

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 12, 2009

David R. Schanker
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. 2007AP2330

Cir. Ct. No. 2006CV286

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. KENYATTA CLINCY,

PETITIONER-APPELLANT,

V.

TIMOTHY LUNDQUIST,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Juneau County:
JOHN P. ROEMER, JR., Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Kenyatta Clincy appeals an order denying his petition for a writ of habeas corpus. In his petition Clincy contended that after his parole revocation, the Department of Corrections miscalculated the time he had left for reincarceration. We reject his arguments on appeal and affirm.

¶2 Clincy commenced serving three prison terms in 1996, a ten-year term, and two concurrent five year terms, consecutive to the ten-year term. He was released on parole in August 2005. At the time his mandatory release date for all three sentences was March 11, 2007. Clincy's paroles were revoked in February 2006 after he waived his final revocation hearing. At the same time, he waived his right to a reincarceration hearing. The DOC had previously calculated the time available for reincarceration on the ten-year term at three years, two months, and calculated the time on each of the five-year terms at three years, three months and two days. The DOC did not impose a maximum reincarceration on Clincy, instead requiring him to serve one reincarceration term of eleven months and twelve days, and two reincarceration terms of eleven months and twenty-one days. Those terms were imposed consecutively, taking him past his former mandatory release date.

¶3 Clincy complained to officials about the calculation of the time available for reincarceration, but did not seek formal, administrative review of that calculation. Instead, he commenced this action for habeas corpus review of the reincarceration calculation. In the trial court he contended that he could not be sentenced beyond his March 11, 2007 mandatory release date, and that the DOC violated his due process rights by not providing him with a reincarceration hearing, and a written revocation decision. He renews those arguments on appeal.

¶4 The respondent contends that we should affirm because Clincy's remedy for challenging the reincarceration calculation was by certiorari review, and Clincy did not file a timely certiorari petition. However, the respondent fails to identify the administrative decision that would have triggered Clincy's right to a

judicial review by certiorari.¹ Because the respondent has not established that certiorari review was available to Clincy, we decline to hold that review by habeas is unavailable to him, and we therefore address his arguments on appeal.

¶5 Clincy first contends that the absence of a written explanation of the parole revocation decision violates his due process rights. However, Clincy has not challenged his revocation in this or any other proceeding. The only decision he has challenged is the calculation of his maximum reincarceration time and, according to the record, the DOC made that calculation months before revoking his parole. Consequently, any procedural error in failing to adequately explain the revocation decision could have had no conceivable effect on the reincarceration calculation, and any such error was therefore harmless in this proceeding.²

¶6 Clincy next contends that he was compelled to waive his right to a reincarceration hearing when he waived his revocation hearing. However, the record contains no evidence that Clincy's waiver was compelled. And even if it were, any error in depriving him of a hearing on reincarceration is harmless because, as we explain below, there is no merit to his argument that the DOC erred as a matter of law in calculating his maximum reincarceration time.

¶7 Clincy contends that, because he was paroled discretionarily, he must receive credit for the time he spent on parole, and could not lawfully be

¹ The respondent points to record document 1:33 as a reviewable decision of the Division of Hearings and Appeals. That document is, in fact, entitled "Notification of Sentence Data," and was issued by the DOC. The record shows that the DHA did not participate in the revocation or reincarceration decisions, due to Clincy's waivers.

² An administrative rule of the DOC requires a written explanation of the revocation decision, even where the revocation hearing is waived. WIS. ADM. CODE § DOC 331.06(4). Arguably, the decision to revoke does not adequately explain the decision.

incarcerated past his mandatory release date as calculated before he was paroled. As noted, his argument has no merit. Wisconsin law no longer distinguishes between those serving indeterminate sentences who receive discretionary or mandatory parole, for the purpose of calculating the maximum reincarceration term. In both cases, the parolee may be returned to prison “for a period up to the remainder of the sentence for a violation of the conditions of parole. The remainder of the sentence is the entire sentence, less time served in custody prior to parole.” WIS. STAT. § 302.11(7)(am) (2007-08)³; *see also* WIS. STAT. § 302.11(7)(b) (parolee returned to prison is not subject to mandatory release or presumptive release). Under the plain terms of these provisions there is no right to the credit Clincy claims for either the time he spent on parole before revocation, or to release after reaching his original mandatory release date.⁴

By the Court.—Order affirmed.

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

³ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

⁴ Regulations of the DOC also plainly refute Clincy’s arguments. For those indeterminately sentenced for a crime committed after June 1, 1984, WIS. ADMIN. CODE § DOC 302.25(2) expressly erases any distinction between a discretionary parole violator or a mandatory release parole violator for the purposes of revocation and reincarceration. In each case the parole violator may be reincarcerated up to a period of time consisting of the entire sentence less time served in custody prior to parole. *See* WIS. ADMIN. CODE § DOC 302.25(5).

