

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 12, 2008

David R. Schanker
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. 2007AP2237

Cir. Ct. No. 2007CV378

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN EX REL. RAYNARD K. L'MINGGIO,

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:
BARBARA A. KLUKA, Judge. *Affirmed.*

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

¶1 PER CURIAM. Raynard L'Minggio appeals from an order affirming the revocation of his parole. He argues that he was denied due process because his parole agent was given additional time to produce the document confirming that L'Minggio's parole had not expired and that the revocation is

invalid because he was not given *Miranda*¹ warnings before making a statement, he was denied the right to confront and cross-examine an agent who participated in home checks, and his agent failed to follow established procedures for resolving his absconder status. We affirm the circuit court's order.

¶2 L'Minggio was released on parole on February 17, 2004. His discharge from parole would have occurred November 14, 2005. L'Minggio failed to report to his parole agent for a scheduled appointment on July 13, 2004. The agent twice attempted to contact L'Minggio at his home but received no answer at the door. A letter was sent to his home. L'Minggio did not report and an apprehension request was issued. The Department of Corrections (DOC) completed a "stop time" order October 6, 2004, effective July 6, 2004.²

¶3 Not until October 13, 2006, was L'Minggio apprehended. He made a statement to a parole agent indicating that he had been at his reported address since July 2004 and that he didn't report to his agent because he was mad at his agent for not working with him. The administrative law judge (ALJ) of the Division of Hearings and Appeals (DHA) found that the stop time order was timely issued. The ALJ found that L'Minggio violated supervision rules by failing to report for a scheduled appointment, absconding from supervision for more than two years, driving a motor vehicle on October 13, 2006, without a valid driver's license, and giving a false name to a police officer on October 13, 2006. Parole

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

² The effective date of the stop time order relates to an allegation that on July 6, 2004, L'Minggio tested positive for cocaine use. That allegation was not proven at the revocation hearing.

was revoked and L'Minggio was reincarcerated for the maximum amount of available time—one year, eight months, and twenty-seven days.

¶4 In this appeal we do not review the decision of the circuit court; we directly review the decision of DHA revoking L'Minggio's parole. *State ex rel. Tate v. Schwarz*, 2001 WI App 131, ¶10, 246 Wis. 2d 293, 630 N.W.2d 761 *rev'd on other grounds*, 2002 WI 127, 257 Wis. 2d 40, 654 N.W.2d 438. 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 so as to represent its will and not its judgment; and (4) whether the evidence was such that the DHA might reasonably make the determination in question. *Von Arx v. Schwarz*, 185 Wis. 2d 645, 655, 517 N.W.2d 540 (Ct. App. 1994). A claim that due process of law has been denied requires us to consider whether the agency acted according to law. *State ex rel. Meeks v. Gagnon*, 95 Wis. 2d 115, 119, 289 N.W.2d 357 (Ct. App. 1980). "Whether the agency acted according to law is a question of law that is reviewed de novo." *Tate*, 246 Wis. 2d 293, ¶10.

¶5 L'Minggio first argues that he was denied due process of law because the stop time order was not properly maintained in his file and not readily available to counsel before the revocation hearing. The revocation hearing record was held open for two days so the agent could produce a copy of the stop time order, which was timely produced and entered into the record. L'Minggio claims that had he known before the hearing that there was no reason to challenge the DOC's jurisdiction over him, he would have waived the revocation hearing and accepted his agent's six month reincarceration recommendation. He asserts that

the DOC failed to follow its own rules by not having the stop time order in his file.³ In his reply brief he suggests that the ALJ erred by not postponing the revocation hearing and that holding the record open was arbitrary and unreasonable.

