

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 7, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2004AP2791-FT

Cir. Ct. No. 2004CV67

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN EX REL. ROY W. SWANSON,

PLAINTIFF-RESPONDENT,

V.

ROGER WILSON AND FOREST COUNTY SHERIFF,

DEFENDANTS,

WISCONSIN DEPARTMENT OF CORRECTIONS,

INTERVENOR-APPELLANT.

APPEAL from an order of the circuit court for Forest County:
ROBERT A. KENNEDY, JR., Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The Department of Corrections appeals an order granting Roy Swanson release on bond pending a probation revocation hearing. After Swanson's initial revocation was reversed and a new hearing ordered, he commenced this habeas corpus proceeding alleging the right to be released from custody because the final hearing was not held within fifty days of the trial court's order requiring a new hearing.¹ See WIS. STAT. § 302.335(2)(b). Relying on the dissenting opinion in *State ex rel. Jones v. Division of Hearings & Appeals*, 195 Wis. 2d 669, 536 N.W.2d 213 (Ct. App. 1995), the trial court ordered Swanson released on bond pending the hearing. We reverse the order for three reasons: (1) the trial court miscalculated the time limits that apply to § 302.335(2)(b); (2) that statute does not require the probationer's release when the time limits are not met; and (3) release on bond is not allowed pending revocation of probation.²

¶2 WISCONSIN STAT. § 302.335(2)(b) requires the Division of Hearings and Appeals in the Department of Administration to begin a final revocation hearing within fifty calendar days after the probationer is detained in the county jail, other county facility or tribal jail. That provision is not designed to benefit probationers. It is designed to benefit jailers by limiting the amount of time they must incarcerate probationers. Although the statute is unambiguous, our interpretation is supported by three factors: (1) the placement of this statute amid other provisions that relate to the use of jails for prisoners who might more

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² In its reply brief, the Department acknowledges that its appeal is moot because Swanson has been returned to the county jail. We will nonetheless address the merits of this appeal to curtail recurrence of the trial court's errors that would evade appellate review because of the limited time before the revocation hearing takes place. See *In re Jeremiah C.*, 2003 WI App 40, ¶10, 260 Wis. 2d 359, 659 N.W.2d 193.

appropriately be placed in the State prison; (2) the language limiting applicability to a person “detained in the county jail, other county facility or tribal jail;” and (3) the remedy provision set out in WIS. STAT. § 302.335(3), which allows, but does not compel, the sheriff to release a probationer if the hearing is not timely commenced.

¶3 WISCONSIN STAT. § 302.335(2)(b) requires commencement of the final hearing within fifty days of the probationer’s detention in the county jail. The trial court ran the fifty days from the date of its certiorari order granting Swanson a new hearing. Swanson was incarcerated in a State prison facility, not the county jail, during most of that time. He was returned to the county jail on or about August 18, 2004, making the fifty-day deadline for conducting the final hearing October 7, 2004. Swanson’s revocation proceedings were recommenced August 24 and rescheduled for September 16, 2004. At the time Swanson filed the petition for a writ of habeas corpus, August 31, 2004, he had thus been incarcerated in the county jail only thirteen days.

¶4 Even if the Department had failed to comply with the fifty-day deadline, habeas corpus relief would not be appropriate because continued incarceration of a probationer does not constitute an illegal detention, a prerequisite to granting a writ of habeas corpus. *See* WIS. STAT. §§ 782.04(5) and 782.21(4). Because WIS. STAT. § 302.335(3) merely allows, but does not compel, the sheriff to release a probationer whose hearing has not been held within fifty days, *Jones*, 195 Wis. 2d at 673, Swanson’s continued confinement would not constitute an illegal detention. The trial court relied on the dissenting opinion in *Jones*, believing its rationale was not contradicted by the majority opinion. A dissenting opinion is what the law is not. *State v. Perry*, 181 Wis. 2d 43, 49, 510 N.W.2d 722 (Ct. App. 1993). In addition, the majority opinion’s holding that the

sheriff “may” release a probationer is inconsistent with the dissent’s conclusion that the sheriff “must” release him. *See Jones*, 195 Wis. 2d at 677.

¶5 Finally, the trial court has no authority to grant bail pending a revocation proceeding. *See State ex rel. Shock v. DHSS*, 77 Wis. 2d 362, 366, 253 N.W.2d 55 (1977). The right to bail after conviction is limited by WIS. STAT. § 969.01(2) and does not include post-sentencing release on bond pending a revocation proceeding.

By the Court.—Order reversed.

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

