

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 6, 2008

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. 2007AP1184

Cir. Ct. No. 2006CV668

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN EX REL. DWAYNE G. THOMAS,

PETITIONER-APPELLANT,

V.

**DAVID M. SCHWARZ, ADMINISTRATOR, DIVISION OF
HEARINGS AND APPEALS,**

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Dwayne G. Thomas appeals from the order denying his petition for a writ of habeas corpus. He argues on appeal that he received ineffective assistance of counsel at his revocation hearing. We conclude

that Thomas has not established that he received ineffective assistance of revocation counsel, and we affirm the order of the circuit court.

¶2 Thomas was convicted of robbery by use of force, and placed on probation for twenty years with an imposed and stayed sentence of fifteen years. Thomas served a period of confinement in the county jail. When he was released, he was allowed to travel to Arizona to be with his family. He was also serving a period of probation in Arizona. Subsequently, Thomas failed drug tests in Arizona, absconded, was arrested, and was returned to Wisconsin.

¶3 Thomas's probation was revoked in 2002. He appealed, the administrator sustained the decision, and he then filed a petition for a writ of certiorari in the circuit court. That court sustained the administrator's decision and denied the petition. Thomas then filed, pro se, an appeal to this court, and we also affirmed. *See State ex rel. Thomas v. Schwarz*, No. 2004P1065, unpublished slip op. (WI App June 22, 2005).

¶4 In March 2006, Thomas filed a petition for a writ of habeas corpus in the circuit court arguing that he had received ineffective assistance of counsel at his revocation hearing. The circuit court denied the petition on the merits.

¶5 The State argues that the issues Thomas raises were either previously decided by this court or are barred under the principles of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994).

[I]n a postconviction setting, a petition for a writ of *habeas corpus* will not be granted where (1) the petitioner asserts a claim that he or she could have raised during a prior appeal, but failed to do so, and offers no valid reason to excuse such failure, or (2) the petitioner asserts a claim that was previously litigated in a prior appeal or motion after verdict.

State v. Pozo, 2002 WI App 279, ¶9, 258 Wis. 2d 796, 654 N.W.2d 12 (citations omitted). Thomas may not use a petition for a writ of habeas corpus to relitigate the issues he previously raised. Further, he cannot avoid the procedural bar by reframing them as claims of ineffective assistance of counsel. We are not convinced, however, that *Escalona* bars review of the claims he did not raise in his certiorari appeal from the revocation proceeding. A claim of ineffective assistance of postconviction or appellate counsel may overcome the *Escalona* bar. See *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

¶6 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); *State ex rel. Flores v. State*, 183 Wis. 2d 587, 619-20, 516 N.W.2d 362 (1994). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *Strickland*, 466 U.S. at 697. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. *Id.* To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

¶7 In his previous appeal to this court, Thomas, who represented himself, argued that: (1) the Division of Hearings and Appeals did not have jurisdiction to revoke his probation, and that it lost jurisdiction to revoke his

probation;¹ (2) the Department of Corrections violated its own policies when it sought revocation of his probation because he had already been disciplined for the same conduct in Arizona; (3) Wisconsin violated the double jeopardy clause when it revoked his probation for violations for which he had already been disciplined in Arizona; (4) there was insufficient evidence to support the allegation that he had violated his probation for failing to make restitution payments; and (5) the circuit court erred when it failed to remand the case given its finding that the allegation that Thomas had not attended AODA treatment was not supported by any evidence that his Wisconsin agent had ordered him to attend such treatment.

¶8 In his petition for a writ of habeas corpus, Thomas argued that his revocation counsel was ineffective because: (1) he did not argue under *State v. Killebrew*, 115 Wis. 2d 243, 340 N.W.2d 470 (1983), that the disposition imposed by Arizona for violation of his probation there, barred Wisconsin from imposing a second punishment for the same crime; (2) counsel did not challenge the Division of Hearings and Appeals' subject matter jurisdiction because there was no interstate compact; (3) counsel chose not to present evidence that Wisconsin had not ordered Thomas to attend AODA treatment or that he was unable to pay restitution in both Arizona and Wisconsin; and (4) counsel chose to appeal solely to keep Thomas from challenging the adequacy of counsel's representation at the revocation hearing.²

¹ Thomas actually argued that the Department of Corrections did not have jurisdiction. We determined, however, that since it was the Division of Hearings and Appeals who conducted the hearing, Thomas was really challenging the jurisdiction of the Division.

² Thomas has not addressed the fourth issue in his brief to this court, and therefore, has waived a challenge to the circuit court's decision on this issue.

