COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP240 **Cir. Ct. No. 2011CV17614**

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

STATE OF WISCONSIN EX REL. ANGEL RODRIGUEZ,

PETITIONER-APPELLANT,

V.

MICHAEL DITTMAN, WARDEN, REDGRANITE CORRECTIONAL INSTITUTION,

RESPONDENT-RESPONDENT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Angel Rodriguez, *pro se*, appeals from a circuit court order dismissing his petition for a writ of *habeas corpus*. Rodriguez argues that the circuit court erroneously dismissed his petition, without considering its

merits, on grounds that the petition should have been filed with the court of appeals rather than with the circuit court. We agree with Rodriguez that the petition was properly brought in the circuit court. However, we affirm the dismissal of the petition on other grounds because we conclude that Rodriguez is not entitled to *habeas corpus* relief. We also reject Rodriguez's assertion that the circuit court is liable to pay Rodriguez $1000 pursuant to WIS. STAT. § 782.09 (2009-10).[1]

BACKGROUND

¶2 In 2007, Rodriguez was released on parole after serving about nine years in prison for second-degree reckless homicide and second-degree recklessly endangering safety. He was also on probation for possession with intent to deliver cocaine.

¶3 In 2009, the Department of Corrections sought to revoke Rodriguez's parole and probation and reconfine him for just under four-and-one-half years due to alleged violations of the Rules of Community Supervision applicable to Rodriguez, including: (1) changing residences without agent approval; (2) participating in the packaging of illegal drugs for resale; (3) participating in illegal drug dealing; (4) possessing 19.21 grams of cocaine; and (5) possessing 24.71 grams of marijuana.

¶4 A hearing was scheduled before an administrative law judge (ALJ) from the Wisconsin Division of Hearings and Appeals. Rodriguez appeared with

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

counsel. No transcript of that hearing has been made part of the record in this appeal, but according to the written decision ultimately issued by the ALJ, Rodriguez "stipulated to the truth of the allegations at the hearing." The decision stated:

> Rodriguez stipulated to possessing marijuana, cocaine and engaging in the packaging and selling of drugs. The Department provided a police report noting that Mr. Rodriguez had cocaine and marijuana on his person when he was stopped by police on January 24, 2009. A subsequent search of Mr. Rodriguez'[s] residence revealed sandwich baggies and $2900 in U.S. currency.

¶5 In addition, Rodriguez signed a written waiver of his right to a final revocation hearing and checked the box indicating he would like a hearing on the amount of reincarceration to be imposed. That hearing took place immediately, as the ALJ's decision explained: "As Mr. Rodriguez stipulated to the allegations at the hearing, the substance and testimony at the hearing was less about what happened and mostly about the period of reincarceration that the Department has requested."

¶6 The Department requested reconfinement for about sixty percent of the time remaining on Rodriguez's sentence, while Rodriguez asked for reconfinement for thirty percent of the remaining time. The ALJ rejected both recommendations and ordered Rodriguez reconfined for the entire remaining time available. The ALJ explained that Rodriguez was "on parole for some exceedingly serious behavior" and had "been found dealing drugs again." Rodriguez filed an administrative appeal; the ALJ's reincarceration order was affirmed.

¶7 Represented by new counsel, Rodriguez filed a petition for a writ of *certiorari* in the circuit court. He challenged his reincarceration on numerous

bases, including on grounds that the attorney who represented him at the reconfinement hearing provided ineffective assistance of counsel. The circuit court refused to consider the merits of the ineffective assistance claim, stating: "*Certiorari* review is limited, and does not include a critique of the strategic decisions made by [Rodriguez's] counsel during the hearing." (Italics added.)

¶8 Rodriguez appealed the denial of his petition for a writ of *certiorari* on grounds that the Department of Hearings and Appeals lacked jurisdiction to revoke his parole; it does not appear that he raised the issue of ineffective assistance of revocation counsel. We affirmed. *See* ***State ex rel. Rodriguez v. Schwarz***, No. 2010AP777, unpublished slip op. and order (WI App Dec. 17, 2010) (hereafter, "***Rodriguez I***").

¶9 In 2011, now proceeding *pro se*, Rodriguez filed the petition for a writ of *habeas corpus* that is at issue in this appeal. He alleged that his revocation counsel provided ineffective assistance in numerous ways. The State, by the Milwaukee County District Attorney's Office, moved to dismiss the petition on grounds that Rodriguez was alleging the ineffective assistance of appellate counsel and must therefore file his petition for *habeas corpus* in the court of appeals. The circuit court agreed and dismissed the petition. This appeal follows.[2]

DISCUSSION

¶10 Rodriguez argues that the circuit court erred when it dismissed his petition for a writ of *habeas corpus* after adopting the State's argument that his

[2] Before filing his notice of appeal, Rodriguez filed a motion for reconsideration that was not formally denied by the circuit court. In that motion, Rodriguez presented the argument that is successful on appeal: that his petition was properly filed in the circuit court.

petition had to be filed with the court of appeals. He also argues that the circuit court acted "fundamentally unfair" because Rodriguez was not given an opportunity to respond to the State's motion to dismiss.

