STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP2637

STATE OF WISCONSIN ex rel. ANTJUAN REDMOND,
Petitioner-Appellant,

v.

BRIAN FOSTER,
Warden, Kettle Moraine Correctional Institution,
Respondent-Respondent.

On Notice of Appeal from a Decision and Order Denying Petition for Writ of Habeas Corpus Entered in the Circuit Court for Sheboygan County, Honorable L. Edward Stengel, Presiding

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SUPPLEMENTAL BRIEF AND APPENDIX OF PETITIONER-APPELLANT

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ISSUES PRESENTED

1. Is a petition for writ of habeas corpus the proper legal mechanism for Mr. Redmond to assert a claim of ineffective assistance at his probation supervision revocation hearing?

The circuit court concluded that due to the availability of a writ of certiorari, there were other adequate remedies of law and dismissed the petition for writ of habeas corpus.

2. Is a motion to reopen before the Department of Hearings and Appeals an adequate and available remedy for Mr. Redmond's claim of ineffective assistance of counsel in his revocation proceedings?

Not answered by the circuit court.

3. Is there any established mechanism for a post-revocation motion for relief before the Division of Hearings and Appeals, and if so, what is the mechanism and what standards apply?

Not raised in the circuit court.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested because the issues can be developed and resolved by the parties' briefs.

ARGUMENT

I. A Writ of Habeas Corpus is the Proper Legal Mechanism for Mr. Redmond's Claim that He was Denied the Effective Assistance of Counsel in His Probation Revocation Proceedings.

A. Standard of review and principles of law.

An individual's right to petition a court of law for a writ of habeas corpus is guaranteed by both the United States and Wisconsin Constitutions and Wisconsin Statutes Chapter 782. ***J.V. v. Barron***, 112 Wis. 2d 256, 259-60, 332 N.W.2d 796 (1983); Wis. Const. Art. I, §8, cl. 4; U.S. Const, Art. I, §9, cl. 2; Wis. Stat. § 782.01. It is an equitable remedy arising from common law. *See* ***State v. Pozo***, 2002 WI App 279, ¶18, 258 Wis. 2d 796, 654 N.W.2d 12. This writ's special function to protect a person's right of personal liberty by freeing them from illegal restraint. ***Id***. As the Wisconsin Supreme Court explained:

> Petitioning for a writ of habeas corpus is a right granted by the United States and Wisconsin Constitutions and Wisconsin Statutes, ch. 782. The roots of the writ can be traced deep into English common law and "indisputably holds an honored position in our jurisprudence." *Engle v. Isaac*, 456 U.S. 107, 126 (1982). Its special function is to protect and vindicate a person's right of personal liberty by freeing him from illegal restraint.

Barron, 112 Wis. 2d at 259-60.

Habeas corpus relief is available where: 1) the petitioner is restrained of their liberty; 2) the restraint was imposed by a tribunal lacking jurisdiction or the restraint was imposed contrary to constitutional protections; and 3) there is

no other adequate remedy at law. ***State ex rel. Fuentes v. Court of Appeals***, 225 Wis. 2d 446, 451, 593 N.W.2d 48 (1999). Whether a writ of habeas corpus is available to the person seeking such relief is a question of law subject to de novo review by this court. ***Pozo***, 258 Wis. 2d 796, ¶6.

B. Well-settled caselaw provides that habeas corpus is the appropriate legal procedure for claims of ineffective assistance of counsel in revocation proceedings.

Mr. Redmond's habeas petition asserted that his personal liberty was being restrained unconstitutionally because he was denied the effective assistance of counsel in his revocation proceedings. (10:1,8-31). In Wisconsin, there is a well-honed and clearly defined procedure for raising claims of ineffective assistance of counsel in revocation proceedings. According to well-settled Wisconsin caselaw, a petition for writ of habeas corpus was the proper legal mechanism for Mr. Redmond to raise his claims of ineffective assistance of counsel in his revocation proceedings.

