

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 26, 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. 2006AP1768

Cir. Ct. No. 2006CV1983

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. BARRY L. BALL,

PETITIONER-APPELLANT,

V.

RICHARD SCHNEITER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Barry Ball appeals an order dismissing his certiorari petition seeking review of an administrative confinement decision on the grounds that the petition was time-barred, and a subsequent order denying

reconsideration. We agree with the circuit court that Ball failed to meet the statutory certiorari deadline and affirm.

BACKGROUND

¶2 Ball has been serving a life sentence in the Wisconsin prison system since 1980. On May 18, 2005, an Administrative Confinement Review Committee determined that Ball should be placed in administrative confinement because his conduct record and history of assaultive behavior showed that his presence in the general population would pose a risk to institutional security. The warden set aside that determination for a violation of the hearing time limit and remanded for a new hearing. On November 2, 2005, another Administrative Confinement Review Committee determined that Ball should be placed in administrative confinement based on an alleged gang leadership role, as well as his conduct record and history of assaultive behavior. Ball again appealed.¹ On January 27, 2006, the Division of Adult Institutions' administrator upheld the administrative confinement notwithstanding the initial time violation.

¶3 On February 2, 2006, Ball filed a procedural complaint numbered WSPF 2006-3397 in the Inmate Complaint Review System (ICRS) alleging that: (1) he was denied a staff advocate; (2) he was denied the right to have witnesses; (3) the report contained false statements that he was a gang leader; (4) the rehearing was time barred; and (5) he was denied his right to a fair hearing. The complaint was rejected on its merits by the inmate complaint examiner, the corrections complaint examiner, and finally the office of the Secretary of the

¹ Ball also filed other premature ICRS complaints during this time period that were dismissed because the administrative appeal was still pending.

Department of Corrections. The Secretary's final decision was dated March 10, 2006, although a note at the bottom of the page showed that it was not printed until March 13, 2006.

¶4 While his administrative appeals of WSPF 2006-3397 were still pending, Ball filed two other ICRS complaints on February 13, 2006, arguing that: (1) if the original hearing was not timely, the committee should have lost competency to proceed, and a rehearing should not have been a proper remedy; (2) placement in a "supermax" prison poses an atypical and significant hardship in violation of his liberty interests; and (3) the gang affiliation allegation was falsely manufactured. The institution complaint examiner returned Ball's materials on the grounds that ICRS complaints must be limited to a single, clearly identified issue. WIS. ADMIN. CODE § 310.09(1)(e). Ball challenged that decision, contending that his first complaint dealt only with the competency issue and the second complaint dealt only with the gang affiliation issue. A final decision on these complaints was issued on March 1, 2006.

¶5 Ball also filed an additional series of ICRS complaints dealing with how his earlier set of ICRS complaints had been handled. It appears the last decision in the record from any of those secondary complaints was issued on March 27, 2006.

¶6 On May 1, 2006, Ball submitted a certiorari petition to the circuit court seeking review of both the May 18 and November 2, 2005 administrative confinement decisions. The Prisoner Litigation Staff Attorney for Dane County notified Ball that his submission would not be accepted for filing because Ball had not included an authorization to withhold payments from his prison account until the filing fee had been paid. The letter gave Ball twenty-one days to supplement

his submission with the required document. Ball signed the required authorization statement on May 22, 2006, and the circuit court received and filed Ball's completed submission on June 9, 2006. The circuit court then dismissed the petition as untimely under WIS. STAT. § 893.735(2) (2005-06).² Ball appeals that dismissal.

DISCUSSION

¶7 WISCONSIN STAT. § 893.735(2) sets a forty-five day deadline for Wisconsin prisoners seeking certiorari relief from an administrative decision. Under the statute, the time limit for seeking certiorari review begins to run on the date of the decision, but the deadline can be extended by the number of days that the prisoner proves have elapsed between the decision “and the prisoner’s actual notice of the decision or disposition” giving rise to his cause of action. WIS. STAT. § 893.735(2). A prisoner’s failure to meet the statutory filing deadline generally deprives the court of subject matter jurisdiction. *State ex rel. Collins v. Cooke*, 2000 WI App 101, ¶5, 235 Wis. 2d 63, 611 N.W.2d 774.

