

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 10, 2008

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. 2008AP273

Cir. Ct. No. 2006CV2183

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

COREY PRINCE,

PETITIONER-APPELLANT,

V.

LISA KENYON, DEPARTMENT OF CORRECTIONS, REGION II,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County:
WAYNE J. MARIK, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Corey Prince appeals pro se from an order denying his petition for a writ of certiorari challenging his probation revocation. Prince

contends the Department of Corrections (DOC) failed to issue new Rules of Community Supervision when his status changed from extended supervision (ES) to probation, and then revoked him on the “expired” rules applicable to his ES. Opting to address the merits of Prince’s untimely petition for certiorari, the trial court concluded that Prince’s criminal offenses provided sufficient basis for the revocation and dismissed the writ of certiorari. We agree and affirm.

¶2 The history, largely undisputed, is somewhat fact-intensive. On April 25, 2001, Prince was convicted in a Racine county case of three felonies—fleeing police, resisting/obstructing, and reckless endangerment—all as a habitual criminal. He was sentenced to three years’ confinement followed by one year ES for fleeing; a year and a day confinement, concurrent, for resisting; and a withheld sentence and three years’ probation, consecutive to the prison terms, for reckless endangerment. He later was ordered to pay nearly \$2500 in restitution. On May 11, 2004, Prince was released from prison on ES.

¶3 Less than four months later, Prince was arrested in Kenosha county for possession of marijuana and cocaine, both second offenses. His ES was revoked and he was reconfined until March 1, 2005. On March 2, back on ES, Prince acknowledged by signing a set of Rules of Community Supervision, imposed in addition to his court-ordered conditions of his ES status. The first rule advised Prince that he must “avoid all conduct which is in violation of federal or state statute” Prince began his three-year consecutive probation on May 25, 2005, when he completed his prison and ES terms. Upon completion of his ES, the DOC did not issue a discharge certificate to Prince, provide him with Rules of Community Supervision specific to his probation or notify him that a civil

judgment could be issued against him due to the restitution that remained unpaid. *See* WIS. STAT. § 301.03(3r) (2005-06).¹

¶4 Meanwhile, Prince pled guilty in March 2005 to the Kenosha county drug possession charges. At sentencing on July 13, 2005, sentence was withheld and Prince was placed on three years' probation on each count, consecutive to the Racine county case. The probation terms later were amended to run concurrent.²

¶5 On January 4, 2006, Prince violated his probation supervision. The DOC's Division of Community Corrections (DCC) served Prince with a formal notice of violation and a request for a revocation hearing. The notice alleged that Prince fled police, resisted arrest, possessed marijuana and cocaine with intent to deliver, and possessed a cellular telephone, and advised him that by doing so he violated specific Rules of Community Supervision he had signed on March 2, 2005. The papers indicated that the DOC was seeking revocation of probation in both the Racine county and Kenosha county cases. Due to a clerical error, the request also indicated that Prince had eight months and twenty days of ES time remaining and that DOC was requesting six months of that as reconfinement. This was error because Prince's ES had discharged on May 25, 2005.

¶6 Shortly before the revocation hearing, Prince's agent met with him at the Racine county jail. The agent told Prince he had no reincarceration time available because his ES on the Racine county fleeing charge had discharged and his probation on both the Racine county and Kenosha county cases had begun.

¹ All references to the Wisconsin Statutes are to the 2005-06 version.

² Probation cannot be made consecutive to probation. *See State v. Pierce*, 117 Wis. 2d 83, 85, 342 N.W.2d 776 (Ct. App. 1983).

She explained that the revocation hearing request mistakenly reflected the reincarceration time at the time of his January 2005 ES revocation. When Prince protested that DOC had not mailed him a discharge certificate on his ES case, his agent reminded him that she had advised him verbally, and explained that when his ES case discharged, his probation automatically “kicked in.” Since he faced resentencing, Prince indicated he would not waive his revocation hearing. At the hearing on February 20, however, Prince waived the hearing on advice of counsel.

¶7 On March 10, 2006, DOC issued a Revocation Order and Warrant. A sentencing-after-revocation hearing was started and adjourned on June 9 due to “confusion” over whether Prince was to be sentenced on the ES, as the request for a revocation hearing mistakenly indicated, or on the withheld sentence. On October 31, Prince, aided by counsel, filed a petition for a writ of certiorari seeking a review and determination of the probation revocation. After briefing and oral argument by the parties, the court ordered the writ dismissed. Two days later, the court sentenced Prince to two years’ initial confinement and two years’ ES for the Racine county charge of reckless endangerment. Prince appeals.

