COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2825

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

STATE OF WISCONSIN EX REL. JEFFREY K. KROHN,

PETITIONER-APPELLANT,

V.

MARGARET BROWDER, WILLIE SNOWDEN,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Jackson County: ROBERT W. RADCLIFFE, Judge. *Affirmed.*

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

PER CURIAM. Jeffrey K. Krohn appeals from a circuit court order denying his petition for *habeas corpus*. For the reasons set forth below, we affirm. However, we make our determination on different grounds than did the circuit court. ***Kafka v. Pope***, 186 Wis.2d 472, 476, 521 N.W.2d 174, 176 (Ct. App. 1994), *aff'd*, 194 Wis.2d 234, 533 N.W.2d 491 (1995).

BACKGROUND

In 1996, Krohn was under parole supervision by the Department of Corrections (DOC) after a previous conviction. He failed to appear for a January 18, 1996 court appearance, and he failed to report to his supervising agent as directed by phone. On March 6, 1996, he was apprehended in Arlington, Texas, on a violation warrant.[1] On April 30, 1996, he signed a written admission that he had traveled to Texas. On May 2, 1996, he was served with a notice of violation,[2] which he signed. On May 6, 1996, he was informed by letter that, in accordance with WIS. ADM. CODE § DOC 331.04(2)(b),[3] because of his written statement admitting a violation, no preliminary hearing would be held. A final revocation hearing was held on July 1, 1996.

On July 15, 1996, Krohn's probation and parole were revoked, and on July 16, 1996, Krohn filed a petition for *habeas corpus* with the circuit court for Jackson County. By order dated July 19, 1996, the writ issued, but was later quashed on the grounds that the matter sought to be litigated should have been raised by *certiorari*. On September 4, 1996, Krohn filed a notice of appeal to this court.

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[1] The warrant alleged Krohn's failure to appear for the January court date, his act of leaving the State of Wisconsin without permission, and his failure to contact his agent. All were in violation of the rules of parole imposed previously.

[2] The notice charged him with violating various provisions of his rules of supervision, including traveling to Cancun, Mexico, operating a car without permission, taking a $3,000 cell phone without permission, being out of contact with his supervising agent, obtaining a driver's license under a false name, and traveling to Texas.

[3] That section provides in relevant portion that an exception is made to the requirement for a preliminary hearing when "[t]he client has given and signed a written statement which admits the violation."

Habeas Corpus.

We agree with the circuit court that this case is one which should have been filed as a petition for *certiorari*, rather than as a *habeas corpus* proceeding. Review of matters involving probation and parole revocation is by common-law *certiorari*. ***State ex rel. Johnson v. Cady***, 50 Wis.2d 540, 549-50, 185 N.W.2d 306, 311 (1971). However, the fact that the petition was wrongly labeled does not end our inquiry. We will liberally construe pleadings that are mislabeled. ***State ex rel. McMillian v. Dickey***, 132 Wis.2d 266, 279, 392 N.W.2d 453, 457-58 (Ct. App. 1986). Therefore, we treat the petition as one for *certiorari*.

Certiorari.

Judicial review of *certiorari* actions is limited to determining four factors: (1) whether the department of corrections kept within its jurisdiction, (2) whether it proceeded on a correct theory of law, (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment, and (4) whether the evidence reasonably supported the determination. As to this last factor, we evaluate whether reasonable minds could arrive at the conclusion reached by the administrative tribunal. ***State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment,*** 131 Wis.2d 101, 120, 388 N.W.2d 593, 600 (1986). *See also* ***Van Ermen v. DHSS,*** 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978) (same standard applies on appellate review). Most of Krohn's contentions focus on the last factor.

Krohn alleges that his probation agent failed to use all possible means to contact him, that the violation warrant was based on false information, that he was denied due process as well as other constitutional rights by the failure to conduct a preliminary hearing, that his revocation hearing was untimely and

that his defense was impaired by being in several custodial locations during the course of the revocation proceedings. We reject each of these arguments.

