

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No.2014AP002095

STATE OF WISCONSIN EX REL. VINCENT MARTINEZ,
PETITIONER-APPELLANT,

VS.

BRIAN HAYES,
RESPONDENT-RESPONDENT.

RECEIVED
DEC 02 2015
CLERK OF COURT OF APPEALS
OF WISCONSIN

ON APPEAL FROM THE CIRCUIT COURT FOR WASHINGTON COUNTY
THE HONORABLE ANDREW T. GONRING, PRESIDING
CIRCUIT COURT CASE NO.14CV594
ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

REPLY BRIEF OF PETITIONER-APPELLANT

VINCENT MARTINEZ #204321
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A. Issues Presented

1. Martinez states that habeas corpus is the proper forum to bring claims of ineffective assistance of counsel. The Wisconsin Supreme Court in State ex rel. Vanderbeke v. Endicott, 210 Wis.2d 502, 563 N.W.2d 883 (1997), the court stated:

The court stated in the absence of statutory provisions for judicial review of a revocation of probation, the "right of review of a revocation hearing is by certiorari directed to the court of conviction." Cady, 50 Wis.2d at 549-50. The Court of Appeals has, held, however, that habeas corpus is available in circumstances in which certiorari is not available, State ex rel. McMillian v. Dickey, 132 Wis.2d 266, 278-79, 392 N.W.2d 453 (Ct.App.1986), and that habeas rather than certiorari is the appropriate procedure for an allegation of ineffective assistance of counsel at probation revocation proceedings, when additional evidence is needed. Id. Vanderbeke, 210 Wis.2d at 522.

The Respondent appears to suggest that the Wisconsin Supreme Court's decision in Vanderbeke, supra, is an error, in holding that habeas corpus rather than certiorari is the proper forum for ineffective assistance of counsel claims. The Respondent relies upon State ex rel. Booker v. Schwarz, 2004 WI App.50, 270 Wis.2d 745, 613 N.W.2d 591, for the position that a motion to the Division of Hearings and Appeals should have been made to bring claims of ineffective assistance of counsel.

The Respondent does not cite any policy or procedure of the Division of Hearings and Appeals which allows ineffective assistance of counsel claims nor cite any decisions by the

State of Wisconsin Supreme Court or Court of Appeals, which states that a Booker, motion should be brought for ineffective assistance of counsel claims.

Instead, the Respondent states that there is presently pending before this Court two other cases, which raises this issue.

Martinez states that ineffective assistance of counsel claims has been clearly defined in Vanderbeke, supra, habeas corpus is the proper forum.

2. Martinez states that his Attorney Katherine Romanowich was ineffective in failing to object to hearsay statements being used against Martinez.

Martinez states that during the revocation hearing, that the Administrative Law Judge identified all the exhibits which were submitted by Extended Supervision Agent Jennifer Duffy-Juoni (R.50:3-4).

Martinez states that once the exhibits were marked, the following exchange took place:

ADMINISTRATIVE LAW JUDGE: Ok. Any objections to any of those exhibits being received into evidence?

ATTORNEY ROMANOWICH: No.

ADMINISTRATIVE LAW JUDGE: Ok, they are received.
Ok, Ms. Duffy-Juoni do you have any witnesses other than yourself? (R.50:4)

Martinez states that his defence counsel Ms. Romanowich agreed that the exhibits should be received into evidence. Martinez states that in Wisconsin, evidence is defined by

WIS JI-CRIMINAL 103, which states isolated here:

Evidence is:

First, the sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness.

Second, the exhibits the court received, whether or not an exhibit goes to the jury room.

Third, any facts to which the lawyers have agreed or stipulated or which the court has directed you to find.

Anything you may have seen or heard outside the courtroom is not evidence. You are to decide the case solely on the evidence offered and received at trial.

Martinez states that WIS JI-CRIMINAL 155, EXHIBITS, states isolated here:

155 EXHIBITS

An exhibit becomes evidence only when received by the court. An exhibit marked for identification and not received is not evidence. An exhibit received is evidence, whether or not it goes to the jury room.

Martinez states that this was not a conditional receipt of the exhibits, the Administrative Law Judge made clear, "any objections to those exhibits being received into evidence ?" (emphasis added). Attorney Romanowich stated "No." (emphasis added). (R.50:4)

Martinez states that he never had a chance to confront and cross-examine the witnesses, that there was no preliminary proceedings, there was no preliminary hearings where the witnesses were present and subject to cross-examination. The reliability of the witnesses and police reports were never established.

Martinez states according to State ex rel. Simpson v. Schwarz, 2002 WI App.7, 250 Wis.2d 214, 640 N.W.2d 527, the court held that the hearsay evidence must be **reliable**.

Martinez states that some courts have held that for hearsay evidence to be deemed reliable, the evidence must "bear substantial guarantees of trust-worthiness." Some examples of evidence with sufficient "indicia of reliability" include:

- (1) the conventional substitutes for live testimony (e.g., affidavits, depositions, and documentary evidence);
- (2) statements falling under an established exception to the hearsay rule;
- (3) statements corroborated by detailed police investigative reports;
- and (4) statements corroborated by the releasee's own statements.

In the case presently before the Court, defence counsel Romanowich did not ensure that the evidence was reliable, and agreed that hearsay evidence could be used against Martinez.

3. Martinez states that Extended Supervision Agent Jennifer Duffy-Juoni did not provide Martinez with a copy of the medical reports, and did not provide a copy of the medical reports to the Hearing Examiner, even though she indicated as being included at the hearing (R.31:Ex.A page 2).

Martinez states that he should have been provided a copy of the medical reports, to disprove any claims by Kristy Villanueva that Martinez had physically assaulted her.

Martinez states that this issue was not addressed by the brief of the Respondent, and any issues which were not addressed by the Respondent should be conceded or waived.

See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp., 90 Wis.2d 97, 279 N.W.2d 493 (Ct.App.1979), there the court held:

Respondent on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute. Id.90 Wis.2d at 109.


B. Conclusion

1. Martinez states that the decision of the Circuit Court should be reversed, and the petition for a Writ of Habeas Corpus should be issued, either the Respondent grants Martinez a new hearing, or the original decision and order revoking Martinez' extended supervision should be reversed;

2. Martinez states that he request that this Court should do what is fair and just.

Dated this 1 day of December, 2015.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Vincent Martinez". The signature is written in black ink and is positioned above a solid horizontal line.

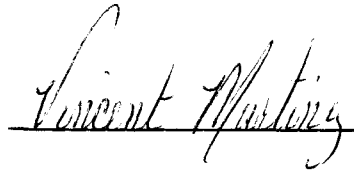
Vincent Martinez

C. Form and Length Certification

I hereby certify that this Reply Brief conforms to the rules contained in 809.19(8)(b) and (c) for briefs produced with a monospaced font.

The length of this Reply Brief is 5 pages.

Dated this 1 day of December, 2015.

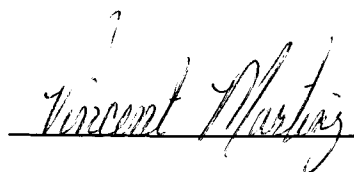
A handwritten signature in cursive script, reading "Vincent Martinez", written over a horizontal line.

Vincent Martinez

D. Certification of Mailing

I certify that this Reply Brief was deposited in the United States mail for delivery to the Clerk of Court of Appeals, and the Assistant Attorney General by first class mail. I further certify that the REply Brief was correctly addressed and postage pre-paid.

On this date 1 of December, 2015.

A handwritten signature in cursive script, reading "Vincent Martinez", is written over a horizontal line.

Vincent Martinez