorities or report to them to commence serving his probation in Racine county circuit court case no. 93-CF-854.

¶5 Knowlin remained unsupervised until his arrest on July 21, 1999, when he was taken into custody by the police during a burglary investigation. Revocation proceedings were then commenced in this case. The notice of violation alleged that on July 21, 1999, Knowlin carried a concealed knife with an illegal blade length in violation of Rule 1 of the probation and parole rules signed by him on June 1, 1993, "and court order." The notice also alleged that on or about February 20, 1999, Knowlin failed to report to his agent in violation of

Rules 4, 5, 7 and 13 of the probation and parole rules signed by him on June 1, 1993, "and court order."

¶6 Following a revocation hearing, the administrative law judge (ALJ) found that when police arrested Knowlin on July 21, 1999, he was carrying a knife with a three-and-one-half inch blade in his pocket. The ALJ found that this constituted carrying a concealed weapon in violation of Knowlin's rules of probation. The ALJ further found that regardless of what Knowlin was told by prison authorities upon release from prison on February 20, 1999, the judgment of conviction imposing an eight-year term of probation was clear, and Knowlin should have known that this term did not expire until October 24, 2003, and that he remained on probation in 1999. Based upon undisputed evidence at the hearing, the ALJ also found that Knowlin had been on probation and parole in the past, and, even if he did not sign new rules for this case, he should have known that he was required to obey the law and maintain contact with probation authorities. The ALJ also noted that, pursuant to WIS. ADMIN. CODE § DOC 328.04(3)(a) and (e), Knowlin had notice that he was to avoid all conduct which violated state statutes or municipal or county ordinances and was required to submit a monthly report to probation authorities, along with any other relevant information required.

¶7 The administrator of the Division of Hearings and Appeals upheld the ALJ's findings and decision, concluding that Knowlin knew he was on probation in February 1999, and finding incredible his claim that he believed his probation had ended. On certiorari review, the trial court upheld the revocation.

¶8 On appeal of a trial court order affirming a probation revocation decision, 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). A decision revoking a petitioner will be upheld if it is supported by substantial evidence, even if the evidence would also support a contrary determination. ***Id.*** at 656. Substantial evidence is evidence that is relevant, credible, probative and of a quantity that a reasonable fact finder would consider sufficient to support a conclusion. ***Id.***

¶9 Knowlin's revocation complied with due process requirements and was supported by substantial evidence. Addressing his claim that the Division failed to act according to law when it revoked him for carrying a concealed weapon, we note that Knowlin was on probation pursuant to the judgment of conviction entered in this case regardless of what prison authorities told him. The October 24, 1995 judgment of conviction unambiguously decreed that Knowlin was on probation for a period of eight years. Pursuant to this judgment, Knowlin was turned over to the custody of the Department of Corrections until discharged at the expiration of the term of probation. *See* ***State ex rel. Rodriguez v. DHSS***, 133 Wis. 2d 47, 51, 393 N.W.2d 105 (Ct. App. 1986). Because the discharge issued on February 20, 1999, did not pertain to Racine county circuit court case no. 93-CF-854, Knowlin was on probation for the period between his release on February 20, 1999, and his arrest on July 21, 1999, even if personnel of the Department of Corrections erroneously informed him that he was not. *See* ***id.***

¶10 The Division also reasonably found that Knowlin knew he was on probation. Knowlin was in court when he was placed on eight years of probation

in Racine county circuit court case no. 93-CF-854. The written judgment of conviction was unambiguous. The Division therefore reasonably determined that Knowlin's claim that he did not know he was on probation between February and July 1999 was incredible.

¶11 Admittedly, Knowlin was not contacted by probation authorities or given new rules of probation to sign in February 1999. "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." ***In re G.G.D. v. State***, 97 Wis. 2d 1, 10-11, 292 N.W.2d 853 (1980). In this case, Knowlin had fair warning that he could not violate a state statute or a municipal or county ordinance. The judgment of conviction expressly required him to obey all rules and regulations of probation. This included WIS. STAT. § 973.10(1) (1999-2000),[1] which provides:

> Imposition of probation shall have the effect of placing the defendant in the custody of the department and shall subject the defendant to the control of the department under conditions set by the court and rules and regulations established by the department for the supervision of probationers, parolees and persons on extended supervision.

