COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1349 **Cir. Ct. No. 2013CV3901**

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

BRUCE T. DAVIS,

PETITIONER-APPELLANT,

V.

TIM DOUMA, WARDEN, NEW LISBON CORRECTIONAL INSTITUTION AND STATE OF WISCONSIN,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed.*

Before Curley, P.J., Fine[1] and Kessler, JJ.

[1] This opinion was circulated and approved before Judge Fine's death.

¶1 PER CURIAM. Bruce T. Davis, *pro se*, appeals an order dismissing his petition for a writ of *habeas corpus* and an order denying his motion to reconsider. We affirm.

BACKGROUND

¶2 The Department of Corrections alleged that, while Davis was serving a term of extended supervision for three burglaries, he violated the terms of his supervision on several occasions. Following an evidentiary hearing at which Davis was represented by counsel, an administrative law judge found that the Department proved the allegations that, on August 31, 2011, Davis entered Meghan S.L.'s home without her consent, grabbed her, and demanded money.[2] The administrative law judge concluded that Davis's "violations are serious and warrant revocation."

¶3 Davis appealed the administrative law judge's decision to the administrator of the Division of Hearings and Appeals. The administrator upheld the decision, concluding: "given that Davis is on supervision for three burglaries ... his violations warrant revocation to protect the community from further crime."

¶4 Represented by new counsel, Davis petitioned the Milwaukee County circuit court for *certiorari* review of the revocation decision. The circuit court affirmed, and Davis did not appeal.[3]

[2] The administrative law judge found that the Department of Corrections failed to prove allegations of violations that Davis allegedly committed in September 2011 and October 2011.

[3] The Honorable Jane V. Carroll presided over Davis's action for *certiorari* review and entered the order affirming revocation of Davis's supervision.

¶5 Davis then launched the instant litigation. Proceeding *pro se*, he petitioned the circuit court for a writ of *habeas corpus*, naming as respondents the State of Wisconsin and the warden of the institution where Davis is confined. He alleged that the attorney who represented him in the *certiorari* review proceeding was ineffective for failing to challenge the effectiveness of the attorney who represented him in the revocation proceedings. He went on to allege that the attorney who represented him during the revocation proceedings was ineffective by failing to prepare for the hearing with an adequate investigation and by failing to make appropriate objections in response to the evidence presented. Davis asserted that, but for the alleged ineffectiveness of the lawyer who represented him in the revocation proceedings, the administrative law judge "more th[a]n likely would have dismissed the charges" and would have concluded that the "evidence against [Davis] was clearly insufficient to revoke [his] supervision."

¶6 The State in response moved to dismiss the petition, arguing that the allegations lacked merit. Further, the State argued that the proceedings were moot because, following the revocation of Davis's extended supervision, a jury found Davis guilty of the crimes underlying the revocation decision, and his convictions alone are sufficient to support revocation of his extended supervision. The State attached more than 150 pages of documents to its motion, including the transcript of the revocation hearing, the decision of the administrative law judge revoking Davis's extended supervision, the decision of the Administrator of the Division of Hearings and Appeals sustaining that decision, the circuit court decision affirming the Administrator, and circuit court docket entries reflecting Davis's criminal convictions for offenses he committed against Meghan S.L.

¶7 Davis filed a reply brief contending that the proceedings for a writ of *habeas corpus* were "not rendered moot by virtue of petitioner's criminal

convictions" because he was pursuing an appeal of his criminal convictions. Thus, in his view, any claim that the Department would revoke his extended supervision based on those convictions was merely speculative. The circuit court entered a decision and order dismissing Davis's petition. The circuit court also denied his motion to reconsider, and he now appeals.

DISCUSSION

¶8 Davis petitioned for a writ of *habeas corpus* to address his claims that he received ineffective assistance of counsel. "Whether writ of *habeas corpus* is available to the party seeking relief is a question of the law that we review *de novo*." ***State v. Pozo***, 2002 WI App 279, ¶6, 258 Wis. 2d 796, 654 N.W.2d 12.

¶9 We first dispose of the claim based on the alleged ineffectiveness of the attorney who represented Davis during the *certiorari* proceedings. "[U]nder the Sixth Amendment [to the United States Constitution] the 'right to counsel' means the right to effective assistance of counsel." *See* ***A.S. v. State***, 168 Wis. 2d 995, 1003 n.4, 485 N.W.2d 52 (1992). Where Wisconsin provides a statutory right to counsel, that right also includes the right to effective assistance of counsel. *See* ***State ex rel. Schmelzer v. Murphy***, 201 Wis. 2d 246, 253, 548 N.W.2d 45 (1996). As the State explains, however, Davis did not have a statutory or a constitutional right to counsel for *certiorari* review of an administrative decision revoking community supervision. *See* ***State ex rel. Griffin v. Smith***, 2004 WI 36, ¶¶22, 31, 270 Wis. 2d 235, 677 N.W.2d 259. Therefore, he may not obtain any relief based on a claim that the lawyer who assisted him in that review was

allegedly ineffective.[4] *See* ***Coleman v. Thompson***, 501 U.S. 722, 752 (1991) (no claim for ineffective assistance of counsel absent right to counsel).

