

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 9, 2016

Diane M. Fremgen
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. 2014AP2637

Cir. Ct. No. 2014CV310

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN EX REL. ANTIJUAN REDMOND,

PETITIONER-APPELLANT,

V.

**BRIAN FOSTER, WARDEN, KETTLE MORAINÉ CORRECTIONAL
INSTITUTION,**

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County:
L. EDWARD STENGEL, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Antjuan Redmond appeals from an order granting the State's motion to dismiss his petition for a writ of habeas corpus. Redmond claims that the attorney who represented him during a proceeding to revoke his

probation and extended supervision provided ineffective assistance of counsel in defending against allegations that he battered his girlfriend and her nephew. Because Redmond was found to have violated three other conditions of his probation and extended supervision, any alleged ineffectiveness of counsel did not prejudice him. Thus, we affirm the order.

¶2 The State charged Redmond with two counts of burglary in violation of WIS. STAT. § 943.10(1m)(a) (2013-14).¹ He was convicted and sentenced to two years of initial confinement followed by three years of extended supervision on one count and, on the other count, sentence was withheld and he received five years of probation. Subsequently, while on probation and extended supervision, Redmond battered his girlfriend, A.T., who was seven weeks pregnant with their child, and A.T.'s eight-year-old nephew K.B. The Department of Corrections (DOC) initiated revocation proceedings against Redmond for this incident. In addition, Redmond was cited for failing to report to his agent as scheduled, driving a motor vehicle without a valid driver's license, and giving false information to police.

¶3 A hearing on the revocation was held before an administrative law judge (ALJ) during which Redmond was represented by counsel. At the outset, counsel indicated that Redmond stipulated to having failed to report to his agent as scheduled, driving a motor vehicle without a valid driver's license, and giving false information to police. The ALJ admitted into evidence various exhibits, including the police report detailing Redmond's alleged assault of A.T. and K.B.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

It was noted that the agent had subpoenaed A.T. to testify, but she did not appear. Since A.T. did not appear, Redmond's counsel objected to the admission of the police report because it contained hearsay statements from A.T. and, without being able to cross-examine A.T., the ALJ could not judge her credibility. The ALJ overruled the objection. Counsel then added that if there was any argument that A.T.'s statements constituted an excited utterance, he would argue that there was no foundation as to A.T.'s general state of mind in order to judge if her statements were excited. The ALJ overruled the objection.

¶4 The ALJ asked if Redmond's counsel wanted to cross-examine the police officers who authored the reports, because they were outside the hearing room, but counsel declined. He agreed with the ALJ that, in effect, cross-examination would serve little purpose because the police officers would testify to only the contents of their reports.

¶5 Counsel then examined Redmond's probation agent. The agent acknowledged that A.T. had recanted her allegations and said that another man was present and he had battered her. The agent conceded that she would "probably not" be considering revocation were it not for the allegations of battery and the pending felony charge that resulted.

¶6 On Redmond's case, counsel entered into evidence A.T.'s medical records and letters she wrote to Redmond supporting the theory that she had fabricated the allegations, that she told K.B. to lie, and that another man had battered her.

¶7 Following the hearing, the ALJ found that Redmond had battered A.T. and K.B. The ALJ found the police report reliable. The ALJ pointed out that K.B. told police that Redmond had struck him on the back with a phone in order to

prevent him from calling 911, and K.B.'s injury, a large red mark on the middle of his back, was consistent with what he told police. Similarly, both A.T. and K.B. had told police that Redmond struck A.T. near the kitchen sink, and the police observed blood in that sink. The best evidence in this case, the ALJ found, was K.B.'s "excited utterances" to police, which was corroborated by the physical evidence that the police observed. The ALJ rejected Redmond's "conspiracy theory" that A.T. decided to blame Redmond for the battery shortly after it happened instead of the person who actually struck her, pointing out that neither A.T. nor anyone in the apartment mentioned another man. The ALJ did not believe that K.B., an eight-year-old child, could be "co-opted to fabricate a story within a few short minutes before police arrived," tell a fabricated story, and be "consistent with the other witnesses." Redmond admitted that he had been present but fled the scene. The ALJ asked why, if he was not the person who battered A.T., he did not stay and comfort her. Redmond acted guilty by fleeing. Although A.T. did not testify, her written recantations could be explained by her continued relationship with Redmond and being pregnant with his child.

