

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 8, 2009

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. 2008AP2896

Cir. Ct. No. 2007CV14132

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. STEVEN HASSELKUS,

PETITIONER-APPELLANT,

v.

DAVID H. SCHWARZ,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
DAVID A. HANSHER, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Steven Hasselkus appeals from a circuit court order affirming the decision of David H. Schwarz, the Administrator of the Department of Administration, Division of Hearing and Appeals (the Division). Hasselkus sought *certiorari* review of the revocation of parole and extended

supervision, and argued that the Department of Corrections could not revoke his extended supervision because he was not then serving the extended supervision components of his sentences. We disagree and conclude that the Department of Corrections acted properly when it revoked both Hasselkus's parole and his extended supervision. Accordingly, we affirm.

FACTS

¶2 The sentence structure for three convictions is pertinent to this appeal, and we first set out the three sentences and relevant post-sentencing events.

- 1996CF359: In this pre-truth-in-sentencing (TIS) case, Hasselkus was sentenced in 1996 to an indeterminate sentence of sixty months on count one. Sentence was withheld on counts two and three, and Hasselkus was placed on probation for five years on each count, to run concurrently with each other and consecutively to the sentence on count one.¹ Probation was later revoked, and on November 18, 2005, the court imposed concurrent, four-year indeterminate sentences on counts two and three.
- 2003CF1040: On July 15, 2004, Hasselkus was placed on probation for five years. Probation was later revoked, and on December 12, 2005, the

¹ According to the decision of the Administrative Law Judge, Hasselkus completed serving his sentence on count one on September 1, 2003. Hasselkus does not dispute that statement. Thus, Hasselkus began serving his probationary terms on counts two and three on September 1, 2003.

court sentenced Hasselkus to eight years of imprisonment, comprised of three years of initial confinement and five years of extended supervision, to be served consecutively to any previous sentence.

- 2005CF2812: On November 30, 2005, the court sentenced Hasselkus to twenty-four months of imprisonment, comprised of twelve months of initial confinement and twelve months of extended supervision.

¶3 In 2006, Hasselkus successfully completed the Challenge Incarceration Program (CIP). On August 30, 2006, Hasselkus was released to parole in the 1996 pre-TIS case and to extended supervision in the other two cases. After Hasselkus violated the rules of supervision by using cocaine, the Department of Corrections revoked his parole and extended supervision. Hasselkus appealed the revocation decision to the Division, and Administrator Schwarz affirmed the revocation.²

¶4 Hasselkus then filed a petition for *certiorari* review of the Division's decision. The circuit court rejected Hasselkus's argument that he began serving only his parole sentence after he successfully completed CIP so that the two extended supervision sentences could not later be revoked because he was not then serving them. Hasselkus appeals to this court and renews the argument raised in the circuit court.

² Schwarz modified the length of reincarceration in the pre-TIS case and modified the length of the recommended reconfinement in the two TIS cases. Those modifications are not relevant to this appeal.

DISCUSSION

¶5 *Certiorari* review of a revocation order

“is limited to four inquiries: (1) whether the [Division] acted within the bounds of its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will, not its judgment; and (4) whether the evidence was sufficient that the [Division] might reasonably make the determination that it did.”

State ex rel. Tate v. Schwarz, 2002 WI 127, ¶15, 257 Wis. 2d 40, 654 N.W.2d 438 (citation omitted). This court reviews the Division’s decision rather than the decision of the circuit court. See *State of Wis.—Dep’t of Corrections v. Schwarz*, 2004 WI App 136, ¶5, 275 Wis. 2d 225, 685 N.W.2d 585, *rev’d on other grounds*, 2005 WI 34, 279 Wis. 2d 223, 693 N.W.2d 703.

