

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 19, 2005

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. 2004AP22

Cir. Ct. No. 2003CV143

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. LAWRENCE MCCOY,

PETITIONER-APPELLANT,

v.

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

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County:
DENNIS G. MONTABON, Judge. *Affirmed.*

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Lawrence McCoy appeals an order denying his petition for writ of certiorari challenging a decision revoking his parole. He argues: (1) that his reincarceration time improperly exceeds the penalty schedule

in the Department of Corrections (DOC) manual; (2) that he should have been allowed to earn good time on his forfeited time; (3) that DOC did not adequately consider alternatives to revocation; (4) that the record before this court is not adequate because it does not contain mitigating information; and (5) that his attorney failed to object to factual errors in the revocation summary. We reject these arguments and affirm.

¶2 McCoy argues that his parole agent's recommendation regarding the amount of time McCoy should be reincarcerated, which was adopted by the hearing examiner, exceeded the time listed in the DOC Probation and Parole Operations Manual. Because the hearing examiner is not bound by the DOC manual, we reject this argument. See *George v. Schwarz*, 2001 WI App 72, ¶1, 242 Wis. 2d 450, 626 N.W.2d 57.

¶3 McCoy next argues that the hearing examiner erroneously exercised his discretion in not allowing McCoy to earn good time on his forfeited time. The hearing examiner did not allow McCoy to earn good time against the forfeited amount because of the severity of McCoy's underlying conviction, second-degree homicide, and his new criminal conduct, which included using and selling drugs. The hearing examiner's decision was an appropriate exercise of discretion.

¶4 McCoy next argues that DOC did not adequately consider alternatives to revocation. The record undermines his claim. The record shows that DOC considered alternatives, but rejected them because McCoy had problems with supervision, he did not attend outpatient drug treatment, and his prior placement in a residential treatment facility had been terminated for noncompliance. The record also shows that placement at a halfway house was

considered, but rejected, due to McCoy's problems with supervision and his refusal to comply with outpatient drug treatment. We reject McCoy's claim.

¶5 McCoy next argues that the record before this court is not adequate to revoke him because it does not contain mitigating information. However, the record does show that McCoy missed scheduled appointments without explanation or contact and that McCoy admitted to cocaine use. An undercover agent testified that McCoy sold cocaine. Regardless of any additional mitigating information, the evidence in the record was more than sufficient to support the revocation.

¶6 In his reply brief, McCoy argues that his attorney failed to object to factual errors in the revocation summary. Because this argument is raised for the first time in his reply, we will not consider it. See *State v. Marquardt*, 2001 WI App 219, ¶14 n.3, 247 Wis. 2d 765, 635 N.W.2d 188 (court declined to address argument made for first time in reply brief).

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

