

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 18, 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. 2005AP3108

Cir. Ct. No. 2005CV8677

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. ROBERT W. HUBER,

PETITIONER-APPELLANT,

v.

**DAN BENIK, WARDEN, STANLEY CORRECTIONAL INSTITUTION,
E. MICHAEL McCANN, DISTRICT ATTORNEY, MILWAUKEE COUNTY, AND
M. JOSEPH DONALD, CIRCUIT COURT JUDGE, MILWAUKEE COUNTY,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Robert W. Huber appeals from an order denying his petition for a writ of habeas corpus. We conclude that Huber's detention

pursuant to a final judgment of a competent tribunal precludes him from obtaining habeas corpus relief. Therefore, we affirm.

¶2 In 1988, Huber was convicted of two counts of forgery. He was placed on probation and ordered to pay \$6,000 in restitution. In 1992, the restitution had not been paid; thus, Huber's probationary term was extended. In 2000, Huber's probation was revoked for absconding and other violations. Huber, then represented, decided not to challenge the revocation order. He returned to the trial court, which imposed two ten-year concurrent sentences. Huber appealed and we affirmed, rejecting his sentencing challenges on their merits, and his other challenges as barred for failing to previously raise them.¹ See *State v. Huber*, 2001AP3083-CR, unpublished slip op. at 3-5 (WI App June 6, 2003). Consequently, he has waived any issues involving his revocation, with the exception of ineffective assistance of counsel.

¶3 Huber filed a petition for a writ of habeas corpus in the trial court, challenging his imprisonment. WISCONSIN STAT. § 782.02 (2005-06) provides, “[n]o person shall be entitled to prosecute such writ who shall have been committed or detained by virtue of the final judgment or order of any competent tribunal of civil or criminal jurisdiction or by virtue of any execution issued upon such order or judgment.”² Huber alleges that he completed his probationary term before it was revoked; consequently, the revocation was illegal. He then alleges

¹ Our decision was limited to post-revocation issues; Huber was barred from challenging the underlying judgment. See *State v. Scaccio*, 2000 WI App 265, ¶10, 240 Wis. 2d 95, 622 N.W.2d 449. See *State v. Huber*, 2001AP3083-CR, unpublished slip op. at 3 (WI App June 6, 2003).

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

that his revocation counsel was ineffective for failing to pursue this jurisdictional issue.

¶4 The time to challenge the validity of his underlying (pre-revocation) judgment from 1988, has long passed. *See* WIS. STAT. RULE 809.30(2) (1987-88). Huber also explicitly did not seek to challenge his revocation order. If Huber claims that his revocation counsel was ineffective, he must show that the decision not to challenge the revocation order was not a matter of Huber’s personal choice or a strategic decision. *See Strickland v. Washington*, 466 U.S. 668, 690-91 (1984) (Matters of reasonably sound strategy, without the benefit of hindsight, are “virtually unchallengeable,” and do not constitute ineffective assistance). Huber challenged the post-revocation judgment and postconviction order. *See Huber*, 2001AP3083-CR. If Huber claims that his postconviction counsel was ineffective, he must pursue that claim by postconviction motion pursuant to *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 683-84, 556 N.W.2d 136 (Ct. App. 1996).

¶5 Despite his allegations to the contrary, Huber is detained by virtue of a final judgment of the Milwaukee County Circuit Court. Consequently, he is not entitled to habeas corpus relief. *See* WIS. STAT. § 782.02.

By the Court.—Order affirmed.

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

