COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3678

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

STATE OF WISCONSIN EX REL. TERRY L. HOOKER,

PETITIONER-APPELLANT,

V.

DAVID SCHWARZ, ADMINISTRATOR, DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

PER CURIAM. Terry Hooker appeals from an order affirming a parole revocation decision. He raises several issues regarding the revocation proceeding, none having merit. We therefore affirm.

Hooker was convicted of two felonies in 1986 and placed on probation. In May 1988, probation was revoked and he received concurrent eight and two-year prison terms. His discharge date on the eight-year term was set for June 1995. In August 1988, he was convicted on three more felonies, and received concurrent three-year, two-year and two-year prison terms, consecutive to his prior eight-year sentence.

In May 1992, he was paroled. In 1995, he was revoked, served six months in prison and was paroled again.

The Department of Corrections commenced this revocation proceeding in March 1997, based on Hooker's numerous criminal and parole rule violations. His parole agent computed the time remaining on his eight-year sentence at two years, six months and twenty days and on his three-year sentence at two years, eleven months and twenty-six days, respectively.[1] He recommended that Hooker serve the remainder of the eight-year sentence plus five months and twenty-five days on the three-year sentence, for a total prison term of three years and five days.

At the final revocation hearing Hooker did not dispute the alleged parole violations, nor did he oppose revocation. The sole issue was the length of his sentence on revocation. The hearing examiner subsequently revoked parole and ordered Hooker to serve a total prison sentence of three more years, less approximately five months in sentence credit. The administrator of the Division of Hearings and Appeals affirmed that order, resulting in circuit court review and, ultimately, this appeal.

[1] Hooker had already received a discharge on his three two-year sentences.

We review revocation decisions to determine whether the division kept within its jurisdiction, acted according to law, made an arbitrary, oppressive or unreasonable decision that represented its will and not its judgment, and heard evidence such that it might reasonably make the determinations in question. ***Van Ermen v. DHHS***, 84 Wis.2d 57, 63, 267 N.W.2d 17, 20 (1978).

Hooker first argues that he was discharged on his eight-year sentence in June 1995, and could not have been revoked later. In effect, Hooker argues that his prison sentences continued to run while he was on parole. However, § 302.11(7)(a), STATS., provides in plain terms that the DOC may return a parolee to prison "for a period up to the remainder of the sentence for a violation of the conditions of parole." That section defines the remainder of the sentence as "the entire sentence, less time served in custody prior to parole." Therefore, under this section, a parolee can only receive credit for time served on parole if the department, in its discretion, awards it. ***State ex rel. Ludtke v. DOC***, 215 Wis.2d 1, 14-15, 572 N.W.2d 864, 870 (Ct. App. 1997). Otherwise, time served on parole tolls the prison sentence.

Hooker next argues that the DOC based the three-year reincarceration term on erroneous facts. Specifically, he notes that the hearing examiner relied on an incident where he battered his girlfriend and attempted to batter a police officer, without evidence that he was ever charged with battery or attempted battery. However, the hearing examiner's reference to battery and attempted battery are based on the undisputed facts concerning the incidents themselves. It is irrelevant whether he was subsequently charged for his conduct.

Hooker next argues that the parole agent based his recommendation on erroneous facts, and did not use proper procedures in reaching it. However, we

are reviewing the revocation decision, not the agent's recommendation that preceded it. Additionally, Hooker pointed out the agent's errors at his hearing, and there is no indication in the record that those errors influenced the revocation decision. As for the agent's alleged procedural error, again it is the hearing examiner's decision and not the recommendation that is under review. In any event, the issue is waived because Hooker did not raise it during the administrative proceeding.

Hooker contends the three-year incarceration order was oppressive and unreasonable. He primarily contests the determination that it was necessary to reincarcerate him for three years "to protect the public from further criminal activity." At the revocation hearing, Hooker conceded that he committed numerous violations including marijuana use, battery, resisting arrest and attempted battery of a police officer. As the hearing examiner further noted, "during the course of parole, the client ... violated his parole on numerous occasions, including a hit and run with a motor vehicle, repeatedly consuming marijuana and alcohol, ... and stealing gasoline from a convenience store." He also engaged in disorderly conduct and threatened a police officer. The hearing examiner, and the administrator on review, could reasonably conclude from this pattern of behavior that Hooker was liable to engage in further criminal activity unless reincarcerated for a substantial time. It is not an oppressive determination demonstrating an exercise of will and not judgment.

Finally, Hooker contends that he did not receive the reincarceration hearing required under WIS. ADM. CODE § DOC 331.14. We disagree. One is required to allow the revoked individual the opportunity to litigate the length of the reincarceration term. That is exactly what Hooker received at his final revocation hearing. There is no rule, nor other authority, that requires separate

hearings to determine revocation and reincarceration. In any event, Hooker waived this issue by not raising it during the administrative proceeding.

By the Court.—Order affirmed.

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