¶12 One of the rules established by the Department for the supervision of probationers is WIS. ADMIN. CODE § DOC 328.04(3)(a), which provides that a probationer shall "[a]void all conduct which is in violation of state statute, municipal or county ordinances." Knowlin was subject to this rule even though he did not sign written rules of probation in this case. ***Rodriguez***, 133 Wis. 2d at 52. Moreover, even absent § DOC 328.04(3)(a), a probationer who violates a criminal

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

statute may be revoked for his or her conduct, regardless of whether he or she has signed rules of probation. ***Id.***

¶13 A police report, admitted at the revocation hearing, indicated that when the police stopped Knowlin on July 21, 1999, an officer conducted a pat-down of him and felt a hard object which the officer believed was a weapon. The report indicated that the officer retrieved the object, which was a "knife with a locking blade."[2] In a written statement made at the time of his arrest, Knowlin admitted that he was carrying a knife with an illegal blade length, but denied knowing that the length was illegal. He reiterated this admission at the revocation hearing, stating that when he was stopped on July 21, 1999, he had a pocket knife "on him," and that the police officer told him that the blade was three and one-eighth inches long.

¶14 Based upon this evidence, the Division reasonably found that Knowlin carried a concealed weapon in violation of the law and his rules of probation. Knowlin admitted that he was carrying a knife. Based upon the evidence that the officer first felt the knife as a hard object during a pat-down and then retrieved it, a reasonable inference is that the knife was concealed. Carrying a concealed knife can be deemed to constitute carrying a concealed weapon in violation of WIS. STAT. § 941.23, a state criminal statute.[3] In addition, City of Racine Ordinance § 66-57 (1973) provides that "[n]o person except a bona fide peace officer may go armed with a concealed and dangerous weapon." Pursuant

[2] The report appears to state that the blade was over three inches long, but the word "over" is not fully legible.

[3] Nothing in this statute establishes a minimum blade length before a knife constitutes a dangerous weapon.

to City of Racine Ordinance § 66-56, a knife is dangerous per se if it has a blade three inches or longer. The Division thus reasonably concluded that Knowlin carried a concealed weapon in violation of his rules of probation which prohibited him from violating a state law or a municipal or county ordinance.

¶15 The Division also reasonably determined that Knowlin violated his rules of probation by failing to report to probation authorities. As already discussed, both the judgment of conviction and WIS. STAT. § 973.10(1) provided Knowlin with notice that he was required to obey all rules and regulations of probation. These rules included WIS. ADMIN. CODE § DOC 328.04(3)(d) and (e), which require a probationer to inform his or her agent of his or her whereabouts as directed and require the probationer to submit a written monthly report. In addition, Knowlin admitted that he had been on both probation and parole in the past. The Division therefore reasonably determined that he knew that reporting to an agent and maintaining contact with probation authorities was always a requirement of probation, and that his failure to contact probation authorities after his February 1999 release warranted revocation.[4]

¶16 Knowlin's next argument is that the Division deprived him of due process when it required him to present his defense by written evidence and written final argument. This contention is not supported by the record. The record indicates that after October 4, 1999, the revocation hearing was rescheduled at the

[4] Knowlin argues that he was given inadequate notice of the rules he allegedly violated because the notice of violation served on him referred to violations of rules regarding reporting signed by him in 1993, more than two years before he was convicted in this case. However, the notice of violation also alleged that Knowlin's failure to report violated "court order." Because the court order, or judgment of conviction, required Knowlin to abide by all rules of probation, which as a matter of law included WIS. ADMIN. CODE § DOC 328.04, we reject his claim that the notice of violation was inadequate.

request of Knowlin's counsel, first to October 11, then to November 11 and December 9, 1999. In early December, Attorney David Saldana, who was substituted for Knowlin's original counsel, moved twice for an adjournment of the December 9 hearing. In both of his requests he claimed that an adjournment was needed to permit him to obtain expert testimony regarding shoe print evidence.[5] The ALJ denied the request for a continuance, but stated that if necessary the record would be held open after the hearing or the hearing would be reconvened to permit Knowlin to submit expert testimony.

