**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

July 22, 1997

**NOTICE**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**No. 96-2341**

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

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**STATE EX REL. ELDON BODDIE,**

**PETITIONER-APPELLANT,**

**v.**

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

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Eldon Boddie appeals *pro se* from an order dismissing his petition for writ of *certiorari* to review his parole revocation. Boddie claims that: (1) the Department of Corrections' decision to revoke his parole should be reversed because his final revocation hearing was held after the

fifty-day time limit mandated by § 302.335, STATS.; (2) the 104-day delay between his arrest and his final revocation hearing violated his right to due process; (3) the Department violated § 302.335(3), STATS., and WIS. ADM. CODE § DOC 328.22(3), by holding him for sixteen days prior to serving him with a Notice of Parole Violation; and (4) the Department should have amended its forfeiture recommendation after his criminal charges were reduced. We affirm.

## I. BACKGROUND

On August 28, 1991, Boddie was convicted of first-degree reckless injury as a party to a crime. He was sentenced to ten years' imprisonment. Boddie was granted discretionary parole on February 13, 1995.

On July 12, 1995, Boddie was arrested for possession of a firearm by a felon and possession of a controlled substance with intent to deliver. After being taken into custody, Boddie was placed on a parole hold. On July 13, Boddie was charged with the possession crimes, and on July 20, Boddie was charged with robbery, recklessly endangering safety, and reckless use of a dangerous weapon. On August 3, 1995, Boddie was served with a Notice of Parole Violation. His final revocation was scheduled for August 23, 1995, but was postponed several times, finally taking place on October 16, 1995.

On August 22, 1995, Boddie pleaded guilty to possession of a controlled substance with intent to deliver-cocaine and one count of possession of a firearm by a felon. He was sentenced to thirty-six months in prison for the cocaine offense and eighteen months in prison for the firearm offense, to be served concurrently. On September 12, 1995, Boddie was convicted of theft from person, and was sentenced to a five-year prison term, imposed and stayed, and was placed on probation for four years, consecutive to all sentences.

Following Boddie's final revocation hearing, the administrative law judge revoked Boddie's parole. On administrative appeal, the Division of Hearings and Appeals Administrator affirmed the ALJ's decision. Boddie then sought relief by writ of *certiorari*; the circuit court dismissed the petition.

## II. ANALYSIS

Boddie claims that his revocation should be reversed because his final revocation hearing was held after the fifty-day time limit for commencement of proceedings set forth in § 302.335, STATS.[1] Boddie contends that § 302.335 is mandatory and, therefore, that a revocation resulting from a hearing held after the time limit must be reversed. Boddie is wrong.

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[1] Section 302.335, STATS., provides, in relevant part:

> **302.335 Restrictions on detaining probationers and parolees in county or tribal jail. (1)** In this section, "division" means the division of hearings and appeals in the department of administration.
>
> **(2)** …
>
> ….
>
> (b) The division shall begin a final revocation hearing within 50 calendar days after the person is detained in the county jail, other county facility or the tribal jail. The department may request the division to extend this deadline by not more than 10 additional days, upon notice to the probationer or parolee, the sheriff, the tribal chief of police or other person in charge of the facility, and the division. The division may grant the request. This paragraph does not apply if the probationer or parolee has waived the right to a final revocation hearing.
>
> **(3)** If there is a failure to begin a hearing within the time requirements under sub. (2), the sheriff, the tribal chief of police or other person in charge of a county facility shall notify the department at least 24 hours before releasing a probationer or parolee under this subsection.

In ***State ex rel. Jones v. Division of Hearings & Appeals***, 195 Wis.2d 669, 536 N.W.2d 213 (Ct. App. 1995), this court held that the fifty-day time period set forth in § 302.335, STATS., is directory, not mandatory. ***Jones***, 195 Wis.2d at 672, 536 N.W.2d at 214. "The object of § 302.335 is to regulate the length of time persons are held in county jails pending parole revocation hearings. It does not regulate the authority of the Division of Hearings and Appeals to hold those hearings." ***Id***. at 673, 536 N.W.2d at 215. To construe the statute as mandatory would effectively preclude revocation of parole in all instances in which the time period was violated. ***Id.*** In ***Jones***, we concluded that, in the absence of such legislative intent, we would not impose this consequence. ***Id***. at 673-74, 536 N.W.2d at 215. Therefore, Boddie's claim that § 302.335 requires reversal of his revocation fails.

