COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP934 **Cir. Ct. No. 2012CV13428**

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

STATE OF WISCONSIN EX REL. JUAN ANTONIO RODRIGUEZ,

PETITIONER-APPELLANT,

V.

MARK RICE, WARDEN, JOHN C. BURKE CORRECTIONAL CENTER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: MARSHALL B. MURRAY, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Juan Antonio Rodriguez, *pro se*, appeals from the circuit court order denying his petition for a writ of *habeas corpus*. Rodriguez alleged that he had received ineffective assistance of counsel at his revocation hearing. We conclude that Rodriguez has failed to demonstrate ineffectiveness of

his counsel and, thus, he fails to show he is restrained contrary to the Constitution. We therefore affirm the order.

¶2 In December 2003, Rodriguez was convicted of burglary and possession of a firearm by a felon. He was sentenced to five years' initial confinement and five years' extended supervision for the robbery, and a concurrent two years' initial confinement and one year of extended supervision for the possession. In February 2008, he was discharged to extended supervision. Around June 2011, the Department of Corrections began proceedings to revoke the supervision on two grounds: first, that Rodriguez had failed to notify his agent of a change in employment status within seventy-two hours as required, and second, that Rodriguez had struck his girlfriend in the face, causing injury.

¶3 Rodriguez admitted the first ground. After a hearing, the administrative law judge (ALJ) found that Rodriguez had committed the second ground. Of five years and two days available, the ALJ ordered Rodriguez reconfined for three years and one day. Rodriguez attempted an appeal to the Division of Hearings and Appeals. The administrator noted that the appeal was late but further ruled that even if the appeal had been timely, the administrator would have affirmed the ALJ's determinations.

¶4 Rodriguez then petitioned the circuit court for a writ of *habeas corpus*, claiming the ineffective assistance he received at the revocation hearing deprived him of due process. The State objected, arguing that because Rodriguez had subsequently pled guilty to a disorderly conduct charge stemming from his assault on his girlfriend, the issue was moot. The circuit court denied the writ petition, finding that "the record conclusively demonstrates that Rodriguez is not

entitled to the requested relief" and agreeing with the State that "the matter is moot because Rodriguez has been convicted." Rodriguez appeals.

¶5 A writ of *habeas corpus* is available under limited circumstances and subject to three prerequisites. *See* ***State ex rel. Marberry v. Macht***, 2003 WI 79, ¶23, 262 Wis. 2d 720, 665 N.W.2d 155. "First, the petitioner must be restrained of his liberty. Second, the restraint must have been imposed … contrary to constitutional protections. Third, the petitioner must demonstrate that there are no other adequate remedies available in the law." ***Id.*** (citations omitted).

¶6 By alleging ineffective assistance of counsel, Rodriguez is effectively claiming his restraint was imposed contrary to constitutional protections. *See* ***State ex rel. Griffin v. Smith***, 2004 WI 36, ¶45, 270 Wis. 2d 235, 677 N.W.2d 259 (acknowledging right to counsel at probation revocation hearings); ***State ex rel. Schmelzer v. Murphy***, 201 Wis. 2d 246, 253, 548 N.W.2d 45 (1996) (where right to counsel exists, counsel must be effective). To prevail on an ineffective-assistance claim, a defendant must show deficient performance—that is, that counsel's conduct fell below an objective standard of reasonableness—as well as prejudice, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62 (internal quotation marks omitted; citations omitted). The ultimate determination of whether counsel was ineffective presents a question of law that this court reviews *de novo*. *See* ***State v. Balliette***, 2011 WI 79, ¶19, 336 Wis. 2d 358, 805 N.W.2d 334; ***Marberry***, 262 Wis. 2d 720, ¶8 (we review legal issues in a *habeas corpus* petition *de novo*).

