Appeal No. 2014AP2637 **Cir. Ct. No. 2014CV310**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN EX REL. ANTJUAN REDMOND,

PETITIONER-APPELLANT,

V.

BRIAN FOSTER, WARDEN, KETTLE MORAINE CORRECTIONAL INSTITUTION,

RESPONDENT-RESPONDENT.

FILED

APR 27, 2016

Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

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

Pursuant to WIS. STAT. RULE 809.61 (2013-14),[1] this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

Whether an offender whose parole and extended supervision was revoked after a revocation hearing has an adequate remedy other than a writ of habeas corpus to pursue a claim that the attorney who represented him during the

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

hearing rendered constitutionally ineffective assistance?[2] Specifically, must the offender raise a claim of ineffective assistance of revocation counsel in a motion to the division of hearings and appeals (DHA) in the department of administration?

BACKGROUND

The State charged the petitioner Antjuan Redmond with two counts of burglary in violation of WIS. STAT. § 943.10(1m)(a). He was convicted and sentenced to two years of initial confinement followed by three years of extended supervision on one count and, on the other count, sentence was withheld and he received five years of probation. Subsequently, while on probation and extended supervision, Redmond allegedly battered his girlfriend, A.T., who was seven weeks pregnant with their child, and A.T.'s eight-year-old nephew, K.B. The department of corrections (DOC) initiated revocation proceedings against Redmond for this incident as well as for several other alleged violations.

Following a hearing, the administrative law judge (ALJ) found that Redmond had battered A.T. and K.B., and, as a result of that violation, as well as others, Redmond had violated his probation and extended supervision. The ALJ revoked Redmond's probation and extended supervision. Redmond appealed to the DHA, and the administrator sustained the ALJ's determination. Redmond did not appeal the DHA's determination.

[2] For ease of reference, we use offender in this opinion to refer to offenders who have been charged with violation of, or been adjudged to have violated, their probation and/or extended supervision. "Revocation" as used herein means the removal of an offender from probation or extended supervision. WIS. ADMIN. CODE § HA 2.02(8) (May 2010).

Redmond then requested a new revocation hearing before the DHA based on newly discovered evidence. Redmond did not claim that revocation counsel was ineffective. The DHA denied the request, concluding that the evidence was not new, and Redmond did not appeal that decision.

Nearly twenty months after revocation was sustained by the DHA, Redmond petitioned the circuit court for a writ of habeas corpus based on counsel's alleged ineffective assistance at the revocation hearing. The State moved to dismiss the petition, arguing that while the petition was meritless, the circuit court need not reach the merits because Redmond had another adequate remedy available other than a writ of habeas corpus by which to pursue his claim. The circuit court agreed and dismissed the petition, both on the procedure and the merits of Redmond's ineffective assistance claim.

Does Redmond have an Otherwise Adequate Remedy in the Law—A Motion to Reopen His Revocation Proceeding Based on Alleged Ineffective Assistance of Counsel?

Redmond challenges the circuit court's dismissal of his petition for habeas corpus on the ground that he had another adequate remedy. The State counters that Redmond had, and may still have, an otherwise adequate remedy in the law—a motion to reopen his revocation proceeding based on alleged ineffective assistance of revocation counsel. The State asks us to address the appropriate procedure for such a challenge, even though the State also argues that no matter the procedure, Redmond would be unsuccessful in establishing ineffective assistance. The State's request that we address the procedure merits review, as we explain below.

