STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP2095

STATE OF WISCONSIN ex rel.
VINCENT MARTINEZ,

Petitioner-Appellant,

v.

BRIAN HAYES,

Respondent-Respondent.

ON APPEAL FROM THE JULY 6, 2015, DECISION OF THE WASHINGTON COUNTY CIRCUIT COURT, CASE NO. 14-CV-594, THE HONORABLE ANDREW T. GONRING, PRESIDING

RESPONDENT'S BRIEF

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ISSUES PRESENTED FOR REVIEW

1. A 2004 decision in *Booker* created a remedy through which the administrator may order new revocation hearings just as trial courts may provide criminal defendants with post-conviction relief. *Booker* motions now provide an adequate and available remedy for ineffective assistance of counsel claims in the revocation setting. Is habeas barred because Martinez cannot prove that the same relief he now seeks was unavailable through the *Booker* motion remedy?

The trial court answered: Yes.

2. Under Wisconsin law, habeas corpus relief is barred unless a petitioner proves he lacked adequate and available remedies to obtain the same relief. Martinez filed this habeas case seeking relief from the consequences of an agency decision revoking his extended supervision. Since Martinez could have sought this same relief through certiorari review, is habeas barred because he cannot prove that he lacked adequate and available remedies at law?

The trial court answered: Yes.

3. Martinez pursues habeas relief based on his allegations that his revocation attorney did not assert sufficient challenges to the reliability of the evidence on which the revocation decision was based. The certified record displays repeated substantive objections by his revocation attorney to the reliability of that evidence. If this case is not dismissed based on the existence of adequate and available

remedies, is an evidentiary hearing unnecessary due to the evidence in the record?

The trial court answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issues presented are fully briefed. Publication may be warranted to address the *Booker* issue, as it is likely to recur.[1]

STATEMENT OF THE CASE

The respondent, Division of Hearings and Appeals (DHA) Administrator Brian Hayes, affirmed an administrative law judge's (ALJ) decision to revoke appellant Vincent Martinez's extended supervision. (R. 31:71.) Martinez challenged Hayes's decision in circuit court by filing a petition for a writ of habeas corpus. (R. 5.) This case is an appeal of the circuit court's decision dismissing Martinez's petition for habeas relief. (R. 69.)

Martinez originally filed his petition for habeas relief on August 6, 2014. (R. 5.) The circuit court denied the petition on August 19, 2014, finding that Martinez did not include sufficient allegations regarding his liberty. (R. 8.) Martinez appealed that decision. On January 16, 2015, this Court reviewed the record and determined that the circuit

[1]It should be noted that there are two other cases before this Court that raise this issue—*SXR Redmond v. Foster*, Case No. 2014AP2637 and *SXR Hollins v. Pollard*, Case No. 2015AP1653.

court's August 19, 2014, decision did not properly address the substance of Martinez's writ petition. This Court remanded to the circuit court to address the substance of the petition and the parties' motions to supplement the record. (R. 22.)

Martinez's petition alleges ineffective assistance of revocation counsel, along with allegations that the hearing examiner violated his procedural due process rights by failing to allow him to confront and cross-examine witnesses and by failing to find good cause for their absence. (R. 5:6.) Martinez's petition also alleges that the hearing officer improperly relied on hearsay evidence without finding it to be reliable. (R. 5:7.)

On remand, the respondent filed a motion to dismiss the petition and quash the writ, which the circuit court granted in a decision issued on July 6, 2015. (R. 69.) This appeal followed.

STANDARD OF REVIEW

A trial court's order denying a petition for a writ of *habeas corpus* presents a mixed question of fact and law. *State ex rel. McMillian v. Dickey*, 132 Wis. 2d 266, 276, 392 N.W.2d 453 (Ct. App. 1986). Factual determinations will not be reversed unless clearly erroneous. *Id.* Whether a writ of *habeas corpus* is available to the party seeking relief is a question of law, which this Court reviews independently. *Id.*; *see also State ex rel. Woods v. Morgan*, 224 Wis. 2d 534, 537, 591 N.W.2d 922 (Ct. App. 1999).

ARGUMENT

This case is about whether Martinez is allowed to bring his revocation challenge through a petition for a writ of habeas corpus. It is the State's position that Martinez cannot use habeas to challenge the agency's decision because he had other adequate remedies available to him. And, even if this Court decides that a petition for a writ of habeas corpus is proper in this case, the circuit court properly dismissed the petition because the record is sufficient to determine that Martinez's counsel was not ineffective.

I. This Court should affirm the circuit court's dismissal of Martinez's petition for writ of habeas corpus because Martinez had adequate remedies available at law.

