

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 20, 2016**

Diane M. Fremgen  
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. 2015AP1386**

**Cir. Ct. No. 2013CV1495**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN EX REL. MARQUELUS BROWN,**

**PETITIONER-APPELLANT,**

**V.**

**BRIAN HAYES,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Outagamie County:  
NANCY J. KRUEGER, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Marquelus Brown appeals an order dismissing his petition for a writ of certiorari as untimely. He contends the petition was timely

filed under WIS. STAT. § 893.735<sup>1</sup> and other tolling provisions. Because we conclude the petition was not timely filed so as to give the circuit court competency to hear the petition, we affirm the dismissal order.

### **BACKGROUND**

¶2 The administrator of the Division of Hearings and Appeals (DHA), Brian Hayes, issued a final decision confirming the revocation of Brown’s extended supervision on August 22, 2013. That decision was mailed to Brown’s attorney, who forwarded the decision to Brown on September 2, 2013. By letter filed October 7, 2013, Brown requested from the circuit court an extension of time for filing a petition for a writ of certiorari, stating he “just received the notice of appeal rights last week on Sep 28, 2013,” he was waiting for a copy of the motion his attorney filed with the DHA so he could attach it to his petition, and he has had problems getting to the prison law library. By order entered October 18, 2013, the circuit court granted a thirty-day extension for filing the petition.

¶3 Brown’s petition for a writ of certiorari, dated October 17, 2013, was initially sent to the judge and was not filed with the clerk of court until December 30, 2013. Along with the petition, Brown submitted an affidavit stating he requested his “three-strikes” certification from the Department of Justice on October 8, 2013, and received the certification on October 16. The circuit court initially dismissed the action based on Brown’s failure to serve the petition within forty-five days. This court reversed that decision and remanded the matter for the circuit court to determine whether the action was timely commenced considering

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

the applicable tolling rules. On remand, the circuit court concluded it lacked the authority to grant the extension, and Brown failed to prove facts necessary to apply the tolling provisions. Therefore, the circuit court concluded the petition was not timely filed.

### DISCUSSION

¶4 The time for filing a petition for a writ of certiorari under WIS. STAT. § 893.735 is forty-five days from the date of the administrator’s decision, “except that the court may extend the period by as many days as the prisoner proves have elapsed between the decision for disposition and the prisoner’s actual notice of the decision or disposition.” Forty-five days from the administrator’s decision would have been October 7, 2013. However, the Department concedes Brown is entitled to seven days of tolling for the time it took the Department of Justice to process his three-strikes certification. That would extend the deadline to October 13, 2013. Brown concedes he did not place his petition in the prison mailbox until October 21, 2013. Therefore, the petition was not timely filed, even under the prison mailbox rule.

¶5 Brown seeks to invoke the provision of WIS. STAT. § 893.735 that gives the circuit court discretion to extend the period by as many days as the prisoner proves have elapsed from between the decision and his actual notice of the decision. Brown contends he did not receive the letter from his attorney until October 15, 2013, and therefore his petition was timely filed. That argument fails for several reasons. First, Brown’s letter requesting an extension of time for filing the petition was written before he claims to have received the letter from his attorney. Brown’s letter to the circuit court correctly calculated the due date for the petition based on the date of the administrator’s decision and therefore, in

some manner, Brown was informed of the decision long before the date he claims to have received his counsel's letter. Second, Brown focuses on the date he was informed of his appeal rights. The tolling provision of § 893.735 allows the circuit court to toll the time that elapsed between the date of the administrator's decision and "the prisoner's actual notice of the decision," not the date of notification of appeal rights. Third, and most importantly, the statute requires the prisoner to "prove" the number of days that elapsed between the decision and notice of the decision. Brown presented no proof of the date he received actual notice of the adverse decision. Argument is not evidence. *State v. Eugenio*, 210 Wis. 2d 347, 358, 565 N.W.2d 798 (Ct. App. 1997). Therefore, Brown has not provided sufficient proof to invoke the tolling provision of § 893.735.

¶6 Brown also attempts to invoke the tolling rule for the time it took the prison to process his trust account statement, which he requested on August 8, 2013. See *State ex rel. Walker v. McCaughtry*, 2001 WI App 110, ¶16, 244 Wis. 2d 177, 629 N.W.2d 17. That request appears to have been made weeks before the administrator's decision; it is not one of the documents Brown listed in his affidavit as mailed to the circuit court on October 21, 2013; and the trust account statement is not included in Brown's submissions to the circuit court. Therefore, Brown provided no proof that the late filing of the petition was due to delay in receiving the trust account statement.

¶7 Brown argues that his error in mailing the petition to the judge's chambers rather than to the clerk of court should not invalidate the petition. Neither the circuit court nor this court bases the conclusion that Brown's petition was untimely on that defect.

¶8 Brown also argues that the failure to timely file the petition should be disregarded under the harmless error statute, WIS. STAT. § 805.18(1). However, failure to timely file a petition deprives the circuit court of competency to hear the petition, a defect that is not subject to harmless error analysis. *See Jefferson Cty. v. Joseph S.*, 2010 WI App 160, ¶15, 330 Wis. 2d 737, 795 N.W.2d 450.

¶9 Finally, for the first time in his reply brief, Brown argues he is entitled to equitable tolling of the time for filing the petition. We do not consider arguments raised for the first time in a reply brief. *See Northwest Wholesale Lumber v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

*By the Court.*—Order affirmed.

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