Writ of Habeas Corpus

The "Great Writ," the writ of habeas corpus, can be traced back deep into English common law, and it "holds an honored position in [American] jurisprudence," enshrined in both the United States and Wisconsin Constitutions and in WIS. STAT. § 782.01, et seq. ***Engle v. Isaac***, 456 U.S. 107, 126 (1982); ***J.V. v. Barron***, 112 Wis. 2d 256, 259-60, 332 N.W.2d 796 (1983). It has long been considered "a bulwark against convictions that violate 'fundamental fairness.'" ***Engle***, 456 U.S. at 126 (citation omitted). However, the extraordinary relief of the writ of habeas corpus "is available only when specific factual circumstances are present." ***State ex rel. Fuentes v. Wisconsin Court of Appeals***, 225 Wis. 2d 446, 451, 593 N.W.2d 48 (1999). The person seeking such relief must be restrained of his or her liberty, that restraint must have been imposed by a tribunal lacking jurisdiction or contrary to constitutional protections, and the person improperly restrained must have no other adequate remedy available in the law. ***Id.*** In other words, on this third element, if there is an otherwise adequate remedy available in the law to the petitioner, then the petitioner may not pursue habeas corpus relief. ***State ex rel. Krieger v. Borgen***, 2004 WI App 163, ¶5, 276 Wis. 2d 96, 687 N.W.2d 79. It is the petitioner who bears the burden of showing that there is no adequate remedy available in the law. ***State ex rel. Haas v. McReynolds***, 2002 WI 43, ¶12, 252 Wis. 2d 133, 643 N.W.2d 771. Whether the writ of habeas corpus is available to a petitioner is a question of law subject to de novo review. ***State ex rel. Pharm v. Bartow***, 2005 WI App 215, ¶11, 287 Wis. 2d 663, 706 N.W.2d 693.

Probation and Extended Supervision Revocation

While on probation or extended supervision, the offender is in the legal custody of the DOC. WIS. STAT. § 973.10(1). The offender's liberty is conditional. Probation or extended supervision may be revoked after a proceeding at which the DHA determines both that the offender violated a condition of probation or extended supervision and that revocation is appropriate. WIS. ADMIN. CODE § HA 2.05(7) (May 2010). The offender may appeal a revocation decision to the DHA administrator, and ultimately to the circuit court by writ of certiorari. Sec. HA 2.05(8); ***State v. Horn***, 226 Wis. 2d 637, 652, 594 N.W.2d 772 (1999) ("Judicial review of an administrative decision is by writ of certiorari."); ***State ex rel. Johnson v. Cady***, 50 Wis. 2d 540, 549-50, 185 N.W.2d 306 (1971).

Revocation is a civil proceeding in Wisconsin. *See* ***State ex rel. Cramer v. Schwarz***, 2000 WI 86, ¶28, 236 Wis. 2d 473, 613 N.W.2d 591 (noting that "[a] probation revocation is the product of an administrative, civil proceeding that occurs after the adversarial criminal prosecution has ceased"). However, because revocation may entail a substantial loss of liberty, the offender is entitled to due process of law. ***State ex rel. Vanderbeke v. Endicott***, 210 Wis. 2d 502, 513-14, 563 N.W.2d 883 (1997). At a revocation hearing, an offender has "[t]he right to the assistance of counsel." WIS. ADMIN. CODE § HA 2.05(3)(f) (May 2010). Where there is a statutory right to the assistance of counsel, that "right includes the right to effective counsel"; otherwise the right to counsel would be of little value. ***State ex rel. Schmelzer v. Murphy***, 201 Wis. 2d 246, 253, 548 N.W.2d 45 (1996); *see* ***Strickland v. Washington***, 466 U.S. 668, 685-86 (1984).

State ex rel. Vanderbeke v. Endicott and ***State v. Ramey***

Redmond argues that a writ of habeas corpus is the only remedy available for a challenge to revocation counsel's effectiveness under ***Vanderbeke***, 210 Wis. 2d at 523, and ***State v. Ramey***, 121 Wis. 2d 177, 182, 359 N.W.2d 402 (Ct. App. 1984). The State counters that these cases are not binding, given our subsequent decision in ***State ex rel. Booker v. Schwarz***, 2004 WI App 50, 270 Wis. 2d 745, 678 N.W.2d 361, which created a procedure by which an offender may move the DHA to reopen a revocation hearing based on newly discovered evidence. We examine each case.

