COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP409 **Cir. Ct. No. 2006CV4328**

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

STATE OF WISCONSIN EX REL. DORIAN BROWN,

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. DiMOTTO, Judge. *Affirmed*.

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

¶1 FINE, J. Dorian Brown appeals, *pro se*, a circuit-court order affirming on *certiorari* review the revocation of his probation. Brown claims that: (1) the Division of Hearings and Appeals did not have jurisdiction to revoke his

probation; (2) he was denied the right of confrontation; and (3) his revocation-hearing lawyer was ineffective. We affirm.

I.

¶2 In October of 2002, Brown was convicted of two counts of not paying child support in the 1990s. *See* WIS. STAT. § 948.22(2) (1993–94). The circuit court imposed a stayed prison sentence and placed him on probation in July of 2003. Brown did not sign written probation rules in connection with the failure-to-support convictions. He had, however, signed written probation rules in May of 2002, when he was placed on probation for the unrelated crimes of possessing cocaine and tetrahydrocannabinols and obstructing an officer. Among the rules that Brown signed were directions that he: (1) avoid all conduct that violated federal or state statutes; (2) not engage in any assaultive, violent, or threatening behavior; (3) reside in and not leave Milwaukee County without his probation agent's written consent; and (4) pay monthly supervision fees. Brown was discharged from probation on the drug and obstructing crimes in November of 2004. He remained on probation for the child-support crimes.

¶3 In February of 2006, Brown's probation agent notified Brown that he had committed seven probation violations:

> 1. Since on or about 11-12-2002, Dorian Brown had failed to make payments toward his probation supervision fees.
>
> 2. On or about 08-21-2005, Dorian Brown while in the area of 1706 Western Avenue #37, Green Bay WI hit the victim Bambi Loeffler without her consent.
>
> 3. On or about 08-21-2005, Dorian Brown while in the area of 1706 Western Avenue #37, Green Bay WI kicked the victim Bambi Loeffler without her consent.
>
> 4. On or about 08-21-2005, Dorian Brown while in the area of 1706 Western Avenue #37, Green Bay WI dragged

> the victim Bambi Loeffler into the bedroom without her consent.
>
> 5. On or about 08-21-2005, Dorian Brown while in the area of 1706 Western Avenue #37, Green Bay WI threatened to start the victim Bambi Loeffler on fire.
>
> 6. On or about 08-21-2005, Dorian Brown while in the area of 1706 Western Avenue #37, Green Bay WI put a cigarette out on the back of the victim Bambi Loeffler.
>
> 7. Between 05-03-2002 and 08-21-2005, Dorian Brown left Milwaukee County and went to Brown County [Green Bay, WI] without the consent of [his] probation and parole agent.

(Rule violations omitted; first set of brackets in original.)

¶4 Several witnesses testified at Brown's probation revocation hearing, including Brown's probation agent. On cross-examination, the agent told the judge that while Brown did not receive a set of rules when he was placed on probation for the child-support crimes, she told him that the rules he signed in May of 2002 still applied:

> Q Could you clarify, for the record, did Mr. Brown ever receive any rules for this case in particular when he started supervision [on] July 28 of 2003?
>
> A He was still on supervision for the other case and at that point, it wasn't necessary, I didn't think, to do rules again. So, rules were still in effect.
>
> Q Was this communicated to Mr. Brown that his rules that were signed previous to this supervision were still applicable to the … supervision as … after July 28th of 2003?
>
> A Yes. Because this … this probation started while he was still on the previous probation.

(Ellipses in original.)

¶5 In a written decision, the administrative law judge determined that Brown had committed all of the violations. Brown appealed to the Division of Hearings and Appeals. The Division sustained the administrative law judge's findings of fact and legal conclusions.

II.

¶6 On appeal, we review the decision of the Division of Hearings and Appeals. ***State ex rel. Simpson v. Schwarz***, 2002 WI App 7, ¶10, 250 Wis. 2d 214, 222, 640 N.W.2d 527, 532. Our review of a probation revocation is limited to the following questions: (1) whether the Division kept within its jurisdiction; (2) whether the Division acted according to law; (3) whether the Division's actions were arbitrary, oppressive, or unreasonable and represented its will rather than its judgment; and (4) whether the evidence was such that the Division might reasonably make the decision in question. ***Ibid.***

A. *Jurisdiction.*

¶7 Brown claims that the Division did not have jurisdiction because he had been discharged from the probation imposed for the drug and obstructing crimes, and, also, because he had not signed the rules in connection with his child-support convictions. Although he did not assert these two interrelated arguments before the Division, we address them because the jurisdiction of an administrative agency may be raised at any time. ***Kennedy v. Wisconsin Dep't of Health & Soc. Servs.***, 199 Wis. 2d 442, 448–449, 544 N.W.2d 917, 919 (Ct. App. 1996).

