COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP240 **Cir. Ct. No. 2005CV1112**

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

STATE OF WISCONSIN EX REL. DANIEL D. DROW,

PETITIONER-APPELLANT,

V.

RANDY HOENISCH, MARATHON COUNTY SHERIFF,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Daniel Drow appeals an order denying his petition for a writ of habeas corpus. He argues he was entitled to a default judgment or summary judgment because the State failed to file an answer in the statutorily prescribed time, the circuit court judge "should have recused himself for the

appearance of bias," and his petition for writ of habeas corpus should have been granted because he received ineffective assistance of counsel. We reject Drow's arguments and affirm the order.

BACKGROUND

¶2 In 1993, Drow was convicted of second-degree sexual assault of a child, exposing a child to harmful material, and two counts of felony bail jumping. The court withheld sentencing and placed Drow on probation for ten years. Drow's probation was revoked in 1996 and he received a seventeen-year sentence.

¶3 Drow challenged his revocation and, after exhausting his administrative appeal, sought certiorari review in the circuit court. The circuit court affirmed the revocation and Drow appealed. The court of appeals ultimately affirmed the judgment revoking Drow's probation and declined to address Drow's ineffective assistance of counsel claim "because his claims are merely bald allegations neither adequately developed nor fully supported by valid authority to allow a reasoned determination upon them." ***Drow v. Schwarz***, No. 1997AP1867, unpublished slip op. at 2, n.2 (WI App. Sept. 8, 1999).

¶4 On July 18, 2006, Drow served a petition for habeas on Sheriff Hoenisch. On September 4, Drow informed the court that he had served his habeas petition on Hoenisch. The court held a scheduling conference on September 28 and gave the State three weeks to file responsive pleadings. The district attorney later requested and received a one-week extension. The district attorney filed the State's response brief on October 26. The court subsequently denied Drow's petition.

DISCUSSION

¶5 Drow first argues he was entitled to a default judgment or to summary judgment because the State did not file a timely response after Drow served his petition. Drow bases his argument on the State's failure to file its response brief until October 26, when he had served a petition on Hoenisch on July 18.

¶6 Drow's brief evinces a misunderstanding of the habeas corpus procedure. A habeas proceeding is commenced by filing a petition with the court. WIS. STAT. §§ 782.03, 782.06.[1] The court must then grant the writ unless it appears from the petition that the party applying for it is prohibited from prosecuting the petition. WIS. STAT. § 782.06. The writ, which is issued by the court, commands production of the prisoner "forthwith *or* at a day certain, as the case may require" together with the return. WIS. STAT. § 782.07(2) (emphasis added), § 782.07(1). The return must state whether the respondent has the prisoner in custody and the reason therefore. WIS. STAT. § 782.14. When a writ is properly served, "the person upon whom it was served, having the custody of the prisoner … shall obey and make return to such writ and such prisoner shall be produced at the time and place specified therein." WIS. STAT. § 782.13.

¶7 Thus, when a habeas proceeding is commenced by the filing of a petition for a writ of habeas corpus with the court, as Drow did here on September 4, the date for the respondent's return is established by the court when the court grants the writ. In this case, the State properly asked for and received an

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

extension[2] to the time initially indicated by the court. The State responded within the appropriate time.[3] There is no error.

¶8 Drow next argues Judge Gregory Grau "should have recused himself for the appearance of bias" because Judge Grau "was the former D.A. in this case." A judge must disqualify him or herself if the judge "previously acted as counsel to any party in the same action or proceeding." WIS. STAT. § 757.19(2)(c). However, the disqualification "may be waived by agreement of all parties and the judge after full and complete disclosure on the record of the factors creating such disqualification." WIS. STAT. § 757.19(3).

¶9 Drow's habeas proceeding challenged his counsel's performance at the probation revocation hearing and subsequent circuit court certiorari proceeding. Therefore it is not clear whether the habeas proceeding is the same proceeding as the underlying criminal conviction Judge Grau took part in as the district attorney for the purpose of WIS. STAT. § 757.19(2)(c). However, even assuming it is, Drow clearly waived any objection. The record shows that Judge Grau informed Drow he was the district attorney at the time Drow was charged with his offenses. Judge Grau gave Drow an opportunity to request another judge stating, "if you have any reservations about that whatsoever, I will allow you to

[2] Drow contends the State did not serve the request for an extension on him, that the court's order granting the extension is not in the record, and that he never received an order granting an extension. The record does not support Drow's contentions.

[3] Drow alternatively argues that the response to the habeas petition was not timely filed under WIS. STAT. § 802.06(1) because it was not filed within forty-five days of the service of the habeas petition. However, this rule is not applicable "where different procedure is prescribed by statute or rule." WIS. STAT. § 801.01(2). As detailed above, WIS. STAT. ch. 782 sets forth a different procedure for the filing of a response to a habeas petition.

seek another Judge to preside over the case." Drow affirmed that he did not wish to seek another judge.

