

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 21, 2010

A. John Voelker
Acting 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. 2009AP3102

Cir. Ct. No. 2009CF1505

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

MARK A. SZARKOWITZ,

PETITIONER-APPELLANT,

V.

DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County:
HAROLD V. FROEHLICH, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Mark Szarkowitz, pro se, appeals from an order dismissing as untimely his petition for writ of certiorari. The petition challenged a decision sustaining the revocation of his probation. Szarkowitz argues we should construe a prior letter to the circuit court as a timely petition for certiorari. He also

argues the time for filing certiorari should be tolled because his attorney told him she would appeal the decision sustaining the probation revocation, but failed to do so. We reject his arguments and affirm the order.

¶2 Szarkowitz received notice of violations of probation regarding a misdemeanor case and two felony cases. At a July 29, 2008 review hearing, Szarkowitz agreed to stipulate to the alleged violations of probation and waive his appeal rights if the State would only revoke his misdemeanor case and not his felony cases. Consistent with the stipulation, Szarkowitz's probation was revoked only in the misdemeanor case. The court's sentence essentially gave Szarkowitz time served on the misdemeanor charge. The decision was affirmed by the Division of Hearings and Appeals on August 1, 2008.

¶3 On October 31, 2008, a notice of new violations and a revocation hearing request were filed regarding the two felony cases. On November 19, Szarkowitz, through counsel, requested dismissal of the revocation proceedings due to the stipulation at the July 29 hearing. The division responded in part as follows:

At the July 29, 2008 revocation hearing for Mr. Szarkowitz, there was an agreement for Mr. Szarkowitz to stipulate to the violations and waive his appeal rights if the Department only revoked Mr. Szarkowitz'[s] misdemeanor case and not his felony cases. This agreement resulted in the revocation of only Mr. Szarkowitz'[s] misdemeanor case and not his felony cases.

I have reviewed the recording from this hearing and the agreement as stated on the record. There was nothing in the agreement to prevent the Department from bringing another revocation action for separate violations. Therefore, your request to have the current revocation proceeding dismissed is denied.

¶4 On December 5, 2008, Szarkowitz, through counsel, moved for “summary judgment” concerning the revocation proceedings, again claiming his rights were violated because of the July 29 stipulation. The administrative law judge issued an order on December 22, revoking Szarkowitz’s probation in both cases.

¶5 On December 30, 2008, Szarkowitz filed a pro se letter in the Outagamie County Circuit Court, requesting a date for sentencing after revocation and also requesting a habeas corpus hearing “due to the fact that my constitutional rights were violated when D.O.C. violated their agreement with me and initiated a second revocation hearing in violation of the law.” Szarkowitz included a copy of the motion for summary judgment that his attorney had filed with the division. He contended, “[The administrative law judge] stated that he could not hear the motion because a revocation hearing is not a court of law.” The record does not indicate the circuit court took any action on the December 30 letter.

¶6 On January 5, 2009, Szarkowitz, through counsel, appealed to the division the revocation order in the felony cases. On January 14, 2009, the division sustained the underlying revocation decision. Included with the decision was a “NOTICE OF APPEALS RIGHTS,” stating that “Judicial review of a revocation decision may be obtained by writ of certiorari” that “must be commenced within 45 days of the decision to be reviewed.”

¶7 On August 4, 2009, Szarkowitz, filed a pro se petition for writ of certiorari. On October 20, 2009, the circuit court dismissed the petition for writ of certiorari because it was not timely filed. Szarkowitz now appeals.

¶8 Szarkowitz argues his December 30, 2008 letter to the circuit court, requesting a habeas corpus hearing, should be construed as a timely petition for

writ of certiorari. Alternatively, he argues the time for filing should be tolled because his defense counsel told him she would file an appeal of the decision sustaining the order revoking his probation, but failed to do so.

¶9 We reject the argument that Szarkowitz's December 30, 2008 letter should be construed as a timely petition for writ of certiorari. Szarkowitz had counsel at the time of the December 30 letter, and counsel was pursuing an administrative appeal. On January 5, 2009, Szarkowitz's counsel filed the appeal of the revocation order. Accordingly, at the time Szarkowitz filed the letter he now wants construed as a petition for writ of certiorari, his administrative remedies were not exhausted. This case is not one of the instances in which the exhaustion doctrine should not apply. See *State ex rel. Mentek v. Schwarz*, 2001 WI 32, ¶9, 242 Wis. 2d 94, 624 N.W.2d 150. When Szarkowitz eventually filed his petition for writ of certiorari on August 4, 2009, it was untimely and properly dismissed.¹

¶10 Szarkowitz also fails to establish the time for filing a petition for writ of certiorari review should be subject to equitable tolling. See *State ex rel. Griffin v. Smith*, 2004 WI 36, ¶3, 270 Wis. 2d 235, 677 N.W.2d 259. He contends his counsel told him that she would file a petition for writ of certiorari after the division sustained the revocation of his probation. However, Szarkowitz cites nothing in the appeal record indicating this assertion is true. We therefore decline to consider the argument further. See *Grothe v. Valley Coatings, Inc.*, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463.

¹ We note Szarkowitz's notice of appeal states he is appealing the circuit court's October 20, 2009 order, which explicitly dismissed the August 4, 2009 petition for writ of certiorari.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5 (2007-08).