In ***Ramey***, 121 Wis. 2d at 178, we held that a writ of certiorari challenging counsel's effectiveness at a revocation hearing "is not a proper subject for review of an administrative action." While certiorari is the appropriate procedure to challenge revocation, the challenge to ineffectiveness of revocation counsel, in which additional evidence was needed, did not fall within the scope of review of a certiorari proceeding. ***Id.*** at 182. A challenge to the effectiveness of counsel is not directed at whether the administrative agency stayed within its jurisdiction, whether it acted according to law, "whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment," or "whether the evidence was such that it might reasonably make the order or determination in question." ***Id.*** However, while certiorari was inappropriate, this did not totally preclude the petitioner from raising a claim of ineffective assistance of revocation counsel; "he [or she] may apply for a writ of habeas corpus." ***Id.***

After ***Ramey*** was decided, in ***Vanderbeke***, 210 Wis. 2d at 522, our supreme court addressed "the proper procedure for seeking judicial review of revocation of probation." The parties disputed whether habeas corpus or certiorari

was the proper procedure for raising due process violations based on the offender's incompetency and lack of counsel in a revocation proceeding. ***Id.*** The supreme court cited ***Ramey*** for the holding that "habeas rather than certiorari is the appropriate procedure for an allegation of ineffective assistance of counsel at a probation revocation proceeding when additional evidence is needed." ***Vanderbeke***, 210 Wis. 2d at 522.

State ex rel. Booker v. Schwarz

Then, in ***Booker***, 270 Wis. 2d 745, ¶¶11-15, we held that, as a matter of due process, an offender who has his or her probation or parole revoked has the right to reopen the revocation hearing based on newly discovered evidence. There was no administrative code provision providing for such a right, and so we relied on the due process clause. ***Id.***, ¶13. ***Booker*** was based on the concept that it would be unjust to allow criminal defendants to pursue posttrial motions based on newly discovered evidence, while persons whose probation was revoked could not pursue similar postrevocation motions. ***Id.***, ¶¶9-14.

Because there was no administrative procedure, we crafted "standards and requirements to govern these types of cases." ***Id.***, ¶14. We looked to criminal case procedures as an analogy and applied those procedures to this type of case. ***Id.*** We required that, in order to be entitled to an evidentiary hearing on a newly discovered evidence claim before the DHA, an offender must meet the five-prong test of ***State v. Bembenek***, 140 Wis. 2d 248, 252, 409 N.W.2d 432 (Ct. App. 1987). ***Booker***, 270 Wis. 2d 745, ¶¶12, 15. The allegations in support of that five-prong test must be specific and not conclusory. ***Id.***, ¶15. If the record conclusively shows that the offender is not entitled to relief, the DHA may deny the motion without a hearing. ***Id.*** The DHA's denial of a motion to reopen is

subject to certiorari review: de novo review in the circuit court if the denial was based on insufficient allegations or, if the denial was based on a record conclusively showing that the offender is not entitled to relief, for an erroneous exercise of discretion. ***Id.***

The Parties' Contentions

Although ***Booker*** did not involve a claim of ineffective assistance of revocation counsel and ***Ramey*** and ***Vanderbeke*** remain good law, the State urges us to hold that such a motion brought before the DHA is a logical extension of ***Booker***. The State argues that today, unlike when ***Ramey*** and ***Vanderbeke*** were decided, a motion to reopen revocation before the DHA, under the logic of ***Booker***, is available, and that it is an adequate avenue for bringing a claim of ineffective assistance of revocation counsel, with the opportunity to introduce additional evidence at the administrative level. The State reads ***Ramey*** and ***Vanderbeke*** narrowly, as holding only that "habeas corpus, not certiorari, is the appropriate remedy when there is no other remedy available." But now, the State contends, there is a third way, extension of a ***Booker*** motion to alleged ineffective assistance of revocation counsel.

Redmond contends that ***Booker*** did not address the issue that confronts us here. ***Booker*** involved a writ of certiorari and a postrevocation motion based on newly discovered evidence, not a writ of habeas corpus, and not a claim of ineffective assistance of revocation counsel. ***Ramey***, which held that an ineffective assistance of revocation counsel claim may be brought via habeas corpus, and was cited favorably by ***Vanderbeke***, could not have been overruled by ***Booker***. Redmond reminds us that we are powerless to overrule, modify, or withdraw language from ***Ramey***, even if we agreed with the State that a ***Booker***

motion would be an adequate avenue for bringing a challenge to revocation counsel's effectiveness. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Of course, we also lack the power to overrule, modify, or withdraw any of the supreme court's language. *See* ***Malone v. Fons***, 217 Wis. 2d 746, 759, 580 N.W.2d 697 (Ct. App. 1998).

The courts in ***Vanderbeke*** and ***Ramey*** concluded that, as between certiorari and habeas, habeas was appropriate when the review is not simply of the administrative agency's action and additional evidence is needed. Redmond argues that the fact that these decisions were limited to a "certiorari versus habeas" analysis does not necessarily mean that the holdings are effectively nullified because a third option is now presented to address postrevocation ineffective assistance of counsel claims. Moreover, it appears that ***Booker*** created a new procedure perceiving there to be no other option available, but here, habeas is available.

Since ***Ramey*** and even after ***Booker***, many courts have held that a writ of habeas corpus is the mechanism by which an offender may claim that revocation counsel was ineffective. *See* ***Hashim v. Baenen***, No. 13-CV-65-BBC, 2014 WL 793338, at *2 (W.D. Wis. Feb. 26, 2014); ***Maldonado v. Raemisch***, No. 10-CV-90-BBC, 2010 WL 3730974, at *4 (W.D. Wis. Sept. 20, 2010); ***Weston v. Raemisch***, No. 09-CV-339-BBC, 2009 WL 1797860, at *1 (June 24, 2009); ***Davis v. Douma***, No. 2013AP1349, unpublished slip op. ¶10 (WI App Dec. 16, 2014); ***State ex rel. Porter v. Cockroft***, No. 2011AP308, unpublished slip op. ¶10 (WI App Mar. 6, 2012); *see also* ***State v. Walker***, 2007 WI App 142, ¶¶1, 5-9, 302 Wis. 2d 735, 735 N.W.2d 582 (review of habeas petition based on ineffective

assistance of revocation counsel).[3] It appears that the State has only recently asserted that ***Booker*** changed the law.

Habeas versus ***Booker***: *The Benefits and the Disadvantages*

The State argues that there are persuasive reasons for having the DHA adjudicate a postrevocation claim of ineffective assistance. For example, the ALJ who took the testimony and adjudicated the revocation would be more familiar with the facts of the case and possibly better able to gauge whether there was any deficiency in counsel's performance and, if so, if it resulted in prejudice to the offender. *See* ***Massaro v. United States***, 538 U.S. 500, 506 (2003). As with the determination that circuit courts are better able to review ineffective assistance of trial and postconviction counsel as a preliminary matter in criminal proceedings rather than the court of appeals, the DHA's familiarity with the case and prior proceedings is compelling.

One could also argue that the DHA has a level of expertise in making revocation decisions that makes it appropriate for it to decide first if revocation counsel was ineffective. At a proceeding to revoke probation, for example, the DHA determines both whether the offender violated a condition of probation and whether revocation is appropriate. ***Vanderbeke***, 210 Wis. 2d at 512, 514. The ultimate question is "whether the interests of community safety and of the probationer's rehabilitation are best served by continued liberty or by

[3] ***State v. Walker***, 2007 WI App 142, 91, 302 Wis. 2d 735, 735 N.W.2d 582, was a consolidated appeal reviewing two different orders: one denying Walker's petition for a writ of habeas corpus and the other reconfining him for two years. The supreme court accepted review of the reconfinement order but not the order denying the writ. ***State v. Walker***, 2008 WI 34, ¶11, 308 Wis. 2d 666, 747 N.W. 2d 673.

incarceration." ***Id.*** at 513. This question "implicates wide-ranging, intangible factors." ***Cramer***, 236 Wis. 2d 473, ¶28. Within this context, the DHA may be in the best position to assess whether revocation counsel's performance was deficient and, if so, whether it prejudiced the offender. Revocation hearings are governed by different rules and determining prejudice in the context of decisions as to whether revocation was appropriate requires analyses within the DHA's institutional competence.

If ultimately an evidentiary hearing is warranted, the evidence can be heard by the original tribunal, an ALJ. If the claim fails, the offender would likely have the right to an administrative appeal. If the ALJ's decision is sustained, then the offender could pursue a writ of certiorari to the circuit court. As such, a ***Booker***-type motion would allow for consistency in the procedure used to review a revocation determination. Whether, for example, based on a claim that it was arbitrary and capricious to revoke probation or whether based on a claim of ineffective assistance of revocation counsel, both would be reviewable by way of certiorari. Certiorari review is highly deferential towards the determination of the DHA, who is the expert in these matters. *See* ***Von Arx v. Schwarz***, 185 Wis. 2d 645, 655, 517 N.W.2d 540 (Ct. App. 1994). In short, one might question why a claim of ineffective assistance of revocation counsel should be the lone claim excepted from certiorari review and why the DHA should not have the first opportunity to review such a claim, given its responsibility and role vis-à-vis revocations.

Permitting the DHA to hold an evidentiary hearing instead of the circuit courts would relieve them from that additional burden. It may also

facilitate faster review for offenders for, as it is well known in the case of ***Machner***[4] hearings, evidentiary hearings may take months to complete. STATE OF WISCONSIN CRIMINAL PENALTIES STUDY COMMITTEE FINAL REPORT 129 (1999), http://www.wistatedocuments.org/cdm/ref/collection/p267601coll4/id/439 (last visited Apr. 18, 2016) (concluding that having ALJs conduct revocation hearings was the most efficient and effective way, as it speeds up the process and eases the workload of circuit court judges).

Notably, the State identifies no administrative code provisions providing an avenue for challenges to the effectiveness of revocation counsel. If the State's position that such a challenge could be brought with a motion to reopen revocation before the DHA, procedures to govern such a motion, any hearing and review, whether administrative and/or judicial, would have to be created. For example, what would an offender have to allege in order to be entitled to a hearing? *Cf.* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Would there be any temporal limitation on bringing a claim for ineffective assistance of revocation counsel and/or would laches apply? *Cf.* WIS. STAT. § 974.06(2). If the offender brought a prior ***Booker*** motion based on newly discovered evidence, would ***Escalona-Naranjo***/***Pozo***[5] bar a subsequent ***Booker*** motion based on ineffective assistance of revocation counsel? *See* ***State ex rel. Macemon v. Christie***, 216 Wis. 2d 337, 342-43, 576 N.W.2d 84 (Ct. App. 1998) (applying ***Escalona-Naranjo*** to appeals by writ of certiorari from parole and probation revocation hearings). Would the rules of evidence be applicable or

[4] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[5] ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994); ***State v. Pozo***, 2002 WI App 279, 258 Wis. 2d 796, 654 N.W.2d 12.

would they be relaxed? *Cf.* WIS. STAT. § 911.01(4)(c); WIS. ADMIN. CODE § HA 2.05(6)(d) (May 2010). How would the matter be reviewed? *See* ***Booker***, 270 Wis. 2d 745, ¶1. Would there be a layer of administrative review? Sec. HA 2.05(8). If so, would there be judicial review before the circuit court via a writ of certiorari, which would then be subject to our review? *See* ***Cady***, 50 Wis. 2d at 550. What would be our standard of review and would the standard be different depending on the procedural context in which the claim was resolved? *See* ***Booker***, 270 Wis. 2d 745, ¶15.