A. Habeas relief is barred unless the party seeking habeas relief shows a lack of adequate remedies available at law.

A "[w]rit of habeas corpus is an equitable remedy that protects a person's right to personal liberty by freeing him or her from illegal confinement." *State ex rel. Washington v. State*, 2012 WI App 74, ¶ 18, 343 Wis. 2d 434, 819 N.W.2d 305 (quoting *State v. Pozo*, 2002 WI App 279, ¶ 8, 258 Wis. 2d 796, 654 N.W.2d 12). But habeas corpus is an extraordinary writ that is only available to a petitioner under limited circumstances. *State ex rel. L'Minggio v. Gamble*, 2003 WI 82, ¶ 18, 263 Wis. 2d 55, 667 N.W.2d 1. A petitioner who seeks habeas corpus relief must show that: (1) he is restrained of his liberty; (2) the restraint was

imposed by a tribunal without jurisdiction or that the restraint was imposed contrary to constitutional protections; and (3) there was no other adequate remedy available in the law. *Id.*

If there is an adequate remedy available in the law, "habeas corpus is not available to the petitioner." *State ex rel. Krieger v. Borgen*, 2004 WI App 163, ¶ 5, 276 Wis. 2d 96, 687 N.W.2d 79. In *Kreiger*, this Court determined that habeas relief was properly denied "because [the petitioner] cannot show that he pursued other remedies available to him in the law." *Id.* ¶ 13.

B. Martinez is not entitled to habeas relief because a *Booker* motion was an adequate remedy available to him.

Martinez's habeas petition was properly dismissed because he could have sought a *Booker* motion. A *Booker* motion precludes habeas relief because it provides Martinez with an adequate and available remedy at law.

Martinez claims that habeas is the appropriate avenue for pursuing his ineffective assistance claim. But the case law supporting Martinez's position predates the availability of a *Booker* motion.

The potential of using *habeas* to claim ineffective assistance of revocation counsel was addressed in three reported Wisconsin decisions in the 1980s and 1990s. In chronological order, they were *State v. Ramey*, 121 Wis. 2d 177, 359 N.W.2d 402 (Ct. App. 1984),

State ex rel. Vanderbeke v. Endicott, 210 Wis. 2d 502, 563 N.W.2d 883 (1997), and *State ex rel. Reddin v. Galster*, 215 Wis. 2d 179, 572 N.W.2d 505 (Ct. App. 1997). *Reddin*, issued in November 1997, is the latest reported decision addressing that issue.

Vanderbeke viewed *Ramey* as having held 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 522-23. Based on *Ramey*, *Vanderbeke* concluded that "habeas corpus was a proper method for Vanderbeke to use in challenging his probation revocation on the grounds of violation of due process because of incompetency and lack of counsel." *Id.*

Several months later, the court of appeals in *Reddin* viewed *Ramey* as having "*intimated* that a writ of habeas corpus may be available to raise a claim of ineffective assistance of counsel during probation revocation proceedings." *Reddin*, 215 Wis. 2d at 186 (emphasis added). *Reddin* also viewed *Ramey* as having held that "a claim of ineffective assistance of counsel during probation revocation proceedings could *not* be addressed on certiorari review, because the scope of that review focuses solely on the actions and determinations of the administrative decision maker." *Id.*

Then, seven years after *Reddin*, a new remedy was created by the court of appeals in *State ex rel. Booker v. Schwarz*, 2004 WI App 50, 270 Wis. 2d 745, 678 N.W.2d 361. The *Booker* case expressly created a remedy through which Martinez could have sought, and may still seek, to re-open his revocation case. *Id.* ¶¶ 9-14. Under *Booker*, an offender whose probation or parole was revoked has a right to move the DHA Administrator to reopen the revocation case. *Id.* ¶ 20. In *Booker*, probation was revoked through an ALJ decision and later affirmed by the DHA Administrator. *Id.* ¶ 4. Six years later, with Booker still incarcerated based on the revocation, "Booker filed a motion with the Division seeking to vacate the revocation or, in the alternative, an evidentiary hearing to determine whether newly discovered evidence entitled him to a new revocation hearing." *Id.* ¶ 5. The DHA Administrator denied the motion. *Id.* ¶ 7. This Court held that, even without authority expressly allowing the DHA Administrator to re-open revocation proceedings, justice and due process required the Administrator to consider newly discovered evidence in civil revocation proceedings. *Id.* ¶¶ 9-14.

The five-prong test applicable in criminal proceedings now applies to motions to reopen filed with the DHA Administrator in civil revocation settings:

> (1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to

> the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial.

Id. ¶ 12 (quoting *State v. Bembenek*, 140 Wis. 2d 248, 252, 409 N.W.2d 432 (Ct. App. 1987)).

