

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 29, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1664

Cir. Ct. No. 2005CV3320

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. EARL L. DIEHL,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
RICHARD G. NIESS, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Earl Diehl appeals from an order denying his petition for certiorari review of a decision revoking his probation. We affirm.

¶2 Diehl first raises several challenges to the circuit court’s decision. He argues: (1) that the circuit court misused its discretion when it allowed the State to file a brief after the date specified in the briefing schedule had passed; (2) that the circuit court should have granted him summary judgment based on the fact that the State did not file a reply brief; (3) that the circuit court violated his rights when it did not inform him that it had decided to belatedly accept the State’s brief; and (4) that the circuit court “gave its own view of the evidence” regarding a missing signature on a document.

¶3 On certiorari review of an administrative decision revoking probation, we review the decision of the Division of Hearings and Appeals, not that of the circuit court. *State ex rel. Warren v. Schwarz*, 211 Wis. 2d 710, 717, 566 N.W.2d 173 (Ct. App. 1997). Our review of the Division’s decision is limited to four inquires: (1) whether it stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will, not its judgment; and (4) whether the evidence was such that it might reasonably make the decision that it did. *Id.* We will not consider Diehl’s arguments about alleged errors in the circuit court because we review the decision of the division, not the decision of the circuit court. Even if the circuit court erred, this has no bearing on whether the division properly revoked Diehl’s probation.

¶4 Diehl next argues that he was subjected to double jeopardy because he was detained on a probation hold on February 14, 2005, released from detention shortly thereafter to Jefferson County for sentencing on a different case, and then once again detained on a probation hold on March 2, 2005. Double jeopardy principles do not apply to probation revocation proceedings. *See State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 382-387, 260 N.W.2d 727 (1978).

¶5 Diehl next argues that he was entitled to a preliminary hearing before proceeding with the revocation charge. A preliminary hearing is not required where a probationer has been found guilty of a crime for the same conduct that is alleged to be a violation of supervision. WIS. ADMIN. CODE § DOC 331.04(1)-(2) (Oct. 2007) (when revocation proceedings are commenced, “a preliminary hearing shall be held ... to determine whether there is probable cause to believe that the client violated a rule or a condition of supervision ... [unless] [t]here has been an adjudication of guilt by a court for the same conduct that is alleged to be a violation of supervision”). Diehl was found guilty of theft by contractor on April 20, 2004. Diehl’s probation agent initiated revocation proceedings on March 8, 2005. One of the grounds alleged for revocation was Diehl’s conviction for theft by contractor. Under the administrative rules, no preliminary hearing was required because the revocation was premised in part on Diehl’s prior criminal conviction.

¶6 Diehl next argues that his agent’s failure to sign the revocation hearing request form constituted denial of his due process rights. Diehl has not alleged that this purported failure caused him harm or prejudice. Therefore, we reject this claim. See *State ex rel. Sahagian v. Young*, 141 Wis. 2d 495, 501, 415 N.W.2d 568 (Ct. App. 1987) (an error is not cognizable under certiorari unless it caused substantial harm to the petitioner).

¶7 Finally, Diehl argues that his due process rights were violated because the revocation hearing was not timely held. There was no due process violation because the delay was due to a series of rescheduled hearings intended to allow Diehl time to prepare his defense and to obtain the assistance of counsel. Diehl cannot argue that his due process rights were violated by delays from which he benefited.

By the Court.—Order affirmed.

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

