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**DISTRICT II**

November 4, 2020

To:

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

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2019AP933

John P. Morgano v. Jennifer McDermott  
(L.C. #2018CV2329)

Before Neubauer, C.J., Gundrum and Davis, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

John P. Morgano filed a petition for a writ of habeas corpus alleging ineffective assistance of counsel at his revocation hearing. The circuit court dismissed the petition, concluding that Morgano had another available, more proper, remedy, namely a certiorari petition. Upon

reviewing the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).<sup>1</sup> We affirm the order.

In 2007, Morgano was convicted of possession with intent to deliver cocaine. He was sentenced to five years' initial confinement, followed by ten years' extended supervision. The sentence was stayed, and Morgano was placed on seven years' probation. While on probation, Morgano committed a spate of new violations; he was revoked in 2007 and again in 2013. In 2017, he again was revoked but accepted drug treatment as an alternative to revocation. Morgano allegedly committed nine rule violations shortly after being released from the drug treatment program. The Department of Corrections initiated revocation proceedings.

At the revocation hearing before a Division of Hearings and Appeals (DHA) Administrative Law Judge (ALJ), Morgano stipulated to four of the allegations: operating a motor vehicle without agent permission, speeding, failing to wear a seatbelt, and fleeing from police after a traffic stop. Evidence was presented on the other five alleged violations: changing his residence without agent permission, residing with his father in violation of his agent's verbal directive, failing to report to his agent, possessing drug paraphernalia, and failing to provide truthful information to his agent. The ALJ revoked Morgano's probation and imposed a nearly seven-year sentence, sixty percent of his remaining time. The DHA administrator sustained the decision.

Morgano filed a writ of habeas corpus, in which he agreed that revocation was appropriate but objected to the sentence as stemming from revocation counsel's ineffective failure to object to hearsay at the hearing before the ALJ, even though the ALJ expressly noted in her decision that

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

the “Department could not substantiate” the allegations that are the subject of Morgano’s current challenge and there is nothing to indicate that the allegations were relied upon in its reconfinement decision. Warden Jennifer McDermott moved to dismiss the petition. She argued that Morgano actually was challenging the administrative decisions<sup>2</sup> for erroneously relying on the unobjected-to hearsay. She contended that certiorari is the proper vehicle to challenge the DHA’s decision and a habeas petition is not available when the petitioner has another adequate available remedy. *See State ex rel. L’Minggio v. Gamble*, 2003 WI 82, ¶18, 263 Wis. 2d 55, 667 N.W.2d 1.<sup>3</sup> Morgano responded that he was making a claim of ineffective assistance of counsel, which is appropriately brought by a habeas petition, not a writ of certiorari. *See State v. Ramey*, 121 Wis. 2d 177, 182, 359 N.W.2d 402 (Ct. App. 1984). The circuit court agreed with McDermott and dismissed the habeas petition but left open Morgano’s right to still file a writ of certiorari. Morgano appeals.

Here, the parties again dispute which avenue, as between certiorari and habeas corpus, Morgano should have pursued. We can dispose of this case on the merits without addressing that procedural point. We choose to address the ineffectiveness argument.

To prevail on an ineffectiveness claim, a defendant must show *both* deficient representation and resulting prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court does

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<sup>2</sup> Morgano complains that the ALJ’s decision relied heavily on the unsubstantiated evidence. Not only is this belied by the written decision, but the DHA administrator, whose decision controls the revocation sentence, makes no mention of it. *See* WIS. ADMIN. CODE § HA 2.05(8)(a) (through July 2020); *see also George v. Schwarz*, 2001 WI App 72, ¶24, 242 Wis. 2d 450, 626 N.W.2d 57 (decision to impose reincarceration time is solely DHA’s responsibility).

<sup>3</sup> Whether by strategy or oversight, Morgano missed the forty-five-day deadline for filing for certiorari in the circuit court. *See* WIS. STAT. § 893.735(2). He does not assert that counsel failed to honor his request for certiorari, which, in equity, would entitle him to reinstate his right to certiorari review. *See State ex rel. Griffin v. Smith*, 2004 WI 36, ¶¶3, 45, 270 Wis. 2d 235, 677 N.W.2d 259.

not need to address both aspects of the *Strickland* test if the defendant does not make a sufficient showing on one of them. *See id.* at 697.

Accepting for argument's sake that counsels' failure to object to the unsubstantiated hearsay evidence constituted deficient performance, we conclude that Morgano has not shown that the DHA administrator relied on that evidence to Morgano's prejudice in upholding the ALJ decision. As previously noted, the ALJ decision expressly stated that the Department of Corrections "could not substantiate" the alleged hearsay allegations; it would be unreasonable to conclude that the ALJ nonetheless relied on these unsubstantiated allegations for her decision and there is nothing in the record to suggest that the ALJ did so.

As for the DHA decision, although the DHA administrator wrote that "the record supports the decision," which Morgano reads as meaning that the administrator relied on the "entire" record, including the unsubstantiated hearsay statements in the hearing transcript, there was substantial other evidence, expressly cited in the decision, that supported DHA's decision on reincarceration time. The administrator cited the seriousness of Morgano's original offenses, his poor performance on supervision, the seriousness of the violations, and the need to protect the public. The DHA decision makes no mention of the unsubstantiated hearsay statements of which Morgano complains. We thus conclude that there is no reasonable probability that this evidence contributed to the outcome of the proceeding.

Finally, citing *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), Morgano asserts that he is entitled to an evidentiary hearing on his ineffective assistance of counsel claim because a court cannot decide such a claim without taking the testimony of the allegedly ineffective attorney. *See also State v. Curtis*, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct.

App.1998). A defendant is not automatically entitled to an evidentiary hearing on an ineffective assistance of counsel claim. *Id.* at 555, n.3. A postconviction motion may be denied without a hearing if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *State v. Bentley*, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). In this case, the record, including the ALJ decision and DHA decision sustaining it, conclusively demonstrates that the revocation sentence was not based on the unobjected-to hearsay, meaning there is no reasonable probability that the result would have been different had an objection to the evidence been made.

Therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*