COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-2445

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

STATE OF WISCONSIN EX REL. SCOTT ALAN LUDTKE,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF CORRECTIONS,

RESPONDENT-RESPONDENT.

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

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

¶1 PER CURIAM. Scott Alan Ludtke appeals pro se from an order denying his petition for habeas corpus. He argues on appeal that the State lacks the statutory authority to return him to probation once his probation has been

revoked. Because we conclude that Ludtke's interpretation of the relevant statute is incorrect and would lead to an absurd result, we affirm.

¶2 In 1989, a court sentenced Ludtke to five years in prison. His sentence was stayed and he was put on probation for five years. In 1991, his probation was revoked and he was sent to prison. The Department of Corrections (DOC) calculated his mandatory release and discharge dates. In January 1992, Ludtke was released on parole. He remained on parole until 1995, when his parole again was revoked and he was reincarcerated. The DOC advised him that he had a period of three years, seven months and twenty-four days remaining on his sentence. Ludtke requested and received a "good time forfeiture/reincarceration" hearing. At that hearing, the ALJ recognized that Ludtke had more than three years remaining on his sentence, but sentenced him to be reincarcerated for a period of eighteen months. He received new mandatory release and discharge dates based on the total amount of time remaining on his original sentence.

¶3 In February 1996, Ludtke was again released on parole. He then filed a petition for a writ of habeas corpus to be released from the supervision of the DOC on the grounds that he had been denied credit for the time served on parole. The circuit court refused to grant the petition and Ludtke appealed. We affirmed the decision of the circuit court. *See* ***State ex rel. Ludtke v. Department of Corrections***, 215 Wis. 2d 1, 572 N.W.2d 864 (Ct. App. 1997).

¶4 In 1997, Ludtke's parole was again revoked and he was given a mandatory release date of November 22, 1999. Ludtke then filed another petition for a writ of habeas corpus challenging the authority of the DOC to extend his mandatory discharge date. The circuit court again denied the petition on the

grounds that it was barred by the doctrine of issue preclusion and that it was a successive petition. It is from this order that Ludtke appeals.

¶5 The first issue presented is whether Ludtke's petition should have been barred by collateral estoppel or issue preclusion. The State concedes that the issues raised in the petition and appeal should not be barred. Therefore, we will not consider whether issue preclusion applies. The State also argues that the petition should be barred as a successive petition under ***State ex rel. Schmidt v. Cooke***, 180 Wis. 2d 187, 509 N.W.2d 96 (Ct. App. 1993). We will, however, address the appeal on its merits. We affirm the order of the circuit court, but for a different reason. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985).

¶6 Ludtke argues that under WIS. STAT. § 302.11(7) (1997-98),[1] the DOC lacked the statutory authority to establish a new discharge date for him as a parole violator. He contends that the DOC has the authority only to reincarcerate him. Ludtke states that "the statute does not afford the discretion that would permit the ALJ or the DOC to subject the parolee to any future parole for the period of the remainder that was not used for reincarceration."

¶7 Ludtke goes on to argue that the ALJ ordered him incarcerated only for eighteen months and not for the more than three years remaining on his sentence. He argues that the DOC cannot calculate his maximum discharge date based on the more than three years remaining on his sentence. In other words, Ludtke contends that he cannot be subject to additional parole for the time

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

remaining on his sentence beyond the time he was ordered incarcerated by the ALJ.

¶8 Ludtke is simply wrong. It is the court, and not the ALJ, which determines the length of a defendant's sentence. The court sentenced Ludtke to five years in prison. The ALJ's subsequent determination that Ludtke should spend eighteen months incarcerated as a result of one of several parole violations does not change the actual sentence imposed.

¶9 WISCONSIN STAT. § 302.11(7)(a) provides in relevant part:

> The division of hearings and appeals in the department of administration, upon proper notice and hearing, or the department of corrections, if the parolee waives a hearing, may return a parolee released under sub. (1) or (1g) (b) or s. 304.02 or 304.06 (1) 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.

Ludtke argues that the language "may return a parolee to prison" means "may *only*" return a parolee to prison. In other words, the DOC may return a parolee to prison but cannot let him or her out on parole again. But that is not what the statute says. "May" is not a mandatory word and the statute does not require the DOC to only return a parole violator to prison. Further, the statute does not prohibit the DOC from establishing a new period of parole as long as it is within the remainder of the defendant's sentence.

¶10 Further, as the State has argued, Ludtke's interpretation would lead to absurd results. The court must avoid absurd results when construing statutes. *See* ***Campenni v. Walrath***, 180 Wis. 2d 548, 560, 509 N.W.2d 725 (1994). For example, a person is sentenced to ten years in prison and is paroled after three years. A year later, when he or she has seven years remaining on the sentence, he

or she commits a relatively minor parole violation. The person is sentenced to six months in prison. Under Ludtke's interpretation, when that person is released after six months, he or she would be done with the sentence and the supervision. This was not the intent of the statute. Ultimately, if the court were to accept Ludtke's interpretation, the end result would be that prisoners simply would not be released on parole once they had been reincarcerated after a parole violation, even a minor one. This is plainly absurd and we reject Ludtke's interpretation of the statute.

By the Court.—Order affirmed.

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