COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0983

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

STATE OF WISCONSIN EX REL. JAMES A. MENTEK, JR.,

PETITIONER-APPELLANT,

V.

GERALD BERGE, AND DAVID SCHWARTZ,

RESPONDENTS-RESPONDENTS.

APPEAL from orders of the circuit court for Dodge County: JOSEPH E. SCHULTZ, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

VERGERONT, J. James Mentek appeals the trial court's order dismissing his petition for a writ of habeas corpus and quashing the writ; and the order denying his motion for reconsideration. The petition requested release from custody because of procedural errors and delays in the proceeding to revoke his probation. Mentek contends on appeal that: (1) the trial court erroneously

exercised its discretion in granting the respondents' motion and vacating the default order it had entered on October 20, 1997; (2) the trial court did not give him certain procedural rights to which he was entitled; (3) the Department of Corrections (DOC) employees and their counsel violated two court orders and conspired to falsely imprison him; (4) the Division of Hearings and Appeals (division) erred in reopening the revocation proceedings after the trial court vacated its default order, rather than initiating a new proceeding; (5) the trial court did not rule on all his claims; and (6) its ruling dismissing his petition was contrary to law. We conclude these contentions have no merit, and we affirm.

BACKGROUND

Mentek began serving a ten-year term of probation on July 25, 1996, which was imposed after a conviction for uttering a forged check. On March 11, 1997, he was arrested in Clark County, Nevada, and placed in jail there pursuant to a bench warrant issued by the Kenosha County Circuit Court for failure to appear at a pretrial hearing on a pending criminal charge, and an apprehension request issued by his probation agent. Mentek was transferred to Kenosha County Jail on March 30, 1997. On April 3, 1997, he signed a written statement admitting probation violations including ingesting illegal drugs, missing scheduled appointments and court appearances, and leaving the state; and the probation revocation proceeding commenced about that time. Mentek was transferred to the Dodge County Correctional Institution on April 16, 1997, apparently to begin serving a six-year sentence that was imposed on April 11, 1997, after conviction on other offenses.

Mentek filed his petition for a writ of habeas corpus on July 2, 1997. The court issued a writ on August 4 and the respondents, David Schwartz and

Gerald Berge, were served on August 13 and 18, 1997, respectively. The respondents filed a motion for summary denial of the petition on September 10, 1997; and the court denied their motion on the same day. On October 13, 1997, Mentek filed a motion for a default judgment, which the court granted. The court entered an order on October 20, 1997, finding that neither respondent had filed a return to the writ, and both were in default. The court ordered Mentek released from custody and the revocation proceedings dismissed. On October 24, 1997, the respondents filed an answer and a motion requesting that the court reopen or stay its October 20 order.

Mentek was still in custody on November 21, 1997, when he posted bond pending appeal in the cases in which he was sentenced on April 11. On November 24, 1997, the Kenosha County Circuit Court ordered Mentek released from state prison because he had posted bond pending appeal in those cases.

The hearing in this case on respondents' motion to reopen or stay the October 20 default order took place on November 26, 1997. The court on that day granted their motion, and vacated its October 20 order. On February 18, 1998, the court issued the decision and order from which Mentek appeals, concluding that Mentek was not entitled to a preliminary hearing in the revocation proceeding, and neither his statutory nor constitutional rights were violated by the delay in the final hearing. The court denied Mentek's motion for reconsideration.

DISCUSSION

Relief under § 806.07, STATS.

Mentek contends that the trial court erroneously exercised its discretion in vacating the October 20 order. Section 806.07, STATS., authorizes a

court to relieve a party from a judgment on various specified grounds[1] including "[m]istake, inadvertence, surprise or excusable neglect," § 806.07(1)(a), and "[a]ny other reasons justifying relief from the operation of the judgment," § 806.07(1)(h). Whether to grant relief under § 806.07 is committed to the trial court's discretion, and we will not reverse unless the court erroneously exercises its discretion. *See* ***Baird Contracting, Inc. v. Mid Wis. Bank***, 189 Wis.2d 321, 324, 525 N.W.2d 276, 277 (Ct. App. 1994). In exercising its discretion under § 806.07, the trial court is to consider these factors: the statute is remedial in nature and should be liberally construed; general policy favors giving litigants an opportunity to try the issues; and default judgments are regarded with disfavor. ***Baird***, 189 Wis.2d at 325, 525 N.W.2d at 277.

---

[1] Section 806.07(1), STATS., provides:

> **Relief from judgment or order**. (1) On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15 (3);
>
> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
>
> (d) The judgment is void;
>
> (e) The judgment has been satisfied, released or discharged;
>
> (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
>
> (g) It is no longer equitable that the judgment should have prospective application; or
>
> (h) Any other reasons justifying relief from the operation of the judgment.

Section 806.07(1)(h), STATS., extends the grounds for relief beyond those specifically stated in the preceding subsections, and applies when there are extraordinary circumstances justifying relief in the interests of justice. ***State ex rel. M.L.B. v. D.G.H.,*** 122 Wis.2d 536, 544-45, 555, 363 N.W.2d 419, 423-24 (1985). In deciding whether to grant relief under § 806.07(1)(h), the trial court is to consider the following factors, among others:

> [1.] whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant;
>
> [2.] whether the claimant received the effective assistance of counsel;
>
> [3.] whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments;
>
> [4.] whether there is a meritorious defense to the claim; and
>
> [5.] whether there are intervening circumstances making is inequitable to grant relief.

M.L.B., 122 Wis.2d at 552-53, 363 N.W.2d at 427.

A trial court properly exercises its discretion when it examines the relevant facts, applies the correct legal standard and, using a rational process, reaches a reasonable result. ***Baird***, 189 Wis.2d at 324, 525 N.W.2d at 277. If the trial court fails to set forth its reasoning on the record, we independently review the record to determine whether it provides a basis for the trial court's exercise of discretion. ***State v. Sullivan***, 216 Wis.2d 768, 781, 576 N.W.2d 30, 36 (1998).

The respondents' explanation for failing to timely file a return to the writ[2] was that the district attorney's office mislaid its copy of the court's September 10 order denying the respondents' motion for summary dismissal; and the attorney handling the matter was therefore not aware that the court had denied the motion. The court found this was not excusable neglect under § 806.07(1)(a), STATS. However, it granted relief under § 806.07(1)(h), reasoning that the provision is to be liberally construed to accomplish justice, default judgments are not favored, and justice would be served by setting aside the default because the respondents' pleading showed they may have a meritorious defense.

The trial court expressly considered the appropriate factors under § 806.07, STATS., in general, but did not expressly consider the factors relevant to relief under § 806.07(1)(h) in particular. However, our independent review of the record persuades us that application of those factors supports the trial court's decision to vacate its default order. The respondents' default was not the result of their deliberate and well-informed choice, but was the result of a mistake in their counsel's office. Therefore, the default order was entered against the respondents without their receiving the effective assistance of counsel.

The default order releasing Mentek from custody and dismissing the probation revocation proceedings against him was entered without a consideration of the merits of his petition. Since the revocation proceeding was based on allegations of additional criminal activity, the respondents and the public at large have an interest in a decision on the merits of Mentek's petition that outweighs the general interest of the system in the finality of judgments. The trial court

[2] Pursuant to court order, respondents were to make a return to the writ within forty-five days after service upon them.

concluded that the respondents' pleading presented a defense that might be meritorious, and the court ultimately decided in the respondents' favor. Finally, Mentek presented no evidence of intervening circumstances that made it inequitable for the trial court to grant relief. Indeed, the respondents filed an answer and moved to reopen only four days after the default order was entered. We conclude that the trial court did not erroneously exercise its discretion in vacating the default order.

Mentek next argues that his right to due process was denied because he was not allowed to prepare a defense to the respondents' motion to set aside the default order in that he was not given prior notice of the hearing. We conclude there is no merit to this contention. The transcript of the hearing on November 26, 1997, shows that Mentek appeared by telephone without counsel. He did not object to a lack of notice. He participated in the hearing. The record contains a letter he wrote to the court the day after the hearing complaining about DOC but thanking the court "for allowing me to proceed in your courtroom," stating "[a]t least you took the time to listen, to hear my complaints," and ending by thanking the court for its assistance. Mentek's brief on appeal does not explain what defense he was prevented from presenting in opposition to the motion to set aside the default order.

Mentek also argues that he was entitled to an evidentiary hearing, oral argument and a briefing schedule before the trial court rendered its decision on his petition. Mentek does not explain what disputed factual issues required an evidentiary hearing. We are aware of no authority that entitles a litigant before the trial court to oral argument. With respect to briefing, Mentek did file a "memorandum of law in support of petition" along with his petition for a writ of habeas corpus. He subsequently filed another "memorandum of law in support of

petitioner's motion for temporary restraining order and/or preliminary injunction," accompanied by his three-page affidavit. Mentek also filed: four-page "motion to deny motion to reopen and order for affirmation," three-page letter to the court, "memorandum of law in support of motion to compel," "supplemental amended petition for writ of habeas corpus with attachments," memorandum of law in support, affidavit from Attorney Jerold W. Breitenbach, and seven-page "motion to strike answer and motion for relief" with attachments. These were all filed before the court entered its decision and order dismissing the petition and quashing the writ on February 18, 1998. All addressed Mentek's claim that he was entitled to release from custody and dismissal of the parole revocation proceeding. The court stated in its decision and order that "briefs have been filed," no doubt referring to these many filings. There was no need for the court to establish a briefing schedule because, even without a schedule, Mentek presented ample argument to the court in support of his petition.

Mentek's contention that he was held in custody in violation of court orders is also without merit. At the time the trial court ordered Mentek's release in this proceeding on October 20, 1997, Mentek was being held in custody pursuant to judgments of convictions in other cases in which the sentences totaled six years. It was not until November 24, 1997, that the court in those proceedings ordered his release from Racine Correctional Institution pursuant to the bond posted on his behalf pending appeal. Two days later the trial court in this case vacated its October 20 order that Mentek be released because the respondents had defaulted. The effect of vacating that order was to place the parties in the position they were in before that order was entered, as if the order never had been entered. *See* 47 AM. JUR. 2D *Judgments* §§ 741 and 867 (1995). Mentek therefore was not held in custody in violation of the October 20 order. And the November 24, 1997 order

entered by the Kenosha County Circuit Court in the unrelated cases did not release him from the custody deriving from the probation revocation proceeding.

For similar reasons, we reject Mentek's contention that the division did not have jurisdiction to continue with the revocation proceeding once the October 20 order was vacated, but instead had to initiate a new proceeding. When the court vacated its order dismissing the probation revocation proceeding, the division could properly continue with that proceeding.

Decision on the Petition

Mentek next argues that the trial court did not rule on all of the claims in his petition and amended petition, and did not rule on all the motions that he filed. He states that he asserted forty-three claims in the petition and amended petition, yet the trial court ruled on only three issues. It appears that the forty-three claims Mentek refers to are the twenty-seven numbered paragraphs in his petition and the numbered paragraphs twenty-eight through forty-three in his supplemental petition. Most of the numbered paragraphs are factual assertions or portions of legal argument. The trial court's decision and order entered on February 18, 1998, fairly characterizes the initial petition as challenging Mentek's custody on the grounds that he was not granted a preliminary hearing in the revocation proceeding and there was a delay in the proceeding; and the court addressed these issues.

Mentek's "supplemental amended petition for writ of habeas corpus" which he filed on January 12, 1998, repeats his complaint about the delay in the probation revocation proceeding and makes a number of objections to the first day of the hearing, which had taken place on October 1, 1997. According to documents that Mentek submitted, the hearing on his parole revocation began on

October 1, 1997, after having been rescheduled several times. Testimony was taken from a witness on that date and the hearing was continued until October 28, 1997. However, it did not take place on that date because of the trial court's October 20 order dismissing the revocation proceeding. At the time Mentek filed the supplemental petition, the rescheduled hearing had not yet taken place.

The writ of habeas corpus is not the proper vehicle for challenging a decision to revoke probation on procedural and substantive grounds; the proper vehicle is review by certiorari. ***State ex rel. Reddin v. Galster***, 215 Wis.2d 178, 182-83, 572 N.W.2d 505, 506 (Ct. App. 1997). Although we may look beyond a pro se litigant's label of the pleadings, ***id.***, we cannot treat Mentek's petition as a petition for review by certiorari: when he filed his petition, no probation revocation hearing had yet taken place, and, when he filed his supplemental petition, the hearing had not yet been completed. There was thus no decision revoking probation for a court to review. Mentek is not entitled to have alleged errors of a partially completed probation revocation proceeding reviewed by way of a petition for writ of habeas corpus. The trial court therefore did not error in failing to consider the claims of error in the supplemental petition.

Mentek filed numerous and lengthy motions—fourteen by his count—and he claims that the trial court erred because it did not rule on each one. We assume the trial court reviewed the motions, determined they were without merit, and determined they did not warrant a written order in response. Mentek cites no authority, and we are aware of none, that requires a trial court to respond by written order or decision to all filings of a litigant, without regard to their merit or their number. The relevant inquiry, therefore, is whether the implicit denial of a particular motion is erroneous.

The one motion that Mentek refers to in other than a cursory fashion is his motion for the appointment of counsel. Contrary to Mentek's assertion, he did not have a right to counsel in this proceeding under the Sixth Amendment, because that applies only to criminal prosecutions. *See* ***State v. Hardwick***, 144 Wis.2d 54, 56, 422 N.W.2d 922, 923 (Ct. App. 1988). And while it is true a court has the inherent power to appoint counsel as a discretionary matter, *see* ***Office of State Public Defender v. Dodge County Circuit Court***, 104 Wis.2d 579, 590, 312 N.W.2d 767, 772 (1981), we conclude the record supports the trial court's decision not to appoint counsel for Mentek. There was no need for an evidentiary hearing, and Mentek showed himself fully capable of expressing in writing the grounds on which he believed he was entitled to release from custody.

Mentek does not present any developed argument explaining why the trial court's implicit denials of his many other motions were erroneous. Many of the motions were related to Mentek's efforts to obtain release from custody based on the October 20 order, after it was vacated. As we have explained above, Mentek was not entitled to release under that order because it was vacated, and the court explained that to Mentek at the hearing on November 26. Mentek's general assertion that the trial court erred by not ruling on every motion warrants no further discussion. *See* ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987) (a reviewing court does not consider undeveloped arguments).

We now turn to the merits of the trial court's decision and order dismissing the petition and quashing the writ. Mentek contends that the trial court erred in concluding that he was not entitled to a preliminary hearing because he signed a written statement admitting the violations was in error. Section 302.335(2)(a), STATS., provides that when a probationer is detained in a

county jail pending disposition of a probation revocation proceeding, DOC shall begin a preliminary revocation hearing within fifteen working days after the probationer is detained in the county jail, unless written notice of an extension of not more than five additional working days is provided to the probationer and the sheriff. However, this does not apply when the probationer has given and signed a written statement admitting the violations. Section 302.335(2)(a)2. Mentek argues that he signed the written statement on April 3, 1997, the eighteenth working day after he had first been taken into custody in Nevada, and therefore he is entitled to release from custody.

The State responds with a number of reasons why Mentek's argument does not entitle him to release, but we need address only one. We agree with the State that the only reasonable construction of "county jail, or other county facility" in § 302.335, STATS., is a county jail or county facility in Wisconsin. Section 302.335(3) provides that if there is a failure to begin a hearing within the time periods of subsec. (2) "the sheriff … or other person in charge of the county facility shall notify the department [DOC] at least 24 hours before releasing a probationer or parolee under this subsection." The legislature cannot have intended "sheriff … or other person in charge of the county facility" in subsec. (3) to include failures in other states, because our legislature has no authority to impose obligations on sheriffs and other public officers of other states.

We therefore conclude that the fifteen working days referred to in § 302.335(2)(a), STATS., begins when the probationer is detained in a county jail or other county facility in the State of Wisconsin. Since Mentek signed a written statement confessing to the violations within fifteen working days of March 30, 1997, the date on which he was transferred to a county jail in the State of Wisconsin, he was not entitled to a preliminary revocation hearing.

Mentek also challenges the trial court's conclusion that he was not entitled to a final revocation hearing within fifty calendar days of first being detained in a county jail, as provided under § 302.335(2)(b), STATS. The trial court reasoned that he was transferred from the Kenosha County Jail to the Dodge Correctional Institution on April 16, 1997, and that institution is a state prison, *see* § 302.01, STATS., not a "county jail [or] other county facility." *See* § 302.335(2)(b). We agree with the trial court.

The object of § 302.335, STATS., is to regulate the length of time persons are held in county jails pending parole revocation hearings. *See* ***State ex rel. Jones v. Division of Hearings & Appeals***, 195 Wis.2d 669, 673, 536 N.W.2d 213, 215 (Ct. App. 1995). Mentek's argument that the fifty calendar days began to run when he was first taken into custody in Nevada is without merit, for the reasons we have already discussed in relation to § 302.335(2)(a). Moreover, even if one counts from the date of Mentek's detention in Nevada—March 11, 1997—fifty calendar days had not yet passed when he was transferred from the Kenosha County Jail to Dodge Correctional Institution. Finally, even if § 302.335(2)(b) applied to Mentek, the failure of the division to hold a final revocation hearing within the statutory time period does not deprive it of jurisdiction to hold the hearing at a later date. *See* ***Jones***, 195 Wis.2d at 673-74, 536 N.W.2d at 215.

