



State of Wisconsin DIVISION OF HEARINGS AND APPEALS

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In the Matter of 021711-391882-A

DECISION

Julian G. Thomas
Public Safety Building
115 W Doty St
Madison, WI 53703-3202

Hearing in the matter of the recommended revocation of the extended supervision of Julian G. Thomas was held at the Public Safety Building, Madison, Wisconsin, on March 29, April 14, and June 1, 2011, before Robert G. Pultz, Administrative Law Judge, Wisconsin Division of Hearings and Appeals.

APPEARANCES: Julian G. Thomas appeared in person and by Attorney Joseph Sommers.
The Division of Community Corrections appeared by Joe Packard, Agent.

ALLEGATIONS:

1. On or about 7/12/10, Julian Thomas did, while threatening harm to an employee, take money belonging to the Check Advance Store at 505 W. Main Street in Sun Prairie, WI without their consent. This behavior is in violation of rule #1 of the Rules of Community Supervision signed by him on 6/16/09.
2. Between 12/10/10 and 2/9/11, Julian Thomas failed to make any payments towards his supervision fees as instructed by this agent. This behavior is in violation of rule #11 of the Rules of Community Supervision signed by him on 6/16/09.

FINDINGS OF FACT, CONCLUSIONS OF LAW

Mr. Thomas was sentenced to one year confinement and three years extended supervision (ES), 18 months confinement-18 months ES consecutive, following convictions for Delivery of Cocaine and Forgery in Rock and Dane County Circuit Courts. Mr. Thomas is also on probation for eight years, sentences withheld, following convictions for five additional counts of Forgery. Release to ES occurred on 07/29/09.

Mr. Thomas, by his attorney, stipulated to allegation two. Based on this stipulation, I find Mr. Thomas violated his supervision by failing to pay supervision fees.

A police report is part of the record in this case. Hearsay evidence is admissible in a revocation proceeding. See Wis. Admin. Code § HA 2.05 (6) (d). It may form the basis of a revocation decision whenever it “bears substantial indicia” of reliability. See *Egerstaffer v. Israel*, 726, F.2d 1231 (7th Cir. 1984) and the general discussion of hearsay evidence in *State ex rel. Henschel v. H&SS Dept.*, 91 Wis.2d 268 (Ct. App. 1979) and *State ex rel. Thompson v. Riveland*, 109 Wis.2d 580 (1982). Also see the discussion in *State ex rel. Prellwitz v. Schmidt*, 73 Wis.2d 35, 242 N.W.2d 227 (1976), citing *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 Sup. Ct. 2593 (1972) on the use of “letters, affidavits, and other material that would not be admissible in an adversarial criminal trial” as well as the comments on the use of “conventional substitutes for live testimony” in *Gagnon v. Scarpelli*, 411 U.S. 778, 783, 93 Sup. Ct. 1756 (1973). Police reports bear substantial indicia of reliability because they are business records of a public agency. *Mitchell v. State*, 84 Wis.2d 325, 267 N.W.2d 349 (1978). This report was supplemented with testimony from Sun Prairie Police Officer Randall Sharpe.

Pauline Cooper testified she was robbed by Mr. Thomas on July, 12, 2010, while she was working at the Check Advance Store in Sun Prairie, WI. She testified she did not know Mr. Thomas and was able to identify him from a photo lineup. She described clothing Mr. Thomas was wearing and provided details of how the robbery was committed. Ms. Cooper admitted she falsified a story of being robbed of money that belonged to Check Advance while traveling to a bank to make a deposit. She made this report to Sun Prairie Police, but after a police investigation and questioning admitted it was false. Ms. Cooper admitted she kept the money intended for the Check Advance bank deposit and paid it to her husband’s drug dealer. Ms. Cooper testified she had been threatened by the drug dealer prompting her to steal the money. Ms. Cooper became a suspect in two other robberies of the Check Advance Store, including the one at issue here, after police learned of the falsified report. The two in-store robberies of Check Advance were done in a similar manner. Ms. Cooper testified she does not know Michael Evans.

Michael Evans, former friend of the Mr. Thomas’s, testified Mr. Thomas robbed Check Advance on 07/12/10. Mr. Evans stated he went with Mr. Thomas to rob the Check Advance, but Mr. Evans came back to his vehicle from the store without doing it he had to leave to go to his daughter’s high school graduation ceremony. He testified Mr. Thomas borrowed one of his (Evan’s) cars and later went back to rob the Check Advance. Mr. Evans testified he told Mr. Evans the method he used in committing a prior robbery at Check Advance in March of 2010. After the second robbery, Mr. Evans viewed the money in Mr. Thomas’s possession and was told how the robbery was committed. Clothing, described by Ms. Cooper, as worn by the man in the robbery was found at Mr. Evans’s home. Mr. Evans told police this clothing, including a dew rag, belonged to Mr. Thomas. Mr. Evans has been charged with the March 2010 robbery of Check Advance and is on bail monitoring. Mr. Evans lied to police about his involvement in first Check Advance robbery until he was confronted with DNA evidence that linked him to the robbery note. Mr. Evans also initially lied to police about his whereabouts and use of vehicles on the dates of the second robbery at Check Advance. A recent DNA result from the State Crime Lab demonstrates Mr. Evans is the source of DNA from the dew rag that was worn in the second robbery and which was found in his home. Mr. Evans testified he does not know Pauline Cooper.