¶11 The State, now represented by the Attorney General, concedes that if Rodriguez is alleging the ineffective assistance of *revocation* counsel, then "a petition for writ of *habeas corpus* to the circuit court is the correct vehicle for Rodriguez to raise his claim." (Italics added.) *See* ***State ex rel. Vanderbeke v. Endicott***, 210 Wis. 2d 502, 522, 563 N.W.2d 883 (1997) ("[*H*]*abeas* rather than *certiorari* is the appropriate procedure for an allegation of ineffective assistance of counsel at a probation revocation proceeding when additional evidence is needed.") (italics added); ***State ex rel. Reddin v. Galster***, 215 Wis. 2d 179, 186, 572 N.W.2d 505 (Ct. App. 1997) (recognizing "that a writ of *habeas corpus* may be available to raise a claim of ineffective assistance of counsel during probation revocation proceedings") (italics added). Having reviewed Rodriguez's petition, we agree that it is alleging that Rodriguez's revocation counsel was ineffective. Therefore, the petition should not have been dismissed on grounds that Rodriguez needed to file his petition with the court of appeals.

¶12 Nonetheless, we agree with the State that even though Rodriguez raised his claims in the proper court, the petition was properly denied because Rodriguez is not entitled to *habeas corpus* relief, for reasons explained below.[3]

[3] The State in its brief urged this court to affirm on grounds that Rodriguez's "claims are insufficient to entitle him to relief" and presented detailed argument as to why the petition was insufficient. In his reply brief, Rodriguez declined to address the merits of the State's arguments, asserting that they "are irrelevant" to the issues Rodriguez raised on appeal. Rodriguez's failure to respond to the State's arguments provides a basis to accept the State's arguments without additional discussion, *see* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed admitted), but we will briefly discuss the reasons why the petition was insufficient.

Therefore, we affirm the order dismissing Rodriguez's petition, albeit on other grounds. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (On appeal, "we 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."). We also reject Rodriguez's claim that he is entitled to $1000 pursuant to WIS. STAT. § 782.09 ("Any judge who refuses to grant a writ of *habeas corpus*, when legally applied for, is liable to the prisoner in the sum of $1,000.") (italics added).

I. Analysis of Rodriguez's petition for a writ of *habeas corpus*.

¶13 "A *habeas* petition must contain a statement of the legal issues and a sufficient statement of facts that bear on those legal issues, which if found to be true, would entitle the petitioner to relief." ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶18, 290 Wis. 2d 352, 714 N.W.2d 900. An "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. We will uphold any factual determinations unless clearly erroneous, but we will independently determine whether *habeas* relief is available under those facts. ***Id.*** In this case, because the circuit court denied Rodriguez's petition without a hearing, we will review *de novo* whether the allegations in the petition would be sufficient to warrant relief. *Cf.* ***State v. Allen***, 2004 WI 106, ¶¶9, 27 & 36, 274 Wis. 2d 568, 682 N.W.2d 433 (applying *de novo* review to the sufficiency of allegations to warrant the relief sought in the context of a postconviction motion).

¶14 Rodriguez's petition asserts that he was denied the effective assistance of revocation counsel. A circuit court may refuse to hold an evidentiary

hearing on an allegation of ineffective assistance of counsel "'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). To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a court concludes that the defendant has failed to prove one prong, it need not address the other prong. ***Id.*** at 697.

¶15 Rodriguez's petition and accompanying brief alleged that revocation counsel provided ineffective assistance in four ways. First, Rodriguez alleged that revocation counsel "erroneously advised [Rodriguez] to waive his right to have all 5 allegations proven at a final revocation hearing." He contends that "[i]t is standard fare for a parole agent to manufacture as many violations as possible" and that the four drug-related allegations by the Department were "identical in substance." He also asserted that the allegation that he changed residences without prior approval would not have been provable, because his girlfriend would have testified that Rodriguez was not living with her. In addition, Rodriguez said that "a great doubt to the extent of [his] criminal activities would have been raised" if his girlfriend had been called to provide testimony that would have called into question whether the sandwich bags and currency found in her home were used by Rodriguez in drug trafficking. Rodriguez concludes that "his stipulation to the violations [was] not voluntary."

¶16 We interpret Rodriguez's claim to be that his revocation counsel's advice was deficient and that Rodriguez was prejudiced because he involuntarily stipulated to the Department's allegations. We are not persuaded that Rodriguez's

petition adequately alleged either prong of the ***Strickland*** test. According to an affidavit from Rodriguez's girlfriend that Rodriguez filed with his petition, the girlfriend was present at the hearing and was prepared to offer testimony that would call into doubt the residency allegation and the extent of Rodriguez's criminal activities. The existence of a witness prepared to refute some allegations does not render an attorney's advice to admit allegations *per se* deficient, especially where there are other undisputed serious allegations, such as the possession of significant quantities of cocaine and marijuana. Moreover, Rodriguez does not explain how his waiver was involuntary, given that he was apparently aware that his girlfriend was available to refute some allegations. He has not explained why, despite that knowledge, he chose to accept his revocation counsel's advice and admit the allegations. We are unconvinced Rodriguez was entitled to a writ of *habeas corpus* or a ***Machner***[4] hearing based on the assertions in his petition.

¶17 The second argument that Rodriguez presented in his petition was that his revocation counsel erred when he "failed to object to procedural and jurisdictional defects" at the hearing. Rodriguez's allegations appear to be essentially the same as those he raised in his appeal of the denial of his petition for a writ of *certiorari*. *See* ***Rodriguez I***, No. 2010AP777, unpublished slip op. and order at 3-6. In that appeal, we rejected Rodriguez's arguments and concluded that the Division of Hearings and Appeals had "jurisdiction to revoke [Rodriguez's] parole and determine the sentence on reconfinement." *See* ***id.*** at 5. We also rejected Rodriguez's claim "that he was not given adequate notice that the

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

hearing before the ALJ would be the reincarceration hearing." *See* ***id.*** Because we have already concluded that the claimed jurisdictional and procedural defects lacked merit, it follows that Rodriguez has not shown that his revocation counsel was deficient for failing to raise those issues. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 ("Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit.").

¶18 Rodriguez's petition raised several other subissues in the context of his claim that his revocation counsel failed to raise procedural and jurisdictional defects. For instance, he asserted that "no record was made during the hearing of [his] final revocation hearing waiver." However, Rodriguez did not provide a transcript of the hearing before the ALJ, so neither this court nor the circuit court is in a position to evaluate Rodriguez's argument. *See* ***Lee v. LIRC***, 202 Wis. 2d 558, 560 n.1, 550 N.W.2d 449 (Ct. App. 1996) ("It is the appellant's burden to ensure that the record is sufficient to address the issues raised on appeal.").

¶19 Rodriguez's petition also asserted that he was treated differently from another parolee, that this constituted evidence that he was denied due process, and that "counsel['s] failure to object constitutes ineffective assistance of counsel." Rodriguez's allegations are conclusory and insufficient to demonstrate that Rodriguez was denied the effective assistance of counsel.

¶20 Rodriguez's third argument in support of his claim that his revocation counsel was ineffective was that counsel should have asserted a "breach of waiver agreement" argument because the ALJ was allowed to make a revocation decision before the Department made one. This appears to be a variation of the same argument that we rejected in Rodriguez's earlier appeal. *See*

Rodriguez I, No. 2010AP777, unpublished slip op. and order at 5 ("[I]t is clear from the language of [WIS. STAT. § 304.06(3)] that when, as here, a parolee waives a revocation hearing but requests a final administrative hearing as to reconfinement, [the Division of Hearings and Appeals] has jurisdiction to revoke parole and determine the sentence on reconfinement."). Revocation counsel cannot have been deficient for failing to raise a meritless argument. *See* ***Wheat***, 256 Wis. 2d 270, ¶14.

¶21 The fourth argument in Rodriguez's petition is that his revocation counsel performed deficiently by failing "to present mitigating argument" at the hearing before the ALJ. Because Rodriguez has not provided a transcript of the hearing, neither this court nor the circuit court can evaluate this claim and it must fail. *See* ***Lee***, 202 Wis. 2d at 560 n.1.

¶22 For the foregoing reasons, we conclude that the allegations in Rodriguez's petition are not sufficient to warrant relief. We affirm the dismissal of the petition on grounds different than those relied upon by the trial court.

II. Analysis of Rodriguez's claim for $1000.

¶23 In his appellate brief, Rodriguez for the first time seeks $1000 pursuant to WIS. STAT. § 782.09, which provides: "Any judge who refuses to grant a writ of *habeas corpus*, when legally applied for, is liable to the prisoner in the sum of $1,000." (Italics added.) Rodriguez's single paragraph argument does not explain the legal standards that would apply to an analysis of such a claim, whether he can seek relief under § 782.09 for the first time on appeal, whether he would have to file a separate civil action, or whether he could be entitled to $1000 if this court affirms the dismissal of his petition. His reply brief also did not address those issues. We decline to address the merits of Rodriguez's claim

because it is inadequately briefed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Order affirmed.

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