COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1386 **Cir. Ct. No. 2010CV6008**

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

STATE OF WISCONSIN EX REL. EDDIE GENE EVANS,

PETITIONER-APPELLANT,

V.

DAVID SCHWARZ, ADMINISTRATOR, DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

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

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

¶1 PER CURIAM. Eddie Evans appeals a circuit court order that affirmed the administrative revocation of his extended supervision on certiorari review. We affirm the revocation for the reasons discussed below.

BACKGROUND

¶2 On May 27, 2004, Evans was convicted of armed robbery and sentenced to seven years of initial confinement and thirteen years of extended supervision. The circuit court granted a petition for sentence adjustment on January 5, 2010, giving the DOC thirty days to effectuate the conversion of Evans' remaining initial confinement time to extended supervision. On January 21, 2010, the DOC placed Evans on an electronic monitoring bracelet in a transitional living apartment operated by ATTIC. Just five days later, however, Evans' parole agent ordered a probation hold while investigating whether Evans had falsified certain documents pertaining to the sentence adjustment, and Evans was transferred to the Dane County Jail.

¶3 While detained at the Dane County Jail, Evans was involved in two incidents that formed the basis for the revocation proceeding now before us. The revocation materials alleged that on February 14, 2010, Evans pulled the cable cord out of a television, causing damage to the television, and that on March 21, 2010, Evans removed the wringer assembly from a mop and used it to strike another inmate multiple times. In addition, the revocation materials charged that Evans had violated his rules of supervision by refusing to provide his agent a statement about the two incidents.

¶4 At his revocation hearing, Evans claimed that he broke the cable accidently while trying to fix the television; that he used the mop wringer on the other inmate in self-defense; and that his attorney advised him not to discuss the incidents due to a pending criminal charge of battery by an inmate. However, after viewing security videos of the two underlying incidents, as well as reviewing written statements of witnesses, the administrative law judge determined that

Evans' explanations for his conduct were not credible and revoked his extended supervision based upon the violations. The revocation was upheld on both administrative appeal and certiorari review in the circuit court.

¶5 On this appeal from the circuit court's certiorari decision, Evans claims: (1) there was insufficient evidence to show that Evans did not act in self-defense in the mop-wringer incident; (2) Evans' acquittal on a criminal battery by prisoner charge stemming from the same mop-wringer incident constituted newly discovered evidence warranting a new revocation hearing; (3) Evans was not actually on extended supervision at the time of the incidents; (4) the revocation hearing was untimely; (5) Evans did not receive proper notice of the second and third alleged violations; (6) the evidence presented at the hearing violated Evans' right to confrontation; (7) the ALJ should have been collaterally estopped from reaching a different result than the jury on the battery charge; and (8) no one ever advised Evans that he would be provided immunity in any criminal proceeding for any statement given in the revocation proceeding.

STANDARD OF REVIEW

¶6 Review of revocation decisions on certiorari is limited to determining whether the division of hearings and appeals acted: (1) within the scope of its jurisdiction; (2) according to law; (3) in a non-arbitrary manner; and (4) based upon the evidence. ***George v. Schwarz***, 2001 WI App 72, ¶10, 242 Wis. 2d 450, 626 N.W.2d 57. "The evidentiary test on certiorari review is the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion that the [division] reached." ***Id.*** We will not substitute our view of the credibility of the witnesses or the weight of the evidence

for that of the division, acting as fact finder. ***State ex rel. Washington v. Schwarz***, 2000 WI App 235, ¶26, 239 Wis. 2d 443, 620 N.W.2d 414.

DISCUSSION

Sufficiency of the Evidence on the Battery Violation

¶7 Evans contends that his self-defense claim on the second violation was supported by the admission of the inmate he struck with the mop wringer that the other inmate instigated the altercation, and that the partial video of the incident did not disprove Evans' claim that the other inmate was also armed. However, our role on certiorari review is not to consider or weigh the evidence that might have supported a contrary finding, but merely to ascertain whether there was substantial evidence to support the finding that was made. In addition to witness statements, the finding that Evans struck the other inmate with the mop wringer without sufficient justification was supported by substantial evidence in the form of a surveillance video that showed Evans removing the wringer and approaching the other side of the room with it. The video did not show the other inmate attacking Evans. What happened out of the range of the video camera was a question of credibility, which the ALJ was entitled to answer.

Newly Discovered Evidence on Battery Violation

¶8 Evans argues that his acquittal on a criminal battery charge stemming from the same mop-wringer incident constituted newly discovered evidence warranting a new revocation hearing. However, WIS. ADMIN. CODE § DOC 331.08 explicitly states that "[a]n acquittal in a criminal proceeding for a client's conduct underlying an alleged violation shall not preclude revocation of that client's probation or parole for that same conduct." Thus, the mere fact of a

subsequent acquittal—standing alone—does not warrant a new revocation hearing. The reason for this rule is that the burden of proof is higher in a criminal proceeding than in a revocation proceeding. It is therefore entirely possible for the evidence in a particular case to establish a violation by a preponderance of the evidence, even if it is not strong enough to establish the conduct beyond a reasonable doubt.