¶10 If the circuit court judge were actually biased, that would constitute a structural error that cannot be waived. ***State v. Carprue***, 2004 WI 111, ¶¶57-59, 274 Wis. 2d 656, 683 N.W.2d 31. However Drow's argument heading refers to the "appearance of bias," not actual bias. Drow does make a conclusory assertion that he "fears the probable reason for this habeas action taking 500-days to even get to a hearing, and then to have all of Drow's issues dismissed without even a modicum of reasoning given, can only be due to judicial bias." Drow does not develop this argument. We will not develop Drow's amorphous and unsupported arguments for him. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).

¶11 Further, a review of the record indicates the circuit court was not responsible for any significant delay in this case.[4] Additionally, the court explained its reasoning for dismissing Drow's claims. The court stated it denied Drow's summary judgment motion because it granted a one-week extension to the district attorney and Drow was not prejudiced by that extension. With regard to the merits of Drow's petition, the court stated it found the arguments in Hoenisch's response sound and adopted that rationale.

[4] The circuit court issued a decision reviewing the habeas petition seven weeks after Drow paid the filing fee and granted Drow's request to substitute respondents within two weeks of that request. The court held a scheduling conference less than four weeks after Drow notified the court that he had served Hoenisch, and held a hearing on the merits of the petition less than four weeks after the filing of Drow's reply brief.

¶12 Finally, Drow argues his "petition for writ of habeas corpus is meritorious" and he is therefore entitled to a ***Machner***[5] hearing on his claims of ineffective assistance of counsel. The State concedes Drow's petition was not moot[6] and was not barred by ***Escalona v. Naranjo***, 185 Wis. 2d 168, 178, 517 N.W.2d 157 (1994). We therefore turn to the substance of Drow's arguments.

¶13 Drow argues that a ***Machner*** hearing is necessary for his former attorney to explain his strategies, including why he failed "to aggressively demonstrated [sic] the constitutionally infringing nature of Drow's revocation and ensure the official record contained testimony regarding the precise behavior to which Drow was being compelled to self-incriminate himself."[7] However, Drow does not explain his assertions or analyze them under the standard for ineffective assistance of counsel. Instead, he asks the court to read his petition and motion. We will not develop Drow's unsupported argument for him. *See* ***Barakat***, 191 Wis. 2d at 786. We also will not review issues incorporated in an appellate brief by reference to circuit court pleadings, particularly if incorporating those other documents would allow the party to circumvent the length limits for appellate briefs,

[5] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[6] The circuit court adopted the State's reply brief, which stated that Drow's petition was moot because "he was released from prison on March 7, 2006, refused community supervision, and went through an entirely new revocation process."

[7] Drow alleges ineffective assistance of counsel for both his probation revocation hearing and the subsequent circuit court certiorari proceeding. However, Drow did not have the right to counsel during the certiorari review of his probation revocation. *See* ***State ex rel. Griffin v. Smith***, 2004 WI 36, ¶3, 270 Wis. 2d 235, 677 N.W.2d 259. Because the right to effective assistance of counsel is grounded on the right to counsel, Drow had no right to effective assistance of counsel for the certiorari review hearing, and we need not address this claim. *See* ***State ex rel. Schmelzer v. Murphy***, 201 Wis. 2d 246, 253, 548 N.W.2d 45 (1996).

as it would here. ***State v. Flynn***, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994).

¶14 Additionally, even after reviewing Drow's petition, we are unable to find a potentially meritorious claim. Drow's claim that his attorney failed to demonstrate that he was being compelled to incriminate himself is not supported by the record. Drow argues his probation was revoked for his refusal to admit that he committed acts other than those to which he pled no contest. However, the probation revocation decision does not support this claim. The probation revocation decision stated:

> During the following two months, the client was argumentative and disruptive in his group sexual offender treatment sessions. He blamed agents and law enforcement persons of planting false memories in the heads of his victims. He refused to read the police reports for his sexual assaults. He called his therapists "snake charmers." He stated that his sexual assault conduct was acceptable under unspecified laws in Europe. He was expelled from sexual offender treatment on March 5, 1996….
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> ….
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> The client's expulsion from sex offender treatment on March 5, 1996, for his continued silence, nonparticipation and disruption of treatment sessions, along with his declared lack of need for treatment and his refusing to address sex offender issues constitute violations of the conditions of his probation and also a rejection of community-based treatment. His violations of probation and his rejection of community-based treatment demonstrate there is no viable and feasible alternative to revocation.

The only instances of denial noted in the records relate to Drow's contention that he only touched his victim on the breast while pushing her away. Thus, Drow was not expelled from sex offender treatment for refusing to admit he committed acts other than those to which he pled no contest. Rather, Drow was expelled for

refusing to accept responsibility for any acts of sexual assault and nonparticipation in and disruption of treatment sessions. Therefore, Drow's claim is without merit.

By the Court.—Order affirmed.

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