While acknowledging that there is no current procedure in place, the State contends that the standards applicable to ineffective assistance in criminal proceedings should apply, that the procedure and rules applicable to revocation should apply, and that the procedure and standards of review for certiorari would apply.

Redmond argues that a writ of habeas corpus has an established procedure and standards for adjudicating a claim of ineffective assistance of revocation counsel. *See* ***Walker***, 302 Wis. 2d 735, ¶¶5-6, 11-12.

In addition, Redmond argues that a determination of whether revocation counsel was ineffective "is not within the special expertise of" the DHA. To the contrary, Redmond asserts, "given the familiarity of the circuit courts with this issue in the context of criminal proceedings, the decision to be made is squarely within the expertise of the circuit courts." Redmond would prefer a standard of review that is less deferential towards the DHA. *See, e.g.*, ***Cramer***, 236 Wis. 2d 473, ¶58 (Walsh Bradley, J., dissenting). On appeal of the denial of a writ of habeas corpus claiming ineffective assistance of revocation counsel, the mixed standard of review applies: findings of fact will not be

disturbed unless clearly erroneous, but the legal question of whether, based on those found facts, revocation counsel was ineffective is reviewed de novo. *See* ***Walker***, 302 Wis. 2d 735, ¶12.

We Believe the Supreme Court Should Accept Certification

The supreme court is "designated by the constitution and the legislature as a law-declaring court." ***State v. Grawien***, 123 Wis. 2d 428, 432, 367 N.W.2d 816 (Ct. App. 1985); *see* ***Cook***, 208 Wis. 2d at 190. The issue raised by this appeal—the proper mechanism for an offender to bring a claim alleging ineffective assistance of revocation counsel raises matters of procedure and policy—is best suited for resolution by the supreme court. We believe that the supreme court should clarify the law on this issue. *See* WIS. STAT. § 809.62(1r)(c).

The question of whether a writ of habeas corpus is the only avenue available for pursuing such a claim "is a question of law" and one "that is likely to recur unless resolved by the supreme court." WIS. STAT. § 809.62(1r)(c)3. Currently there are approximately 68,000 adult offenders on court-ordered probation, parole, or extended supervision in the community. WISCONSIN DEP'T OF CORRS., *Overview of the Department of Corrections*, http://doc.wi.gov/about/doc-overview (last visited Apr. 7, 2016). ALJs preside over approximately 9000 revocation hearings each year. *See* Gina Barton, *No New Conviction, But Sent Back to Prison*, MILWAUKEE J. SENTINEL (WI), Jan. 18, 2015, 2015 WLNR 1649872. In 2014, 4841 offenders had their supervision revoked. WISCONSIN DEP'T OF CORRS., OFFICE OF THE SECRETARY RESEARCH & POLICY UNIT, PRISON ADMISSIONS: 1990-2014, at 15, 23 (Aug. 2015), http://doc.wi.gov/Documents/WEB/ABOUT/DATARESEARCH/

NOTABLESTATISTICS/DAI%20Admissions%201990-2014.pdf. This court has before it two other pending appeals that raise the same issue. *See* ***State ex rel. Hollins v. Pollard***, No. 2015AP1653; ***State ex rel. Martinez v. Hayes***, No. 2014AP2095. With so many potential claims and the loss of liberty being a serious deprivation, we believe there are "special and important reasons" for the supreme court to review the issue presented and, thus, we respectfully urge the supreme court to accept certification of this appeal. *See* §§ 809.61, 809.62(1r); ***Gagnon v. Scarpelli***, 411 U.S. 778, 781 (1973).