¶9 In Thomas's appeal from the denial of his certiorari petition, we rejected the arguments underlying his first claim. We concluded that the double jeopardy clause does not apply to revocation proceedings, and we rejected his challenge on that basis. Thomas reframed the issue in the circuit court by arguing that his counsel was ineffective for failing to argue that Arizona had already concluded that the conduct for which he was later revoked in Wisconsin, did not warrant prison. He further argued that when Wisconsin revoked his probation, it was, in essence, the executive branch of Wisconsin overriding the decision of the judiciary of another state. To this court, he has reframed the issue again to argue that issue and claim preclusion prevent him from being punished for the same conduct.

¶10 First, Thomas is making essentially the same argument he made before us in his certiorari appeal. As we stated, Thomas may not relitigate the issues we previously decided by reframing them as claims of ineffective assistance of counsel. Even if we allowed him to do so he would not be successful. We have already concluded that the double jeopardy challenge lacks merit, and counsel is not ineffective for failing to make meritless arguments. *State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶11 The issue and claim preclusion argument also lacks merit. Thomas's Arizona probation was revoked in Arizona. The same conduct violated the terms of his Wisconsin probation, and so his probation was revoked by Wisconsin. Thomas had separate convictions in both states. As the circuit court stated, the imposition of a sentence after revocation of probation is not a new punishment but rather a continuing consequence flowing from the original conviction. *See State v. Verstoppen*, 185 Wis. 2d 728, 736-37, 519 N.W.2d 653 (Ct. App. 1994).

¶12 Thomas next claims that the Division of Hearings and Appeals lost “competence to exercise subject matter jurisdiction” because of a failed interstate compact agreement. In Thomas’s appeal from the writ of certiorari, he argued that the Department of Corrections lost jurisdiction to revoke his probation. We stated there that it was not clear what the basis was for his jurisdictional challenge. We further determined that if he was challenging competency, that issue had not been raised in the revocation hearing, and hence was waived. We then addressed whether the Division had subject matter jurisdiction to conduct the hearing, and concluded that it did.

¶13 Thomas has now reframed the issue to argue that his counsel was ineffective because he did not argue that the Division lost competency. “[A] failure to comply with a statutory mandate pertaining to the exercise of subject matter jurisdiction may result in a loss of the circuit court’s competency to adjudicate the particular case before the court.” *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶9, 273 Wis. 2d 76, 681 N.W.2d 190 (citations omitted).

Whether a particular failure to comply with a statutory mandate implicates the circuit court’s competency depends upon an evaluation of the effect of noncompliance on the court’s power to proceed in the particular case before the court. Many errors in statutory procedure have no effect on the circuit court’s competency. Only when the failure to abide by a statutory mandate is “central to the statutory scheme” of which it is a part will the circuit court’s competency to proceed be implicated.

Id., ¶10 (citations omitted).

¶14 The circuit court addressed Thomas’s argument on this issue and concluded that while he alleged several statutory violations, he failed to demonstrate how these violations affected the competency of the Division of Hearings and Appeals to exercise its jurisdiction. We agree with the circuit court.

Because Thomas has not established that the argument has merit, he has not established that he received ineffective assistance of counsel.

¶15 Thomas next argues that his revocation counsel was ineffective for failing to argue at the probation revocation hearing that: (1) Thomas was unable to pay restitution, and (2) he had not been ordered to attend AODA treatment. This court already concluded in the previous appeal that the evidence supported the finding that Thomas failed to comply with the restitution requirements of his probation. In the first appeal, Thomas argued that he did not pay restitution in Wisconsin because he believed that the payments he made in Arizona satisfied the requirement to pay restitution in both states. When we rejected that argument, we did so because Thomas had testified that the reason he did not pay restitution in Wisconsin was because he could not afford to make both restitution payments.

¶16 Thomas now argues that his counsel was ineffective for failing to argue that Thomas did not pay because he could not afford both. Thomas himself testified at the hearing that he could not afford to pay both. The ALJ, nonetheless, found that his excuses did not justify his failure to pay. Further, in our decision in the certiorari appeal we concluded that Thomas's probation would have been revoked even without the AODA violation. Therefore, even assuming that counsel failed to make the argument,³ and that such a failure was deficient, Thomas cannot establish that he was prejudiced by it.

³ The circuit court when rejecting the habeas petition found that there was evidence offered that Thomas had attended AODA treatment voluntarily.

¶17 We reject all of Thomas's claims. Thomas has not established that he received ineffective assistance of counsel. For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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