¶8 In addition, based on the stipulation, the ALJ found that by failing to report to his agent as scheduled, driving a motor vehicle without a valid driver's license, and giving false information to police, Redmond had violated his probation and extended supervision.

¶9 The ALJ revoked Redmond's probation and extended supervision.

¶10 Redmond appealed to the Department of Hearings and Appeals (DHA) and the DHA administrator sustained the ALJ's determination. The administrator noted that the violations of failing to report to his agent as scheduled, driving a motor vehicle without a valid driver's license, and giving

false information to police warranted revoking Redmond's probation and extended supervision. Redmond did not appeal the administrator's determination.

¶11 Nearly twenty months after revocation was sustained by the DHA, Redmond petitioned the circuit court for a writ of habeas corpus based on counsel's alleged ineffective assistance at the revocation hearing. Counsel, Redmond claimed, was ineffective in the following ways: (1) counsel should have interviewed and subpoenaed A.T. and, had he done so, she would have testified in a manner consistent with the affidavit she provided, namely, that she fabricated the allegations; if the probation agent subpoenaed A.T., counsel should have "enforce[d]" it; (2) counsel should not have waived Redmond's right to cross-examine the officers who completed the police report; (3) counsel should have objected to statements in the police report about the police observing blood in the kitchen sink and photographing it because the police never collected a sample and tested it; so, there was no way to determine with certainty that it was A.T.'s blood; (4) counsel should have introduced both a telephone recording from the Dane County jail between Redmond and A.T. during which A.T. admitted that she paid K.B. to say that Redmond hit her, and a victim impact statement from K.B. that Redmond "never did anything to" him; (5) counsel should have requested an adjournment of the revocation hearing so that he could subpoena witnesses, investigate exculpatory evidence, and see if the charges in the criminal case stemming from his battery of A.T. would proceed beyond a preliminary hearing; and (6) counsel "aid[ed] and abett[ed]" the DOC by mentioning the excited utterance exception to the hearsay rule, which the ALJ used to admit K.B.'s statements in the police report into evidence.

¶12 The State moved to dismiss the petition, arguing that the petition was meritless. As relevant, the State highlighted that Redmond admitted to

several probation violations other than the ones involving battery. The administrator said that these violations warranted revocation supervision. Thus, the alleged ineffective assistance of counsel simply did not matter.

¶13 Redmond responded that if counsel was found to have provided ineffective assistance, then there might be a new hearing, which might prove more favorable to him on all of the allegations. Further, Redmond contended that if he was “cleared” of the battery allegations, the probation agent would have to decide whether to pursue revocation and, if so, then the ALJ would have to decide whether to revoke Redmond’s probation and extended supervision. Redmond offered that not all violations warrant revocation. Indeed, Redmond contended, the probation agent said during the revocation hearing that she would not revoke Redmond’s probation and extended supervision if the allegations of battery were dismissed.

¶14 The circuit court granted the State’s motion and dismissed Redmond’s petition. The court concluded that many of the claimed deficiencies of counsel were matters of strategy. In any event, even if counsel was deficient, Redmond was not prejudiced because other allegations of violations, besides those related to Redmond having battered A.T. and K.B., were sustained, which provided more than sufficient basis to revoke Redmond’s probation and extended supervision.

¶15 On appeal, the State argued, as it had before the circuit court, that the petition should be dismissed because Redmond had an adequate remedy other than a writ of habeas corpus to allege ineffective assistance of counsel, namely, a *Booker*-type motion, in which the ineffectiveness of revocation counsel claim would be brought before the agency, not the circuit court. *See State ex rel.*

Booker v. Schwarz, 2004 WI App 50, 270 Wis. 2d 745, 678 N.W.2d 361. We certified this question to our supreme court, which it accepted. The State, however, moved to withdraw the supreme court's grant of certification and to remand the matter to this court to consider the remaining issue presented for review, conceding that the remedy of writ of habeas corpus applies here. The supreme court granted the State's motion and ordered the matter vacated and remanded.

