COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1791-CR **Cir. Ct. No. 99-CF-1356**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COREY L. MARIONEAUX,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Cause remanded with directions.*

Before Deininger, P.J., Dykman and Vergeront, JJ.

¶1 DEININGER, P.J. Like the writ proceedings in ***State ex rel. Ford v. Holm***, No. 02-1828-W (WI App Jan. 29, 2004), released today and recommended for publication, this appeal presents a question that has surfaced with some frequency in motion and writ practice before this court: Must an attorney appointed to represent an indigent defendant in postconviction

proceedings move for court permission to withdraw from representation after the attorney concludes that his or her client has agreed to have the attorney "close the file" without filing a postconviction motion, appeal, or no-merit report? A closely related second question is whether appointed postconviction counsel renders ineffective assistance by failing to obtain court permission to withdraw or otherwise seek a judicial determination that the defendant has knowingly waived either the right to appeal or the right to counsel? We concluded in ***Ford*** that the answer to these questions is no and that, given the supreme court's express declination to so order in ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 622-23, 516 N.W.2d 362 (1994), it would be inappropriate for us to require withdrawal motions to be filed in every case such as this. However, because we also conclude that the record before us is insufficient to permit us to determine whether Marioneaux knowingly waived either the right to counsel or to an appeal, we remand the matter to the circuit court for evidentiary proceedings on the question of waiver.

BACKGROUND

¶2 Corey Marioneaux pled no contest to armed robbery and, on November 15, 1999, the court sentenced him to six years in prison. He timely filed a notice of intent to seek postconviction relief and the State Public Defender (SPD) appointed postconviction counsel for him. Counsel sent Marioneaux a standard "Information for Clients" form prepared by the SPD which informed him, among other things, of the potential for a "No Merit report" and of the options under WIS. STAT. RULE 809.32(1)(b) (2001-02).[1] The form also explained that the

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

SPD "will not appoint successor counsel simply because you disagree with counsel's conclusion as to the issues, or lack of issues, for appeal."

¶3 In March 2000, counsel informed Marioneaux by letter that he had reviewed the record and determined that it offered "no grounds for appeal or sentence modification." Counsel also told Marioneaux that he had three options:

> (1) you can accept my opinion and authorize me to close my file without further court action; (2) you can discharge me and either hire a private lawyer or act as your own post-conviction attorney; or, (3) you can ask me to file a "no merit" appeal. In a no-merit appeal, I would explain my legal opinion to the Court of Appeals in a written report and you would receive a copy of my report and instructions how you could file a written response, if you wish. The Court of Appeals would then review the entire case and decide for itself whether there are any grounds for appeal. I recommend option #1, but it is your decision.

Counsel subsequently moved this court to enlarge the time for filing a postconviction notion or notice of appeal, informing us that Marioneaux had discharged him "in order to retain private post-conviction counsel."

¶4 We did not immediately grant the motion. Instead, we issued an order advising Marioneaux that if his present counsel were discharged, successor counsel would not be appointed for him. We also outlined his responsibilities to comply with various procedural requirements if he were unable to privately retain successor counsel and elected to proceed pro se, and we noted the potential disadvantages of proceeding pro se in postconviction proceedings. Finally, we explained the no-merit procedure under WIS. STAT. RULE 809.32 and ordered Marioneaux to carefully consider the information provided and advise us if he wanted to discharge his appointed postconviction counsel, noting that if his

response left us in doubt about his understanding of the consequences of proceeding pro se, we would not authorize counsel to withdraw.

¶5 Marioneaux failed to respond to our order. We then extended the time for the filing of a postconviction motion, notice of appeal or no-merit appeal and ordered "that counsel shall not be permitted to withdraw." After receiving this order, counsel wrote to Marioneaux, reiterating his belief that there were no arguably meritorious grounds for relief from his conviction and sentence. Counsel requested Marioneaux to elect whether to have counsel "file a 'no merit' appeal" or to close his file "without further court action," again recommending the latter option. Counsel also informed Marioneaux that if he received no response by a date certain, counsel would assume that Marioneaux had in fact chosen the latter option and counsel would close the file. The date passed and counsel sent another letter to Marioneaux, this one informing him that because he had not responded, "I am assuming that you have authorized me to close my file without further court action." Counsel has subsequently informed us that, on the same day he sent the last letter, Marioneaux telephoned him and "expressly consented to the closing of my file without further court action." Counsel then forwarded transcripts to Marioneaux and confirmed that counsel had closed his file.

