



OFFICE OF THE CLERK
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 II

February 23, 2022

To:

Hon. Michael O. Bohren
Circuit Court Judge
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County
Electronic Notice

Karla Z. Keckhaver
Electronic Notice

Scott Prouty, #474076
Stanley Correctional Inst.
100 Corrections Dr.
Stanley, WI 54768

Special Litigation & Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Stanley Correctional Institution
Business Office
100 Corrections Dr.
Stanley, WI 54768-6500

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

2020AP1107

Scott Prouty v. State of Wisconsin (L.C. #2019CV1248)

Before Gundrum, P.J., Neubauer and Kornblum, 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).

Scott Prouty appeals from an order dismissing his petition for writ of certiorari, without prejudice. Prouty challenges the court's dismissal of his petition as well as denial of his motions for appointment of counsel, to appear at status conference hearings in person, and to bypass to the supreme court. 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 (2019-20).¹ We affirm.

On July 15, 2019, Prouty filed a petition for writ of certiorari in the circuit court seeking review of a revocation decision and naming as respondents the State of Wisconsin and Brian Hayes, the administrator of the Division of Hearings and Appeals (DHA).² The circuit court accepted the case for filing and returned copies of the petition to Prouty for service upon the respondents. On September 19, 2019, Prouty sent a copy of the petition to Hayes via certified mail. DHA promptly sent a letter advising that Prouty had failed to, and was required to, provide a signed copy of a court order requiring that DHA provide the underlying record to the court for review. On October 3, 2019, Prouty forwarded the DHA's letter to the court and asked the court to order DHA to produce the record. On October 15, 2019, the court responded by instructing Prouty to prepare the order. Rather than submit the proposed order, Prouty proceeded to file dozens of letters and motions, three of which are at issue on appeal and will be addressed below. Prouty did not submit a proposed writ of certiorari for the court's signature at any time prior to dismissal of his petition.

At a telephonic status conference on March 10, 2020, the court ordered Prouty to submit a proposed writ of certiorari for the court's signature within twenty-one days and advised that failure to do so will result in dismissal of the case at the next telephonic status conference on

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

² The State is not a proper respondent to this certiorari action seeking review of DHA's revocation decision. *See State ex rel. Myers v. Smith*, 2009 WI App 49, ¶10, 316 Wis. 2d 722, 766 N.W.2d 764 (writ of certiorari must be directed to the body that made the determination sought to be reviewed). As such, dismissal on this ground as well as for lack of jurisdiction was appropriate.

April 8.³ The status conference was rescheduled to June 17, 2020, and because Prouty failed to submit a proposed writ to the court as ordered, the court dismissed the case.

We first note that the circuit court’s form dismissal order provides that the dismissal is based on the court’s conclusion that “[t]his matter has not been diligently prosecuted.” Prouty makes no mention of the same. As the appellant, it is Prouty’s responsibility to develop and show that the stated basis for the circuit court’s dismissal—failure to prosecute—was in error. He has failed to so do. We further note that, given Prouty’s failure to include the transcripts in the record, any challenge to the dismissal for failure to prosecute also fails because “we must assume that the missing material supports the [circuit] court’s ruling.” See *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993). Given Prouty’s failure to provide the transcripts and to develop an argument that the court erroneously exercised its discretion in dismissing for failure to prosecute, we affirm on these grounds alone. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (declining to review an inadequately developed argument).

³ The record on appeal contains no transcripts of the two status conferences held in this case on March 10, 2020, and June 17, 2020. It was Prouty’s responsibility to ensure that the record is complete. See *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993).

However, the electronic circuit court docket entry provides additional information about the March 10, 2020 status conference. Specifically, the entry provides that the court had a colloquy with the parties regarding the background of the case and verified that “no order has been signed by this Court allowing the writ of certiorari.” The entry further notes: “Court will give Mr. Prouty 21 days to submit the proper documents for Court’s approval to grant writ of certiorari. Court sets a status hearing, at that status hearing if the documents are not submitted the Court will dismiss the case at that time.” See Waukesha County Circuit Court Case No. 2019CV001248, <https://wcca.wicourts.gov/caseDetail.html?caseNo=2019CV001248&countyNo=67&index=0> (last visited Feb. 3, 2022). This court may take judicial notice of electronic circuit court docket entries. See *Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

Nevertheless, we address Prouty’s additional arguments in the interest of completeness, as he appears to set them forth as reasons for his failure to prosecute. Moreover, as the State aptly emphasizes, because Prouty failed to obtain and serve the writ of certiorari, dismissal was appropriate because the circuit court lacked jurisdiction over DHA after the case had been pending for almost a year. Thus, we discuss the dismissal in terms of failure to properly serve resulting in a lack of jurisdiction which, here, is the direct result of the failure to prosecute.

Prouty seeks review of the circuit court’s decision to dismiss his petition for writ of certiorari. He also claims he was constitutionally and statutorily entitled to appointment of counsel, to appear at status conference hearings in person, and to a grant of bypass to the supreme court. These issues present questions of law, which we review de novo. See *Useni v. Boudron*, 2003 WI App 98, ¶8, 264 Wis. 2d 783, 662 N.W.2d 672 (whether service sufficient to confer personal jurisdiction is a question of law); *State v. Urdahl*, 2005 WI App 191, ¶10, 286 Wis. 2d 476, 704 N.W.2d 324 (whether defendant deprived of a constitutional right is a question of law); *State ex rel. Saffold v. Schwarz*, 2001 WI App 56, ¶5, 241 Wis. 2d 253, 625 N.W.2d 333 (whether a statute applies is a question of law).