¶16 The State argues that the remaining issue presented for review is whether Redmond's petition should be dismissed on the merits because the findings that he violated the conditions of his probation and extended supervision by failing to report to his agent as scheduled, driving a motor vehicle without a valid driver's license, and giving false information to police alone warranted revoking his probation and extended supervision; thus, it does not matter if counsel was ineffective as to the allegations of battery, and there was no prejudice to Redmond.

¶17 We apply the same analysis to a claim of ineffective assistance of revocation counsel in the context of this habeas petition as that applicable to trial counsel in the context of postconviction proceedings. A petitioner alleging ineffective assistance of revocation counsel must prove both that counsel's performance was deficient, and that the deficiency prejudiced the petitioner's defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a petitioner must show that counsel's performance fell below an objective standard of reasonableness. *State v. Love*, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. To show prejudice, a petitioner must show that there is a reasonable probability that, but for counsel's deficient performance, the

result of the proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

¶18 In order to be entitled to an evidentiary hearing on an allegation of ineffective assistance of revocation counsel, a petitioner must allege sufficient material facts which, if true, would entitle the petitioner to relief. *State v. Allen*, 2004 WI 106, ¶¶12-14, 274 Wis. 2d 568, 682 N.W.2d 433. However, an evidentiary hearing may be denied in the discretion of the circuit court if the allegations do not entitle the petitioner to relief, if one or more key factual allegations in the petition are conclusory, or if the record conclusively demonstrates that the petitioner is not entitled to relief. *Id.*, ¶12. If the circuit court denies the motion based on any of these three factors, its act is reviewed under the erroneous exercise of discretion standard. *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996).

¶19 Here, the record conclusively demonstrates that Redmond is not entitled to relief. As the State notes, “[v]iolation of a condition is both a necessary and a sufficient ground for the revocation of probation.” *State ex rel. Warren v. Schwarz*, 211 Wis. 2d 710, 724, 566 N.W.2d 173 (Ct. App. 1997) (citation omitted). In the decision of the DHA administrator, well before Redmond alleged any instance of ineffective assistance of revocation counsel, the administrator noted that Redmond admitted to failing to report to his agent as scheduled, driving a motor vehicle without a valid driver’s license, and giving false information to police, and that “[t]hese violations warrant revocation of his supervision.” In other words, Redmond’s probation and extended supervision would have been revoked on these three violations alone. Since Redmond’s probation and extended supervision would have been revoked anyway, it matters not whether counsel’s performance was deficient in defending against the battery allegations. In short,

the alleged ineffective assistance of revocation counsel in defending against the battery allegations did not prejudice Redmond.

¶20 For the first time on appeal, and only in his reply brief, Redmond argues that counsel was ineffective for advising him to stipulate to the allegations of failing to report to his agent as scheduled, driving a motor vehicle without a valid driver's license, and giving false information to police. Given the manner in which this issue is raised, we need not consider it. See *State v. Zien*, 2008 WI App 153, ¶¶2, 40, 314 Wis. 2d 340, 761 N.W.2d 15; *State v. Grade*, 165 Wis. 2d 143, 151 n.2, 477 N.W.2d 315 (Ct. App. 1991). That said, we note that Redmond himself offers a reasonable strategy as to why counsel advised him to stipulate to these three allegations. See *State v. Carlson*, 2014 WI App 124, ¶31, 359 Wis. 2d 123, 857 N.W.2d 446. Counsel told him to stipulate to the less serious violations because it would show that he was taking responsibility, and the ALJ might be more lenient with him.

¶21 Moreover, Redmond's contentions about what might happen at a new hearing are pure speculation and inapposite. While Redmond points to the agent's testimony that she might not have pursued these three allegations alone, the battery allegations were indeed pursued, and a new hearing would not take this case back to the agent. Our review is of the administrator's decision, and the administrator has already determined that revocation was warranted based on Redmond's failure to report to his agent as scheduled, driving a motor vehicle without a valid driver's license, and giving false information to police. Finally, Redmond has not offered any defense on the merits as to the allegations of failing to report to his agent as scheduled, driving a motor vehicle without a valid driver's license, and giving false information to police.

¶22 We affirm.

By the Court.—Order affirmed.

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