¶6 In *State ex rel. Thomas v. Schwarz*, 2007 WI 57, ¶38, 300 Wis. 2d 381, 732 N.W.2d 1, the supreme court held that “simultaneous revocation of parole and extended supervision is permitted by the sentencing statutes.” The court rejected Thomas’s argument that he was required to complete serving his pre-TIS parole sentence before he could begin serving his extended supervision sentence. *Id.*, ¶44. The court approved as “sound” the reasoning of the pre-TIS case of *Ashford v. Division of Hearings and Appeals*, 177 Wis. 2d 34, 501 N.W.2d 824 (Ct. App. 1993), and held that “extended supervision and parole are to be treated as one continuous period, and both may be revoked upon violation of the conditions imposed.” *Thomas*, 300 Wis. 2d 381, ¶47.³ Moreover,

³ In *Ashford v. Division of Hearings and Appeals*, 177 Wis. 2d 34, 38, 501 N.W.2d 824 (Ct. App. 1993), the court of appeals held that a person serving consecutive sentences was subject to parole revocation for both sentences if a parole violation were committed prior to discharge of the first sentence.

“[a]ccording to the plain language of WIS. STAT. § 302.113(4), two consecutive periods of extended supervision are computed as one continuous period.” *State v. Collins*, 2008 WI App 163, ¶13, 314 Wis. 2d 653, 760 N.W.2d 438.⁴

¶7 The facts of this case mirror those in *Thomas*. Like Hasselkus, Thomas was serving both an indeterminate sentence and a determinate sentence. *See id.*, 300 Wis. 2d 381, ¶¶5-6. Like Hasselkus, Thomas successfully completed CIP, and he was released to supervision. *See id.*, ¶7. Like Hasselkus, Thomas violated the rules of supervision, and the Department of Corrections sought to revoke both parole and extended supervision. *See id.* ¶¶8-9. Like Hasselkus, Thomas moved to dismiss the proceedings for revocation of extended supervision, arguing that he had not yet commenced serving extended supervision and that, therefore, extended supervision could not be revoked. *See id.*, ¶9. The result for Hasselkus must be what it was for Thomas, in other words, “the Division acted within its jurisdiction when it revoked [Hasselkus’s] parole and extended supervision simultaneously.” *See id.*, ¶38.

¶8 In his attempts to distinguish *Thomas*, Hasselkus relies on the dissent in *Thomas* wherein Justice Bradley contended that the majority’s holding “treating the period of extended supervision as continuous with the period of parole will result in illegal sentences” in “many instances.” *See id.*, ¶71. Of course, statements in a dissent are not controlling.

⁴ WISCONSIN STAT. § 302.113(4) (2007-08) provides: “All consecutive sentences imposed for crimes committed on or after December 31, 1999, shall be computed as one continuous sentence. The person shall serve any term of extended supervision after serving all terms of confinement in prison.” All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶9 Hasselkus also contends that the simultaneous revocation of his parole and extended supervision is improper because such a revocation would result in an illegal increase of the sentences imposed. However, Hasselkus's calculation of his potential sentences, which he asserts now exceed the original sentences, includes credit for time spent on supervision, rather than time in custody. We agree with the State's assessment that Hasselkus's "excess" sentence "is due to the remaining time on his other two consecutive sentences and to time spent on supervision on the street, which is not creditable to reincarceration or reconfinement time after revocation. See WIS. STAT. §§ 302.11(7)(am), 302.113(9)(am)." As we stated in Hasselkus's appeal from the reconfinement order in circuit court case No. 2003CF1040:

WISCONSIN STAT. § 302.11(7)(am) states that when a parolee is revoked, he may be returned to prison for a period up to the remainder of the sentence. "The remainder of the sentence is the entire sentence, less time served in custody prior to parole." *Id.* Similarly, WIS. STAT. § 302.113(9)(am) provides that if a person's extended supervision is revoked, the court shall order the person to be returned to prison "for any specified period of time that does not exceed the time remaining on the bifurcated sentence." The time remaining on the bifurcated sentence is defined as "the total length of the bifurcated sentence, less time served by the person in confinement under the sentence before release to extended supervision ... and less all time served in confinement for previous revocations of extended supervision under the sentence." *Id.*

As these statutes indicate, a revoked defendant does not receive credit off his sentence for time spent on extended supervision or parole, as opposed to time spent in actual custody.

State v. Hasselkus, No. 2008AP1879-CR, unpublished slip op. at 5 (WI App May 6, 2009).

¶10 Because the revocation of both Hasselkus's parole and extended supervision was sanctioned by *Thomas* and *Collins*, and because Hasselkus's overall sentence was not increased by the revocation, we affirm the circuit court's order.

By the Court.—Order affirmed.

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