Boddie next claims that he was denied due process because the Department of Corrections failed to hold a prompt final revocation hearing. We disagree.

Whether a delay in the holding of a final revocation hearing violated a parolee's due process rights is a question of law, which this court reviews *de novo*. *See* ***State v. Carrizales***, 191 Wis.2d 85, 92, 528 N.W.2d 29, 31 (Ct. App. 1995). "The United States Supreme Court has held that an element of the fair process due a parolee facing revocation is that the hearing must be tendered within a reasonable time after the parolee is taken into custody." ***State ex rel. Alvarez v. Lotter***, 91 Wis.2d 329, 332, 283 N.W.2d 408, 409 (Ct. App. 1979) (citing ***Morrissey v. Brewer***, 408 U.S.2d 471 (1972)). This due process right is not triggered, however, if the parolee is being held pursuant to other convictions. *See* ***Alvarez***, 91 Wis.2d at 333-34, 283 N.W.2d at 409-10 (discussing ***Moody v. Daggett***, 429 U.S. 78 (1976)). "[N]o due process is due a parolee facing

revocation until his life, liberty, or property interests are impaired by the revocation." ***United States ex rel. Sims v. Sielaff***, 563 F.2d 821, 826 (7th Cir. 1977).

Boddie does not contend that he was held solely pursuant to his parole hold. He has never claimed that he would have made bail on the new charges, and the record is silent on the issue.[2] If Boddie had been held solely because of the parole hold, his due process rights would have been activated and he would have been entitled to a prompt final revocation hearing. However, Boddie was held pursuant to new charges that were issued on July 13, and to which he entered guilty pleas on August 22, 1995. Therefore, he was incarcerated on other charges well within the fifty-day limit allowed under § 302.335(2)(b), STATS. Accordingly, we reject his due process claim.

Boddie next argues that the Department failed to serve him with Notice of Violation within the prescribed time period and that it detained him unlawfully. He claims that under WIS. ADM. CODE § DOC 328.22(3), STATS., a parolee can only be detained for five days for a disciplinary violation without the filing of a Notice of Violation with the Department.[3] Again, Boddie is mistaken.

Boddie fails to recognize the exception to the provisions of WIS. ADM. CODE § DOC 328.22(3). WIS. ADM. CODE § DOC 328.22(3) provides in pertinent part:

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[2] The record establishes that Boddie received credit for the time he spent in custody; apparently he did not post bail on the new charges.

[3] Boddie cites WIS. ADM. CODE § DOC 328.02(3), which does not exist. We infer from his argument that he meant to cite WIS. ADM. CODE § DOC 328.22(3).

> This subsection does not apply to detentions pending final revocation which are authorized by an agent's immediate supervisor under s. DOC 331.04(5) when a preliminary hearing is not held pursuant to s. DOC 331.04(2)

This exception applies to Boddie's situation. He was arrested on July 12, 1995, and was bound over on felony charges by the circuit court for the same conduct alleged in the August 3 Notice of Violation; therefore, he was not being held solely pursuant to the Department's authority. In addition, Boddie was not entitled to a preliminary revocation hearing because, under WIS. ADM. CODE § DOC 331.04(2), the exceptions to the preliminary revocation hearing requirement, there had already been a finding of probable cause on the felony charges. Pursuant to WIS. ADM. CODE § DOC 331.04(5), Boddie's parole agent's supervisor reviewed the violation report and authorized his detention; therefore, the Department was in compliance with the administrative regulations.

