COURT OF APPEALS
DECISION
DATED AND FILED

September 26, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP512 **Cir. Ct. No. 2015CV684**

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

STATE OF WISCONSIN EX REL. ARTHUR J. FARIOLE,

PETITIONER-APPELLANT,

V.

BRIAN FOSTER, WARDEN, GREEN BAY CORRECTIONAL INSTITUTION,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 PER CURIAM. Arthur J. Fariole, *pro se*, appeals from a circuit court order denying his petition for a writ of *habeas corpus*. Fariole's petition alleged that the attorney who represented him at his parole revocation hearing provided constitutionally deficient representation in six ways. On appeal, Fariole seeks a new parole hearing or a ***Machner*** hearing concerning his petition.[1] We affirm the circuit court's order denying Fariole's *habeas corpus* petition.

BACKGROUND

¶2 This is the second time we have considered Fariole's 2011 parole revocation hearing. In 2013, we affirmed the circuit court's order affirming the revocation of Fariole's parole.[2] *See* ***State ex rel. Fariole v. Schwarz ("Fariole I")***, No. 2012AP1729, unpublished slip op. (WI App Sept. 24, 2013). In doing so, we provided this background:

> Fariole was convicted of first-degree sexual assault, armed burglary, and armed robbery in 1980. He was sentenced to fifty years in prison. He was paroled in 2003, but revoked in 2004. In 2010, he was again paroled. A few months after his second release, the department again sought revocation. The hearing examiner revoked Fariole's parole, concluding that he should serve the remainder of his sentence, twenty-four years. The circuit court denied Fariole's [*pro se*] petition for *certiorari* review of the revocation proceedings without a hearing.

See ***id.***, ¶2.

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[2] The Honorable Maxine A. White affirmed the revocation of Fariole's parole. The Honorable Christopher R. Foley denied the *habeas corpus* petition at issue in this appeal.

¶3 In his *pro se* appeal, Fariole raised six issues, including three complaints about how the circuit court addressed his petition for a writ of *certiorari*—which we concluded were not relevant because we review the decision of the administrative agency, not the circuit court—and three issues related to the revocation hearing. *See* ***id.***, ¶¶1, 4. Fariole's three hearing-related arguments were: (1) "the hearing examiner should not have allowed [a witness named Gary] Klotz to testify by phone because it violated [Fariole's] constitutional right to confront and cross-examine the witnesses against him";[3] (2) the hearing examiner improperly admitted hearsay evidence: a written statement by a man named Jason Nichols;[4] and (3) the Administrator of the Division of Hearings and Appeals should have granted Fariole a new parole hearing or an evidentiary hearing based on an affidavit Fariole submitted concerning Klotz's testimony. *See* ***id.***, ¶¶1, 6, 7.

¶4 In January 2015, Fariole filed the *pro se* petition for a writ of *habeas corpus* that is the subject of this appeal. The petition alleged that the attorney who represented Fariole at his parole revocation hearing provided constitutionally deficient representation by failing to:

> a. Inform Fariole he had a right to confront accuser/witness Gary Klotz face to face (unless the hearing officer specifically found good cause for not allowing confrontation.)
>
> b. Inform Fariole he had to agree to a hearing conducted by telephone conference pursuant to [WIS. ADMIN. CODE § HA 2.05(6)(a)].

[3] Klotz testified that he and Fariole were planning to abscond from parole and that Fariole took from Klotz the money that Klotz had withdrawn to fund their escape.

[4] This court's opinion erroneously referred to the man as James Nichols; the correct name is Jason Nichols. *See* ***State ex rel. Fariole v. Schwarz ("Fariole I")***, No. 2012AP1729, unpublished slip op., ¶6 (WI App Sept. 24, 2013).

> c. Object to a telephone conference hearing and failed to request that Fariole had a federal constitutional right to confront accuser/witness Gary Klotz face to face (unless the hearing officer specifically found good cause for not allowing confrontation.)
>
> d. Obtain and review a[n] 8 page handwritten statement originally given by Gary Klotz.
>
> e. Take the necessary steps to have Gary Klotz brought to the revocation hearing for face to face confrontation.
>
> f. Object to a written statement by Jason A. Nichols entered into the record at the revocation hearing by Fariole's [parole] agent despite the fact that Nichols failed to honor a subpoena to appear issued by the agent.

