COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP384 **Cir. Ct. No. 2013CV1559**

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

STATE OF WISCONSIN EX REL. JIMI P. MCDONALD,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ, ADMINISTRATOR, DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County: JOHN S. JUDE, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. This case concerns the sentence credit due Jimi P. McDonald as a result of his overlapping criminal offenses in Illinois and

Wisconsin. He seeks immediate release from confinement, arguing that additional periods of incarceration in Illinois should count toward his Wisconsin sentence, fully satisfying it. We disagree and affirm.

¶2 In December 2005, McDonald was sentenced in Racine county for substantial battery-intend bodily harm stemming from a September 2004 incident in which he battered someone with a tire iron during a bar brawl. The court imposed a sentence of five years' initial confinement and two years' extended supervision, but stayed it and ordered three years' probation, consecutive to an Illinois sentence he already was serving. The Illinois sentence discharged in October 2007. McDonald disregarded instructions to contact his Wisconsin Department of Corrections (DOC) agent so that his probation might begin.

¶3 Illinois police arrested McDonald in January 2008 for robbing a gas station. He also was arrested on the Wisconsin warrant. McDonald remained in the Will county, Illinois jail until his January 5, 2009 sentencing on the robbery. He was given credit for that approximate year against both his Illinois and Wisconsin sentences. His requests for a revocation hearing in Wisconsin during this period were denied. On November 26, 2012, he was paroled in Illinois and extradited to Wisconsin.

¶4 A revocation hearing was held on March 4, 2013. McDonald stipulated to the factual grounds for the revocation request. His probation was revoked, reinstating his Wisconsin sentence for the substantial battery. He was given sentence credit for the 452 days he was incarcerated pending his 2005 Wisconsin conviction; for the period from January 24, 2008, through January 5, 2009, when he was held in Illinois between the arrest and sentencing for the

robbery; and for the period from November 26, 2012 to March 4, 2013, the time between his extradition and the revocation hearing.

¶5 McDonald challenged the sentence credit awarded. He argued that he also was entitled to credit from January 5, 2009 to November 26, 2012, the time he served for the Illinois robbery, because he was on a Wisconsin probation hold during that time. Alternatively, he argued that at a minimum he should be credited with the last thirty-six months of his Illinois sentence because under "standard Illinois procedure he would have been released when he became 36 months short of his mandatory release date," but was "forced" to serve the remainder due to the probation hold. By either measure, the additional time effectively would have completed service of his Wisconsin sentence. The administrative law judge (ALJ) disagreed, ruling that the Illinois sentencing severed the connection between his custody and Wisconsin. The Division of Hearings and Appeals (the division) sustained the ALJ's decision.

¶6 McDonald then filed in the circuit court a petition for a writ of certiorari and, soon after, a petition for a writ of habeas corpus. The court denied relief and upheld the probation revocation and the sentence credit determination. This appeal followed.

¶7 "On certiorari review of a probation revocation, this court 'review[s] the division's decision, not that of the trial court.'" ***State ex rel. Greer v. Wiedenhoeft***, 2014 WI 19, ¶34, 353 Wis. 2d 307, 845 N.W.2d 373 (citation omitted). Our review is limited to whether: the division acted within its jurisdiction; the division acted according to law; its action was arbitrary, oppressive, or unreasonable and represented its will, not its judgment; and the evidence was sufficient that it might reasonably make the determination that it did.

State ex rel. Tate v. Schwarz, 2002 WI 127, ¶15, 257 Wis. 2d 40, 654 N.W.2d 438 (2002). "When used in conjunction with certiorari review, the phrase 'acted according to law' includes the common-law concepts of due process and fair play." ***State ex rel. Lomax v. Leik***, 154 Wis. 2d 735, 740, 454 N.W.2d 18 (Ct. App. 1990).

¶8 WISCONSIN STAT. § 973.155 (2011-12)[1] governs sentence credit. The statute requires two determinations: whether the convicted offender was (1) "in custody" (2) "in connection with the course of conduct for which sentence was imposed." Sec. 973.155(1)(a). The defendant must prove both conditions. ***State v. Villalobos***, 196 Wis. 2d 141, 148, 537 N.W.2d 139 (Ct. App. 1995). An offender is not entitled to sentence credit for custody being served to satisfy another, unrelated criminal sentence. ***State v. Gavigan***, 122 Wis. 2d 389, 393, 362 N.W.2d 162 (Ct. App. 1984). That McDonald was in custody is not at issue. The only dispute is whether his custody in Illinois was in connection with the course of conduct for which his Wisconsin sentence was imposed. McDonald asserts that his probation hold was the sole factor extending his Illinois sentence beyond his mandatory release date, making the additional time "in connection with the course of conduct for which sentence was imposed" for the battery.

¶9 We disagree. At the time of McDonald's sentencing in the Wisconsin battery case in 2005, his sentence was imposed but stayed and he was placed on probation. Only after being released from his Illinois custody in 2012 was his probation revoked and his consecutive sentence triggered. *See* ***State v. Thompson***, 208 Wis. 2d 253, 257, 559 N.W.2d 917 (Ct. App. 1997) (revocation of

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

probation "merely triggers the execution or implementation of the sentence"). Had he reported to his DOC agent as directed, this discussion would not be necessary.

