

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 5, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP119

Cir. Ct. No. 2008CV4145

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. ROBERT HUBER,

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:
JEAN W. DI MOTTO, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Robert Huber, *pro se*, appeals from an order denying his petition for writ of *certiorari* directed to a decision of David W. Schwarz, Administrator, Division of Hearings and Appeals (the Division), in which the Division denied Huber's request to vacate a 2000 order revoking his

probation. Because the time for review of that revocation order has long since passed, we affirm the circuit court's order.

¶2 In 1988, Huber was convicted of two counts of forgery. The circuit court withheld sentence and placed Huber on probation for four years. The court also ordered Huber to pay over \$6000 in restitution. In 1992, restitution was not yet paid, and the circuit court extended Huber's probation for three years. Probation was revoked in 2000 due to repeated and lengthy periods of absconding and other violations of the rules of supervision. Huber did not seek *certiorari* review of the revocation decision. See *State ex rel. Reddin v. Galster*, 215 Wis.2d 179, 186–187, 572 N.W.2d 505, 508 (Ct. App. 1997) (revocation proceedings reviewable upon a timely petition for writ of *certiorari*). Huber returned to the circuit court for sentencing, and the circuit court imposed two concurrent ten-year prison terms.

¶3 Huber appealed and this court summarily affirmed. See *State v. Huber*, No. 2001AP3083-CR, unpublished slip op. (WI App June 6, 2003) (*Huber I*). In our opinion, we declined to address Huber's arguments that pertained to the underlying 1988 judgment of conviction or those related to the revocation of probation. See *id.* at 2–3. We confined our discussion to whether the imposition of two ten-year sentences was a proper exercise of sentencing discretion and whether Huber was entitled to sentence modification based upon a new factor. See *id.* at 3–5.

¶4 Huber subsequently filed a petition for a writ of *habeas corpus*. In his petition, Huber argued that the 2000 revocation order was illegal because he had already completed his probationary term and that his revocation counsel was ineffective for not pursuing that issue. See *State ex rel. Huber v. Benik*,

2005AP3108, unpublished slip op. ¶3 (WI App Sept. 18, 2007) (*Huber II*). The circuit court denied the petition and Huber appealed. We affirmed the circuit court's order. *See id.*, ¶1. In our decision, we reviewed the procedural history of the case, including Huber's previous "deci[sion] not to challenge the revocation order," and we stated that "[c]onsequently, [Huber] has waived any issues involving his revocation, with the exception of ineffective assistance of counsel." *Id.*, ¶2 (discussing *Huber I*). Consistent with *Huber I*, we stated that "the time to challenge the validity of [the] underlying (pre-revocation) judgment from 1988, has long passed" and that "Huber also explicitly did not challenge [the] revocation order." *Huber II*, unpublished slip op. ¶4. As to Huber's assertion that his revocation counsel was ineffective, we stated that Huber "must show that the decision not to challenge the revocation order was not a matter of Huber's personal choice or a strategic decision." *Ibid.* (citation omitted). Huber made no such claims and, accordingly, we held that he was "detained by virtue of a final judgment of the Milwaukee County Circuit Court ... [and] not entitled to habeas corpus relief." *Id.*, unpublished slip op. ¶5.

¶5 On February 11, 2008, Huber filed a petition with the Division to vacate the order revoking his probation. Huber argued that his probationary term had expired on November 3, 1995 because the Department of Corrections "never properly tolled his probation service time." Huber contended, therefore, that the Department of Corrections lacked subject matter jurisdiction to revoke his probation in 2000. After Huber received two letters denying the request to vacate, Huber filed the underlying petition for a writ of *certiorari* with the circuit court. The circuit court ruled that "the doctrine of issue preclusion (formerly known as collateral estoppel) ... appl[ies] to the instant petition and precludes granting

Huber relief.” The circuit court, therefore, affirmed the Division’s decisions and dismissed Huber’s petition. Huber appeals.

¶6 In his *certiorari* petition and on appeal, Huber takes great pains to distinguish his current challenge to the probation revocation order from his previous challenges to the order. Huber points out that his earlier challenges to the validity of the revocation order concerned the restitution obligation and whether his probationary term was properly extended because of his failure to pay restitution. This latest argument—that the Department of Corrections did not properly toll his probation—is not “a restitution issue” and, in Huber’s view, he should not be barred from raising the argument at this time. Huber is mistaken.

¶7 As we noted in both *Huber I* and *Huber II*, Huber did not challenge the revocation order when it was entered in 2000. See *Huber I*, unpublished slip op. at 2; *Huber II*, unpublished slip op. ¶¶2, 4. In both prior cases, we held that Huber’s failure to seek review of the revocation order constituted a waiver of any issues involving his revocation. See *Huber I*, unpublished slip op. at 2–3 (refusing to consider Huber’s arguments pertaining to the extension of his probation based on nonpayment of restitution and his revocation); *Huber II*, unpublished slip op. ¶2 (holding that Huber “has waived any issues involving his revocation, with the exception of ineffective assistance of counsel”). That waiver extends both to the restitution-related issues that Huber has previously attempted to make and to his current argument. Huber could have challenged the authority of the Department of Corrections to revoke his probation when the revocation order was entered in 2000. However, he chose not to do so, and he cannot mount repetitive attacks on the revocation order. It does not matter that Huber’s latest argument is not related to the earlier restitution-related arguments. Huber did not timely file a petition for writ of *certiorari* when the revocation order was first entered in 2000. Regardless

of the nature of his underlying legal argument, Huber cannot challenge the revocation order nearly a decade after it was entered.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