¶6 Over the next two years, Marioneaux filed two pro se motions for sentence modification, both of which the circuit court denied. He then filed a timely notice of appeal of the second order denying his sentence modification motion, and in the notice, Marioneaux requested the court to appoint "counsel as of a matter of right on 1st appeal, and pursuant to ***State v. Flores***." We directed Marioneaux's counsel to explain what had transpired after our last order of some two years previous where we had denied counsel permission to withdraw.

¶7 On receipt of counsel's explanation that, with Marioneaux's consent, he had closed his file without further court action, we noted that we had "no record establishing that Marioneaux intelligently and competently waived his right to counsel." We ordered counsel to continue representing Marioneaux unless granted permission to withdraw and directed him to proceed in one of three ways: move to voluntarily dismiss Marioneaux's appeal in order to pursue postconviction proceedings in the circuit court, file an appellant's brief, or file a no-merit report. The SPD wrote to us asking that we reconsider or clarify our order. Ultimately, in conjunction with the writ petition in ***State ex rel. Ford v. Holm*****,** No. 02-1828-W (WI App Jan. 29, 2004), we obtained pro bono counsel for Marioneaux and directed the briefing as described below.[2]

ANALYSIS

¶8 Notwithstanding the procedural and factual differences between this appeal and the writ proceeding in ***State ex rel. Ford v. Holm*****,** No. 02-1828-W (WI App Jan. 29, 2004), we conducted joint oral argument on the two cases. In addition to the common question that arises in both cases, they also share a somewhat unusual alignment of parties and positions. Both Marioneaux's appeal and Ford's writ petition were initially filed pro se. Attorney James Troupis

[2] Although Marioneaux has formally invoked our jurisdiction by appealing the denial of his pro se sentence modification motion, we construe his request for appointment of counsel and reinstatement of direct appeal rights as a petition for writ of habeas corpus alleging ineffective assistance of postconviction or appellate counsel (i.e., a ***Knight*** petition). *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 602, 516 N.W.2d 362 (1994). In a letter Marioneaux sent to this court after filing his notice of appeal, he explained his request for counsel as follows: "At the time of plea and sentencing in this matter the attorney at the time (trial) did not file a notice of appeal. Pursuant to ***State v. Flores***, its [sic] my understanding that I have a right to a first appeal." Although Marioneaux refers to his trial attorney, as we have explained, it was his appointed postconviction counsel who "closed the file" without filing a postconviction motion, notice of appeal, or no-merit brief.

answered our request of the Wisconsin State Bar Appellate Law Section to provide pro bono representation in both matters, and we directed him to file in each case "an amicus curiae brief in support of [Marioneaux and Ford]'s position that appointed postconviction counsel erred in closing [their] file[s] without filing a motion to withdraw."

¶9 Because the attorneys appointed to provide postconviction representation in both cases were appointed and employed by the Office of the State Public Defender (SPD), and because we concluded that these cases raise "issues of statewide importance that are likely to impact" that office, we invited the SPD to file an amicus brief in each case. The SPD accepted our invitation and, along with the State, filed briefs in response to those filed on behalf of Marioneaux and Ford. Additionally, we invited Marioneaux and Ford to file supplemental pro se briefs if they wished, but neither did so.

¶10 Attorney Troupis on behalf of Marioneaux asks that we order his direct appeal rights under WIS. STAT. RULE 809.30 reinstated and that counsel be appointed for him. Additionally, he requests us to "articulate an obligation for future counsel to seek Court approval before foregoing a criminal appeal." The State joins in the latter request, arguing that "appointed appellate counsel should always be required to file a motion to withdraw and, where necessary, a no-merit brief whenever counsel intends to end representation." The State agrees that we should reinstate Marioneaux's direct appeal rights but asks us to direct his originally appointed counsel to file a no-merit brief under WIS. STAT. RULE 809.32.

¶11 The State thus largely supports the arguments advanced on behalf of Marioneaux that he was denied effective assistance of postconviction or appellate

counsel. The SPD disagrees. It asks us to "find" that Marioneaux "validly waived his right to a no merit report" and that "postconviction counsel properly closed the file." The SPD argues in the alternative, if we cannot reach those conclusions on the present record, that the case should "be remanded to the circuit court for fact finding." The SPD also contends that, under ***Flores***, we cannot (or at least should not) require appointed counsel to file motions to withdraw on facts such as those before us.

¶12 As in our opinion in ***State ex rel. Ford v. Holm*****,** No. 02-1828-W (WI App Jan. 29, 2004), we address in this decision only the question of whether something happened, or did not happen, after Marioneaux's criminal conviction that should result in his having his rights restored to directly appeal his conviction with the assistance of appointed postconviction counsel. The merits of any underlying claims of error that would invalidate his conviction or sentence have not been briefed and are not presently before us.