Douglas Cooper testified his wife, Pauline Cooper, identified Michael Evans to him in the lobby on the Public Safety Building while she was waiting to testify in this matter. Mr. Cooper is aware a man he knows as "K" threatened his wife regarding a debt he owed. Mr. Cooper denied this debt was drug related. He also denied "K" was Michael Evans.

By Affidavit, the defense submits evidence from investigator William Garrott who indicates Camile Major admitted to him that she was "put up" to falsely testify against Mr. Thomas in a pending felony forgery case. The forgery matter is not an issue here as the Department has not submitted a relevant allegation. Ms. Major also told the investigator Mr. Evans wrote both forged checks that she later cashed.¹

The Department does not have the luxury of selecting their witnesses. In this case the case against Mr. Thomas relies on the testimony of Michael Evans and Pauline Cooper. There is no physical evidence, DNA results, or other facts that support a conclusion Mr. Thomas robbed the Check Advance Store on July 12, 2010. It is a fact that Michael Evans previously robbed the Check Advance using a method similar to the one employed on July 12, 2010. A dew rag recovered from Mr. Evans home, which is indentified as worn by the July 12th robber is a DNA match to Mr. Evans. Other clothing worn in the second robbery was recovered from Mr. Evans home, but his wife told police the clothing was the property of Mr. Thomas. Mr. Evans has admitted to the first robbery, but lied to police about his involvement until DNA linked him to the handwritten note. Mr. Evans also lied to police about his whereabouts on July 12, 2010 and the use of his vehicles on that day. He admits, in incriminating Mr. Thomas, that he went to the Check Advance with Thomas planning to commit a robbery but said Thomas backed out. Mr. Evans's vehicle was indentified near the Check Advance during the time the July 12th robbery took place. Mr. Evans has been charged with one robbery and has an extensive criminal history. He denied knowing Pauline Cooper, but it is clear from the testimony of Douglas Cooper that she knows and identified him to her husband in the lobby of the Public Safety Building. Mr. Evans is about as unreliable as it gets in these hearings. His story has shifted and changed. He has much to gain by implicating someone else in the second robbery of Check Advance. The recent DNA match makes him a more likely suspect than Mr. Thomas in the July 12, 2010 robbery. Given these facts, I cannot find Mr. Evans to be reliable or credible.

While Pauline Cooper identified Mr. Thomas as the person who robbed her at Check Advance, there are more reasons to disbelieve than believe her testimony. Ms. Cooper embezzled money from Check Advance while claiming she was robbed on her way to the bank. She denied this until police confronted her with overwhelming evidence she was lying. Ms. Cooper testified she did not know Mr. Evans, but told her husband who he was while they were at the PSB. Ms. Cooper testified her husband was a drug user who owed money to his supplier. She was at one point willing to embezzle money from her employer to pay this debt. Ms. Cooper could be charged with a felony for her embezzlement. At one point, Ms. Cooper was a considered a suspect/co-conspirator in the July 12, 2010 Check Advance Robbery. Ms. Cooper is far from a

¹ The record was held open only to allow introduction of the affidavit of Mr. William Garrott. Mr. Sommers submitted further argument in another correspondence and information concerning other possible evidence. The Department objected in writing. The objection is sustained. The record was held open for the sole purpose of considering the affidavit.

disinterested witness and has much to gain from her testimony. Given this background, I cannot find Ms. Cooper to be a credible or reliable witness.

At the argument stage the Department apparently threw in the towel concerning Mr. Evans's credibility, but urges the DHA to believe Pauline Cooper and place trust in her at hearing identification of Mr. Thomas. Given the problems with Mr. Evans and Ms. Cooper as witnesses, I have combed the record to find even a single piece of physical evidence or an objective fact that would support her testimony, and have found none. Moreover, the testimony of Mr. Evans and Ms. Cooper is intertwined. If we accept the credibility of one, we also have to accept the veracity of the other. I find neither to be credible. In sum, there are more likely suspects in the July 12, 2010 robbery than Mr. Thomas. Therefore, I cannot reach a conclusion it is more likely than not that he committed that act. Hence, I find the Department failed to meet their burden of proof on allegation number one.

It is clear the Department proceeded to revocation on allegation number one. Allegation two does not rise to a level of conduct requiring revocation at this time. Mr. Thomas needs to pay his supervision fees. However, that was not what this hearing was about. The Department may renew their revocation request if Mr. Thomas is found guilty of the Check Advance robbery in circuit court. *State ex rel. Leroy v. H&SS Department*, 110 Wis.2d 291, 329 N.W.2d 229 (Ct.App. 1982).

Pursuant to a stipulation by the parties, I find the following sentence credit is due: from 07/29/09 to 07/31/09; from 08/31/10 to 09/02/10; from 10/22/10 to 12/10/10; and continuously from 02/09/11.

Reincarceration Time Available:

Case No. 05CF188; three years, zero months, and zero days.

Department recommends: zero years, ten months, and 24 days.

Case No. 08CF698; two years, eight months, and 28 days.

Department recommends: zero years, nine months, and 26 days.

ORDER

It is ordered that the ES and probation of Mr. Julian Thomas is not revoked.

Given under my hand at the city of Madison this 14th day of June,
2011

/s _____
Robert G. Pultz
Administrative Law Judge
Division of Hearings and Appeals
RGP/rgp