

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 25, 2007

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. 2006AP3082

Cir. Ct. No. 2006CV504

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. STEVEN JACKSON,

PETITIONER-APPELLANT,

V.

KATHY JESS,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Dodge County:
DANIEL W. KLOSSNER, Judge. *Affirmed.*

Before Higginbotham, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Steven Jackson appeals orders denying his petition for habeas corpus relief. Jackson is imprisoned following revocation of his probation on a felony conviction. He sought review of the revocation decision by habeas petition after he failed to timely file for certiorari review. The failure to

file a timely petition for certiorari review of a revocation decision may in some cases be excused on equitable grounds. *See State ex rel. Griffin v. Smith*, 2004 WI 36, ¶¶36-38, 270 Wis. 2d 235, 677 N.W.2d 259. The issue on appeal is whether the circumstances in this case provide equitable grounds to excuse Jackson's delinquency, and to allow him to obtain judicial review of the revocation. We conclude that the requisite equitable grounds do not exist, and we therefore affirm.

¶2 Jackson's revocation decision was issued on November 23, 2005. By letter dated December 13, 2005, his privately retained attorney in the revocation proceeding informed Jackson that the attorney had asked the State Public Defender's office to represent Jackson on certiorari review. The letter informed Jackson that the Public Defender's office would contact him with its decision on representation. Jackson did not hear from the Public Defender's office until he received a letter dated February 8, 2006, informing him that his forty-five day deadline for judicial review, set forth in WIS. STAT. § 893.735(2) (2005-06),¹ had expired. Jackson subsequently commenced this habeas proceeding in August 2006.

¶3 A prisoner who fails to file a timely certiorari petition for review of a revocation decision may nevertheless obtain review of the decision, in equity, when he or she timely asks counsel to file for certiorari, counsel promises to do so, and then fails to timely file. *Griffin*, 270 Wis. 2d 235, ¶38. A prisoner's certiorari deadline may be equitably tolled in other circumstances as well. *See id.*, ¶¶35-37.

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

However, in *Griffin* and in other instances of equitable tolling² the failure to timely file an appeal was attributable to the acts of someone the prisoner either reasonably or necessarily relied on to perform timely. Here, the circumstances leading to Jackson's delinquency were not beyond his control and were not the product of necessary or reasonable reliance on others. There is no evidence in the record that counsel misled Jackson or failed to perform as promised. Counsel's letter indicates he discussed a referral with Jackson, and then timely made the referral. Jackson received no promise that the Public Defender's office would represent him, and could not reasonably assume that it would on a matter where he had no right to counsel. *See id.*, ¶22 (holding that no constitutional right to counsel to file certiorari petition exists). Furthermore, the cover letter to his revocation decision informed him of the forty-five day certiorari deadline, even if counsel's letter did not, and he therefore should have known that relatively quick action was necessary.³ Consequently, it was Jackson's responsibility to follow up and ensure a timely response from the Public Defender's office, or to take steps to meet the appeal deadline on his own if he did not receive a timely response. He has shown no reasonable basis to rely on others, or to attribute his delinquency to others.

² *See State ex rel. Nichols v. Litscher*, 2001 WI 199, 247 Wis. 2d 1013, 635 N.W.2d 292 (equitable tolling applied where inmate missed thirty-day filing deadline because mailroom officer did not mail appeal immediately); *State ex rel. Brown v. Bradley*, 2003 WI 14, 259 Wis. 2d 630, 658 N.W.2d 427 (applying *Nichols* retroactively, determining that equitable tolling applied because Brown was "similarly situated" to Nichols).

³ Counsel's letter referred to a conference counsel had with Jackson, and to discussions counsel had with a friend of Jackson's. There is no record of those discussions, and we make no assumption whether counsel communicated the deadline to Jackson through them.

¶4 Arguably, in his role as an effective advocate, counsel could have done more to ensure that Jackson obtained the review he desired. As *Griffin* points out, however, Jackson does not have an ineffectiveness claim he can pursue. *Id.*, ¶¶20-31. The only relief available to him is on equitable grounds and, as explained in this opinion, Jackson has not shown that he is entitled to equitable relief on the narrow grounds that *Griffin* and other cases have made available.

By the Court.—Orders affirmed.

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