¶8 WISCONSIN STAT. § 973.10(1) places a probationer in the custody of the Department, and thus within the jurisdiction of the Division, "under conditions set by the court and rules and regulations established by the department." *See also*

§ 973.10(2).[1] Thus, even though Brown did not sign written rules when he was placed on probation for the child-support crimes, he was still required to abide as a matter of law with departmental regulations, including the requirements in WIS. ADMIN. CODE §§ DOC 328.04(3)(a), (d), and (n), that he: "[a]void all conduct which is in violation of a state statute"; "[i]nform the agent of his or her whereabouts and activities as directed"; and "[p]ay [a] supervision or monitoring fee." *See* ***State ex rel. Rodriguez v. Department of Health & Soc. Servs.***, 133 Wis. 2d 47, 52, 393 N.W.2d 105, 107 (Ct. App. 1986) (Department had jurisdiction to revoke probation "even without a written agreement"). Further, as we have seen, Brown's probation agent told Brown when placing him on probation for the child-support crimes in July of 2003 that the rules he signed in 2002 still applied. In short, while Brown had been discharged from the drug and obstructing crimes, he was still in the custody of the Department for the child-

[1] WISCONSIN STAT. §§ 973.10(1) and (2) provide, as material:

> **(1)** Imposition of probation shall have the effect of placing the defendant in the custody of the department and shall subject the defendant to the control of the department under conditions set by the court and rules and regulations established by the department for the supervision of probationers, parolees and persons on extended supervision.
>
> ….
>
> **(2)** If a probationer violates the conditions of probation, the department of corrections may initiate a proceeding before the division of hearings and appeals in the department of administration. Unless waived by the probationer, a hearing examiner for the division shall conduct an administrative hearing and enter an order either revoking or not revoking probation. Upon request of either party, the administrator of the division shall review the order.

support crimes. Accordingly, the Division had jurisdiction over his probation revocation.

B. *Confrontation.*

¶9 Brown contends that he was denied his right to confrontation because the administrative law judge allowed Ricardo Morales, Bambi Loeffler's neighbor, to testify by telephone at Brown's probation revocation hearing. He also argues that at least part of Morales's telephonic testimony was hearsay. Brown did not argue these contentions before the Division. Accordingly, we decline to review them on appeal. *See* ***State v. Outagamie County Bd. of Adjustment***, 2001 WI 78, ¶55, 244 Wis. 2d 613, 647–648, 628 N.W.2d 376, 390 (party must raise issue before administrative agency to preserve it for review).

C. *Ineffective Assistance.*

¶10 Brown argues that his revocation-hearing lawyer was ineffective. Although that contention is not properly before us in this appeal, *see* ***State v. Ramey***, 121 Wis. 2d 177, 181–182, 359 N.W.2d 402, 405 (Ct. App. 1984) (ineffective-assistance claims in probation revocation proceedings raised through writ of habeas corpus), we address it nevertheless in the interest of judicial economy.

¶11 A defendant claiming ineffective assistance of counsel must establish that: (1) the lawyer was deficient; and (2) the defendant was prejudiced as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Ibid.*** That is, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he

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.***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Ibid.*** We need not look at the deficient-performance aspect unless the defendant has shown ***Strickland*** prejudice. ***Id.***, 466 U.S. at 697.

¶12 Brown contends that his lawyer should have interviewed Morales to determine whether Morales's testimony was credible. Brown has not shown prejudice. He does not allege what his lawyer would have learned had she interviewed Morales or how this information could have affected the administrative law judge's assessment of Morales's credibility. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994) (defendant who alleges a failure to investigate must allege with specificity what the investigation would have revealed and how it would have altered the outcome).

¶13 Brown also claims that his lawyer should have: (1) subpoenaed Morales to appear at the probation revocation hearing; and (2) objected when the administrative law judge allowed Morales to testify by telephone. He alleges that Morales could have been "reading from a script" or "being led with his testimony over the telephone." He offers no support in the Record, however, for these conclusory speculations. Further, in connection with the "prejudice" aspect of the two-fold ***Strickland*** test, Brown does not even allege that his lawyer was not able to meaningfully cross-examine Morales or that Morales's telephonic testimony made Brown's probation revocation hearing unfair. *See* ***Town of Geneva v. Tills***, 129 Wis. 2d 167, 176, 384 N.W.2d 701, 705 (1986) (testimony by telephone in civil jury cases permitted if right to fair trial is preserved).

¶14 Finally, Brown argues that his lawyer did not ensure that the administrative law judge prepared an adequate Record. Brown asserts that "[t]here are several omissions in the record and transcript that would leave a reviewing court without a complete record to review on certiorari to be able to determine a decision on a factual basis." This claim is conclusory and undeveloped. Brown, who, of course, was at the revocation hearing and thus would be able to tell us what, if anything affecting our review was missing, does not tell us what he claims was missing or how alleged gaps in the Record made the *certiorari* review either impossible or unreliable. *See* ***Barakat v. Department of Health & Soc. Servs.***, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (we will not review arguments that are "amorphous and insufficiently developed").

By the Court.—Order affirmed.

Publication in the official reports is not recommended.