COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2939

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN EX REL.
RAYMOND HOLLIMAN,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ, ADMINISTRATOR,
DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL J. BARRON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Raymond Holliman appeals *pro se* from an order denying his petition for a writ of certiorari following the revocation of his probation. He claims: (1) that his attorney at his revocation hearing was

ineffective; (2) that he was improperly revoked; and (3) that alternatives to revocation were not considered.[1] We affirm.

I. BACKGROUND.

Holliman was convicted of arson on October 7, 1992. On December 7, 1992, he was sentenced to four years' imprisonment, his sentence was stayed, and Holliman was placed on four years' probation. On October 28, 1996, Holliman was served a notice of probation violation for alleged possession/consumption of cocaine, possession/consumption of alcohol, failure to attend a Clinical Services substance abuse treatment program appointment, failure to pay toward court obligations, and for allegedly slapping a woman friend. On November 26, 1996, an administrative law judge (ALJ) of the Division of Hearings and Appeals entered a decision, following a hearing, revoking Holliman's probation.

Holliman then filed a petition for a writ of certiorari[2] with the trial court requesting that his probation be reinstated. The trial court denied Holliman's petition for a writ of certiorari on September 4, 1997. Holliman now appeals.

II. DISCUSSION.

[1] Holliman's other assertions dispersed throughout his brief will not be addressed. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398-99 (Ct. App. 1995) (court of appeals need not address "amorphous and insufficiently developed" arguments).

[2] The document is entitled "complaint," but was nonetheless treated as a writ of certiorari.

On appeal, "[w]e owe no deference to the circuit court's ruling as we directly review the department's decision." ***State ex rel. Macemon v. McReynolds***, 208 Wis.2d 594, 596, 561 N.W.2d 779, 780 (Ct. App. 1997).

Holliman argues he was denied effective assistance of counsel at his revocation hearing because (1) counsel never responded to Holliman's letters; and (2) counsel failed to conduct an investigation to show that Holliman attempted to enroll in an alcohol and other drug abuse (AODA) program. We find no merit to Holliman's claims. At the outset, we note that Holliman has raised his claims concerning ineffective assistance of counsel in a procedurally inappropriate manner.[3] Nevertheless, we will entertain his arguments and we conclude that his claims would not support the necessity for a hearing to test them.

The familiar two-pronged test for ineffective assistance of counsel claims requires proof that the attorney engaged in deficient performance and that the attorney's conduct resulted in prejudice to the client. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Bentley***, 201 Wis.2d 303, 312, 548 N.W.2d 50, 54 (1996); ***State v. Johnson***, 133 Wis.2d 207, 216-17, 395 N.W.2d 176, 181 (1986). To prove deficient performance, one must show specific

[3] The proper way to bring a claim of ineffective assistance of counsel in a revocation proceeding is by way of a petition for writ of habeas corpus. Holliman brought his claim in a writ of certiorari to the circuit court. *See* ***State v. Ramey***, 121 Wis.2d 177, 182, 359 N.W.2d 402, 405 (Ct. App. 1984). As we stated in ***Ramey***, the scope of review on certiorari is stringently confined to determining:

> (1) Whether the board kept within its jurisdiction; (2) whether it acted according to law; (3) whether is action was arbitrary, oppressive or unreasonable and represented its well and not its judgment; and (4) whether the evidence was such that it might reasonably [place] the order or determination in question.

Id. (citations and internal quotation marks omitted). It is apparent that an argument claiming ineffective assistance of counsel does not come under any of the above. *See* ***id.***

acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. The claim will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed as of the time of counsel's conduct. *See* ***id.*** We will "strongly presume" counsel to have rendered adequate assistance. *See* ***id.*** If this court concludes that one prong has not been proven, we need not address the other prong. *See* ***id.*** at 697. The proof of either the deficiency or the prejudice prong is a question of law which this court reviews *de novo*. *See* ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 715 (1985).

Holliman claims that counsel did not effectively communicate with him because counsel never responded to Holliman's letters. He contends, without explanation, that this fact illustrates that counsel's performance falls below that expected of an effective counsel. Holliman fails, however, to explain how this alleged lack of communication prejudiced him. "[I]f the defendant fails to allege sufficient facts in his motion … or presents only conclusory allegations … the trial court may in the exercise of its legal discretion deny the motion without a hearing." ***State v. Bentley***, 201 Wis.2d 303, 309-10, 548 N.W.2d 50, 53 (1996). Thus, we conclude Holliman failed to sufficiently allege that he was prejudiced by counsel's failure to respond to his letters.