¶7 Rodriguez alleged in his writ petition that revocation counsel was ineffective for failing "to properly impeach the alleged victim" and for failing to subpoena Rodriguez's relatives to testify about the victim's "habit of being the primary aggressor and Rodriguez the victim in every situation." The State argued, and the circuit court agreed, that the issue was moot in light of Rodriguez's guilty plea to disorderly conduct. This is because under WIS. ADMIN. CODE § HA 2.05(6)(f), a violation of the rules of extended supervision "is proven by a judgment of conviction arising from conduct underlying an allegation." Thus, the reasoning goes, there is no reasonable probability of a different result—Rodriguez still would have had his extended supervision revoked, whether or not revocation counsel impeached the victim and subpoenaed Rodriguez's relatives.

¶8 Rodriguez concedes that he would likely still have been revoked, but asserts that he is "challenging the DURATION of reconfinement." He contends that "[t]he facts asserted, and the documents relied upon, in Rodriguez's habeas petition would have substantially undercut [the victim's] allegations of abuse, making the likelihood of a lesser [sentence] great." We, however, disagree with this analysis.

¶9 For one thing, the record does not contain a transcript of the revocation proceedings. Thus, Rodriguez provides no way for us to evaluate revocation counsel's actual performance. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993) (it is appellant's obligation to ensure a complete record on appeal). Further, according to the ALJ's written decision, revocation counsel did challenge the Department's reconfinement recommendation—three years and one day—as unduly harsh. However, a review of the ALJ's decision reveals that whatever "allegations of abuse" the victim in this case may have proffered, which Rodriguez thinks counsel should have better

countered, those allegations had no influence on the length of Rodriguez's reconfinement sentence.

¶10 First, irrespective of whether the victim was the aggressor at other times, the ALJ determined that Rodriguez was the aggressor here. Though Rodriguez claimed the victim had started this altercation by hitting him and breaking his glasses, the ALJ noted that Rodriguez had no evidence corroborating the breakage or any claim of injury to himself. The ALJ also explained that Rodriguez's version of events seemed physically implausible given the location of the victim's injuries. We additionally know that Rodriguez subsequently pled guilty to disorderly conduct based on his behavior. Based on this known behavior, the ALJ concluded that Rodriguez needed anger management and domestic violence counseling but, because he did not take full responsibility for his actions and expressed little remorse, community-based treatment was not likely to be successful, so confinement for treatment was warranted.

¶11 Second, in direct response to revocation counsel's argument that the recommended reconfinement sentence was unduly harsh, the ALJ explained that Rodriguez's adjustment during his first year on release had been poor. He absconded in August 2009. While in absconder status, he bought a vehicle without permission, was not at his approved residence, and drove without a valid driver's license, registration, or plates. This resulted in a sixty-day alternative to revocation sanction. After completing that sanction, Rodriguez possessed marijuana and again drove without a valid driver's license. Neither a ten-day sentence for the marijuana nor a ninety-day alternative to revocation left any impression on Rodriguez, because three months later, he stopped reporting to the Department. During this period of non-reporting, he got into the underlying altercation.

¶12 It is, therefore, clear that whether the victim in this case had a history of aggression towards Rodriguez or whether she was the victim of ongoing abuse was irrelevant to setting the length of reconfinement. Rather, the primary factor was Rodriguez's poor performance during his time on supervision. Thus, Rodriguez has not shown any prejudice from revocation counsel's failure to introduce evidence about the victim's alleged history of aggression at the revocation hearing. This means that revocation counsel was not ineffective, so Rodriguez's restraint is not contrary to the Constitution. Accordingly, we affirm the circuit court, albeit on different reasoning.[1] *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) ("[W]e may affirm on grounds different than those relied on by the trial court."); ***State v. King***, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984) ("If a trial court reaches the proper result for the wrong reason it will be affirmed.").

By the Court.—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[1] In addition, a revocation decision is ordinarily challenged by certiorari to the circuit court. *See* ***State ex rel. Johnson v. Cady***, 50 Wis. 2d 540, 550, 185 N.W.2d 306 (1971). Rodriguez's *habeas corpus* petition did not allege that certiorari review would have been an inadequate remedy.