¶8 Judicial review of revocation decisions by certiorari is limited to whether the agency kept within its jurisdiction, acted according to law, took actions that were arbitrary, unreasonable or oppressive, and made a decision it reasonably could make based on the evidence of record. *See State ex rel. Ortega v. McCaughtry*, 221 Wis. 2d 376, 385, 585 N.W.2d 640 (Ct. App. 1998). Our review is identical to that of the trial court, and we decide the merits independently of the trial court’s decision. *Id.* at 385-86. We employ the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion the agency reached. *Id.* at 386. The agency’s factual findings are conclusive upon us if any reasonable view of the evidence supports them. *Id.*

¶9 As a threshold matter, the State argues that we have no jurisdiction to review the March 10, 2006, revocation order. A petitioner who pursues relief from a probation revocation by a writ of certiorari must commence the action within forty-five days after the cause of action accrues. *See* WIS. STAT. § 893.735(2); *see also State ex rel. Cramer v. Court of Appeals*, 2000 WI 86, ¶3, 236 Wis. 2d 473, 613 N.W.2d 591. The time limits usually are jurisdictional, *see State ex rel. Collins v. Cooke*, 2000 WI App 101, ¶5, 235 Wis. 2d 63, 611 N.W.2d 774, although a court may equitably toll the time limits in the proper circumstance. *See State ex rel. Griffin v. Smith*, 2004 WI 36, ¶¶36-38, 270 Wis. 2d 235, 677 N.W.2d 259.

¶10 Prince petitioned for a writ of certiorari on October 31, 2006—235 days after the revocation order. He alleges that on June 9—still 144 days before he filed his petition—“confusion” surfaced over which case he was being reconfined on. The trial court addressed the merits, so as not to “ignore some very serious and very genuine issues.” We agree with this approach and decline the State’s invitation to dismiss the matter.

¶11 Prince raises a host of arguments on appeal. He asserts that the DOC’s failure to properly notify him of his correct status and to have him sign new Rules of Community Supervision on his probation case not only was unfair, but also defied its own rules,³ the Wisconsin Administrative Code⁴ and state

³ Agents of the DOC’s Division of Community Corrections (DCC) supervise offenders while in the community. Rule 03.04.04 of the DCC’s Probation and Parole Operations Manual provides that upon receiving a client on probation, the agent “shall complete new Rules of Community Supervision ... and make a notation in the Chronological Log ... indicating that the parole or [ES] case has been terminated and the consecutive probation case has begun.”

statute.⁵ Prince also suggests that his agent was obligated, but failed, to discharge him from one status and commence the next, and asserts that had he known he was off ES and on probation facing lengthier reincarceration, he “would have changed his lifestyle.” The State responds that Prince has waived a claim of defective notice because he was represented by counsel when he elected to forego the revocation hearing. As the trial court noted, however, to the extent these arguments implicate a claim of ineffective assistance of counsel, a writ of certiorari is not the appropriate remedy. *See State v. Ramey*, 121 Wis. 2d 177, 182, 359 N.W.2d 402 (Ct. App. 1984). We therefore do not address his arguments from the perspective of waiver. Rather, we assess whether a basis existed upon which the DOC could have revoked him absent a new set of rules.

¶12 Issues of counsel’s advice and waiver aside,⁶ Prince’s challenge fails for a simple reason: he broke the law. The revocation notice cited five violations:

⁴ Upon receiving a client for control and supervision, a DOC agent must establish and provide the client with written rules of supervision that are supplemental to existing court-imposed or parole commission conditions, explain the conditions and rules to the client and inform the client of the possible consequences of not abiding by them. *See* WIS. ADMIN. CODE § DOC 328.04(2)(d), (e), (f).

A client shall be discharged upon the issuance of a discharge certificate by the DOC secretary when the term noted on the court order committing the client to the DOC’s custody and supervision expires. WIS. ADMIN. CODE § DOC 328.17(2).

All references to the Wisconsin Administrative Code are to the December 2006 version unless otherwise noted.