“A circuit court obtains personal jurisdiction over a defendant” in a civil action—including this certiorari action seeking review of a revocation decision—“when the defendant is served ... in the manner prescribed by the statutes.” See *Hagen v. City of Milwaukee Emp.’s Ret. Sys. Annuity & Pension Bd.*, 2003 WI 56, ¶12, 262 Wis. 2d 113, 663 N.W.2d 268; *Irby v. Young*, 139 Wis. 2d 279, 281, 407 N.W.2d 314 (Ct. App. 1987) (a writ of certiorari is a civil action). Failure to properly serve a defendant “is a fundamental defect fatal to the action, regardless of prejudice[,]” and warrants dismissal. *Hagen*, 262 Wis. 2d 113, ¶13; *Bartels v. Rural Mut. Ins. Co.*, 2004 WI App 166, ¶16, 275 Wis. 2d 730, 687 N.W.2d 84. “Wisconsin

requires strict compliance with its rules of statutory service, even though the consequences may appear to be harsh.” *Dietrich v. Elliott*, 190 Wis. 2d 816, 827, 528 N.W.2d 17 (Ct. App. 1995).

Prouty elected to file a petition for writ of certiorari under WIS. STAT. § 801.02(5). To obtain personal jurisdiction, Prouty was then required to obtain a writ from the circuit court and personally serve the writ and the petition under WIS. STAT. § 801.11(1)(a). *See State ex rel. DNR v. Walworth Cnty. Bd. of Adjustment*, 170 Wis. 2d 406, 419, 489 N.W.2d 631 (Ct. App. 1992). Prouty failed to submit a proposed writ after he was ordered to do so by the court and, consequently, he failed to effect personal service of the signed writ and the petition.⁴

Prouty also challenges the circuit court’s March 19, 2020, and April 10, 2020 denials of his motions seeking appointment of counsel. While the court adjourned the case for fourteen days to allow Prouty to retain counsel, Prouty never did so.

Despite his insistence to the contrary, Prouty was not constitutionally entitled to appointment of counsel in this civil action—a certiorari action seeking review of a revocation decision. *See State ex rel. Griffin v. Smith*, 2004 WI 36, ¶¶22, 26-27, 31, 270 Wis. 2d 235, 677 N.W.2d 259. As our supreme court explained in *Griffin*, “[t]he Supreme Court has not extended a per se Sixth Amendment right to counsel at revocation hearings or certiorari review of revocation decisions” *Id.*, ¶22.

The circuit court also appropriately decided not to exercise its inherent discretion to appoint counsel absent a constitutional or statutory right to an attorney because Prouty failed to

⁴ Had Prouty obtained a signed writ, he was required to effect personal service of both the writ and the petition; certified mail does not suffice. *See* WIS. STAT. § 801.11(1)(a); *State ex rel. DNR v. Walworth Cnty. Bd. of Adjustment*, 170 Wis. 2d 406, 419, 489 N.W.2d 631 (Ct. App. 1992)

show the same was necessary “for the orderly and fair presentation of a case.” See *Joni B. v. State*, 202 Wis. 2d 1, 11, 549 N.W.2d 411 (1996). The decision to deny counsel came after both DHA and the court advised that Prouty needed to provide the court with a proposed writ, and instead of doing so, he filed dozens of letters and motions. On this record, the court reached “a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning.” See *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Prouty filed the petition and multiple motions and letters—he provided nothing to the circuit court to show that he was unable to submit a proposed writ or to serve the same, actions routinely performed by pro se litigants.

The circuit court also appropriately denied Prouty’s complaint that the court held the status conferences by telephone. “Whenever the applicable statutes or rules so permit, or the court otherwise determines that it is practical to do so, conferences in civil actions and proceedings may be conducted by telephone.” WIS. STAT. § 807.13(3). Further, “[a]ll hearings in which oral testimony is to be presented in an action or special proceeding that is commenced by a prisoner, as defined in [Wis. STAT. §] 801.02(7)(a)2., shall be conducted by telephone, interactive video and audio transmission or other live interactive communication without removing him or her from the facility or institution” WIS. STAT. § 807.04(2) (emphasis added). Here, the court properly denied Prouty’s request to appear in person, as appropriate under Wisconsin law.

Lastly, the circuit court appropriately rejected Prouty’s request that the circuit court submit his case to the supreme court in a petition to bypass. There is no statutory authority for a litigant to seek bypass to the supreme court directly from the circuit court or by motion to the

circuit court. WIS. STAT. § 808.05; *see also* WIS. STAT. RULES 809.60 (petition to bypass), 809.61 (bypass by certification or upon motion of the supreme court).

Prouty initiated this action but then failed to provide the court with a proposed writ of certiorari ordering DHA to produce the record. The circuit court ordered Prouty to file a proposed writ, warned him that his case would be dismissed if he did not comply with the court's order, and then dismissed the case when Prouty did not follow through. Prouty failed to obtain personal jurisdiction over DHA, and the circuit court properly dismissed the case. The court also properly denied his motions for appointment of counsel, to appear in person at status conferences, and to have the circuit court petition to bypass his case to the supreme court.

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.

Sheila T. Reiff
Clerk of Court of Appeals