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DISTRICT II

June 4, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP877-CR State of Wisconsin v. Ross C. Hertzberg (L.C. #2006CF146)
2013AP878-CR State of Wisconsin v. Ross C. Hertzberg (L.C. #2010CF43)
2013AP879-CR State of Wisconsin v. Ross C. Hertzberg (L.C. #2010CF66)

Before Brown, C.J., Reilly and Gundrum, JJ.

In these consolidated appeals, Ross C. Hertzberg appeals from a circuit court order denying his postconviction motion for the appointment of counsel. Based on our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm the order of the circuit court.

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

Hertzberg was convicted following pleas to second-degree sexual assault of a child, delivery/distribution of a schedule I, II, or III non-narcotic, and escape. After sentencing, his trial counsel filed notices of intent to seek postconviction relief and requested public defender representation. On April 20, 2011, the Office of the State Public Defender (SPD) appointed attorney Chris A. Gramstrup to represent Hertzberg in postconviction proceedings.

Prior to the appointment of Gramstrup, Hertzberg filed a pro se motion to reconsider or modify his sentence. The circuit court scheduled a hearing on the motion for June 8, 2011. Upon learning of the pending motion and scheduled hearing, Gramstrup spoke with Hertzberg by telephone to discuss the matter. Gramstrup advised Hertzberg of the disadvantages of self-representation and that if he chose to proceed with his pro se motion, he would be waiving his right to counsel.

Hertzberg declined to withdraw his pending motion. Accordingly, on June 1, 2011, Gramstrup wrote a letter to the circuit court advising it of Hertzberg's decision to proceed pro se. That same day, Gramstrup wrote a letter to Hertzberg confirming that Hertzberg was electing to proceed pro se. That letter informed Hertzberg that Gramstrup was closing the file and stressed that Hertzberg needed to contact him immediately if he had any questions. Hertzberg did not contact Gramstrup. Instead, he went ahead with his motion at the June 8, 2011 hearing, and the circuit court denied it. Hertzberg did not appeal that decision.

Approximately eleven months later, on May 7, 2012, Hertzberg wrote a letter to the SPD asking that new counsel be appointed to reinstate his lapsed direct appeal rights. The SPD declined to do so, citing Hertzberg's decision to discharge Gramstrup and proceed pro se. The

SPD also cited its earlier warning to Hertzberg in an informational packet that if he chose to discharge his appointed attorney, it would not appoint a new one for him.[2]

Hertzberg subsequently petitioned the circuit court for the appointment of new counsel. Following a hearing on the matter, the circuit court partially granted Hertzberg's request and entered an order directing the SPD to appoint an attorney to represent Hertzberg to assist the court in determining whether his right to counsel was knowingly, voluntarily, and intelligently waived.

The SPD filed a motion for reconsideration, setting forth the case's history and its reasoning for declining Hertzberg's request for new counsel. In support of the motion, the SPD provided various documents, including an affidavit from Gramstrup detailing his telephone conversation with Hertzberg, a copy of the June 1, 2011 letter Gramstrup sent to Hertzberg, and a copy of the SPD's own correspondence with Hertzberg. Following another hearing on the matter, the circuit court granted the SPD's motion, finding that Hertzberg had knowingly, voluntarily and intelligently waived his right to appointed counsel. In doing so, it denied Hertzberg's motion for the appointment of counsel. This appeal follows.

Hertzberg's primary argument on appeal is that he was wrongly deprived of his constitutional right to counsel on direct appeal. He accuses Gramstrup of failing to properly withdraw from the case. He also accuses the circuit court of failing to engage in a colloquy with

[2] At the beginning of the case, when Gramstrup was first appointed, the SPD provided Hertzberg with a packet of written materials informing him of his appellate rights and explaining the consequences of discharging his attorney. The Wisconsin Supreme Court has held that this packet sufficiently informs defendants of their appellate rights, including the no-merit option. ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 610-14, 516 N.W.2d 362 (1994).

him to ensure that his waiver of counsel was knowing, voluntary, and intelligent. Whether Hertzberg was wrongly deprived of his constitutional right to counsel is a question of constitutional fact that we review de novo. ***State v. Thornton***, 2002 WI App 294, ¶11, 259 Wis. 2d 157, 656 N.W.2d 45.

For defendants to validly waive their right to counsel on direct appeal, the circuit court must satisfy itself that they are aware: (1) of their rights under ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 516 N.W.2d 362 (1994) ("to an appeal, to the assistance of counsel for the appeal, and to opt for a no-merit report"); (2) of the disadvantages and dangers of proceeding pro se; and (3) that if appointed counsel withdraws, successor counsel would not be appointed to represent them in postconviction proceedings. ***Thornton***, 259 Wis. 2d 157, ¶21. It does matter how or in what manner defendants are advised of this information. ***Id.***, ¶20.

Here, we are satisfied that Hertzberg validly waived his right to counsel on direct appeal. We base this conclusion upon the informational packet he received along with the various documents provided by the SPD, which collectively support the determination that Hertzberg was aware of his right to counsel and knowingly, voluntarily, and intelligently waived it. Although Hertzberg maintains that more should have been done to ensure a proper waiver (e.g., having Gramstrup file a motion to withdraw or requiring the circuit court to engage Hertzberg in a colloquy), our case law does not require such formalized procedures in this context. *See* ***State***

ex rel. Ford v. Holm, 2004 WI App 22, ¶¶1, 19, 31, 269 Wis. 2d 810, 676 N.W.2d 500. For these reasons, we affirm.[3]

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

[3] To the extent we have not addressed an argument raised by Hertzberg on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").