

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 15, 2004

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. 03-2633

Cir. Ct. No. 03CV000219

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**STATE OF WISCONSIN EX REL. GARY D. GARY, A/K/A
GARY D. HAND,**

PETITIONER-APPELLANT,

v.

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

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County:
BRUCE E. SCHROEDER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Gary D. Gary appeals from the order denying his petition for a writ of certiorari. The issue on appeal is whether the circuit court erred when it affirmed the decision of the Division of Hearings and Appeals

(DHA) revoking Gary's probation. Gary argues that the circuit court erred because it lacked jurisdiction over him. We disagree and affirm the order of the circuit court.

¶2 In 1987, Gary was convicted in Kenosha county of bail jumping. The court imposed and stayed sentence and placed him on five years of probation. The probation was to run consecutively to a sentence Gary was then serving. When Gary was done serving that sentence, supervision was not transferred to the probation office, and Gary did not report to a probation agent. Supervision was transferred five months after Gary was released. The Department of Corrections sent a notice to Gary ordering him to report, he did not do so, and an apprehension request was issued. Gary was later apprehended, and he gave a statement to the Department in which he said that he had been told when he was released that he was "a free man." He then signed a request for reinstatement in which he admitted that he had failed to report and agreed to tolling of his probationary period from the date he was released until the date he was taken into custody.

¶3 During the reinstated probationary period, Gary violated probation numerous times. A probation revocation hearing was held and Gary argued that the Department had lost jurisdiction because the time between when he was initially released and when he was apprehended should not have been tolled. The administrative law judge rejected this argument, concluding that the request for reinstatement was sufficient to toll the time for his probation. This decision was affirmed by the DHA. Gary then brought a petition for a writ of certiorari to the circuit court. The court denied the petition.

¶4 Gary argues on appeal that the reinstatement order that tolled the time for the start of his probation was invalid. He asserts that he is entitled to

credit for the time he spent at liberty because he was erroneously released. The State responds that the reinstatement and tolling order was valid, and that Gary's argument that he was erroneously released is irrelevant to the issue presented here. We agree with the State and affirm the order of the circuit court.

¶5 In a review of a decision to revoke probation, we defer to the decision of the DHA, applying the same standard as the circuit court. *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶10, 250 Wis. 2d 214, 640 N.W.2d 527. Our review is limited to the following questions: (1) whether the DHA kept within its jurisdiction; (2) whether the DHA acted according to law; (3) whether the DHA's actions were arbitrary, oppressive or unreasonable and represented its will rather than its judgment; (4) and whether the evidence was such that the DHA might reasonably make the decision in question. *Id.*

¶6 We conclude that under *State ex rel. Beougher v. Lotter*, 91 Wis. 2d 321, 328, 283 N.W.2d 588 (Ct. App. 1979), Gary conceded that he violated parole when he made the request for reinstatement. His request for reinstatement established the absconding violation. *See id.* By conceding that he had absconded, Gary relinquished any claim he may have had to credit for time spent on erroneous release. Because he has relinquished this claim, he is not even theoretically entitled to credit for erroneous release. Consequently, we affirm the order of the circuit court that affirmed the decision of the DHA.

By the Court.—Order affirmed.

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