(Some capitalization, spacing, and punctuation omitted; Fariole's name substituted for "Petitioner.") The circuit court denied Fariole's petition in a written order without a hearing. This appeal follows.

LEGAL STANDARDS

¶5 "A circuit court's order denying a petition for writ of *habeas corpus* presents a mixed question of fact and law." ***State v. Pozo***, 2002 WI App 279, ¶6, 258 Wis. 2d 796, 654 N.W.2d 12. "Factual determinations will not be reversed unless clearly erroneous." ***Id.*** In contrast, "[w]hether [a] writ of *habeas corpus* is available to the party seeking relief is a question of the law that we review *de novo*." ***Id.*** In this case, because the circuit court denied Fariole's petition without a hearing, we will review *de novo* whether the allegations in the petition were sufficient to warrant relief.

¶6 A petitioner alleging ineffective assistance of counsel must prove both that counsel's performance was deficient and that the deficiency prejudiced the petitioner's defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

The test for deficient performance is whether counsel's representation "'fell below an objective standard of reasonableness.'" ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695 (citation omitted). To show prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Id.***, ¶37 (citation omitted). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Strickland***, 466 U.S. at 697. A circuit court may reject an ineffective assistance claim without holding an evidentiary hearing "'if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.'" ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (citation omitted).

DISCUSSION

¶7 At the outset, we note that Fariole's petition for a writ of *habeas corpus* was not notarized. On that basis alone, we could affirm the circuit court's dismissal of Fariole's petition. *See* ***State ex rel. Santana v. Endicott***, 2006 WI App 13, ¶¶10-11, 288 Wis. 2d 707, 709 N.W.2d 515 (state *habeas corpus* statute, WIS. STAT. § 782.04, requires that a petition for a writ of *habeas corpus* be verified, which means the petition must be signed in a notary public's presence). We will, however, briefly address the merits of Fariole's petition.[5]

[5] To the extent Fariole's appellate briefs raise new issues, we decline to address them because they are raised for the first time on appeal. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (issues raised for the first time on appeal are generally deemed waived).

¶8 Four of the petition's complaints about counsel's performance at the revocation hearing related to Klotz's telephonic testimony. Specifically, Fariole's petition alleged that his counsel should have told Fariole that he had a right to confront Klotz in person and "had to agree" before the hearing would be conducted by telephone. Fariole also argued that his counsel should have objected to Klotz's appearance by phone and should have taken "the necessary steps" to secure Klotz's in-person testimony.

¶9 The circuit court's 2012 decision provides helpful background on issues concerning Klotz's telephonic testimony. It indicates that before the revocation hearing, Fariole's parole agent asked the administrative law judge to allow Klotz, who was incarcerated in a different county, to testify by telephone. The circuit court's decision explains: "[T]he administrative law judge contacted all parties by email to inform them that there 'shouldn't be a problem [with Klotz's telephonic testimony], unless counsel has a legitimate objection to the use of a phone.'" (Bracketed language supplied by the circuit court.) Fariole's counsel did not object to Klotz's telephonic testimony before or at the hearing.

¶10 Fariole's petition essentially challenged his counsel's decision not to oppose Klotz's telephonic testimony. This is not the first time Fariole has registered this complaint. In a March 2011 letter to the Division of Hearings and Appeals, Fariole raised concerns about his counsel's decision not to object to Klotz's telephonic testimony and asked that his case be reopened. In a letter denying Fariole's request, Administrator David H. Schwarz addressed Fariole's concerns:

> [Y]ou assert that your attorney erred in failing to object to testimony being taken from witness Gary Klotz by telephone….

> …
>
> Your assertion that your attorney should have objected to the telephone testimony does not warrant a new hearing. This was a tactical decision made by your attorney at the time of your hearing. Although you now second-guess that decision, it does not mean that your counsel was ineffective and is not a valid reason to grant a new hearing. Moreover, the administrative law judge has the authority to take telephone testimony where there is good cause to do so. *See* [WIS. ADMIN. CODE] § HA 2.05(6)(a). The fact that Mr. Klotz was in custody at a different correctional facility from where the hearing was held obviously made it extremely difficult for the department to have him testify in person. Consequently, there was good cause to take Mr. Klotz's testimony by telephone.

