



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

December 19, 2018

To:

Hon. James K. Muehlbauer
Circuit Court Judge
P.O. Box 1986
West Bend, WI 53095

Anthony L. O'Malley
Zacherl, O'Malley & Endejan, S.C.
115 S. Main St.
Fond du Lac, WI 54935

Theresa Russell
Clerk of Circuit Court
Washington County Courthouse
P.O. Box 1986
West Bend, WI 53095-1986

Jennifer L. Vandermeuse
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

2018AP113

State of Wisconsin ex rel. Todd Timblin v. Brian Hayes and
Wisconsin Department of Corrections (L.C. #2017CV297)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

The circuit court order granted Todd Timblin's petition for writ of certiorari to review the decision of the Division of Hearing and Appeals (DHA) that set the time of his reincarceration after his supervision was revoked. The court then affirmed DHA's decision. Based upon review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We affirm the order.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Timblin has a gambling addiction. In 2001, he pled guilty to six counts of theft by deception for persuading others to invest approximately \$1.4 million in a fictitious Florida riverboat gambling enterprise, while actually using the money to pay off past gambling debts and fund future sprees. Three of the counts were subject to indeterminate pre-truth-in-sentencing (TIS); three to determinate post-TIS. He was sentenced to eight, nine, and nine years on the pre-TIS counts, concurrent to any other sentence. On each of the post-TIS counts, he was sentenced to consecutive sentences of five years' initial confinement (IC) and ten years' extended supervision (ES), for a total of fifteen years' IC and thirty years' ES on those counts.

Timblin was released from prison in July 2015, after serving nearly fifteen years. His indeterminate sentences were served by the end of 2009, leaving the ES component for the determinate counts (counts 15, 18 and 21) still unserved. According to Department of Corrections (DOC) records, count 15 was to be served from July 14, 2015, through July 13, 2025, count 18 from July 14, 2025, through July 13, 2035, and count 21 from July 14, 2035, through July 13, 2045.

Timblin was reincarcerated for rule violations² occurring between January 1, 2016, and January 10, 2017, which was during his ES term for count 15, but before his ES term for either count 18 or 21. The DOC placed him in the lowest offense category, Category 1, as his rule violations were not criminal or violent. Under DOC procedure, Category 1 imposes a maximum reincarceration of fifteen percent of remaining ES. Timblin had approximately eight and one-

² Timblin admitted to the violations: frequenting a casino where he gambled and drank, failing to disclose or lying to his agent about these activities, and failing to declare gambling related income.

half years remaining on his count 15 ES. His agent calculated fifty-four months reincarceration time—fifteen percent of thirty years' ES. The administrative law judge (ALJ) agreed.

Timblin did not. He appealed to the Division of Hearings and Appeals (DHA), which sustained the ALJ's order on reconfinement. The circuit court granted Timblin's petition for writ of certiorari. It, too, affirmed the reincarceration decision. Timblin appeals.

Timblin first argues that WIS. STAT. § 302.113(4) is unconstitutional as applied to him because it is inconsistent with a different sentencing statute, and therefore violates equal protection, and it is ambiguous with respect to determining the amount of post-revocation reincarceration, so that the ambiguity should be resolved in favor of revoking periods of extended supervision separately. Timblin raised neither argument before the agency or the circuit court. We need not address issues raised for the first time on appeal. *See State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997). That general rule applies even to constitutional claims. *See State v. Gove*, 148 Wis. 2d 936, 940-41, 437 N.W.2d 218 (1989).

On the merits, Timblin does not contest the revocation decision. He contends only that the ALJ erred in calculating his reincarceration time because it included the ES terms not yet being served. We disagree.

Certiorari review of a revocation is limited to whether: the agency stayed within its jurisdiction; it acted according to law; its action was arbitrary, oppressive or unreasonable, representing its will, not its judgment; and the evidence was such that it reasonably might have made the order or determination in question. *State ex rel. Thorson v. Schwarz*, 2004 WI 96, ¶12, 274 Wis. 2d 1, 681 N.W.2d 914. This court considers the merits independent of the circuit

court. See *State ex rel. Ortega v. McCaughtry*, 221 Wis. 2d 376, 385-86, 585 N.W.2d 640 (Ct. App. 1998). We thus review the agency’s decision, not the circuit court’s.

When revoking ES, the reviewing authority—DHA, WIS. STAT. § 302.113(9)(ag)—has discretion to return the offender to prison “for any specified period of time that does not exceed the time remaining on the bifurcated sentence.” Sec. 302.113(9)(am). “The time remaining on the bifurcated sentence is the total length of the bifurcated sentence, less time served by the person in confinement under the sentence before release to extended supervision under sub. (2) and less all time served in confinement for previous revocations of extended supervision under the sentence.” *Id.* Consecutive sentences shall be computed as “one continuous sentence” and the person “shall serve any term of extended supervision after serving all terms of confinement in prison.” Sec. 302.113(4). This court has interpreted “one continuous sentence” to allow for consecutive periods of ES to be “aggregated into one continuous period, so that revocation of [ES] at any time allows revocation as to all consecutive sentences.” *State v. Collins*, 2008 WI App 163, ¶6, 314 Wis. 2d 653, 760 N.W.2d 438. While the DOC may make a recommendation as to the time an offender should serve after revocation, the statutes ultimately leave the decision to DHA’s discretion. Sec. 302.113(9)(am). DHA’s reincarceration recommendation is not binding on this court. See *State v. Brown*, 2006 WI 131, ¶25, 298 Wis. 2d 37, 725 N.W.2d 262.

The ALJ found that Timblin: had multiple felony convictions that resulted in a restitution order exceeding \$1.4 million; refused to participate in reentry programming; actively engaged in negative behavior for most of the time he was in the community despite being in prison for fifteen years; was in possession of over \$8,000.00 in cash when he was arrested, money he claimed was legitimate income but which he refused to deposit in a bank account, behavior allowing him to avoid reporting it to the IRS or to pay back his victims; and overall exhibited

behavior not in his rehabilitative interest. These are proper considerations. *See* WIS. ADMIN. CODE § HA 2.05(7)(f).

Timblin could have been reconfined for the full thirty years' ES. Based on its specific findings and consideration of the relevant factors, DHA's decision that fifty-four months—four years and six months—was an appropriate length of time for reconfinement meets the standard on certiorari review. Accordingly, we affirm.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals