

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 6, 2012

Diane M. Fremgen
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. 2011AP308

Cir. Ct. No. 2010CV13302

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. GERALD PORTER,

PETITIONER-APPELLANT,

v.

**MICHAEL COCKROFT, SUPERINTENDENT, FELMERS O. CHANEY
CORRECTIONAL CENTER,**

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
JOHN SIEFERT, Judge. *Affirmed in part and remanded with instructions
consistent with this opinion.*

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Gerald Porter appeals from a circuit court order quashing his petition for writ of habeas corpus. Porter's petition alleged

ineffective assistance of revocation counsel on the grounds that his counsel did not investigate the lifting of Porter's parole hold, nor did revocation counsel file a petition for writ of certiorari contending that the Department of Corrections ("the Department") lost jurisdiction to revoke Porter's parole when the parole hold was lifted. Porter also argues that the Department lost jurisdiction over him when it issued a discharge certificate, stating that his sentence had been completed. Because we conclude that the Department did not lose jurisdiction over Porter when it lifted Porter's parole hold, we affirm the circuit court. However, because the circuit court did not make factual findings as to the circumstances surrounding the issuance of the discharge certificate, we remand to the circuit court for a fact-finding hearing on that issue.

BACKGROUND

¶2 In May 1999, Porter was sentenced to five years in prison in Milwaukee County Circuit Court Case No. 1999CF980. Porter was placed on parole in November 2000, and was scheduled for discharge on September 6, 2004. On September 4, 2004, Porter was arrested on suspicion of attempted armed robbery as party to a crime and attempted first-degree intentional homicide as party to a crime. Porter was eventually charged in Milwaukee County Circuit Court Case No. 2004CF5027.

¶3 The Department sought to revoke Porter's parole based on the allegations which resulted in Porter's arrest. A parole hold was placed on Porter on September 5, 2004. On September 22, 2004, the hold was lifted; however, two hours and twenty-six minutes later, the hold was reinstated after Porter was identified in a photo line-up as the armed robber in the robbery that led to his September 4th arrest.

¶4 A revocation hearing was held on January 4, 2005. An Administrative Law Judge (“ALJ”) determined that the Department did not have jurisdiction to seek revocation of Porter’s parole and ordered that Porter’s parole not be revoked. The Department appealed the ALJ’s decision to the Division of Hearings and Appeals (“the Division”). On February 11, 2005, the Division reversed the ALJ’s decision, finding that the Department preserved its jurisdiction over Porter by commencing an investigation of Porter’s alleged parole violations. The Division ordered Porter’s parole revoked and ordered him reincarcerated for one year and six months, with the sentence credit noted by the ALJ. Porter did not petition the circuit court for certiorari review.

¶5 Approximately one year later, on February 10, 2006, Porter was convicted in Case No. 2004CF5027 and was given a total sentence of twenty-one years. On March 10, 2008, the Department issued a discharge certificate as to the prior offense, Case No. 1999CF980, stating that Porter’s discharge was effective as of March 2, 2008. At this time, Porter was incarcerated on the 2004 case.

¶6 On October 30, 2008, Porter was granted a new trial in the 2004 case and the previous judgment of conviction in that case was vacated. Approximately one year later, Porter entered an *Alford*¹ plea to amended charges in the 2004 case and received a total sentence of seven years, consisting of five years of initial confinement and two years of extended supervision. Because he remained incarcerated while the new trial was pending, Porter also received a sentence credit of 1330 days.

¹ See *North Carolina v. Alford*, 400 U.S. 25 (1970).

¶7 On November 11, 2009, the Department rescinded Porter's discharge certificate stating his discharge from the 1999 case because it claimed that the certificate was issued in error. The Department ordered the paperwork regarding the discharge destroyed and instructions were given to prepare a new discharge certificate once Porter reached his new discharge date. According to the Department, Porter's current maximum discharge date is February 17, 2015.