Denials by the Administrator of *Booker* motions may be challenged through certiorari review. *Id.* ¶ 1. It is well-established that, where there are no statutory provisions for judicial review, the actions of a board or commission may be reviewed by certiorari. *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 549-50, 185 N.W.2d 306 (1971).

Using a *Booker* motion to challenge ineffective assistance of counsel in the probation revocation setting makes sense. The *Booker* motion remedy is better suited than habeas to address ineffective assistance of counsel claims because it allows the agency to determine whether the motion makes sufficient allegations to warrant a hearing and, if so, allows the original fact finder—the ALJ in this case—to evaluate counsel's effectiveness. In this sense, the *Booker* motion remedy creates a remedy for ineffective assistance claims that parallels the post-conviction evidentiary hearing used by criminal defendants making the same claim, referred to as a *Machner* hearing. *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Booker provides probationers with an adequate and available remedy to challenge ineffective assistance of revocation counsel, just like criminal defendants may pursue

an ineffective assistance of counsel claim with a motion for a new trial. It makes no sense that probationers would be permitted to make such a challenge in habeas when criminal defendants cannot, especially when certiorari, not habeas, is the common method for reviewing probation revocation.

Martinez does not allege that he made a *Booker* motion to the DHA Administrator. Martinez's habeas petition was properly dismissed because he has not, and cannot, successfully show that his *Booker* remedies were or are unavailable or inadequate.

C. Habeas is inappropriate because Martinez had an adequate and available remedy through certiorari review.

Martinez's habeas petition was properly dismissed because a *Booker* motion was, and is, an adequate and available alternate remedy. But Martinez is also undeserving of habeas relief because he could have obtained the same relief through certiorari.

Martinez seeks relief, through habeas, from the custody effects of having his extended supervision revoked by the DHA Administrator. Habeas relief is generally precluded in revocation settings because certiorari review is "the common route for reviewing probation [or parole] revocations, not a habeas writ." *Prison Litig. Reform Act in State ex rel. Cramer v. Schwarz*, 2000 WI 86, ¶ 48, 236 Wis. 2d 473, 613 N.W.2d 591.

Martinez argues that habeas is appropriate because his petition includes a claim of ineffective assistance of

counsel. (Martinez Br. 11.) The problem with this argument is that Martinez's petition identifies other grounds for obtaining the same relief he requests—relief from the revocation decision—that he could have pursued through a timely certiorari review of the November 12, 2013, decision.

For example, Martinez claims that "there is no doubt that it was error for the administrative law judge to fail to make the required finding of good cause" and that "not only did the hearing officer fail to make the required finding of good cause, the hearing examiner failed to find that the hearsay was reliable" and instead determined that Officer Kristina Meilahn was credible and reliable, "[a] determination [that] misses the point." (R. 5:7.) Those arguments are cognizable in certiorari reviews of revocation decisions, and a favorable certiorari review decision could have provided Martinez with the relief he now seeks through habeas—relief from the revocation decision. *See Johnson*, 50 Wis. 2d at 548-51.

The fact that the revocation decision *could* have been vacated based on these or other arguments is fatal to this habeas action. More precisely, Martinez cannot prove that a certiorari challenge to the revocation decision was futile or provided no possibility of providing him the same relief he now seeks.

Martinez claims that he can pursue this habeas case because he asserts a *ground* for relief that he could not have pursued in a certiorari review, namely, ineffective assistance

of revocation counsel. The adequate remedy question, however, does not turn on whether a petitioner could assert precisely the same *grounds* for obtaining the relief available in habeas. It turns on whether the petitioner could obtain that same *relief*, *i.e.*, release from alleged illegal detention. In other words, Martinez needed to at least attempt to pursue his other options, instead of going straight to habeas.

If the habeas "petitioner has an otherwise adequate remedy that he or she may exercise *to obtain the same relief*, the writ will not be issued." *State ex rel. Haas v. McReynolds*, 2002 WI 43, ¶ 14, 252 Wis. 2d 133, 643 N.W.2d 771 (emphasis added). Martinez had an adequate remedy to "obtain the same relief" within the meaning of *Haas*. *Id.* He could have pursued a certiorari action grounded on his arguments about alleged defects by the decision-making agency without any mention of the quality of the assistance provided by his revocation counsel. He cannot prove that certiorari review, if pursued, would not have resulted in his obtaining the same relief he now pursues.

Assuming for sake of argument that, under the *Ramey*, *Vanderbeke*, and *Reddin* cases discussed above, certiorari remains an inadequate means to challenge detention based on ineffective assistance by revocation counsel, that does *not* make certiorari an inadequate remedy when the habeas petitioner had other challenges to the revocation decision that were cognizable in certiorari.

