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**DISTRICT IV**

October 12, 2018

*To:*

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

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2017AP735	State of Wisconsin v. Cle A. Gray (L.C. # 2008CF375)
2017AP736	State of Wisconsin v. Cle A. Gray (L.C. # 2010CF16)

Before Sherman, Kloppenburg and Fitzpatrick, 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).**

Cle A. Gray, pro se, appeals the circuit court's order that denied Gray's postconviction motion challenging the court's jurisdiction to sentence Gray following revocation of Gray's probation. 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 (2015-16).<sup>1</sup> We summarily affirm.

On August 11, 2010, Gray was placed on probation in two Columbia County criminal cases. In June 2014, the Department of Corrections revoked Gray's probation in the Columbia County cases. The revocation summary and warrant stated that Gray violated his supervision rules dated July 20, 2010, which Gray had signed as an alternative to revocation in a Dane County criminal case, including a rule that Gray not engage in any new criminal conduct.

Gray pursued postconviction relief following his sentencing after revocation. Gray argued that the circuit court lacked jurisdiction to sentence Gray following revocation because, Gray asserted, Gray's probation was improperly revoked for Gray's violation of the rules of his probation in the Dane County case. The court denied postconviction relief, and Gray appealed. We dismissed the appeal because Gray failed to file a timely conforming appellant's brief and appendix.

Gray filed the WIS. STAT. § 974.06 postconviction motion underlying this appeal in December 2016. Gray argued, again, that the circuit court lacked jurisdiction to sentence Gray following revocation because the revocation was for violation of supervision rules in the Dane County case. The court denied the motion.

On appeal, Gray continues to argue that the circuit court lacked jurisdiction to sentence him following revocation because, Gray contends, the revocation here was based on his violation

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

of probation in his Dane County criminal case. Gray argues that the sentencing following revocation violated Gray's rights under the double jeopardy clause. In support, Gray cites *State v. Stefanovic*, 215 Wis. 2d 310, 314-15, 572 N.W.2d 140 (Ct. App 1997), for the proposition that "a condition of a lapsed probation may not be reimposed in a later and different case" when the original probation has lapsed and the State has taken no steps to extend it. Gray argues that here, as in *Stefanovic*, Gray's original probation for the Dane County case had lapsed and the rules of that probation could not be reimposed in his later probation for the Columbia County cases. He contends that the sentence after revocation is therefore void and may be attacked at any time, citing *Kohler Co. v. ILHR*, 81 Wis. 2d 11, 25, 259 N.W.2d 695 (1977) ("When a court or other judicial body acts in excess of its jurisdiction, its orders or judgments are void and may be challenged at any time.").

The State responds that Gray's challenge to the validity of the revocation of his probation was not properly before the circuit court in Gray's WIS. STAT. § 974.06 motion because a challenge to revocation proceedings must be by writ of certiorari. See *State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978) (probation revocation independent from underlying criminal action); see also *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 550, 185 N.W.2d 306 (1971) (judicial review of probation revocation is by petition for certiorari in circuit court). The State also contends that Gray's arguments were already litigated in Gray's prior postconviction motion, and are therefore procedurally barred. See *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."). Finally, the State argues that Gray's arguments lack merit. We agree with the State that Gray is not entitled to relief.

We conclude that Gray's challenge to the court's jurisdiction to sentence him following revocation lacks merit, and we therefore need not address whether his argument is properly before us. Gray argues that the Dane County rules of supervision "discharged" prior to the Columbia County revocation proceedings and could not be "reimposed" in the Columbia County probation to support revocation. However, at the postconviction motion hearing, a probation and parole agent supervisor testified that Gray was on probation continuously from July 20, 2010, when he signed the rules of supervision in his Dane County case, through his placement on probation in these Columbia County cases on August 11, 2010. The supervisor testified that probation and parole policies would not have required Gray to sign new rules while he was subject to a continuous period of supervision unless those rules had changed. She also testified that Gray was subject to eighteen standard rules of supervision that apply in every supervision case, which included a rule that Gray not commit new crimes.

Thus, even though Gray was discharged from his probation in the Dane County case prior to the Columbia County revocation proceedings, the standard rules of his supervision remained in place. Because Gray was subject to a continuous term of supervision from the date he signed the rules of his supervision in his Dane County case until his Columbia County probation was revoked, he was continuously subject to the rules of his supervision. Particularly relevant here, Gray remained subject to the rule that he was not to engage in any new criminal conduct.

Moreover, Gray's reliance on *Stefanovic* is misplaced. The *Stefanovic* court held that the circuit court lost jurisdiction to order Stefanovic to serve a jail sentence that was imposed and stayed as a condition of probation after Stefanovic was discharged from that probation. 215 Wis. 2d at 319. The court cited the holding in *R.L.C. v. State*, 114 Wis. 2d 223, 338 N.W.2d 506 (Ct. App. 1983), that the juvenile court erred when it "reimposed a restitution condition of probation

which had been a condition of a prior probation which had lapsed.” *Stefanovic*, 215 Wis. 2d at 314. The *R.L.C.* court had concluded that “[r]equiring R.L.C. to now make restitution under a lapsed order amounts to being punished twice for the same offense,” violating the double jeopardy clause. *Stefanovic*, 114 Wis. 2d at 314. Thus, the *Stefanovic* and *R.L.C.* courts were concerned with conditions of probation that were specific to terms of probation that had lapsed. Here, in contrast, Gray is disputing the validity of the revocation of his probation for violating the standard rule that he not engage in new criminal conduct, which applied to a continuous term of supervision. *Stefanovic* and *R.L.C.* are not instructive here.

In sum, we reject Gray’s challenge to the court’s jurisdiction to sentence Gray following revocation. We therefore need not address whether Gray’s challenge is properly before us.

Therefore,

IT IS ORDERED that the orders are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*