Similarly, Holliman claims his counsel was deficient for failing to investigate Holliman's attempts to enroll in an AODA program, without explaining how this alleged deficiency prejudiced him. At the hearing, Holliman admitted to failing to attend his clinical services program, one of the reasons he was revoked. The reasons he gave for his missed appointment were that he lost the papers he needed and "[he] just didn't go in that appointment day." He also testified that he tried to sign up for treatment but the facility would not accept his

insurance and that he "just forgot about another [AODA] program that [he] knew was available and so [he] did not apply." Holliman does not now assert what an investigation by his attorney would have uncovered beyond what Holliman testified to. Given the record, even if an investigation would have uncovered other "attempts" by Holliman to enter into an AODA program, Holliman does not provide us with an explanation of how this information would have benefited him. Thus, the trial court properly rejected Holliman's assertions that his counsel was ineffective for failing to investigate his alleged attempts at entering an AODA program.[4]

Holliman next claims that he was improperly revoked. Essentially, he asserts the real reasons he was revoked are not the reasons stated and that he should not have been revoked for failure to pay court-ordered costs.[5] Within his argument, Holliman appears to assert that he was also wrongfully revoked for absconding. The record shows he was charged with violating his probation by consuming alcohol, consuming controlled substances, failing to follow up on substance abuse treatment, failing to pay court-ordered costs, and slapping a woman friend. The ALJ found each allegation had been proven except the slapping incident. Thus, Holliman's claim that he was revoked for absconding is belied by the record. Further, the ALJ found that Holliman was revoked for other valid reasons.

Holliman claims he failed to pay court-ordered costs because he was unable to. However, at the hearing, he testified that he failed to pay because he

[4] We reject Holliman's other allegations of ineffective assistance of counsel because his arguments are insufficiently developed. *See* ***Barakat***, 191 Wis.2d at 786, 530 N.W.2d at 398-99.

[5] Holliman refers to actual court-ordered costs as restitution.

did not know how much he owed. He never indicated he could not pay. In fact, in reference to another fee he owed, he claimed he could have paid it if he had known where to send the money. However, even if, as Holliman alleges, he failed to pay court-ordered costs because he was financially unable to pay, the ALJ revoked him for other serious infractions. The record supports the ALJ's findings that there were ample reasons for revocation.

Holliman's last argument is that no alternatives to revocation were considered by the ALJ. We disagree. ***State ex rel. Plotkin v. DHSS***, 63 Wis.2d 535, 217 N.W.2d 641 (1974), discusses the requirement that alternatives to incarceration be considered when the administrative body is exercising its discretion concerning the possibility of revocation. The steps that were approved and adopted by the ***Plotkin*** court, as pertinent here, are as follows:

> [T]he following intermediate steps should be considered in every case as possible alternatives to revocation:
>
> (i) a review of conditions, followed by changes where necessary or desirable;
>
> (ii) a formal or informal conference with the probationer to re-emphasize the necessity for compliance with the conditions;
>
> (iii) a formal or informal warning that further violations could result in revocation.

Id. at 545, 217 N.W.2d at 645-46 (citation and internal quotation marks omitted).

Holliman argues that the ALJ failed to properly consider alternatives to revocation pursuant to the requirements stated above. The record does not support this contention. After a lengthy discussion of Holliman's violations, the ALJ found "[t]here are no viable or reasonable alternatives to revoking

[Holliman's] probation." Further, the revocation summary by the probation agent, stated:

> Alternatives have been tried in the past and failed. Formal warnings were executed with little effect on his behavior.
>
> Due to Mr. Holliman's failure to comply with the rules of supervision, including absconding along with the seriousness of the current violations, the Electronic Monitoring Program was seen as having little value as an alternative.

It is clear that alternatives were tried in the past and that the ALJ considered such alternatives in revoking Holliman's probation. The ALJ further noted that "[i]t is likely that unless this offender is controlled to the extent necessary, he will continue to violate the terms of his probation and the law." Along with Holliman's tendency to repeat offenses, the ALJ discussed the seriousness of the current offenses and Holliman's inability to change his behavior, and revoked his probation accordingly.

We conclude that alternatives to revocation were properly considered and rejected.

For the reasons stated, we affirm the trial court.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.