¶10 Our supreme court has deemed it "clear" that "unless the acts for which the first and second sentences are imposed are truly related or identical, the sentencing on one charge severs the connection between the custody and the [other charge]." ***State v. Beets***, 124 Wis. 2d 372, 383, 369 N.W.2d 382 (1985). As he testified at the revocation hearing, McDonald argues that the two crimes were related because Illinois does not allow early release when a probation hold is in effect. Thus, he claims, it was only because of the Wisconsin battery charge that he had to serve the final thirty-six months of his Illinois sentence. He also asserted that, per a plea agreement, his robbery sentence was to be served concurrent with his battery sentence. He provided nothing to the ALJ or to this court illustrating the "standard Illinois procedures" that the detainer was all that kept him incarcerated in Illinois. The Illinois sentencing document mentions nothing about a Wisconsin sentence or hold. It indicates only that the robbery sentence was ordered to be consecutive to two other Illinois sentences. It is for the fact-finder to weigh the credibility of witnesses at a revocation hearing, WIS. ADMIN. CODE § HA 2.05(6)(b) (Sept. 2014), and here the ALJ evidently found McDonald's unproved assertions to be self-serving. The division agreed with the ALJ's findings. McDonald has not shown that his custody in Illinois from January 5, 2009 (or, alternatively, November 26, 2009) to November 26, 2012, was related to the Wisconsin battery.

¶11 McDonald next raises several due process claims. He argues that the DOC's decision to delay his revocation hearing until he completed his Illinois incarceration, despite his several requests to commence it sooner, unnecessarily

lengthened his period of confinement and prevented him from getting a more affordable bond and qualifying for a drug program.[2] Whether a delay in the holding of a final revocation hearing violated a probationer's due process rights is a question of law, which this court reviews de novo. *See* ***State v. Carrizales***, 191 Wis. 2d 85, 92, 528 N.W.2d 29, 31 (Ct. App. 1995).

¶12 ***Moody v. Daggett***, 429 U.S. 78 (1976), is instructive.[3] There, the United States Supreme Court recognized that when a parolee's custody stems from another conviction rather than from a parole violation, the resultant loss of liberty due to the parole revocation and protected by ***Morrissey v. Brewer***, 408 U.S. 471 (1972), is not yet triggered. ***Moody***, 429 U.S. at 86-87. McDonald's probation was not even yet revoked. He has not established that his Illinois custody was anything but a result of the Illinois charge.

¶13 McDonald also contends his due process rights were violated because, once extradited, he was denied a revocation hearing within fifty days. *See* WIS. STAT. § 302.335(2)(b). He was received into Wisconsin custody on November 26, 2012; his hearing was on March 4, 2013, ninety-eight days later.

¶14 First, WIS. STAT. § 302.335(2)(b) does not apply. Thirty-one days after McDonald was received into Wisconsin custody, he transferred to Sturtevant

[2] McDonald first raised these claims in his certiorari proceeding without having raised them before the ALJ. His subsequent habeas corpus petition restated the allegations. A habeas court, however, determines only whether the order resulting in a person's restraint of liberty was made in violation of the constitution, or that the court that issued the order lacked the jurisdiction or legal authority to do so. *See* ***State ex rel. Zdanczewicz v. Snyder***, 131 Wis. 2d 147, 151, 388 N.W.2d 612 (1986). Nonetheless, as the circuit court addressed the merits, we will as well.

[3] Although in ***Moody v. Daggett***, 429 U.S. 78 (1976), the issue is parole, there is no discernible "difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation." ***Gagnon v. Scarpelli***, 411 U.S. 778, 782 (1973).

Transitional Facility. Sturtevant is not a county jail, other county facility, or a tribal jail. Second, the fifty-day period for holding a final revocation hearing is directory, not mandatory. ***State ex rel. Jones v. Division Adm'r***, 195 Wis. 2d 669, 672, 536 N.W.2d 213 (Ct. App. 1995). Due process requires only that a parole revocation hearing be held within a reasonable time. ***Id.*** at 674.

¶15 Finally, McDonald mistakenly complains that he was entitled to a default judgment and an order striking the response because the division failed to timely return the writ. A default judgment is unavailable when a court reviews an agency decision on certiorari. *See* ***State ex rel. Treat v. Puckett***, 2002 WI App 58, ¶26, 252 Wis. 2d 404, 643 N.W.2d 515. A default judgment may be rendered under WIS. STAT. § 806.02 only "if no issue of law or fact has been joined and if the time for joining issue has expired." ***Id.*** Section 806.02(1) does not apply to the division because it was not required to "join issue." The return to a writ of certiorari does not consist of denials and affirmative defenses but merely is a certification of the record of the proceedings to be reviewed. *See* ***Consolidated Apparel Co. v. Common Council***, 14 Wis. 2d 31, 37, 109 N.W.2d 486 (1961). Furthermore, the remedy for an improper return is a request to compel a complete return. *See* ***Cecil v. Barber***, 3 Wis. 297, 299 (1854). Such a request was rendered moot by the full return the division provided before the hearing on the motion for a default judgment.

By the Court.—Order affirmed.

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