COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0938

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

STATE OF WISCONSIN EX REL. DAVID J. RUSTAD,

PETITIONER-APPELLANT,

V.

MICHAEL SULLIVAN, SECRETARY, DEPARTMENT OF CORRECTIONS, AND DAVID H. SCHWARZ, ADMINISTRATOR, DIVISION OF HEARINGS AND APPEALS,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. David J. Rustad appeals pro se from an order affirming the revocation of his parole. He argues that notice and time limit requirements were not met, that he was not given sufficient time to prepare for the

revocation hearing, that he was denied meaningful cross-examination, and that the evidence was insufficient to support the revocation decision. We conclude that there were no jurisdictional, procedural or evidentiary infirmities in the revocation proceeding and affirm the order.

¶2 We first note that the circuit court properly construed Rustad's pro se petition for a writ of habeas corpus as a petition for a writ of certiorari. Judicial review of a revocation proceeding is limited to: (1) whether the revoking agency kept within its jurisdiction, (2) whether the agency acted according to law, (3) whether the agency's action was arbitrary, oppressive or unreasonable and represented its will and not its judgment, and (4) whether the evidence was such that the agency might reasonably make the determination in question. *See* ***Drow v. Schwarz***, 225 Wis. 2d 362, 368, 592 N.W.2d 623 (1999). This court addresses the issues raised by certiorari review independently of the circuit court. *See* ***State ex rel. Staples v. DHSS***, 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987).

¶3 Rustad was released on parole on December 6, 1995. Notice of revocation was given on November 24, 1997, alleging that Rustad had violated parole rules by absconding from parole, by entering the apartment of Susan Esty without her permission and by using crack cocaine. Rustad refused to sign an acknowledgement of receipt of the notice of revocation. The parole agent completed that part of the notice form indicating Rustad's refusal and that a copy of the papers were left with Rustad at the Milwaukee county jail. Rustad argues that the agent's service of notice was somehow improper because the agent attested to service of information not yet available to her and failed to attach the attestation of service to the request for a hearing.

¶4 Rustad's confusing argument is of no consequence. The record reflects that he received service of the notice of violation, recommended action and statement of hearing rights form on December 8, 1997. The final hearing did not commence until January 6, 1998. Even if there was an initial lack of service, it was cured well in advance of the hearing. Rustad had actual notice and was not prejudiced by what he contends are defects in the service of notice. *See* ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 394-95, 260 N.W.2d 727 (1978) (actual service only three days before hearing did not prejudice revokee). There is nothing to support Rustad's contention that the agent's failure to attach the attestation of service to the hearing request deprived the agency of jurisdiction to order a hearing.

¶5 Rustad also claims an alleged jurisdictional defect by the agency's failure to commence the revocation hearing within fifty calendar days of his detention on November 10, 1997, as required by WIS. STAT. § 302.335(2)(b) (1997-98).[1] ***State ex rel. Jones v. Division of Hearings & Appeals***, 195 Wis. 2d 669, 671, 536 N.W.2d 213 (Ct. App. 1995), holds that the failure to begin the hearing within the fifty-day time limit does not deprive the agency of authority to hear the revocation proceeding. The time period is directory and not mandatory. *See* ***id.*** at 673. We may not reconsider or overrule the ***Jones*** holding. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). The agency did not lose competency to consider revocation of Rustad's parole.

¶6 An attorney was appointed to represent Rustad in the revocation proceeding. Rustad claims that it was not sufficient that the evidence to be used at

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

the revocation hearing was disclosed to his attorney. He contends that because there is no right to an attorney in a revocation proceeding, he was entitled to personally receive disclosure of the evidence. He argues: "If the presence of a parolee's counsel at the revocation hearing is not a requirement of due process, then it should follow that due process cannot be satisfied by disclosure to the parolee's counsel."

¶7 That counsel is not a due process requirement does not render the appointment of counsel meaningless. Rustad availed himself of the appointment of counsel. Once counsel was appointed, service of all documents on counsel was appropriate. *See* WIS. STAT. § 801.14(2). There is no constitutional right to dual representation by both counsel and the client. *See* ***State v. Debra A.E.***, 188 Wis. 2d 111, 137, 523 N.W.2d 727 (1994). Disclosure to Rustad's attorney satisfied the requirement.

¶8 Rustad further claims that the disclosure of evidence upon his attorney was not timely because it came less than a week before the final revocation hearing. The short time of disclosure was addressed at the hearing when Rustad's attorney requested a continuance in order to further prepare. It was determined that the hearing would proceed because witnesses were present, but the hearing was continued to a later date to afford Rustad the opportunity to present further evidence. The January 6 hearing was continued to February 4, an adequate amount of time to examine the disclosure materials and prepare. At the continued hearing the parole agent and Rustad testified. The potential prejudice to Rustad by the late disclosure was cured by the continuance. *See* ***Flowers***, 81 Wis. 2d at 395.

¶9 The continuance also cured what Rustad claims to be the circumvention of his ability to develop meaningful cross-examination of the

witnesses whose undisclosed statements were allowed to stand for their direct testimony. Rustad was afforded an adequate amount of time to review the statements and could have recalled the witnesses. He did not. Moreover, cross-examination was undertaken at the January 6 hearing. Rustad does not suggest how cross-examination could have been more "meaningful." It was not error to allow the statements to be utilized in place of direct testimony because the technical rules of evidence need not be utilized at a revocation hearing. *See* ***id.*** at 384.

¶10 The final issue is whether the evidence supports revocation. The State must prove the alleged parole violation by a preponderance of the evidence. *See* ***State ex rel. Thompson v. Riveland***, 109 Wis. 2d 580, 585, 326 N.W.2d 768 (1982). The credibility of the witnesses is determined by the administrative law judge. *See* ***State ex rel. Cox v. DHSS***, 105 Wis. 2d 378, 384, 314 N.W.2d 148 (Ct. App. 1981).

¶11 The chronological history prepared by Rustad's parole agent reflects that Rustad had seven entries of "failure to report" and had changed residence without permission. Rustad admitted that he entered Esty's apartment, although he explained that it was with permission because of their mutual agreement to watch each other's place. Esty's statement indicated that such entry was without permission. Esty was found to be credible. Rustad also admitted to his parole agent that he had used cocaine during his period of parole supervision. While Rustad characterizes all this evidence as only creating probable cause of the alleged violations, it is sufficient to support the revocation.

By the Court.—Order affirmed.

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