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DISTRICT I

November 9, 2021

To:

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Circuit Court Judge
Electronic Notice

John Barrett
Clerk of Circuit Court
Milwaukee County Courthouse
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Isiah M. Ware 611355
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You are hereby notified that the Court has entered the following opinion and order:

2019AP1001

State of Wisconsin ex rel. Isiah M. Ware v. Brian Hayes
(L.C. # 2019CV2776)

Before Donald, P.J., Dugan and Graham, JJ.

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).

Isiah M. Ware, *pro se*, appeals from an order of the circuit court that dismissed his petition for a writ of certiorari as untimely. Ware also appeals from an order denying his motion for reconsideration. Based upon our review of the briefs and record, we conclude at conference

that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ The orders are summarily affirmed.

On November 30, 2018, Ware’s extended supervision in Milwaukee County Circuit Court case No. 2012CF3769 was revoked. On January 10, 2019, the Division of Hearings and Appeals upheld the revocation. On March 14, 2019, Ware submitted a petition for certiorari review with the circuit court. On April 17, 2019, the circuit court dismissed the petition as untimely. Ware moved for reconsideration, which the circuit court denied. Ware appeals.

“An action seeking a remedy available by certiorari made on behalf of a prisoner is barred unless commenced within 45 days after the cause of action accrues.” WIS. STAT. § 893.735(2). “Failure to timely file a petition for certiorari ... may result in dismissal.” *See State ex rel. Johnson v. Litscher*, 2001 WI App 47, ¶5, 241 Wis. 2d 407, 625 N.W.2d 887. Our review of the dismissal is *de novo*. *See id.*, ¶4.

The forty-fifth day for seeking certiorari review of the Division’s January 10, 2019 decision would have been on or about February 24, 2019. However, Ware stated he was not aware of the decision until January 22, 2019, which would make the forty-fifth day March 8, 2019. *See* WIS. STAT. § 893.735(2); *see also State ex rel. Tyler v. Bett*, 2002 WI App 234, ¶9, 257 Wis. 2d 606, 652 N.W.2d 800 (“The forty-five-day period begins on the date the prisoner receives ‘actual notice’ of a final decision or disposition regarding his or her requests for administrative relief[.]”). As the circuit court noted, however, Ware’s petition, which was not

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

mailed from his institution until March 14, 2019, was untimely regardless of which deadline applies.

Ware nevertheless contends it was inappropriate for the circuit court to dismiss his petition because, he claims, he was entitled to equitable tolling of the forty-five-day time limit during two periods: from February 24, 2019 to March 5, 2019, while he was waiting for the Department of Justice (“DOJ”) to respond to his request for a three-strikes certification,² and from March 9, 2019 to March 28, 2019, while he was waiting for his institution to respond to his request for copies of documents necessary for requesting a waiver of the filing fee. Relying on *State ex rel. Locklear v. Schwarz*, 2001 WI App 74, ¶32, 242 Wis. 2d 327, 629 N.W.2d 30, which held that “the statute of limitations must be tolled while the prisoner waits for the DOJ to provide him or her with the required documentation,” Ware calculates that his filing deadline was March 17, 2019.

However, equitable tolling only begins “when the documents over which prisoners have control have been mailed, and *all* of the documents over which prisoners have no control have been requested.” *State ex rel. Walker v. McCaughtry*, 2001 WI App 110, ¶18, 244 Wis. 2d 177, 629 N.W.2d 17 (emphasis added). The petitioner in *Locklear* was only waiting for the DOJ certification—a document over which he had no control. *See id.*, 242 Wis. 2d 327, ¶¶31-32. Ware, by contrast, needed both the DOJ certification and copies for his fee waiver application. Unlike the petitioner in *Locklear*, Ware is not entitled to invoke equitable tolling rules because by his own admission, he had not requested all of the necessary paperwork over which he had no

² *See* WIS. STAT. § 801.02(7)(d).

control until after the March 8, 2019 deadline had passed. Prisoners are not permitted to “serially toll the forty-five-day period by requesting one document, and after receiving that document, requesting the next, tolling time further.” *Walker*, 244 Wis. 2d 177, ¶18.

In addition to failing to request all necessary documents before the deadline, Ware also failed to timely submit those documents over which he did have control—like his certiorari petition. While Ware protests that it would have been “unreasonable to send in his sole copy of his petition to the courts,” this is an argument raised for the first time on appeal. We typically do not consider such arguments.³ See *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

Ware further argues that he was denied access to the courts because of the delay in having his copies returned to him. This is also an argument raised for the first time on appeal. In any event, a prisoner’s claims that he or she has been denied access to the courts by his or her institutions “are appropriately addressed through the Inmate Complaint Review System.” See *Tyler*, 257 Wis. 2d 606, ¶19.

Upon the foregoing, therefore,

IT IS ORDERED that the orders are summarily affirmed. See 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

³ We observe, however, that Ware claimed to have submitted three copies of the petition on March 14, 2019, nearly two weeks before he says his copies were returned to him.