¶6 L'Minggio waived any claim of error with respect to the production of the stop time order. On the record the ALJ indicated that as a preliminary matter and in an off-record discussion, L'Minggio's attorney questioned jurisdiction because she was not able to locate the stop time order in the agent's file. The agent had indicated that a stop time order was in fact executed. The ALJ then indicated that the record would be held open so that order could be produced.⁴ Both sides confirmed the ALJ's summary of the off-record discussion. L'Minggio made no objection at the revocation hearing. He did not request an adjournment. He proceeded with the hearing knowing the stop order would be produced in a short time. He waived any issue concerning the stop time order not being in the file.⁵ *State v. Outagamie County Bd. of Adjustment*, 2001 WI 78, ¶55, 244 Wis. 2d 613, 628 N.W.2d 376; *Saenz v. Murphy*, 162 Wis. 2d 54, 63, 469 N.W.2d 611 (1991), *overruled on other grounds by State ex rel. Anderson-El*

³ L'Minggio also contends that the failure to timely disclose the stop time order led to deficient performance by his attorney. Our review is limited to the actions of the administrative body only and the effectiveness of counsel during the revocation hearing is not a proper subject for review in this appeal. *State v. Ramey*, 121 Wis. 2d 177, 178, 359 N.W.2d 402 (Ct. App. 1984).

⁴ There is no suggestion that L'Minggio's counsel doubted the existence of the valid stop time order. The record was also held open to give L'Minggio an opportunity to submit an alternative to revocation proposal, a benefit to L'Minggio.

⁵ No complaint was made about the stop time order or the failure to timely make that available to L'Minggio in his appeal to the DHA administrator. L'Minggio's complaints were raised for the first time before the circuit court.

v. Cooke, 2000 WI 40, ¶¶29-31, 234 Wis. 2d 626, 610 N.W.2d 821 (explaining that an exception to the waiver rule exists for issues that present only a question of law). Additionally, L’Minggio’s statement that he would have waived the hearing if he had known the stop time order existed is self-serving and outside the record of facts established at the hearing. We do not consider factual assertions outside of the record.⁶ *State ex rel. Richards v. Leik*, 175 Wis. 2d 446, 455, 499 N.W.2d 276 (Ct. App. 1993).

¶7 Waiver applies with equal force to L’Minggio’s claim that his statement to a parole agent “must be thrown out” because he was not given *Miranda* warnings. L’Minggio did not object to the admission of the statement into the record. L’Minggio did not assert at the hearing that the statement was improperly obtained. He has waived any claim related to the statement. *Outagamie County Bd. of Adjustment*, 244 Wis. 2d 613, ¶55.

¶8 Even ignoring waiver, we reject his claim that the statement should have been excluded. First, the failure to give *Miranda* warnings before obtaining a parolee’s statement is not grounds to exclude the statement at the revocation hearing. *State ex rel. Struzik v. H&SS Dept.*, 77 Wis. 2d 216, 221-23, 252 N.W.2d 660 (1977). Secondly, L’Minggio’s written statement has a check mark on the box indicating that he was given advisements that he needed to be truthful or he could be revoked and that his statements could not be used against him in

⁶ L’Minggio is not prejudiced by the lost chance to waive the revocation hearing. The agent’s six month recommendation was only that—a recommendation. The same recommendation was made at the conclusion of the hearing. L’Minggio only speculates that the evidence adduced at the hearing gave the ALJ cause to impose a longer period of incarceration. The information produced at the hearing would have been available in deciding the amount of reincarceration even if L’Minggio had waived the hearing.

criminal proceedings. L'Minggio's assertion that he was not given any advisements is not supported by any evidence in the record. L'Minggio did not testify at the revocation hearing. Based on this record, there is no basis for a claim that the statement should have been excluded from the record.

¶9 At the revocation hearing L'Minggio's parole agent was asked what efforts were made to locate L'Minggio after a second home visit. The agent indicated that periodically "we would drive there [to] see if we could see him." The agent later indicated that a yearly follow up was not done because "we periodically drive by his house." Seizing upon the agent's reference to "we," L'Minggio claims that the agent's testimony was improperly bolstering the truth of the matter asserted by reference to another agent that was not produced to give testimony at the hearing. He contends he was denied the opportunity to confront and cross-examine the person "we" referred to.

¶10 There was no objection to the agent's testimony when reference was made to "we." It is ridiculous to assert that the reference to "we" was an attempt to bolster the testimony. It reflects nothing more than an agent's inadvertent reference to the supervising agency as a whole. Moreover, the reference to "we" is not testimony from some other person. There was no testimony by a witness that L'Minggio was not allowed to confront or cross-examination.

¶11 Remaining is L'Minggio's claim that his agent failed to follow guidelines relating to absconding set forth in the DOC's "Probation and

Parole Operations Manual.”⁷ L’Minggio’s agent acknowledged that after two failed home visits and no response to the letter sent to L’Minggio’s last known address, the agent did not check any of the other primary sources listed in the manual. The agent did not follow-up with the Social Security Administration upon inquiry from that agency as to L’Minggio’s status. L’Minggio asserts that the DOC acted beyond its authority because it abandoned its own rules. *State ex rel. Riley v. DHSS*, 151 Wis. 2d 618, 625, 445 N.W.2d 693 (Ct. App. 1989).

¶12 We acknowledge that an agency must abide by its own rules. *Anderson-El v. Cooke*, 234 Wis. 2d 626, ¶17. However, we disagree with L’Minggio’s starting point—that the operations manual is a procedural rule that

⁷ The manual provides at chapter 9:

.03 ATTEMPTS TO LOCATE

When an offender fails to keep a scheduled appointment, the agent should contact the offender by phone or letter. If the attempt to make contact fails, it will be necessary to do a home visit and take appropriate action to determine if offender has absconded.

Primary sources to be checked are the offender’s last known address, neighbors, employer, county lockups, hospitals, parents, siblings, relatives, collaterals, programs in which the offender has been involved, and any unique lead to the case. A certified letter, with return receipt requested (signed by addressee only), may be sent to offender’s last known address. Specific reporting instructions should be contained in this letter.

Other sources for locating offenders include:

Internet
 Social Security Office
 CIB Check
 Human Services
 Child Support
 Crime Stoppers
 Temporary Employment Services
 Post Office
 Department of Transportation Records

Chapter 9: Absconding, <http://www.wi-doc.com/04-12-2004/Chapter%2009%20Absconding.pdf> (last visited Nov. 4, 2008).

must be strictly adhered to. As *George v. Schwarz*, 2001 WI App 72, ¶16, 242 Wis. 2d 450, 626 N.W.2d 57 recognizes, the operations manual is merely an internal working document for the employees of the DOC's probation and parole division. It is not a rule bestowing any type of procedural rights on a parolee.⁸

¶13 The administrative code provision that the DOC had to comply with is WIS. ADMIN. CODE § DOC 328.14(4), which provides that “An agent shall make *reasonable attempts* to locate a client who has absconded which may include a letter to the last known address. Certified letters may be used.” (Emphasis added.) At best, the agent's failure to follow the operations manual would exhibit a lack of reasonable attempts to locate the absconder. The ALJ found otherwise. The ALJ's findings are conclusive if supported by any reasonable view of the evidence. *George*, 242 Wis. 2d 450, ¶10. L'Minggio does not dispute that he failed to show up for his scheduled appointment and did not attempt to contact his agent for more than two years. He absconded. As the DHA administrator aptly observed, “Even if I assume for purposes of this appeal that the department could have done more to locate L'Minggio that does not relieve him of his obligation to report for supervision. Parole is not meant to be a game of hide and seek.”

By the Court.—Order affirmed.

⁸ L'Minggio also argues the agent failed to comply with a provision in the manual at 09.01.04 requiring a home visit before issuance of a stop time order. L'Minggio selectively quotes the provision to suggest that another home visit shall be made if within the thirty days of issuing the apprehension request the absconder is not taken into custody. The manual actually provides: “If an offender has not been apprehended within 30 days after the DOC-58 has been issued, the agent will submit a Recommendation for Administrative Action (DOC-44) stopping time. If a home visit was not conducted during attempts to locate the offender, it shall be made prior to issuing the stop time.” Chapter 9: Absconding <http://www.wi-doc.com/04-12-2004/Chapter%2009%20Absconding.pdf> (last visited Nov. 4, 2008). Contrary to L'Minggio's reading, the manual does not require a separate home visit after the thirty days for apprehension.

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

