

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 14, 2007

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. 2006AP968

Cir. Ct. No. 2006CV2507

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. LAWRENCE ROSS,

PETITIONER-APPELLANT,

v.

MATTHEW J. FRANK, SECRETARY, DEPARTMENT OF CORRECTIONS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
PATRICIA D. MC MAHON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Lawrence Ross appeals from an order dismissing his petition for a writ of certiorari seeking judicial review of a reincarceration order. The issue is whether the Department of Corrections (“Department”) parole

agent and its regional chief were bound to follow, or at least not to exceed, the reincarceration period recommended in the Department's Probation and Parole Operations Manual ("manual's guidelines"). We conclude that the manual's guidelines are recommendations that may be exceeded; WISCONSIN STAT. § 302.11(7)(am) (2005-06) sets the maximum reincarceration term for a revoked parolee.¹ Therefore, we affirm.

¶2 A jury found Ross guilty of first-degree sexual assault of a child. The trial court imposed a fifteen-year sentence. After serving slightly more than ten years of his sentence, Ross was released on parole. Approximately one year later, Ross's parole agent recommended revocation, alleging fifteen violations of the conditions of Ross's parole. Ross waived his right to a final revocation hearing and to a good time forfeiture ("reincarceration") hearing. Absent these waivers, Ross would have proceeded to a revocation and reincarceration hearing before the Division of Hearings and Appeals ("Division"). By waiving this hearing, he agreed to revocation and to allow the Department to determine his reincarceration period. Although the manual's guidelines suggested a lesser reincarceration term for Ross's parole revocation, the Department's Regional Chief ordered Ross reincarcerated for the entirety of the time available on his original sentence.² Ross petitioned for a writ of certiorari to challenge the duration

¹ All references to the Wisconsin Statutes are to the 2005-06 version.

² Ross claims that according to the manual's guidelines, he committed Category II violations, recommending a forfeiture of thirty percent of his remaining sentence; Ross claims that the parole agent erroneously identified him as a Category III violator, thereby designating a forfeiture revocation of sixty percent of his remaining sentence. Resolving this factual discrepancy is unnecessary to our decision because the issue is whether the Department's Regional Chief was authorized to exceed the manual's guidelines for Ross's reincarceration.

of his reincarceration period. The circuit court dismissed the petition. Ross appeals.

¶3 Ross raises a number of issues, all relating to whether the Department's Regional Chief is authorized to exceed the manual's guidelines in imposing a reincarceration period, as long as it does not exceed the time remaining on the revoked parolee's sentence pursuant to WIS. STAT. § 302.11(7)(am). We limit our decision to that issue; we conclude that Ross has a right to judicial review by certiorari from the reincarceration determination, and that the issue of law presented does not require a factual record beyond the admittedly sparse appellate record before us.

¶4 WISCONSIN STAT. § 302.11(7)(am) provides that a parolee may be returned to prison ("reincarcerated") "for a period up to the remainder of the sentence for a violation of the conditions of parole. The remainder of the sentence is the entire sentence, less time served in custody prior to parole." A revoked parolee is reincarcerated for a "period of time determined by the reviewing authority." *See* § 302.11(7)(b).

¶5 Ross waived his reincarceration hearing. In doing so, he left the determination of his reincarceration period to the discretion of the Department rather than the Division.

¶6 Ross claims that the Department is bound by the manual's guidelines, which suggest a lesser period of reincarceration for violations such as his. The Department, however, is not bound by the manual's guidelines. First, the manual is an internal working document of the Department; it is not an administrative rule or a state statute. Second, the manual itself provides that if a parolee waives a reincarceration hearing, the Department's designee, in this case

its regional chief, is authorized to determine the length of the reincarceration period. This authorization also extends to the regional chief's prerogative to exceed the manual's guidelines.

¶7 Had Ross not waived his reincarceration hearing, the reviewing authority, the Division, would not be bound by the manual's guidelines. *See George v. Schwarz*, 2001 WI App 72, ¶30, 242 Wis. 2d 450, 626 N.W.2d 57. Even the Department is not absolutely bound by the manual's guidelines. In fact, the Amended Notice of Violation, Recommended Action and Statement of Hearing Rights ("Amended Notice"), notifies Ross that his agent had recommended the entirety of time available for reincarceration, emphasizing that was only a recommendation; the Amended Notice continues in bold writing, "**The time may be increased or decreased by an administrative law judge [the Division] in the case of hearing or by the [Department] secretary's designee in the case of a waiver.**"³ Consequently, WIS. STAT. § 302.11(7)(am) and (b) and the Department's Amended Notice explicitly refute Ross's numerous contentions that the Department exceeded its authority by exceeding the manual's guidelines for determining his reincarceration period.⁴

¶8 Ross was alleged to have violated fifteen conditions of his parole. The manual directs the parole agent to determine the reincarceration period considering the parolee's most serious charge. Ross's most serious charge among

³ In this instance, the time could not have been lawfully increased because the recommendation was for the remainder of Ross's sentence. *See* WIS. STAT. § 302.11(7)(am).

⁴ Ross's due process challenge – that he assumed he could rely on the Department to follow its own manual's guidelines – also fails. WISCONSIN STAT. § 302.11(7)(am) notifies a parolee of the maximum time available for reincarceration.

the fifteen was that he physically assaulted a friend. Considering that Ross's underlying conviction was for the first-degree sexual assault of a child, and that he violated fifteen conditions of his parole, including physically assaulting his friend, the regional chief was authorized to exceed the manual's guidelines and impose a reincarceration period equal to the entirety of the available time remaining on his original sentence. *See* WIS. STAT. § 302.11(7)(am) and (b). We therefore 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.