Boddie insists, however, that he was not bound over for trial until after July 24, 1995, and therefore, the five-day time period was applicable to him. Boddie, however, cites nothing in the record to support this allegation, and we have located nothing to support his claim. Further, even if we were to assume that his allegation is correct, we would conclude that the lapse in time between the date of his detention (July 12) and the date of his notice (August 3) is subject to the same analysis, under ***Jones***, that we applied to the fifty-day time period between detention and final revocation.

The time restriction on the notice and the preliminary hearing is contained in the same statute as that relating to the date of the final revocation hearing. Section 302.335(2)(a) & (3) provides :

> (a) The department shall begin a preliminary revocation hearing within 15 days after the probationer or parolee is detained in the county jail.... The department may extend, for cause, this deadline by not more than 5 additional working days upon written notice to the probationer or parolee or the person in charge of the county facility....
>
> ....
>
> (3) If there is a failure to begin a hearing within the time requirements under sub. (2), the sheriff, the tribal chief of police or other person in charge of a county facility shall notify the department at least 24 hours before releasing a probationer or parolee under this subsection.

Under the rationale of ***Jones***, a request for a remedy for failure to hold the hearing within the proper time period is directed to the custodian of the facility within which the detainee is being held. *See* ***Jones***, 195 Wis.2d at 673, 536 N.W.2d at 215. Boddie never made such a request. Therefore, even if a Notice of Violation was not served on Boddie within five or fifteen days of his arrest and placement on parole hold, the Department did not lose jurisdiction to hold the revocation hearing.

Finally, Boddie claims that once the criminal charges against him were reduced, his parole agent should have reconsidered his forfeiture recommendation. Once again, we conclude that his argument is without merit.

When reviewing probation revocation determinations, this court must defer to the administrative agency's decision. *See* ***Von Arx v. Schwarz***, 185 Wis.2d 645, 655, 517 N.W.2d 540, 544 (Ct. App. 1994). Our scope of review is limited to: (1) whether the Division kept within its jurisdiction; (2) whether the Division acted according to law; (3) whether the Division's actions were arbitrary, oppressive, or unreasonable and represent its will and not its judgment; and

(4) whether the evidence was such that the Division might reasonably make the order or determination in question. ***Van Ermen v. DHSS***, 84 Wis.2d 57, 63-64, 267 N.W.2d 17, 20 (1978). We conclude that the Division's decision to revoke Boddie for the remainder of his confinement was within its jurisdiction and was not arbitrary or capricious.

Under § 302.11(7)(a), STATS., the Division may return a parolee to prison for the remainder of the sentence for a violation of the conditions of parole. *See* § 302.11(7)(a); *see also* WIS. ADM. CODE § DOC 302.25(5). Whether a parolee is eligible for an alternative to revocation is determined based on the conduct established at the revocation hearing, not on the criminal complaint or judgment of conviction. *See* ***State ex rel. Flowers v. DHSS***, 81 Wis.2d 376, 386, 260 N.W.2d 727, 733 (1978) (revocation is a continuing consequence of the underlying criminal conviction). The results of criminal prosecutions do not control the decisions reached by an ALJ during revocation hearings. *See* ***id.***

At the final revocation hearing, the ALJ concluded:

> [Boddie's] violations are of a highly serious nature. He was on parole rules which required him to avoid unlawful conduct. Despite these rules, he engaged in serious criminal conduct on June 23, 1995, and July 12, 1995. Revocation of his parole and his reincarceration for a period of five years is necessary to protect the public from [Boddie's] further criminal activity and to prevent the undue depreciation of the seriousness of his violations. [This] disposition is necessary as the client is on supervision for a highly assaultive offense which resulted in the death of another individual. He was on parole for only a short time before he got involved in drug trafficking and assaultive offenses involving firearms.

Substantial evidence supports the Division's determination. Boddie's infractions were serious. As a result, his supervising agent recommended that Boddie serve the entire time remaining on his sentence—six years, one month, and twenty-two days. The ALJ did not follow the agent's recommendation, but rather, concluded that a forfeiture of five years would be appropriate. The Division affirmed the ALJ. Clearly, the ALJ and the Division considered the evidence and rationally determined Boddie's forfeiture.

*By the Court.*–Order affirmed.

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