¶10 Davis did, however, have a right to counsel during the revocation hearing. *See* ***Griffin***, 270 Wis. 2d 235, ¶3. A petition for a writ of *habeas corpus* is the mechanism for claiming that counsel was ineffective during that hearing. *See* ***State v. Ramey***, 121 Wis. 2d 177, 178, 182, 359 N.W.2d 402 (Ct. App. 1984). Accordingly, we turn to the question of whether the circuit court properly dismissed the allegations that Davis received ineffective assistance from the lawyer who represented him in the revocation proceedings.

¶11 A defendant alleging ineffective assistance of counsel must prove both that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must show "that counsel's conduct falls below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. To prove prejudice, the defendant must show "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Id.*** (citation omitted). Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law for our independent review. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

[4] Davis complains of flaws in the law governing whether he had a right to counsel during *certiorari* review of a revocation decision. He invites us to re-examine that law. We must decline his invitation. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). Davis also asks us to certify the question of his right to counsel to the supreme court. We see no need to do so.

¶12 When a defendant claims that counsel was ineffective, the defendant must seek to preserve counsel's testimony in an evidentiary hearing. *See* ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶22, 314 Wis. 2d 112, 758 N.W.2d 806. The circuit court may deny the claim without a hearing, however, "'if the record conclusively demonstrates that the defendant is not entitled to relief.'" ***State ex rel. Kyles v. Pollard***, 2014 WI 38, ¶47, 354 Wis. 2d 626, 847 N.W.2d 805 (citation and one set of quotation marks omitted). This is such a case.

¶13 When a court determines that a litigant received ineffective assistance of counsel, the remedy "is to restore the [litigant] to the position he or she would have occupied but for counsel's ineffectiveness." *See* ***id.***, ¶32. Therefore, if Davis were to prevail in his petition for a writ of *habeas corpus* and prove that he received ineffective assistance from his revocation counsel, his remedy would be a new revocation hearing. *See* ***State v. Cooks***, 2006 WI App 262, ¶¶2, 66, 297 Wis. 2d 633, 726 N.W.2d 322 (ordering a new trial as the remedy for defendant who received ineffective assistance of counsel before and during trial). The State shows, however, and Davis does not dispute, that after the revocation proceedings ended, a jury found him guilty of the crimes underlying the revocation of his supervision. His claims of counsel's ineffectiveness during the revocation proceedings are therefore rendered moot. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 ("An issue is moot when its resolution will have no practical effect on the underlying controversy."). This is so because, under WIS. ADMIN. CODE § HA 2.05(6)(f), a violation of the rules of extended supervision "is proven by a judgment of conviction arising from conduct underlying an allegation." Thus, at a new revocation hearing, the Department of Corrections would offer the judgment of conviction arising from the crimes against Meghan S.L. The Department would

thereby prove that Davis violated the terms of his extended supervision, and revocation of that supervision would follow.[5] Because a second revocation hearing would include proof of Davis's violations and result again in revocation of his supervision, the record shows that Davis is not entitled to any relief based on his claims that counsel was ineffective during his first hearing.

¶14 Davis disagrees. He asserts that the Department cannot rely on his criminal convictions to prove that he violated the rules of extended supervision because he has taken steps to appeal those convictions. In his view, the convictions are therefore "non-final" and "tentative." Davis is wrong. Criminal convictions become final when the circuit court enters a judgment of conviction. *See* ***State v. One 1997 Ford F-150***, 2003 WI App 128, ¶20, 265 Wis. 2d 264, 665 N.W.2d 411. "The fact that criminal litigants have the right to appeal from a judgment of conviction does not make the judgment any less final." ***Id.*** Moreover, Davis cites no Wisconsin authority that renders WIS. ADMIN. CODE § HA 2.05(6)(f) inapplicable to judgments of conviction that are in the appellate pipeline. Indeed, the plain language of the regulation imposes no such limitation.