¶8 Porter, through counsel, filed a petition for writ of habeas corpus with the circuit court, arguing that the Department lost jurisdiction over Porter when it lifted the parole hold on September 22, 2004, and when it issued a discharge certificate on March 10, 2008. Porter's petition argued that: (1) if the 1999 case expired when the parole hold was lifted on September 22, 2004, then Porter should not be incarcerated; or, alternatively, (2) if Porter's sentence under the 1999 case was truly discharged as a result of the discharge certificate, then his maximum discharge date should be changed to January 29, 2013. The Department objected to the petition, arguing that Porter's sole recourse was through a writ of certiorari, and that the deadline to file the writ of certiorari had passed. Porter's counsel responded with an amended writ of habeas corpus, alleging ineffective assistance of revocation counsel for not filing a writ of certiorari arguing the jurisdictional issues.

¶9 A three-day hearing was held before the circuit court. During the hearing, Porter, his revocation counsel, Attorneys Michael Hart and Christopher Eippert, and a Department agent, Sandra Turman-Bounds, all testified. The circuit court quashed Porter's motion, finding that the Department did not lose jurisdiction over Porter when it lifted the parole hold due to its ongoing investigation of Porter's alleged parole violations, and was therefore able to revoke his parole. Therefore, the circuit court found, Porter's revocation counsel

was not ineffective. The circuit court did not make factual findings as to whether the Department issued the discharge certificate in error. This appeal follows.

DISCUSSION

Standard of Review.

¶10 “A circuit court’s order denying a petition for writ of habeas corpus presents a mixed question of fact and law.... Factual determinations will not be reversed unless clearly erroneous.... Whether writ of habeas corpus is available to the party seeking relief is a question of the law that we review *de novo*.” *State v. Pozo*, 2002 WI App 279, ¶6, 258 Wis. 2d 796, 654 N.W.2d 12 (citations omitted; some emphasis omitted). Ineffective assistance of counsel at a revocation hearing is reviewable by habeas corpus. *State v. Ramey*, 121 Wis. 2d 177, 182, 359 N.W.2d 402 (Ct. App. 1984).

¶11 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel’s performance was deficient and that the deficient performance produced prejudice. *State v. Sanchez*, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996). “To demonstrate deficient performance, the defendant must show that his counsel’s representation ‘fell below an objective standard of reasonableness’ considering all the circumstances.” *State v. Carter*, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695 (citation omitted). To show prejudice, the defendant must demonstrate “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

A. The Parole Hold.

¶12 Porter argues that Attorney Eippert, after consulting with Attorney Hart, decided not to file for a writ of certiorari, and that this was ineffective assistance of counsel. Case law does not establish a right to counsel on review of revocation of probation or parole. See *State ex rel. Griffin v. Smith*, 2004 WI 36, ¶45, 270 Wis. 2d 235, 677 N.W.2d 259 (“[A]lthough parolees have a right to counsel at the parole revocation hearing, they have no administrative or statutory right to counsel to timely file for certiorari in the circuit court.”); see also *State ex rel. Mentek v. Schwarz*, 2000 WI App 96, ¶11, 235 Wis. 2d 143, 612 N.W.2d 746, *rev’d on other grounds*, 2001 WI 32, 242 Wis. 2d 94, 624 N.W.2d 150 (“Wisconsin and federal constitutional law do not recognize a right to appointed counsel, nor by extension a right to effective assistance of counsel, on an administrative appeal of a probation revocation decision.”). Our review of whether Porter’s revocation counsel was ineffective is therefore limited to whether counsel was ineffective at the revocation hearing for not investigating the jurisdictional question at issue in this appeal. Porter contends that his revocation counsel was ineffective for not investigating whether the Department lost jurisdiction to revoke Porter’s parole when it lifted his parole hold. Specifically, Porter contends that he alerted Attorney Hart that his parole hold had been lifted, to which Attorney Hart allegedly responded “there’s no proof that it happened.” The failure to investigate whether the parole hold had been lifted, Porter contends, was both prejudicial and deficient because the Department lost jurisdiction to revoke Porter’s parole when it lifted the hold. Porter is mistaken.

¶13 Porter relies on WIS. STAT. § 304.072(2) (2009-10)² to support his contention. The statute provides:

If a parolee, probationer or person on extended supervision is alleged to have violated the terms of his or her supervision *but the department or division determines that the alleged violation was not proven*, the period between the alleged violation and the determination shall be treated as service of the probationary, extended supervision or parole period.

