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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

June 5, 2014

To:

Hon. John R. Storck
Circuit Court Judge
Justice Facility
210 West Center St.
Juneau, WI 53039

Christopher S. Carson
Carson Law Office
15350 W. National Ave., Ste. 101
New Berlin, WI 53151

Melissa M. Zamzow
Clerk of Circuit Court
Waushara County Courthouse
PO Box 507, 209 S. Saint Marie St.
Wautoma, WI 54982

Richard B. Moriarty
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

2013AP54

Christopher S. Carson v. DOC (L.C. #2012CV19)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Christopher Carson, an attorney, appeals a circuit court order imposing sanctions against him. 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(1) (2011-12).¹ We summarily affirm.

Carson was retained by Larry Wright, whose extended supervision was revoked after a hearing before an administrative law judge (ALJ). Wright did not file for certiorari review within the forty-five-day time period under WIS. STAT. § 893.735(2). Wright retained attorney

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Carson, who filed a petition for habeas corpus on his behalf. The respondents filed a motion to dismiss and a motion for sanctions in the form of costs and fees, pursuant to WIS. STAT. § 895.044. The circuit court granted the respondents' motion to dismiss and denied the petition for writ of habeas corpus. The court stated that it had "never encountered, frankly, a more clear[-]cut determination" regarding frivolousness. The court held a hearing on the issue of sanctions and, in an order dated September 28, 2012, granted the respondents' motion for sanctions against Carson. After an additional hearing on October 8, 2012, the court entered an order on October 19, 2012, setting the amount of sanctions at \$1,788.50.

Carson filed a notice of appeal seeking review of the September 28, 2012 order. The respondents moved to dismiss the appeal for lack of jurisdiction, and this court issued an order dated May 23, 2013, denying the motion to dismiss. We explained in our May 23 order that, although the notice of appeal was defective in that it identified a non-final order instead of the final order dated October 19, 2012, the defect was technical in nature and did not deprive this court of jurisdiction. *See Carrington v. St. Paul Fire & Marine Ins. Co.*, 169 Wis. 2d 211, 217 n.2, 485 N.W.2d 267 (1992).

Carson failed to include in the appellate record a transcript of the October 8, 2012 hearing underlying the circuit court's final order. The respondents argue that this transcript was necessary for this court to review the circuit court's final order dated October 19, 2012. We agree. It is the responsibility of the appellant to ensure completion of the appellate record. *Jensen v. McPherson*, 2004 WI App 145, ¶6 n.4, 275 Wis. 2d 604, 685 N.W.2d 603. In the absence of a transcript, we must assume that every fact essential to sustain the trial judge's exercise of discretion is supported by the record. *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979). Without the transcript of the October 8, 2012 hearing, we lack a

sufficient record to review the circuit court's decision to impose sanctions in the amount it did, and we affirm on that basis.

Although we affirm on the basis stated above, we note that we would still affirm, based on the record before us, even if we were to reach the merits. The grounds for revocation of Wright's extended supervision were that he had absconded from extended supervision for a period of approximately four months and that he had, on two occasions, engaged in sexual intercourse with a fourteen-year-old girl. The record reflects that, only two days after the ALJ issued his revocation decision, Wright was convicted by a jury of two counts of second-degree sexual assault of a child and one count of child enticement, with respect to the incidents between Wright and the fourteen-year-old girl.

In light of Wright's three outstanding convictions, Carson cannot show that any of the other issues discussed in his briefs prejudiced Wright. The four months that Wright absconded from supervision and any alleged errors that counsel made during the revocation proceedings do not matter because, so long as Wright's criminal conviction remained unreversed, we know that Wright's supervision would have been revoked for the maximum term possible. Any reasonable attorney would have known that, while these convictions remained outstanding and unreversed, a habeas petition would not succeed in obtaining relief. Nonetheless, Carson filed a verified petition for habeas corpus, stating that Wright had been convicted of only one of the charges underlying the revocation decision.

On appeal, Carson argues that the habeas petition was not frivolous because the sexual assault and child enticement convictions will, at some point, be reversed. However, Carson does not explain why he filed a habeas petition before the convictions were overturned, rather than

waiting for a reversal and then filing either a habeas petition or a motion to reopen the revocation proceedings based upon newly discovered evidence. Given Wright's outstanding criminal convictions, it should have been apparent to Carson that the habeas petition was filed at a time when there was no reasonable basis upon which it could be granted. *See* WIS. STAT. § 895.044(1)(b).

In light of the foregoing, the circuit court properly exercised its discretion in finding that the petition was frivolous and assessing sanctions against Carson. *See Sentry Ins. v. Davis*, 2001 WI App 203, ¶19, 247 Wis. 2d 501, 634 N.W.2d 553 (circuit court's decision to impose sanctions is discretionary). Upon appeal from a ruling of frivolousness, we need not determine whether the appeal itself is frivolous before awarding appellate costs and reasonable attorney fees. *Riley v. Isaacson*, 156 Wis. 2d 249, 262, 456 N.W.2d 619 (Ct. App. 1990). Rather, if the claim was correctly adjudged by the circuit court to be frivolous, it is frivolous per se on appeal. *Id.* The respondents are therefore entitled to their costs and reasonable attorney fees on appeal, pursuant to WIS. STAT. RULE 809.25(3).

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1), and the cause is remanded to the circuit court to determine the amount of costs and reasonable attorney fees to be awarded to the respondents pursuant to WIS. STAT. RULE 809.25(3).

Diane M. Fremgen
Clerk of Court of Appeals