⁵ If any restitution remains unpaid when a person’s probation or sentence expires or he or she is discharged by the DOC, the DOC shall give the person written notification that a civil judgment may be issued against the person. *See* WIS. STAT. § 301.03(3r). Although Prince had not paid the ordered restitution, he received no § 301.03(3r) notice.

⁶ The State also argues that Prince is precluded from certiorari review because, by failing to withdraw his waiver of his revocation hearing, he has not exhausted his administrative remedies. We do not address this argument because we do not address the waiver argument.

fleeing a police officer, resisting arrest, possession of marijuana with intent to deliver, possession of cocaine with intent to deliver, and possession of a cellular telephone. To be sure, the revocation notice alleges that Prince's acts violated certain of the rules he signed on March 2, 2005. All except possessing a cell phone, however, also are obvious and recognizable criminal acts.

¶13 Prince's situation is very like that of the petitioner in *State ex rel. Rodriguez v. DHSS*, 133 Wis. 2d 47, 393 N.W.2d 105 (Ct. App. 1986). There, Rodriguez committed a battery while on probation. *Id.* at 49-50. His supervising agent erroneously had informed him that he had been released from probation, however. *Id.* at 49. Rodriguez argued that it would be unfair to require him to follow rules of supervision if he did not know he still was under supervision. *Id.* at 50. We observed that, since the judgment of conviction unambiguously decreed that probation be served consecutive to the prison sentences, Rodriguez therefore was turned over to the DOC's custody for purposes of serving both the prison sentence and the probationary term. *Id.* at 51. Rodriguez argued that he should not be revoked for violating rules he never agreed to. *Id.* at 52. We rejected that argument. "A petitioner cannot seriously contend that a probationer can violate the criminal laws of this state without affecting his or her probationary status, even without signing a probation agreement." *Id.* The dual purposes of probation are to protect the public from criminal conduct and to help the probationer become a useful member of society. *Wagner v. State*, 89 Wis. 2d 70, 77, 277 N.W.2d 849 (1979). By further violating the criminal statutes, a probationer "violates the whole concept of probation." *State ex rel. Rodriguez*, 133 Wis. 2d at 53. Therefore, probation can be revoked for violating a state criminal statute even absent a written probation agreement. *Id.* at 49.

¶14 Prince likewise submits that the March 2, 2005 rules applied to his ES status and expired with his ES on May 25, 2005. He makes too much of the fact that his revocation hinged on “rule” violations. Of his five violations, only possession of a cell phone was not a crime. A probationer who violates the criminal statutes “violates the whole concept of probation.” *See id.* at 53. The first of the March 2 rules Prince signed admonishes him that he “shall avoid all conduct which is in violation of federal or state statute” Even assuming for argument’s sake that the March 2 rules “expired,” we reject out of hand any suggestion that Prince had to obey the law—or that he truly believed that was the case—only if a new rule expressly said he had to. *See id.* at 52.

¶15 To the contrary, WIS. STAT. § 973.10(1) places all probationers under the control of the DOC under conditions the court sets and rules and regulations the DOC establishes. The Rules of Community Supervision may be tailored to an individual’s particular needs and circumstances, but those rules supplement, not supplant, the conditions that a court orders at sentencing. Thus, whether or not Prince was given a new set of customized rules, he first and foremost had to obey the law. *See* WIS. ADM. CODE, § DOC 328.04(3)(a); *see also State ex rel. Rodriguez*, 133 Wis. 2d at 52.

¶16 Prince also submits that a reason his agent did not give him new rules was because she “never commenced the consecutive probation” and “never discharged” him. This argument also fails. A DOC agent has responsibilities coincident to an individual’s status, but the agent does not create the status. Prince’s transition from ES to probation occurred as a result of the judgment the trial court entered; it was not dependent on his agent’s compliance, or lack thereof, with any documentation obligations. Thus, Prince’s probation was available for revocation because it began as a matter of law upon completion of the bifurcated

prison sentence. Prince's status as a probationer, not the promulgation of any rules, gave the DOC jurisdiction to revoke his probation. Indeed, because no discharge certificate was produced for the Racine county case, the DOC still had jurisdiction. *See State ex rel. Rodriguez*, 133 Wis. 2d at 49. The substantial evidence, reasonably viewed, supports the revocation of Prince's probation.

By the Court.—Order affirmed.

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

