

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 6, 2003

Cornelia G. Clark
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. 02-0987

Cir. Ct. No. 01-CV-382

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. DAVID H. HUBBARD,

PETITIONER-APPELLANT,

V.

**DAVID H. SCHWARZ, ADMINISTRATOR, DIVISION OF
HEARINGS & APPEALS,**

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Portage County:
FREDERIC W. FLEISHAUER, Judge. *Affirmed.*

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

¶1 PER CURIAM. David Hubbard appeals from an order affirming the revocation of his parole. He claims that he was denied due process because he never had a preliminary hearing and the revocation hearing was untimely; there was insufficient evidence to support the revocation determination; and the length

of his reincarceration was arbitrary and capricious. We disagree and affirm for the reasons discussed below.

¶2 While on parole, Hubbard was allegedly involved in a check forgery scheme and then left the country to be married in Belize. He was detained at the Miami International Airport when he returned on June 16, 2001. Hubbard waived extradition and was returned to the Dodge Correctional Institution on July 8, 2001. He was given a notice of violation and recommendation for revocation of parole on July 18, 2001. The revocation hearing was held on September 11, 2001.

¶3 Hubbard claims on appeal that he was improperly denied a preliminary hearing. We need not address this argument, however, because Hubbard waived the issue by failing to raise it at his revocation hearing. *See Santiago v. Ware*, 205 Wis. 2d 295, 322, 556 N.W.2d 356 (Ct. App. 1996).

¶4 Hubbard also contends that his hearing should have been held within fifty days after his detention under WIS. STAT. § 302.335(2)(b) (2001-02).¹ However, under *State ex rel. Jones v. Div. of Hearings and Appeals*, 195 Wis. 2d 669, 536 N.W.2d 213 (Ct. App. 1995), the fifty-day rule is directory, not mandatory. The test for due process purposes is whether the length of the detention was reasonable. We agree with the division that the period of detention here was reasonable, particularly since an earlier hearing had to be rescheduled to allow Hubbard's agent to appear. Moreover, Hubbard has not demonstrated that he was prejudiced by the delay, and he was given full credit for the time he was incarcerated.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶5 Hubbard next challenges the sufficiency of the evidence, arguing that one of the witnesses mentioned in the revocation hearing request did not appear; that a replacement witness was asked leading questions when she couldn't recall certain dates; that Hubbard was prevented from cross-examining another witness; and that the evidence of his check forgery contained in police reports was hearsay. However, Hubbard does not identify any favorable evidence he believes the missing witness could have provided; the credibility of the witness with an uncertain memory was a factual question for the ALJ to decide; and the ALJ properly restricted Hubbard from asking questions when he was represented by counsel, who did cross-examine the witnesses. Moreover, as the division correctly points out, the technical rules of evidence do not apply at revocation hearings. WIS. STAT. § 911.01(4)(c); *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 549, 185 N.W.2d 306 (1971). Therefore, the division could properly consider the witness testimony, even if it was elicited by leading questions, and the police reports, even if they contained hearsay. We are satisfied that the information provided by the witnesses and contained in the reports provided sufficient evidence to revoke Hubbard's parole.

¶6 Finally, Hubbard contends that the division improperly deviated from the DOC's recommended penalty schedule for reincarceration when it required him to serve the entire remaining time on his sentence. The division was not bound by the DOC's reincarceration guidelines, however, and the penalty imposed did not exceed that allowed by law.

By the Court.—Order affirmed.

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

