COURT OF APPEALS
DECISION
DATED AND FILED

August 14, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2005AP3106 **Cir. Ct. No. 2005CV8170**

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

STATE OF WISCONSIN EX REL. LEONARD WHITE,

PETITIONER-APPELLANT,

V.

MICKEY MCCASH, WARDEN, FELMERS O. CHANEY CORRECTIONAL CENTER,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County: PATRICIA D. MC MAHON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Leonard White appeals from orders denying his petition for a writ of habeas corpus and his related motion for reconsideration. The issue is whether White's second habeas corpus petition, alleging the

ineffective assistance of counsel, is procedurally barred. We affirm the denial of White's second habeas corpus petition because: (1) his ineffective assistance claims against trial counsel were or could have been previously litigated in his prior proceedings; (2) he fails to allege a sufficient reason in his certiorari petition for failing to previously raise those claims; (3) he is not entitled to appellate counsel in a revocation proceeding, and thus, cannot maintain a viable ineffective assistance claim; and (4) the cumulative effect of his failed ineffective assistance claims does not combine to form a viable claim.

¶2 After serving part of his sentences for multiple crimes, White was released on probation and parole.[1] Less than one month following his release, his agent alleged multiple violations of the probation and parole rules, and recommended revocation.

¶3 At the revocation hearing, a police officer, White's agent, and White testified. The Administrative Law Judge found the testimony of the police officer who arrested White and White's agent more credible than that of White, and revoked White's probation and parole. White appealed from the revocation order, which was affirmed by the Administrator of the Division of Hearings and Appeals ("Division"). White filed a petition for a writ of certiorari for judicial review of the Division's order. The circuit court affirmed. White appealed from the circuit court's order and this court affirmed. *See* ***State ex rel. White v. Schwarz***, No. 2004AP2314, unpublished slip op. (WI App Nov. 8, 2005) ("***White I***").

[1] The Division of Hearings and Appeals revoked White's "probation and parole." It is not clear from the record precisely for which cases White was released on probation and which on parole. Whether White was released on probation or parole is inconsequential to our decision.

¶4 In ***White I***, we rejected White's challenges to the substantiality of the evidence, and his claims that the Division's decision was arbitrary, oppressive or unreasonable. We also denied White's ineffective assistance claim for "counsel's failure to investigate this matter" as not properly before us in a certiorari petition. *See* ***id.***, ¶27.

¶5 White then filed a habeas corpus petition in Racine County where White was detained, alleging the ineffective assistance of counsel. The circuit court had evidently decided to conduct a ***Machner*** hearing on the ineffective assistance claims against counsel who represented White at the revocation hearing ("revocation counsel"), but ultimately dismissed the petition for White's circuit court counsel's failure to timely prosecute.[2] When it dismissed the petition, it attributed the failure to prosecute to White's counsel, but decided rather than changing venue to Milwaukee County, where White was then detained, it would simply dismiss the petition; the circuit court expressly ruled that "[t]his [dismissal] in no way should be interpreted as a decision on the merits of [White's] claim."

¶6 White then filed a *pro se* petition for a writ of habeas corpus in the Milwaukee County Circuit Court. Habeas corpus is the appropriate method to challenge counsel's representation at a revocation hearing. *See* ***State ex rel. Vanderbeke v. Endicott***, 210 Wis. 2d 502, 522-23, 563 N.W.2d 883 (1997). White's current habeas corpus petition challenges the effectiveness of revocation counsel and appellate counsel who represented him on appeal in ***White I***. White alleges numerous instances of ineffective assistance that we organize into four

[2] An evidentiary hearing to determine counsel's effectiveness is known as a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

categories. The first two categories raise counsel's failure to investigate, essentially to refute or impeach the testimony of the police officer and White's agent, counsel's failure to urge the Division to consider alternatives to revocation, and various claims involving the burglarious tools violation. The third category is that appellate counsel raised weak arguments in ***White I***. The fourth category is that the cumulative effect of the foregoing also constitutes ineffectiveness.