Martinez has not demonstrated that they would not have succeeded. Martinez cannot exclude the potential that certiorari was an adequate and available remedy for the relief he now seeks.

II. Even if Martinez is allowed to proceed under habeas, his petition was properly dismissed because the record shows his counsel was effective.

Martinez's petition for habeas relief was properly dismissed because he had other available remedies to address his claims. But even if this Court allows him to proceed under habeas, Martinez is not entitled to relief because there is sufficient evidence in the record to show that his counsel was effective.[2]

Martinez alleges that his revocation attorney did not assert sufficient challenges to the reliability of the evidence on which the revocation decision was based. (R. 5:3, 8-9.) But the record contradicts that premise. It reveals repeated substantive objections by his revocation attorney to the reliability of that evidence.

Revocation hearings are different than criminal trials.

"[R]evocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole

[2]Martinez raises other issues in his brief on appeal—such as errors by the ALJ—but it is undisputed that those issues are cognizable through certiorari. As such, habeas relief is not available to Martinez on those claims.

revocations." *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). As such, a revocation decision based *entirely* on hearsay "is sufficient to prove a probation violation so long as the hearsay is reliable." *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶ 30, n.6, 250 Wis. 2d 214, 640 N.W.2d 527.

Given the law, it would have been pointless for the revocation attorney representing Martinez to object to the admission of the hearsay evidence. And such fruitless objections may well have been perceived negatively by the decision-makers. *See, e.g., State v. Walberg*, 109 Wis. 2d 96, 107-08, 325 N.W.2d 687 (1982) (noting that the trial court expressed "irritation with defense counsel for bringing what it believed to be 'frivolous' motions and objections, and generally wasting the court's time"); *Rubin v. State*, 192 Wis. 1, 9, 211 N.W. 926 (1927) (while attorneys are entitled to make objections, they are never entitled to argue "frivolous objections").

Instead, Martinez's attorney was constrained to arguing that the hearsay evidence admitted was not *reliable*. His revocation attorney acted as effectively as the circumstances allowed. The attorney interrupted Officer Meilahn to interpose a foundation objection that resulted in the ALJ clarifying some issues through additional questioning. (Tr. 6-8.)[3] The revocation attorney also interposed an objection about "double hearsay" that caused

[3]Citations to "Tr." reference the transcript of the hearing on October 8, 2013, located at (R. 50) in the appeals record.

the ALJ to evaluate and consider the evidence being presented, to note that, when the ALJ issued the decision, she would "consider whether I think that the double hearsay testimony that I'm hearing does have a sufficient indicia of reliability," and then to get the questioning back on track. (Tr. 10-11.) On cross-examination, his revocation attorney established how dependent the testimony of Officer Meilahn was on hearsay statements by others, a critical part of the attorney's efforts to undercut the reliability of DHA's evidence. (Tr. 13.) The attorney's questioning of the agent confirmed that the agent was not present during the underlying incidents, another critical part of those efforts. (Tr. 20.) Then, in closing arguments, Martinez's attorney presented a strong set of arguments as could be presented for the hearsay statements being deemed unreliable. (Tr. 22-24.)

Regardless of the quality of these efforts, they were unsuccessful. The ALJ decided to revoke the extended supervision of Martinez and, since his revocation attorney was on leave, a supervising attorney appealed and made a strong set of arguments attacking the reliability of the statements. (R. 31:69-70.)

Martinez has to overcome a presumption that his revocation attorney provided "adequate assistance within the bounds of reasonable professional judgment." *State v. Balliette*, 2011 WI 79, ¶ 78, 336 Wis. 2d 358, 805 N.W.2d 334. Indeed, he had to "overcome the '*strong*

presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *State v. Romero-Georgana*, 2014 WI 83, ¶ 40, 360 Wis. 2d 522, 849 N.W.2d 668 (emphasis added) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). He cannot obtain an evidentiary hearing on ineffective assistance merely by asserting that objections should have been asserted. *State v. Pinno*, 2014 WI 74, ¶ 87, 356 Wis. 2d 106, 850 N.W.2d 207.

If this case is not dismissed based on the existence of adequate and available remedies, no evidentiary hearing is required before determining that the habeas petition lacks merit. The certified records of the agency proceedings confirm that, on the issues identified by Martinez, his revocation attorneys provided effective assistance and that Martinez was not prejudiced by any activities engaged in by his revocation attorneys.

CONCLUSION

For the reasons discussed above, the State respectfully requests that this Court affirm the decision of the circuit court.

Dated this 20th day of November, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,353 words.

Dated this _____ day of November, 2015.

_____
ABIGAIL C. S. POTTS
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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of November, 2015.

_____
ABIGAIL C. S. POTTS
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