¶15 We turn to Davis's contention that the circuit court committed procedural errors in resolving his petition for a writ of *habeas corpus*. We understand Davis's primary complaint to be that the circuit court "failed to issue

[5] Davis does not allege that his lawyer could have done anything during the revocation proceedings that would likely have prevented revocation of his extended supervision upon proof of the offenses against Meghan S.L. *See* ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62 (ineffective assistance claim requires showing of reasonable probability that, but for counsel's allegedly deficient conduct, outcome would have been different). To the extent, if any, that his petition or briefs suggest any allegation of ineffectiveness in this regard, we conclude that he did not adequately raise the issue. Claims of ineffective assistance of counsel must be described with specificity. *See* ***State v. Winters***, 2009 WI App 48, ¶29, 317 Wis. 2d 401, 766 N.W.2d 754.

the writ to obtain the record and testimony." Davis raises this complaint for the first time on appeal. Although he moved to reconsider the circuit court's order dismissing his petition, his motion did not include a claim that the circuit court failed to require the respondents to file a sufficient return. As a rule, we do not consider claims raised for the first time on appeal, *see* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 634, 579 N.W.2d 698 (1998), and we reject his claim for that reason.[6]

¶16 Davis did allege in his motion to reconsider that the circuit court denied him relief without ordering him produced for an evidentiary hearing. Although he preserved this issue for appellate review, his allegation earns him no relief because the circuit court did not err. As we have explained, a petitioner seeking a writ of *habeas corpus* is not automatically entitled to a hearing to explore a claim of counsel's ineffectiveness. *See* ***Kyles***, 354 Wis. 2d 626, ¶47. When, as here, the record conclusively shows that the petitioner is not entitled to relief, the circuit court may deny relief without a hearing. *See* ***id.***

¶17 Next, Davis asserts that the circuit court should not have considered the State's response to his petition because, he says, "the district attorney is not a proper respondent.... The proper, and in fact the only respondent in a *habeas*

[6] For the sake of completeness, we observe that Davis appears to confuse the procedure applicable to a petition for a writ of *certiorari* with the procedure applicable to a petition for a writ of *habeas corpus*. In the former proceeding, the writ requires the respondent to file a return consisting of the record made before an administrative body, and the circuit court then reviews that record to resolve the petitioner's claim. *See* ***State ex rel. Kaufman v. Karlen***, 2005 WI App 14, ¶¶4-9, 278 Wis. 2d 332, 691 N.W.2d 879. When a petitioner seeks a writ of *habeas corpus*, however, the required return described by statute does not include a record made before an administrative body. *See* WIS. STAT. §§ 782.13-782.14 (2011-12). Moreover, in this case, Davis and the State both submitted documents from the administrative record for the circuit court's review. Davis does not identify any relevant documents that the circuit court did not receive. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

action is the custodian of the institution in which the petitioner lodging the petition is held." Davis, however, named the State as a respondent in this proceeding. Therefore, we will not hear his complaint that the State filed a response or his related complaint that the circuit court considered that response. *See* ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992) ("We will not review invited error.").

¶18 Last, we deny Davis's request that we assess a monetary penalty against the circuit court pursuant to WIS. STAT. § 782.09. The statute provides that "[a]ny judge who refuses to grant a writ of *habeas corpus*, when legally applied for, is liable to the prisoner in the sum of $1,000." ***Id.*** Davis raises the issue for the first time on appeal, and his appellant's brief includes only a cursory discussion of the basis for his request. As the State points out, Davis's opening brief does not analyze: (1) whether a litigant may request a monetary penalty for the first time on appeal; (2) whether a litigant may seek the penalty in the *habeas corpus* proceeding rather than initiate an independent legal action for the penalty; or (3) whether a litigant may obtain a financial award when both the circuit court and this court conclude that the litigant is not entitled to a writ of *habeas corpus*. We are satisfied that Davis has not adequately briefed the issue, and we therefore do not address it.[7] *See* ***Pozo***, 258 Wis. 2d 796, ¶11 (declining, in an appeal from

[7] Davis attempts to remedy the deficiencies in his opening brief by including new arguments in his reply brief to support his claim for a financial award under WIS. STAT. § 782.09. We reject the attempt. We do not consider arguments raised for the first time in a reply brief. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). To do so would "thwart[] the purpose of a brief-in-chief, which is to raise the issues on appeal, and the purpose of a reply brief, which is to reply to arguments made in a respondent's brief." ***Verex Assurance, Inc. v. AABREC, Inc.***, 148 Wis. 2d 730, 734 n.1, 436 N.W.2d 876 (Ct. App. 1989).

an order denying a writ of *habeas corpus*, to address an inadequately briefed claim for a financial award under § 782.09).

By the Court.—Order affirmed.

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