OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

August 15, 2023

To:

Hon. Paul R. Van Grunsven
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Appeals Division
Electronic Notice

Brian Keenan
Electronic Notice

Kevin O. Harper 486044
Green Bay Correctional Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

You are hereby notified that the Court has entered the following opinion and order:

2021AP497 State of Wisconsin ex rel. Kevin O. Harper v. Brian Hayes (L.C. # 2020CV2878)

Before Donald, P.J., Dugan and White, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kevin O. Harper, *pro se*, appeals an order of the circuit court affirming the decision of the Department of Hearings and Appeals (DHA) to revoke his extended supervision. He argues that the DHA administrator, Bryan Hayes, erred in multiple ways. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition, and affirm. *See* WIS. STAT. RULE 809.21(1) (2021-22).[1]

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

On August 9, 2005, Harper was convicted of two counts of armed robbery with the threat of force, and one count of attempted armed robbery with the threat of force. The circuit court sentenced Harper to seven years of initial confinement followed by seven years of extended supervision. Harper was released to his most recent term of supervision on April 7, 2015, following a previous revocation. On November 30, 2017, the Department of Corrections (DOC) submitted a revocation hearing request to the DHA alleging three violations: (1) cocaine possession; (2) cocaine distribution; and (3) possession of fake urine. On March 12, 2018, the DOC sent an amended hearing request to the DHA adding three additional violations relating to events that occurred while Harper was in the Waukesha County jail: (1) failure to comply with jail rules by covering the window in his cell; (2) failure to comply with jail rules by spitting on a corrections officer; and (3) failure to comply with jail rules by breaking jail property (a RIPP belt).[2]

In 2018, the matter proceeded to a revocation hearing, where Harper was represented by counsel. Harper admitted to possessing fake urine and covering the window of his jail cell, but denied the other allegations. Following the testimony of the Elm Grove police officers who investigated the cocaine allegations as well as multiple correctional officers who testified about Harper's behavior while incarcerated, the Administrative Law Judge (ALJ) issued a decision revoking Harper's extended supervision. The ALJ ordered Harper reconfined for four years. Harper appealed the ALJ's determination to Hayes, who affirmed the ALJ's determination. Harper then filed a petition for certiorari review in the Milwaukee County Circuit Court.

[2] A RIPP belt is a restraint belt used for transport.

On August 14, 2019, the circuit court affirmed the DHA's revocation decision. Harper appealed that decision and this court dismissed the appeal.

On January 29, 2020, Harper requested a new revocation hearing based on alleged procedural defects during the 2018 hearing and newly discovered evidence. Among other things, Harper alleged that: he was denied the opportunity to call witnesses, he was not given notice of three alleged parole violations; the ALJ was biased; the ALJ applied the wrong legal standard; he was denied a preliminary hearing and a hearing within fifty days; the ALJ denied him the opportunity to contest two allegations; and the ALJ did not weigh the credibility of the witnesses. Harper also alleged that newly discovered evidence would refute the allegations. The evidence included, but was not limited to, statements from inmates at the Waukesha County jail, testimony from Harper's father relevant to the cocaine-related allegations, DNA evidence, and evidence of inappropriate police behavior, Hayes denied Harper's request for a new hearing. Hayes found that none of the testimony or affidavits submitted satisfied the standard for newly discovered evidence because they were not material to the outcome of the initial revocation hearing or were available at the time of the revocation hearing. As to the alleged procedural defects, Hayes stated that many of the defects were previously addressed and that Harper was effectively filing successive appeals of his revocation. Hayes then filed the *pro se* certiorari action in the circuit court that underlies this appeal, raising many of the same issues that were adjudicated in his previous petition. The circuit court affirmed. This appeal follows.

