

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

August 21, 1996

**NOTICE**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

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

**No. 95-3008**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

**STATE OF WISCONSIN ex rel.  
DENNIS MARTH,**

**Petitioner-Appellant,**

**v.**

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

**Respondent-Respondent.**

APPEAL from an order of the circuit court for Waukesha County:  
PATRICK L. SNYDER, Judge. *Affirmed.*

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

PER CURIAM. Dennis Marth appeals from an order affirming the revocation of his probation by the Division of Hearings and Appeals. He argues that the decision failed to consider possible alternatives to revocation and whether revocation was the appropriate remedy under the factors identified in *State ex rel. Plotkin v. Dep't of Human Servs.*, 63 Wis.2d 535, 544, 217 N.W.2d 641, 645 (1974). We conclude that the decision was the result of a proper exercise of discretion and affirm the order appealed from.

Marth was convicted in 1986 of two counts of first-degree sexual assault. Commencing in June 1992, after serving a period of incarceration and parole, Marth began serving a ten-year period of probation. In December 1993, Marth's Florida probation agent contacted Marth's Wisconsin probation agent and reported that Marth had not attended all of the sexual offender treatment sessions required of him. When Marth returned to Wisconsin in February 1994, a probation hold was placed against him. The hearing examiner decided not to revoke Marth's probation. The division administrator, David A. Schwarz, reversed the examiner's decision and revoked Marth's probation.

Upon review of a revocation determination, we review the division's decision, not the circuit court's. We give deference to the division's determination. *Von Arx v. Schwarz*, 185 Wis.2d 645, 655, 517 N.W.2d 540, 544 (Ct. App. 1994). Our review is limited to the following questions: (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 so as to represent its will and not its judgment; and (4) whether the evidence was such that the division might reasonably make the determination in question. *Id.*

Marth explains that his only violation of probation was the failure to attend treatment sessions with a massage therapist, whom he deemed unqualified and ineffectual. He argues that the revocation decision is arbitrary and unreasonable because the record demonstrates that he recognizes his continued need for treatment, that he is willing to participate in treatment, and that he returned to Wisconsin for the sole purpose of finding a viable treatment program. He contends that the division administrator ignored available alternatives to revocation and confinement.

Marth bears the burden of proving that the decision was arbitrary and capricious. *Id.* The division's decision is not arbitrary and capricious if it represents a proper exercise of discretion. *Id.* at 656, 517 N.W.2d at 544. We look for the utilization of a reasoning process based on the facts of record and a logical rationale based on proper legal standards. *Id.* If substantial evidence support the division's determination, it must be affirmed. *Id.*

In the exercise of its discretion, the division should consider alternatives that are available and feasible. *Id.* Revocation is proper if the division finds that: (1) confinement is necessary to protect the public from further criminal activity by the offender; or (2) the offender is in need of correctional treatment which can most effectively be provided if he or she is confined; or (3) it would unduly depreciate the seriousness of the violation if probation were not revoked. *Plotkin*, 63 Wis.2d at 544, 217 N.W.2d at 645.

Here, the division determined that Marth was better served by specialized treatment he could obtain in confinement rather than community based treatment. This determination is supported by the evidence at the hearing. The probation agent testified that there was a two-year sexual offender treatment program available through the prison system which would be appropriate for Marth. A long-term community based specialized treatment program was not then available for Marth. A June 1994 psychological consultation report indicates that Marth continues to experience urges and fantasies about children. Although suggesting a viable alternative of intensive supervision through electronic monitoring, the report highlighted the need for Marth to participate in a specialized treatment program for sexual offenders on a regular basis.

Implicit in the division's decision is that despite Marth's previous successful completion of treatment programs, the violation was sufficiently serious to warrant revocation. Marth's violation—his nonparticipation in required treatment—"went to the heart of the rehabilitative process and was integrally related to the risk" of harm to the community. *Id.* at 547-48, 217 N.W.2d at 647. He cannot be excused from noncompliance because he did not care for the treatment techniques of the assigned group therapist. Marth would like us to unquestionably accept his proposition that the therapist was a "massage therapist" who was unqualified to treat sexual offenders. Nothing in the record suggests that the required group therapy sessions actually involved massage. Nothing in the record supports a challenge to the effectiveness of the therapist. Probation officials were attempting to find suitable treatment. Marth cut the process short by returning to Wisconsin. If reasonable efforts are made to accommodate the probationer's concern over treatment methods, revocation can result from the failure to participate in the treatment chosen by probation officials. *See Von Arx*, 185 Wis.2d at 660-61, 517 N.W.2d at 546 (permissible to revoke probation for noncompliance with a requirement to participate in reasonable sexual offender counseling).

The division also found that Marth's ongoing treatment is necessary to protect community safety. The consultation report indicated a concern that Marth's unexpressed intent was to end treatment. The division's conclusion that Marth is not likely to comply with proposed alternative outpatient treatment programs was a reasonable inference from the evidence.

We conclude that the revocation decision demonstrates a proper exercise of discretion. It considers alternatives to revocation and finds that revocation is necessary to promote public safety and adequate treatment for Marth. The *Plotkin* analysis was performed.

*By the Court.* – Order affirmed.

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