

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 5, 2012

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. 2011AP616

Cir. Ct. No. 2009CF259

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICKEY J. CRUZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS R. CIMPL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Rickey J. Cruz, *pro se*, appeals an order dismissing his petition for writ of *certiorari*. The issue is whether Cruz timely filed the petition. We conclude that he did not. Therefore, we affirm the order dismissing this action.

¶2 A person seeking review of a decision revoking probation must file a petition for writ of *certiorari* in the circuit court within forty-five days of the date of the revocation decision. WIS. STAT. § 893.735(2) (2009-10).¹ This deadline may not be extended because the circuit court lacks subject matter jurisdiction over a petition that is not timely filed. See *State ex rel. Collins v. Cooke*, 2000 WI App 101, ¶5, 235 Wis. 2d 63, 611 N.W.2d 774. The forty-five day period is tolled “when a prison inmate places a certiorari petition in the institution’s mailbox for forwarding to the circuit court.” *State ex rel. Shimkus v. Sondalle*, 2000 WI App 238, ¶14, 239 Wis. 2d 327, 620 N.W.2d 409. This tolling rule applies “only after a prisoner deposits for mailing a petition that is complete, in proper form and accompanied by the required filing fee or fee-waiver documents.” *State ex rel. Tyler v. Bett*, 2002 WI App 234, ¶2, 257 Wis. 2d 606, 652 N.W.2d 800.

¶3 Cruz received the final revocation decision on November 10, 2010. The deadline for filing a petition for writ of *certiorari* was forty-five days later, on December 25, 2010. Cruz did not file the petition in the circuit court until January 13, 2011, well beyond the forty-five day time limit. Therefore, the circuit court lacked subject matter jurisdiction over the petition.

¶4 Cruz attempts to save this action by arguing that he moved to extend the time for filing the petition for writ of *certiorari* before the forty-five day deadline expired. This argument fails for two reasons. Most importantly, the mailbox tolling rule does not apply because Cruz mailed only an extension motion, not “a petition that is complete, in proper form and accompanied by the

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

required filing fee or fee-waiver documents.” *Id.* Second, even if Cruz had filed a properly completed petition rather than a motion for an extension, the filing was not received until December 28, 2010, after the deadline elapsed. Cruz has not documented that he mailed it before the deadline, which would be necessary to toll the deadline. The fact that the document was *dated* December 23, 2010, is irrelevant because tolling begins to run from the date a document is mailed. *See Shimkus*, 239 Wis. 2d 327, ¶14.

¶5 Finally, Cruz argues that he should be excused from the forty-five day time limit because he suffers from mental illness. He cites WIS. STAT. § 893.16, which tolls the statute of limitations in civil cases for persons disabled due to mental illness. That statute does not toll the forty-five day time limit of WIS. STAT. § 893.735 because § 893.735 applies to prisoners seeking relief by *certiorari*; it does not pertain to civil actions.

By the Court.—Order affirmed.

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