¶7 To maintain an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Prejudice must be "*affirmatively* prove[n]." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (emphasis in ***Wirts***). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶8 White's first category of claims relates to the substantiality of the evidence supporting revocation and the basis to consider alternatives to revocation. The Administrative Law Judge relied on what she reasonably viewed as credible evidence from the police officer and the agent regarding White's violation of certain conditions and his notification and receipt of the rules and regulations governing his probation and parole; she explained why she rejected

alternatives to revocation. In his habeas petition, White alleges that had his counsel investigated these facts, he could have found potential witnesses and evidence to refute or impeach that which resulted in his revocation. Preliminarily, White would need more specific allegations to demonstrate the reasonable probability of a different result than revocation to maintain a viable ineffective assistance claim. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) ("Moreover, '[a] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the [proceeding].'") (citation omitted; first alteration by ***Flynn***); *see also* ***Strickland***, 466 U.S. at 694; ***Wirts***, 176 Wis. 2d at 187. Second, and more significantly for purposes of this appeal, the underlying issues regarding the substantiality of the evidence and the credibility of the witnesses were addressed in ***White I***. *See* ***White I***, No. 2004AP2314, unpublished slip op., ¶¶17-20.

¶9 White's second subcategory of alleged ineffectiveness relates to numerous criticisms about another group of violations, his carrying burglarious tools. He challenges trial counsel's effectiveness for failing to challenge the constitutionally of the allegedly vague phrase "burglarious tools," for failing to challenge the substantiality of the evidence in that regard, and for failing to challenge the Division's authority to revoke on the basis of such a charge. We previously rejected many of these "burglarious tools" claims in ***White I.*** *See* ***id.***, ¶¶21-22. Consequently, we will not revisit previously rejected issues in an ineffective assistance context. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Insofar as the precise "burglarious tools" claims

were not directly litigated in ***White I***, White offers no reason why they could not have been.[3] *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994) (requires the defendant to allege a sufficient reason for failing to raise all challenges in the initial postconviction proceeding).

¶10 The trial court summarily denied White's habeas corpus petition as procedurally barred by ***Escalona***. White claims that because the trial court refused to proceed on his first habeas corpus petition because of his counsel's failure to timely prosecute, this petition cannot be procedurally barred as successive. We do not bar this petition as successive for that reason; we bar this petition because White's ineffective assistance claims are closely related to or are the same as those that were or could have been directly litigated in ***White I***.

¶11 White's third category claims the ineffective assistance of appellate counsel for her "worthless" representation in ***White I***. There is no right to counsel in an administrative appeal from a revocation order, much less the right to counsel in an appeal from the circuit court's denial of a certiorari petition for judicial review of a revocation order. *See* ***State ex rel. Mentek v. Schwarz***, 2000 WI App 96, ¶2, 235 Wis. 2d 143, 612 N.W.2d 746, *rev'd on other grounds*, 2001 WI 32, ¶2, 242 Wis. 2d 94, 624 N.W.2d 150. Consequently, there is no right to the effective assistance of counsel, or a claim for ineffective assistance for representation in ***White I***.

[3] On appeal, White claims that he could not litigate counsel's ineffectiveness in a certiorari proceeding. First, his "sufficient reason" must be alleged in the petition itself to afford the trial court the opportunity to determine the sufficiency of his reason. Second, these claims need not have been raised in the ineffective assistance context; they could have been raised directly.

¶12 White lastly claims that the cumulative effect of all of the foregoing instances of ineffectiveness constitute a claim sufficient to warrant a ***Machner*** hearing. Combining unsuccessful claims of ineffectiveness does not construct a successful consolidated claim. Stated otherwise, "[a]dding them together adds nothing. Zero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). Therefore, we affirm the circuit court's orders denying White's petition for a writ of habeas corpus and his correlative motion for reconsideration.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).