When we review a certiorari matter, we consider the merits independent of the circuit court. *See* ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 385-86, 585 N.W.2d 640 (Ct. App. 1998). Our review is limited to whether: (1) the agency stayed within its jurisdiction; (2) the agency acted according to law; (3) the agency's action was arbitrary, oppressive, or

unreasonable; and (4) the agency might reasonably make the decision it did based on the evidence. *See* ***State ex rel. Riesch v. Schwarz***, 2005 WI 11, ¶13, 278 Wis. 2d 24, 692 N.W.2d 219. In our review, we defer to the determinations of the DHA. *See* ***Von Arx v. Schwarz***, 185 Wis. 2d 645, 655, 517 N.W.2d 540 (Ct. App. 1994).

"If a movant wishes to have an evidentiary hearing on a newly discovered evidence claim, he or she may not rely on conclusory allegations." ***State ex rel. Booker v. Schwarz***, 2004 WI App 50, ¶15, 270 Wis. 2d 745, 678 N.W.2d 361. "To obtain an evidentiary hearing on the newly discovered evidence claim, the movant must allege with specificity [the newly discovered evidence] factors in the post-revocation motion." ***Id.*** "Whether the motion sufficiently alleges facts which, if true, would entitle the movant to relief is a question of law to be reviewed independently by this court." *See* ***id.*** "If the [DHA] refuses to hold a hearing based on its findings that the record as a whole conclusively demonstrates that the movant is not entitled to relief, this court's review is limited to whether the [DHA] erroneously exercised its discretion in making this determination." ***Id.***

As stated, Harper contends that numerous procedural defects took place during his 2018 revocation hearing; however, Harper seemingly ignores the facts that: (1) all but one of his allegations were addressed in the circuit court's first decision upholding Hayes's revocation determination;[3] and (2) Harper cannot bring a second action raising arguments that were either raised or could have been raised in his first certiorari action. "An aggrieved defendant should

[3] The one issue the circuit court did not expressly address in Harper's first petition was that the DHA failed to hold a hearing within fifty days and failed to hold a preliminary hearing. However, Harper does not explain why he fits into one of the exceptions to successive petitions outlined in ***State ex rel. Macemon v. Christie***, 216 Wis. 2d 337, 576 N.W.2d 84 (Ct. App. 1998).

raise all claims of which he or she is aware in the original writ of certiorari proceeding; those claims can then be reviewed by the circuit court and, if desired, by the appellate court." ***State ex rel. Macemon v. Christie***, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). Further, "[s]uccessive, and often reformulated, claims clog the court system and waste judicial resources." ***Id.*** A petitioner can proceed only if he shows a sufficient reason that arguments of a constitutional dimension were not raised or if he offers a sufficient basis for why a claim was inadequately argued in the first proceeding. ***Id.*** at 343-44. Harper has not offered a sufficient reason for why these issues can be raised now in a successive petition.

As to Harper's newly discovered evidence claim, we agree with Hayes and the circuit court that none of the evidence Harper puts forth constitutes newly discovered evidence. A person seeking a new revocation hearing based on newly discovered evidence must satisfy a five-prong test: (1) the evidence must have come to the moving party's knowledge after the revocation hearing; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony that was introduced at the revocation hearing; and (5) it must be reasonably probable that a different result would be reached at a new hearing. *See* ***Booker***, 270 Wis. 2d 745, ¶12. We review the DHA's decision, not that of the circuit court. *See* ***id.***, ¶10.

The supposed newly discovered evidence was either known to Harper at the time of his first revocation hearing, available to Harper at that time, or irrelevant to the allegations. Harper has not adequately explained how or why he failed to obtain any of this evidence prior to the first revocation hearing. Nor does he explain why he was not negligent in failing to obtain the evidence. Moreover, Harper cannot show that any of the evidence would have yielded a different result. Much of the evidence pertaining to the cocaine-related allegations was

undisputed. Harper admitted to two of the violations, and testimony supported the remaining allegations. Harper would need to overturn multiple allegations to make it reasonably possible that he would not have been revoked at all. The evidence Harper puts forth does not show that to be a likely possibility.

For the foregoing reasons, we affirm.

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals