

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 2004

Cornelia G. Clark
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. 04-1108
STATE OF WISCONSIN**

Cir. Ct. No. 03CV000601

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. DARWIN SCHMIDT,

PETITIONER-APPELLANT,

V.

THOMAS BORGEN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dodge County:
ANDREW P. BISSONNETTE, Judge. *Affirmed.*

Before Deininger, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Darwin Schmidt appeals a circuit court order that denied his attempted collateral attack on a prior probation revocation decision and quashed a previously issued writ of habeas corpus. We affirm for the reasons discussed below.

BACKGROUND

¶2 On June 7, 1995, the Waukesha County Circuit Court sentenced Schmidt to an indeterminate term of six years in prison in case no. 95-CF-174 (the first case), and imposed a consecutive ten-year term of probation with a stayed sentence in case no. 95-CF-132 (the second case).

¶3 While Schmidt was out on parole on the first case, he was arrested on new charges in Rock County case no. 99-CF-645 (the third case). As a result of the charges in the third case, Schmidt's parole on the first case was revoked.

¶4 On December 6, 1999, the Rock County Circuit Court sentenced Schmidt to three years in prison on one count and probation on another count in the third case. The prison term was to be served concurrently with the remaining portion of the sentence Schmidt was serving on the first case following the revocation of his parole. Schmidt completed his sentence on the first case on February 10, 2001. On April 17, 2001, he was released on parole in the third case.

¶5 Schmidt's parole on the third case and his probation on the second case were both revoked following a hearing held on February 7, 2002. Schmidt sought administrative and certiorari review of the revocation decisions. After failing to obtain relief by either of those methods, he filed the present habeas corpus action. Because Schmidt has now completed his sentence on the third case, this appeal deals only with the sentence he is serving on the second case following the revocation of his probation.

DISCUSSION

¶6 Schmidt first attempts to raise several issues based on the premise that he had not yet begun serving his probation on the second case when the

revocation hearing was held. Although the State contends that any issues based on that premise should be barred by judicial estoppel or waiver, we deem it more efficient to simply address the premise on its merits. Essentially, Schmidt contends that, by imposing a sentence in the third case that was concurrent to Schmidt's sentence in the first case without mentioning his probation in the second case, the Rock County court postponed the commencement of the probationary period in the second case until after the completion of Schmidt's sentence in the third case. We disagree. The Rock County court had the authority to determine whether the sentence on the third case would be consecutive or concurrent to any previously imposed sentence; it could not change when a probationary period already imposed would be served. The Waukesha court had designated that Schmidt's probation on the second case was to be served consecutive to his sentence in the first case. Therefore, the probationary period began when Schmidt completed his sentence on the first case on February 10, 2001, and was in effect at the time of the revocation proceeding.

¶7 Schmidt next attempts to raise a series of issues arising from the revocation proceeding itself. As the State points out, however, alleged errors in revocation proceedings other than allegations of ineffective assistance of counsel are to be reviewed by certiorari rather than by habeas corpus. *See State ex rel. Reddin v. Galster*, 215 Wis. 2d 179, 183-84, 572 N.W.2d 505 (Ct. App. 1997). Therefore, Schmidt's claims that no violation of his probation rules was ever alleged, that the Division of Hearings and Appeals lacked subject matter jurisdiction, that he was improperly prevented from attending a hearing at which a restraining order was issued, that a no-contact order was unconstitutional, that his agent presented false evidence at the revocation hearing, and that the revocation of his probation violated the double jeopardy clause are all outside the scope of this

proceeding. Schmidt already raised or could have raised those issues in his prior certiorari action, and could have appealed that determination. Furthermore, Schmidt waived any right to recast these issues in the framework of ineffective assistance of counsel on this appeal by failing to present them to the trial court in that context.

¶8 Schmidt did present the trial court with two other claims of ineffective assistance of counsel. One of those claims was based on the theory we have already rejected that Schmidt was not on probation at the time of the revocation proceeding. The sole remaining claim properly before us is that Schmidt's attorney provided ineffective assistance by failing to adequately prepare for the revocation proceeding or to request an adjournment. We agree with the trial court, however, that Schmidt's allegations are insufficient to establish prejudice.

¶9 First of all, Schmidt did not specify in his writ petition precisely what testimony additional witnesses would have provided had counsel presented them. In addition, the electronic monitoring and cell phone records which Schmidt claims should have been produced would have had only marginal relevance because the ALJ found that several incidents could have occurred outside Schmidt's house and still been within the range of his electronic monitoring radius, and that a witness may have been inaccurate regarding the dates of certain incidents when cell phone records might have shown she was actually out of town. Finally, the ALJ had the opportunity to observe both Schmidt and the witness in question, whose testimony established several probation violations, and the ALJ explained in considerable detail why he found the witness to be more credible than Schmidt on certain points.

¶10 In sum, given the preponderance of the evidence standard in effect at the revocation hearing, there is no reasonable probability that additional witnesses or evidence would have changed the outcome of the hearing.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