¶9 And, if Evans means to argue that new facts emerged in connection with the criminal prosecution, he has not identified any such evidence that could not have been discovered by him by diligent effort prior to his revocation proceeding. To the contrary, Evans did present much of the same evidence on his self-defense claim at his revocation hearing as he did at his trial—including the video that he contends supports his version of events and affidavits from other inmates. The ALJ simply had a different view of that evidence than did the jury.

Extended Supervision Status

¶10 Evans argues that it was improper to purport to revoke his extended supervision because he was not actually on extended supervision at the time of the incidents. He premises this argument on the dual assertions that he had not yet met with his probation agent at the halfway house to go over his rules of supervision, and that he could not be both on supervision and in custody at the Dane County Jail at the same time. The record shows, however, that Evans had already signed his rules of supervision on November 17, 2009, prior to his release from prison. The fact that Evans had not yet met with his probation agent does not mean that the rules were not in effect. Nor does the fact that Evans remained in DOC custody, first in transitional housing and then on a probation hold, mean that he was not also on extended supervision from his prison sentence. Actual liberty

is not determinative of supervision status. ***State ex rel. Riesch v. Schwarz***, 2005 WI 11, ¶30, 278 Wis. 2d 24, 692 N.W.2d 219. Here, the fact that Evans had been released from prison pursuant to a sentence adjustment order is consistent with his being on extended supervision.

Timeliness of Revocation Hearing

¶11 The respondent concedes that Evans' revocation hearing was held beyond the fifty-day deadline set forth in the administrative rules. As the respondent correctly points out, however, that deadline is advisory, not mandatory. ***State ex rel. Jones v. Division of Hearings & Appeals***, 195 Wis. 2d 669, 672-73, 536 N.W.2d 213 (Ct. App. 1995). Furthermore, Evans has not shown that the delay in holding the hearing prejudiced him in any way—particularly since part of the delay was attributable to Evans discharging his first attorney. Evans was ultimately represented by counsel at the hearing and able to present his version of the events.

Sufficiency of Notice

¶12 Evans complains both that his initial notice of violation addressed only the first incident with the television cable, and that a good deal of time at the revocation hearing was spent discussing the investigation into his sentence adjustment papers and other matters beyond the alleged violations. There was nothing improper, however, about providing a second notice of violation after the mop-wringer incident that also included the prior incident. Moreover, regardless of what other matters may have been discussed at the hearing, the ALJ's discussion makes clear that the revocation was based solely upon the violations alleged in the notice and proved at the hearing.

Right to Confrontation

¶13 Evans contends that his Sixth Amendment right to confront the witnesses against him was violated by the use of hearsay witness statements. However, because a revocation proceeding is civil in nature and involves only the conditional liberty status of a person who has already been convicted, the rules of evidence do not strictly apply and other constitutional protections are less than those in a criminal proceeding. ***Schwarz***, 239 Wis. 2d 443, ¶¶21-23. In short, under the relaxed procedures employed in administrative proceedings, hearsay is admissible. *See* WIS. ADMIN. CODE § HA 2.05(6)(d).

Collateral Estoppel

¶14 Evans next argues that administrative officials should have been collaterally estopped from finding him guilty of the battery violation based upon his acquittal on the criminal charge based upon the same incident. However, by Evans' own account, the ALJ's initial decision *preceded* the jury verdict, and therefore could not have been estopped by an event that had not yet happened. Evans has not provided any authority that would show the collateral estoppel doctrine could be used after the ALJ's decision had already been issued but while the administrative appeal process was still pending. Moreover, to the extent that the doctrine could ever be available in that procedural posture, the criteria would not be satisfied by a verdict rendered under a different burden of proof.

Immunity Warning

¶15 Finally, Evans claims that no one advised him that any statement he gave to his probation agent could not be used against him in the collateral criminal proceeding arising from the same incident. Therefore, he argues, his refusal to

give a statement to his probation agent about the mop-wringer incident was protected by the Fifth Amendment and cannot form the basis of a revocation proceeding. *See* ***State ex rel. Tate v. Schwarz***, 2002 WI 127, ¶¶4, 20, 257 Wis. 2d 40, 654 N.W.2d 438; ***State v. Thompson***, 142 Wis. 2d 821, 833, 419 N.W.2d 564 (Ct. App. 1987).

¶16 Evans' contention on appeal differs somewhat from the assertion he made during the revocation proceedings, which was that his attorney advised him not to give a statement regarding the incident. The ALJ found that Evans' assertion that he had been advised not to give a statement was self-serving and not established by any corroborating evidence. Since Evans did not raise the issue of whether or not he had been provided an immunity warning, the ALJ did not make any specific factual findings on that topic. There is therefore no factual basis in the record to support Evans' claim on appeal.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2009-10).