(Italics added.)

¶11 With that background in mind, we consider the petition's allegations about counsel's performance with respect to Klotz's telephonic testimony. We conclude that Fariole's claims fail for several reasons. First, Fariole's petition did not adequately explain how Fariole was prejudiced by counsel's alleged deficiencies. The petition implied that allowing Fariole to confront Klotz "face to face" would have caused Klotz to testify differently, but that assertion is no more than speculation. Moreover, even if counsel had objected, it is not clear that the administrative law judge would have ignored logistical concerns and required Klotz to testify in person, especially where—as Administrator Schwarz found in 2011—those logistical concerns constituted "good cause to take Mr. Klotz's testimony by telephone."

¶12 Fariole's arguments also fail to the extent he is attempting to relitigate issues that were previously decided against him by the Division of Hearings and Appeals, the circuit court, and this court. *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."). For instance, Fariole's petition explicitly challenged Schwartz's finding that it would have been "extremely difficult for the department to have [Klotz] testify in person." The petition also asserted, citing due process case law, that allowing Klotz to testify by telephone "was not an adequate alternative to live testimony." This court specifically rejected Fariole's constitutional arguments and concluded that the administrative law judge "did not err by allowing Klotz to testify by phone." *See* ***Fariole I***, No. 2012AP1729, ¶5. Fariole is barred from relitigating those issues. *See* ***Witkowski***, 163 Wis. 2d at 990.

¶13 For the foregoing reasons, we conclude that Fariole's ineffective assistance claims related to Klotz's telephonic testimony fail. Next, we turn to the petition's allegation that counsel performed deficiently by failing to "[o]btain and review" an eight-page, handwritten statement from Klotz. Fariole's petition provided only limited information concerning this handwritten statement. It asserted that Fariole's parole agent was allowed to present as evidence "a condensed 3 page statement of selected portions of the 8 page statement" and that "[t]his rendered the proceedings fundamentally unfair and unreliable." (Emphasis and one set of parentheses omitted.) Fariole's petition indicated that he had not been able to procure a copy of the eight-page statement and suggested that Fariole should be allowed to subpoena his parole agent to obtain a copy of that statement.

¶14 In his appellate brief, Fariole has provided additional information. He notes that the parole agent testified that Klotz wrote out an eight-page, handwritten statement. The agent said that he typed the portion of the statement related to Fariole onto a Department of Corrections form, which Klotz later

signed. When Klotz testified at the hearing, he confirmed that he had reviewed the typed statement and signed it.

¶15 Fariole is not entitled to relief based on his allegation that he was prejudiced by counsel's alleged failure to secure Klotz's original handwritten statement. As Fariole admits, he does not know what the handwritten statement said. Fariole's petition did not even allege what the statement might have said or explain how it might vary from either the statement typed on the Department of Corrections form or Klotz's testimony at the hearing. In short, Fariole's petition did not adequately allege or demonstrate prejudice.

¶16 Finally, we consider Fariole's allegation that his counsel should have objected to the admission of a written statement by a man named Jason Nichols. This allegation fails because Fariole has not shown that counsel's objection would have been sustained; thus, he cannot demonstrate prejudice. Fariole's claim is a variation of the argument he advanced in his prior appeal, where he asserted "that the hearing examiner improperly admitted into evidence a written statement from [Jason] Nichols because it was hearsay." *See* ***Fariole I***, No. 2012AP1729, ¶6. We rejected that argument, recognizing that "[h]earsay is admissible during all administrative proceedings, including parole revocations." Fariole cannot relitigate the admissibility of Nichols's statement. *See* ***Witkowski***, 163 Wis. 2d at 990.

¶17 In summary, we conclude that Fariole was not entitled to relief or a hearing on his petition for a writ of *habeas corpus*. His claims were insufficient and, in some instances, barred by previous litigation. We affirm the circuit court's order.

By the Court.—Order affirmed.

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