¶13 It appears from the documents filed in this case that counsel discharged his duties to (1) review and evaluate the circuit court records and transcripts for possibly meritorious grounds for relief from Marioneaux's conviction, and (2) advise Marioneaux regarding his rights and options. The dispute before us has to do with what happened after counsel presented his client with options on how to proceed. Counsel has informed us that his former client affirmatively chose to forego further postconviction proceedings in this court or the circuit court, at least with representation by appointed counsel. Consequently, appointed counsel "closed the file" without filing a no-merit report or formally moving the court for permission to withdraw from further representation, which, he asserts (as does the SPD) is in accord with the supreme court's holding in ***Flores***.

¶14 As we have noted, we have intertwined our consideration of Marioneaux's request for reinstatement of his direct appeal rights with a similar request made by the petitioner in ***Ford***. Our opinion in ***Ford***, released concurrently with this one and recommended for publication, contains our analysis of whether appointed postconviction counsel should be required to move to withdraw in every case before "closing the file," and whether the failure to do so automatically constitutes ineffective assistance of postconviction counsel. Rather than repeating the analysis here, we incorporate it by reference. *See* ***State ex rel. Ford v. Holm*****,** No. 02-1828-W, ¶¶2-5 and ¶¶18-32 (WI App Jan. 29, 2004).

¶15 This court has already had considerable involvement with the issue of Marioneaux's postconviction representation. When appointed counsel first moved for an extension of deadlines to permit Marioneaux to pursue postconviction relief with privately retained counsel, we issued an order that provided Marioneaux with essentially the information now required under ***Thornton***. We also ordered him to inform us whether he in fact wanted to discharge appointed counsel, even if he were unable to obtain successor counsel, or whether he wanted "to retain present counsel." When Marioneaux did not respond, we specifically denied counsel permission to withdraw "at this time" and we extended the time to "file a postconviction motion, notice of appeal, or no merit appeal," expecting that one of these alternatives would be pursued by counsel.

¶16 Counsel pursued none of the alternatives and instead closed his file. After we learned two years later that counsel had closed his file, we commented that counsel's "actions in this case run extremely close to violating an order of this court." The SPD strongly disagrees and asserts that counsel properly closed his file after obtaining Marioneaux's specific consent to do so because "Marioneaux

still had the right to forego an appeal even after this court denied counsel's motion to withdraw." Even if this last assertion is correct, however, the question remains whether Marioneaux did, in fact, waive his right to have counsel file a no-merit report, which was the only alternative other than closing the file counsel offered, given counsel's assessment that arguably meritorious grounds did not exist for Marioneaux to seek postconviction relief.

¶17 The SPD argues that we can conclude that Marioneaux knowingly waived a no-merit report on the record before us because he "did not in any way question the propriety of the case closing" for over two years. The State disagrees, contending that, because Marioneaux did not "affirmatively express consent to forego appeal or proceed without appointed appellate counsel," we cannot find a waiver and thus should direct appointed counsel to "file the no-merit report that he would have filed but for Marioneaux's intransigence." The State, however, overlooks the fact that, in his response to our inquiry, appointed counsel asserts that Marioneaux expressly consented in a telephone conversation to the closing of the file. As in ***Ford***, however, the only indication of this express consent is counsel's unsworn response and a copy of a letter counsel sent to Marioneaux noting that counsel had "closed [his] file at this time without filing a 'no merit' appeal or other court action." Significantly, counsel's letter to Marioneaux does not recite that his closing the file was based on Marioneaux's instructions or consent. We are unwilling, therefore, to treat the letter and Marioneaux's subsequent two-year silence as confirming that Marioneaux had in fact given express consent to closing his file.

¶18 We are thus in need of factual findings in order to determine what relief, if any, should be afforded Marioneaux at this juncture. Accordingly, we remand the matter to the Dane County Circuit Court for a determination of

whether Marioneaux knowingly and voluntarily waived his right to have his appointed counsel file a no-merit report or, alternatively, his right to be represented by counsel in postconviction proceedings. The circuit court should conduct an evidentiary hearing and make specific factual findings regarding what information was provided to Marioneaux, what options and advice were provided by counsel and what choices Marioneaux made and communicated to counsel before counsel closed his file. The court's findings and a transcript of any proceedings on the referred issues shall be filed with this court within ninety days of remittitur. If the circuit court is unable to comply with this deadline, that fact should be communicated to us, along with a proposed alternate date for filing the necessary findings and transcript.

CONCLUSION

¶19 For the reasons discussed above, we remand to the circuit court for evidentiary proceedings.

By the Court.—Cause remanded with directions.

Not recommended for publication in the official reports.