¶17 At the beginning of the revocation hearing, Attorney Saldana set forth his understanding that the hearing would be started, and that "the balance would be put over" so that the defense could present any expert evidence regarding the shoe prints. He made no mention of needing an adjournment to present other evidence unrelated to the shoe prints until midway through the proceeding, when he indicated that it was his understanding that the Department of Corrections would be presenting its case, and that the defendant's case would be put over to another date. Although recognizing that the prior discussions had dealt only with shoe print evidence, the ALJ told Attorney Saldana that if problems arose he should send the ALJ a letter and they would have a conference call to discuss it. The ALJ said that otherwise, the record would be held open for the expert report. Knowlin then proceeded to testify on his own behalf.

¶18 Attorney Saldana subsequently wrote to the ALJ on January 5, 2000, asking for an additional thirty-day extension to complete and submit the shoe print

[5] This evidence pertained to allegations that Knowlin committed a burglary. The ALJ ultimately determined that evidence of this alleged violation was not established at the revocation hearing, and those allegations were not relied upon to revoke Knowlin.

report "and all other information that we will be providing you." The ALJ granted an extension to February 8, 2000. However, when counsel again requested an extension, saying "there is still more discovery out there that has not been made available to us," but failed to explain what specific information he was referring to, the ALJ denied the extension request, stating that Knowlin had been given a full and fair opportunity to present his evidence. However, the ALJ accepted into the record attachments submitted by counsel with his extension request, dealing with Knowlin's discharge from prison on February 20, 1999.

¶19 This chronology demonstrates that Knowlin, through his counsel, was informed that he had to be prepared to present his defense on December 9, 1999, with the exception of evidence regarding the shoe print analysis. Moreover, even after the hearing date, the ALJ expressed a willingness to consider additional evidence or reconvene the proceeding if a showing of need was made within the extension periods granted. However, on February 8, 2000, the ALJ reasonably determined that Knowlin had been afforded adequate time to present or offer any additional evidence and closed the record. In light of the efforts made to accommodate Knowlin, the ALJ's actions did not deprive Knowlin of due process.

¶20 Knowlin also objects that the ALJ denied him an opportunity to present oral argument. However, the revocation hearing transcript establishes that Attorney Saldana first suggested submitting final argument in written form, and that the ALJ simply acquiesced. When action is taken at a party's request, that party cannot later complain that the action constituted error. ***State v. Dietzen***, 164 Wis. 2d 205, 211, 474 N.W.2d 753 (Ct. App. 1991).

¶21 The record also rebuts Knowlin's claim that he was denied an opportunity to present evidence in support of a proposed alternative to revocation.

Although Attorney Saldana's predecessor indicated that he would be presenting such evidence, nothing was offered or discussed at the revocation hearing or at any point thereafter. No basis therefore exists to conclude that Knowlin was deprived of his rights at hearing.[6]

¶22 Knowlin's final argument is that the Division lost competency to conduct a final revocation hearing when it extended the original fifty-day time limit set forth in WIS. STAT. § 302.335(2)(b) beyond ten days. Specifically, he contends that the Division lost competency to revoke him when the final revocation hearing originally scheduled for September 13, 1999 was rescheduled for October 4, 1999.

¶23 Knowlin's argument fails based upon ***State ex rel. Jones v. Division of Hearings and Appeals***, 195 Wis. 2d 669, 672, 536 N.W.2d 213 (Ct. App. 1995), wherein this court held that the time limit for holding a final revocation hearing is directory rather than mandatory.[7] As discussed in ***Jones***, if the time limit set forth in WIS. STAT. § 302.335(2)(b) is not complied with, the remedy is release of the probationer pending revocation proceedings, not dismissal of the revocation proceedings. ***Jones***, 195 Wis. 2d at 673. Moreover, because rescheduling the revocation hearing to October 4, 1999, did not violate Knowlin's due process right to have a hearing within a reasonable time, and because the

[6] In any event, Knowlin has never shown what, if any, evidence he was prevented from presenting. He therefore has not shown that he was prejudiced by the ALJ's procedural orders. Absent such a showing, relief is unwarranted. *See* WIS. ADMIN. CODE § HA 2.08.

[7] Although ***State ex rel. Jones v. Division of Hearings and Appeals***, 195 Wis. 2d 669, 536 N.W.2d 213 (Ct. App. 1995), discussed the fifty-day time limit set forth in WIS. STAT. § 302.335(2)(b), rather than the ten-day extension period involved here, this distinction does not affect its applicability here.

remaining adjournments were at Knowlin's request, no basis for relief exists. *See* ***id***. at 674.

By the Court.—Order affirmed.

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