Over 30 years ago, in ***State v. Ramey***, this Court held that a writ of certiorari was not the appropriate remedy for a claim of ineffective assistance of counsel at a revocation hearing. 121 Wis. 2d 177, 178, 182, 359 N.W.2d 402 (Ct. App. 1984). In so finding, this Court reasoned that the scope of review in a writ of certiorari proceeding is limited to reviewing the actions of the administrative body only. ***Id***. at 178. It observed that the scope of certiorari review is strictly limited to:

> (1) Whether the board kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might

> reasonably make the order or determination in question.

121 Wis. 2d at 182 (citations omitted).

The ***Ramey*** court found that a claim of ineffective assistance of counsel does not fall under any of these four determinations. ***Id***. It concluded that the effectiveness of defense counsel during a revocation hearing "is not the proper subject for review of an administrative action". ***Id***. at 178.

This Court found that Ramey could raise a claim of ineffective assistance of counsel by applying for a writ of habeas corpus:

> This is not to say that Ramey is totally precluded from raising a claim of ineffective assistance of counsel; it is only to say that a writ of certiorari is not the appropriate remedy. If Ramey feels he is restrained of his personal liberty, he may apply for a writ of habeas corpus.

Id. at 182 (footnote and citation omitted).

Twelve years later, in ***State ex rel. Vanderbeke v. Endicott***, the Wisconsin Supreme Court held that a petition for writ of habeas corpus was a proper procedure for challenging a probation revocation on the grounds of a violation of due process due to his incompetency and the lack of counsel. 210 Wis. 2d 502, 522-23, 563 N.W.2d 883 (1997). In so holding, the Supreme Court cited to ***Ramey*** with approval. It found that ***Ramey*** held that a habeas corpus petition, rather than a petition for writ of certiorari is the appropriate legal procedure for an allegation of ineffective assistance of counsel at a revocation proceeding when additional evidence is needed. ***Id***. at 522. The ***Vanderbeke*** court relied upon this holding in ***Ramey*** as part of its rationale

for concluding that a writ of habeas corpus was an available procedure for the petitioner. 210 Wis. 2d at 522.

Courts have relied, and continue to rely, on ***Ramey*** as Wisconsin precedent that claims of ineffective assistance of counsel at revocation proceedings are properly raised in habeas corpus proceedings. For example, in an unpublished, three-judge authored opinion, ***State ex rel. Porter v. Cockroft,*** Case No. 2011AP308, 340 Wis. 2d 741, 813 N.W.2d 247 (unpublished) (Ct. App. March 6, 2012) (Supp. App. 101-10), this Court relied on ***Ramey***: "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)."[1] (Supp. App. 105). Federal district courts have also relied on ***Ramey*** as the Wisconsin precedent on the procedure for ineffective assistance of counsel at a revocation hearing. *See e.g.*, ***Hashim v. Baenen***, No. 13-CV-65-BBC, 2014 WL 79338, *2 (W.D. Wis. Feb. 26, 2014) (Supp. App. 111-19). ("In Wisconsin, claims for ineffective assistance of counsel cannot be brought in certiorari actions, and instead are reviewable in state habeas corpus proceedings…***State v. Ramey***, 121 Wis. 2d 177, 182, 359 N.W.2d 402, 405 (Wis. Ct. App. 1984).)" 2014WL 793338, *2 (Supp. App. 112) (citation to *per curiam* decision omitted).[2]

[1] Though not binding authority for this Court's decision, Mr. Redmond cites to ***Cockcroft***, an authored three-judge panel decision issued after July 1, 2009, for its persuasive value. *See* Wis. Stat. (Rule) 809.23(3)(b).

[2] *See also*, ***Maldonado v. Raemisch***, Case No. 10-CV-90-BBC, 2010 WL 3730974, *4 (W.D. Wis. Sept. 20, 2010) (Supp. App. 120-24) and ***Weston v. Raemisch***, Case No. 09-CV-339-BBC, 2009 WL 1797860, *1 (W.D. Wis. June 23, 2009) (Supp. App. 125-26).

C. This Court's ***Booker*** decision cannot and does not impact the determination that Mr. Redmond's claim of ineffective assistance of counsel at his revocation hearing was appropriate for habeas relief nor does it provide him with an adequate and available remedy at law.

Contary to Foster's assertion, this Court's decision in ***State ex rel. Booker v. Schwarz***, 2004 WI App 50, 270 Wis. 2d 745, 678 N.W.2d 361, does not provide Mr. Redmond with an available and adequate remedy at law for his claim of ineffective assistance of counsel at his revocation hearing. In ***Booker***, a case involving a denial of a writ of certiorari, this Court determined that a person whose probation had been revoked had the right to move the Division of Hearings and Appeals to reopen a revocation hearing on the grounds of newly discovered evidence. 270 Wis. 2d 745, ¶14. Booker had filed such a motion before the division. ***Id***. at ¶5. After the division denied this motion, he filed a petition for writ of certiorari in the circuit court, which was also denied. ***Id***. at ¶1.

Booker cannot be read to apply to claims of ineffective assistance of counsel claims. ***Booker*** provides that a person has a right to file a motion to reopen revocation proceedings under limited circumstances -- where the person is asserting that newly discovered evidence justifies reopening their revocation proceedings. It did not involve a petition for writ of habeas corpus or a claim of ineffective assistance of counsel at a revocation hearing. The decision did not address or discuss habeas procedure or ineffective assistance of counsel claims. Rather, ***Booker*** addressed only the procedure for raising a claim of newly discovered evidence before the Division of Hearings and Appeals.

Nor can the decision be read to have, *sub silentio*, overruled or modified the ***Ramey*** holding, as cited with

approval by the Wisconsin Supreme Court in ***Vanderbeke***, that habeas corpus is the appropriate procedure for raising a claim of the effectiveness of counsel in revocation proceedings. This is because this Court lacks the power to modify, overrule or withdraw language from the ***Ramey*** decision. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) ("only the supreme court…has the power to overrule, modify or withdraw language from a published opinion of the court of appeals."). Moreover, it does not appear that any appellate court in the 12 years since this decision was issued, consider ***Booker*** to apply to claims of ineffective assistance of counsel in revocation proceedings. Courts continue to rely on the ***Ramey*** rule of law. *See e.g.* ***State ex rel. Porter v. Cockroft,*** *supra.* (Supp. App. 101-10).

Given the division's decision-making authority in a revocation proceeding, it makes some sense for the department to decide whether newly discovered evidence merits a new revocation hearing. According to its administrative code, an administrative law judge decides whether the client's conduct was a violation of their supervision rules, and, if so, whether revocation is appropriate, whether time should be tolled, the amount of time to be served (in extended supervision and parole revocations), and the amount of sentence credit. Wis. Admin. Code § HA 2.05(7). New evidence as to any of these points is well within the division's expertise.

Furthermore, certiorari review of the division's decision on newly discovered evidence fits squarely within the scope of certiorari review of an administration action. In most cases, the review of newly discovered evidence issues will involve the fourth question of whether the evidence was such that the division could reasonably make the determination that it did. This question is not subject to *de*

novo review, but rather is reviewed under the deferential standard of whether there is substantial evidence to support the division's decision. *See* ***Van Ermen v. State Dep't of Health and Social Servs.***, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978). Given the division's expertise on the newly discovered evidence issues, deferential review is appropriate.

However, its makes no sense, nor is there any legal or statutory authority, for the division to decide the constitutional question of whether a person is restrained illegally due to the ineffective assistance of counsel during the revocation proceedings. This issue does not involve any determination of supervision rule violations, the appropriateness of revocation, the amount of time to be served, or sentence credit. This decision, therefore, is not within the special expertise of the department. In fact, given the familiarity of the circuit courts with this issue in the context of criminal proceedings, the decision to be made is squarely within the expertise of the circuit courts.

In any event, counsel's research did not reveal any administrative code or rule of a formalized procedure or mechanism for a post-revocation motion for relief before the division, including a claim of newly discovered evidence pursuant to ***Booker***.

CONCLUSION

For all of the reasons set forth above, and in his brief-in-chief and his reply brief, Mr. Redmond respectfully requests that this Court enter an order reversing the circuit court's denial of his petition for writ of habeas corpus and remanding this case to the circuit court for an evidentiary hearing on the petition for writ of habeas corpus.

Dated this 20th day of January, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,007 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 20th day of January, 2016.

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