¶8 In certain circumstances, however, the time limit may be extended by the equitable doctrine of tolling. *State ex rel. Walker v. McCaughtry*, 2001 WI App 110, ¶¶13-16, 244 Wis. 2d 177, 629 N.W.2d 17. In *Walker*, for instance, we held that “tolling begins when the documents over which the prisoners have control have been mailed, and all of the documents over which the prisoners have no control have been requested.” *Id.*, ¶18. We will independently determine

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

whether a certiorari petition was timely filed due to tolling of the statute of limitations. *See id.*, ¶¶11, 18.

¶9 The questions before us on this appeal, then, are when the forty-five day time limit to appeal the November 2, 2005 administrative confinement decision began to run, and when Ball submitted all of the required materials within his control.

Date of the Final Administrative Decision

¶10 Although Ball is seeking review of an administrative confinement decision dated November 2, 2005, the parties agree that the time for him to file his certiorari petition was tolled while he sought relief of alleged procedural errors through ICRS. *Cf. State ex rel. Frasch v. Cooke*, 224 Wis. 2d 791, 796-97, 592 N.W.2d 304 (Ct. App. 1999) (holding the time for an inmate to file a certiorari action seeking review of alleged procedural errors relating to a disciplinary decision is tolled until after the inmate has pursued a complaint through the ICRS). There appears to be some disagreement, however, about which ICRS complaint was the final, appealable document.

¶11 At some points in his brief, Ball seems to contend that his time to file a certiorari petition should not have begun to run until he had received decisions on all of his ICRS complaints alleging errors in the handling of his other ICRS complaints. He cites no relevant authority for that proposition, however, and we find the contention unpersuasive. Adopting that position would permit an endless extension of the filing deadline by filing one complaint after another. We agree with the circuit court that the only ICRS decisions that operated to extend the time to seek relief from the November 2, 2005 administrative confinement decision were those that directly challenged the administrative confinement

proceedings themselves (not the handling of other ICRS complaints) and were filed in a timely manner after the administrative confinement. We further agree with the circuit court that the last administrative decision dealing with a timely ICRS complaint that directly challenged the administrative confinement was the one dated March 10, 2006.

Notice of the Final Administrative Decision

¶12 Ball next argues that, even if the March 10 decision was the final, appealable administrative decision, he should not be deemed to have actually received that decision until March 16, 2006. He points out that a notation on the bottom of the decision states that it was printed on March 13, 2006, and claims that we should impute another three days from the day the decision was printed until when it was likely received by him.

¶13 Although it is not necessarily the case that the copy of the decision in the record was printed the same day as the copy Ball received, we agree that it is a fair inference. Therefore, for the purposes of this appeal we will accept that Ball could not have received notice of the final administrative decision before March 13, 2006. We do not agree, however, that Ball is entitled to some automatic addition of time from that date to compute the date he received notice of the decision.

¶14 If an inmate wishes to assert a delayed receipt of an administrative decision to toll the forty-five day filing period, it is his initial burden to allege the date he claims to have received the decision in his certiorari petition or an attached affidavit. *See State ex rel. Johnson v. Litscher*, 2001 WI App 47, ¶10, 241 Wis. 2d 407, 625 N.W.2d 887. Here, Ball's certiorari petition made no assertion as to when he received the March 10 decision on WSPF 2006-3397. Therefore,

there was simply no evidentiary basis to further toll the filing period based on a delayed receipt of the administrative decision. Ball cannot rectify this initial failing by belated allegations in his appellate briefs.

¶15 In summary, we conclude that the forty-five day filing period began to run on Monday, March 13, 2006 and expired on Thursday, April 27, 2006. Because Ball did not submit his certiorari petition until May 1, 2006, at the very earliest, we agree with the circuit court that the petition was untimely. In light of our decision that the petition itself was untimely, we need not consider whether there would have been an additional tolling period while Ball supplemented his petition with the authorization to withhold funds from his prison account.

By the Court.—Order affirmed.

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