Although the trial court held that § 302.335(2)(b), STATS., was not applicable, it correctly recognized that due process requires that a probation revocation hearing be held within a reasonable time after the probationer is taken into custody. *See* ***State ex rel. Alvarez v. Lotter***, 91 Wis.2d 329, 332, 283 N.W.2d 408, 409 (Ct. App. 1979). After reviewing the reasons for the various delays in completing the final probation revocation hearing, the trial court concluded that

Mentek's due process rights were not violated. We agree with the court's conclusion, although our analysis differs somewhat.[3]

When Mentek was taken into custody in Nevada, there was an active apprehension request issued by DOC and a bench warrant issued by the circuit court for Kenosha County in another criminal case. The due process right to a reasonably prompt revocation hearing is not activated unless the custody is the result of the revocation proceeding. ***Alvarez***, 91 Wis.2d 334-35, 283 N.W.2d at 410. A habeas petitioner has the burden of demonstrating that his or her custody is a result of the probation revocation proceeding, and not a result of proceedings in another criminal matter. ***Id***. Because of the warrant for Mentek's arrest and his subsequent conviction and six-year sentence in the unrelated criminal cases, Mentek's right to a reasonably prompt due process hearing was activated at the earliest on November 21, 1997, when he posted bond pending appeal in the unrelated criminal cases, or, perhaps, on November 24, 1997, when the Kenosha County Circuit Court ordered his release pursuant to that bond.

It appears from materials Mentek submitted that when the court vacated its October 20 order on November 26, 1997, the division restored Mentek's probation revocation to hearing status and scheduled the hearing for January 26, 1998. It was rescheduled to February 23, 1998, at the request of

[3] The trial court held that the delay in holding the final revocation hearing resulted from numerous postponements, including transfers from one prison to another, Mentek's request, permitting Mentek the opportunity to obtain counsel, and the court's October 20, 1997 order dismissing the revocation proceedings. The State contends that each of the postponements was either at Mentek's request or the result of the October 20 court order, which he sought. Mentek disagrees, arguing that the only delay attributable to him is that caused by his counsel's request at the October 1, 1997 hearing to continue it to a later date. It is not necessary to resolve the reasons for these delays, since they preceded the date on which Mentek was released on bond pending appeal in the unrelated criminal cases.

Mentek's new counsel. That was the status when the court entered is decision and order on February 18, 1998. The delay from January 26, 1998, until the date of the court's decision was attributable to Mentek. The issue, then, is whether the delay from November 21 or 24, 1997 to January 26, 1998, violates Mentek's right to a reasonably prompt revocation hearing. We conclude it does not.

In deciding whether Mentek was denied his right to a reasonably prompt probation revocation hearing, we are guided by the four factors courts consider in deciding whether a defendant's right to a speedy trial have been violated. *See* ***United States ex rel. Sims v. Sielaff***, 563 F.2d 821, 827-28 (7th Cir. 1977), and ***Alvarez***, 91 Wis.2d at 334, 283 N.W.2d at 410. These are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right to a prompt trial; and (4) prejudice to the defendant. ***Sims***, 563 F.2d at 828.

In ***State ex rel. Flowers v. DHSS***, 81 Wis.2d 376, 396, 260 N.W.2d 727, 738 (1978), the court held that a time period of two months in custody before a final probation revocation hearing was not unreasonable. Mentek does not argue that the hearing should have been scheduled sometime in December 1997 or earlier in January 1998. Rather, he argues that the division should not have reinstated the proceeding after the court's November 26, 1997 order, but should have initiated a new proceeding. The record contains no evidence that Mentek was prejudiced by the two-month delay or that he ever asserted a right to have the hearing sooner. Indeed, the record shows he was seeking to stay the hearing scheduled for January 26. On January 2, 1998, Mentek filed a motion for a "TRO/Preliminary Injunction" asking the court to stay the hearing then scheduled for January 26, 1998, because he was entitled to a reversal of the court's November 26, 1997 order. In his supplemental petition, filed on January 12, 1998,

he also asked the court to enjoin the revocation proceeding. The fact that Mentek's attorney requested that the hearing be delayed beyond January 26, 1998, is yet another indication that Mentek did not view the division's failure to schedule a hearing before January 26, 1998, to be unreasonable or prejudicial to him.

In summary, we conclude that the trial court correctly dismissed Mentek's petition for a writ of habeas corpus and quashed the writ. It did not erroneously exercise its discretion in vacating the October 20, 1997 default order and it did not violate Mentek's procedural rights. We therefore affirm.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.