(Emphasis added.)

¶14 Porter's reliance on WIS. STAT. § 304.072(2) is mistaken because the record contains no findings that parole violations were not proven. Rather, the circuit court found that, pursuant to § 304.072(3), the Department's investigation of Porter's alleged violations preserved its jurisdiction over Porter such that it was later able to lawfully revoke his parole because, despite the lifting of the parole hold, the Department never ceased its investigation. Section 304.072(3) provides:

Except as provided in s. 973.09 (3) (b), the department preserves jurisdiction over a probationer, parolee or person on extended supervision if it *commences an investigation, issues a violation report or issues an apprehension request concerning an alleged violation prior to the expiration of the probationer's, parolee's or person's term of supervision*.

(Emphasis added.)

¶15 Porter contends that because the parole hold was lifted, the investigation was completed. The statute is clear, however, that so long as the Department's investigation is ongoing, the Department retains jurisdiction over a parolee. *See* WIS. STAT. § 304.072(3). The circuit court found that the

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Department's investigation continued through the two hours and twenty-six minute period in which Porter's parole hold was lifted. Turman-Bounds testified that during those two hours and twenty-six minutes, the Department discovered, through further investigation, that the victim of the armed robbery identified Porter in a photo line-up. Turman-Bounds further testified that upon learning of Porter's identification in the line-up, a Department agent issued an email rescinding the order to lift Porter's parole hold. The circuit court therefore found that the investigation "was not complete when the lift of [the] hold was issued ... [i]t was ongoing. And it is that investigation that keeps the DOC's jurisdiction in place." In making this finding, the circuit court accepted as credible Turman-Bounds's explanation that the practical result of rescinding the order to lift the hold was that the hold remained in place and was never lifted. *See Jacobson v. American Tool Cos.*, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998) (We defer to both the implicit and explicit credibility findings of the circuit court, unless the findings are based upon an erroneous exercise of discretion, an error of law or caprice.). As a result, Porter's revocation counsel could not have been ineffective for failing to investigate the jurisdictional effect of the lifting of the parole hold. *See State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (Counsel is not ineffective for failing to pursue a meritless claim.).

B. The Discharge Certificate.

¶16 Porter also contends that the Department lost jurisdiction over him when it issued a Certificate of Discharge relating to the 1999 case. On March 10, 2008, the Department issued a certificate relating to the 1999 cases stating:

The department having determined that you have satisfied said judgment, it is ordered that effective March 2, 2008, you are discharged from said judgment only.

A series of emails dated November 11, 2009, however, indicate that a Department agent noticed that the certificate had been issued in error. Instructions were given to the agent to prepare an amended certificate once Porter reached his new discharge date.

¶17 The Department contends that the reason the certificate was issued in error concerns the imposition of a consecutive sentence in the 2004 case. On June 8, 2006, Porter received a twenty-one year sentence in the 2004 case to be served consecutive to his sentence in the 1999 case. The 2004 conviction was vacated on October 30, 2008. However, on October 9, 2009, Porter was again convicted in the 2004 case. He was given a seven-year sentence in the 2004 case to be served consecutive to his sentence in the 1999 case.

¶18 The Department contends that the discharge certificate did not take into consideration Porter's consecutive sentences and Porter should not have been discharged in the 1999 case until he completed all of his consecutive sentences. Porter contends that because there was no consecutive sentence in place at the time the discharge certificate was issued, the certificate was properly issued.

¶19 The circuit court did not make findings of fact regarding why the discharge certificate was issued and then withdrawn, but rather quashed the writ without addressing the circumstances surrounding the certificate. If a circuit court fails to make a finding of fact, we may: (1) affirm the order if it is clearly supported by a preponderance of the evidence; (2) reverse if not so supported; or (3) remand for findings and conclusions. *State v. Williams*, 104 Wis. 2d 15, 22, 310 N.W.2d 601 (1981). We remand to the circuit court for a fact-finding hearing on the facts surrounding the issuance, and subsequent withdrawal, of the discharge

certificate in order to determine whether Porter's maximum discharge date should be amended.

By the Court.—Order affirmed in part and remanded with instructions consistent with this opinion.

Not recommended for publication in the official reports.