At the revocation hearing, the Administrative Law Judge (ALJ) determined that Krohn habitually failed to contact his agent as required. Even when informed to come to his agent and report or be arrested, he failed to comply. We reject Krohn's reading of WIS. ADM. CODE § DOC 328.14(4)'s language (an agent shall make reasonable attempts to locate the client) as a requirement that an agent must call or page a client who had been told previously, as Krohn was, to show up or be arrested.

Krohn, himself, signed a written admission that he had traveled to Texas, and that he broke his rules of parole in other ways.[4] We therefore do not consider his allegation about false information further. Additionally, where, as here, a written statement admitting violations has been signed, there is no requirement for a preliminary hearing. WIS. ADM. CODE § DOC 331.04(2)(b). Krohn also argues that he was denied equal protection compared with those incarcerated in county jails. However, Krohn does not support this assertion with legal analysis. Therefore, we do not consider it further. ***Herman v. Milwaukee Children's Hosp.***, 121 Wis.2d 531, 553, 361 N.W.2d 297, 306 (Ct. App. 1984).

Regarding whether his revocation hearing was untimely, the State admits it was delayed past the goal timeline of thirty to forty days, as set forth in

[4] Krohn argues that he was forced to sign the statement. However, at the revocation hearing the ALJ implicitly denied, or was never presented with this argument, because the ALJ found Krohn's admission persuasive. Because this is a *certiorari* review, we take facts found as below, if, as here, there is reasonable evidence to sustain them. *See* ***Kuehnel v. Wisconsin Registration Bd. of Architects and Prof. Engineers***, 243 Wis. 188, 196-97, 9 N.W.2d 630, 633 (1943).

the appendix to WIS. ADM. CODE ch. DOC 331. Nevertheless, we conclude that the delay was not fatal. The factors to consider in analyzing delay are the same as those we consider in speedy trial cases. *See* WIS. ADM. CODE ch. DOC 331, appendix *and* ***Barker v. Wingo***, 407 U.S. 514 (1972). The four factors are the length of the delay, the reasons for the delay, the assertion of the right to a speedy disposition and possible prejudice.

The total time from apprehension in Texas to disposition was four months and one week. Three weeks of the delay are attributable to Krohn's initial refusal of extradition from Texas. Furthermore, while Krohn argues he was prejudiced by his physical placement in inconvenient locations, he makes no cognizable argument that he was prejudiced by delay. We therefore reject Krohn's argument that his revocation hearing was untimely.

Krohn focuses on the unavailability of witnesses, in his argument that multiple custodial locations prejudiced him. However, in light of provisions permitting alternative arrangements, and in the absence of any statement about which witnesses would testify (or be unable to testify), this argument is not persuasive. *See* ***State ex rel. Harris v. Schmidt***, 69 Wis.2d 668, 678-79, 230 N.W.2d 890, 896 (1975). As to his argument that his custodial changes prejudiced counsel, who had insufficient time to prepare, it contradicts Krohn's previous argument that he was unfairly prejudiced by delay. Further, this argument is not supported by counsel's affidavit of record.

Based on his status as a parolee, and based on his status as a possible parole violator, DOC articulated these reasons for pre-revocation custody: a pattern of failure to report; the likelihood that if released, Krohn would engage in criminal activity; and the length of time left to serve, if revoked. *See* WIS. ADM.

CODE § DOC 331.14(3). But even more fundamental than if DOC acted improperly in retaining him in custody, or in denying him a preliminary hearing, if Krohn believed he was improperly held such that his substantive rights were violated, his remedy was a *habeas corpus* action at that time and not after the fact. *See* WIS. ADM. CODE § DOC 331.12 (if any time requirement under that chapter is exceeded, it may be considered harmless error, and disregarded if it does not affect a client's substantive rights). Further, it is axiomatic that a *habeas corpus* action must be timely. ***State ex rel. Dressler v. Racine County Circuit Court***, 163 Wis.2d 622, 630, 472 N.W.2d 532, 536 (Ct. App. 1991) (citation omitted) (a petition for writ will not be granted unless the request for relief is made promptly and speedily). Therefore, we conclude there is no merit to this argument as well.

By the Court.—Order affirmed.

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