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DISTRICT IV

December 2, 2014

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

2013AP901-CRNM State of Wisconsin v. David A. Fillyaw (L.C. # 2012CF169)

Before Higginbotham, J.¹

Attorney Dylan Buffum has filed a no-merit report seeking to withdraw as appellate counsel for appellant David Fillyaw. *See* WIS. STAT. RULE 809.32; *Anders v. California*, 386 U.S. 738, 744 (1967). Fillyaw was sent a copy of the report and has filed a response. Because

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the no-merit report does not establish that further appellate proceedings would be wholly frivolous within the meaning of *Anders* and RULE 809.32, we reject the no-merit report.

In June 2013, the State charged Fillyaw with second-degree sexual assault. After a bench trial, the court found Fillyaw guilty of fourth-degree sexual assault. Fillyaw moved for reconsideration and for a new trial, and the circuit court denied the motions. The court then sentenced Fillyaw to nine months in jail, imposed and stayed, with two years of probation and sixty days of conditional jail time.

Attorney Buffum, who was appointed to represent Fillyaw on appeal, filed a notice of appeal on Fillyaw's behalf. Attorney Buffum then filed a motion in this court to withdraw the notice of appeal and to extend the time to file a postconviction motion. Attorney Buffum explained that Fillyaw had indicated to Attorney Buffum that Fillyaw wished to retain different counsel to give a second opinion or pursue a different strategy. Attorney Buffum informed us that Fillyaw was diligently seeking successor counsel, and that if we granted the motion Attorney Buffum would seek to withdraw in the circuit court so that Fillyaw could proceed pro se or with retained counsel.

We issued an order seeking to clarify whether Fillyaw intended to voluntarily waive his right to counsel on appeal. See *State v. Klessig*, 211 Wis. 2d 194, 204-07, 564 N.W.2d 716 (1997). We explained that if Fillyaw did not clearly express a knowing choice to discharge appointed counsel, we would not allow counsel to withdraw. We stated that, if we did not allow counsel to withdraw, counsel would be entitled to raise any issues counsel believed warranted postconviction consideration, or a no-merit report, if appropriate.

Attorney Buffum then informed us that Fillyaw had determined that he was unable to retain private counsel, and had determined that the no-merit procedure was his preferred option. Attorney Buffum also provided an affidavit by Fillyaw, stating that Fillyaw and Attorney Buffum had “discussed the merits of multiple potential issues,” the risks and benefits of proceeding pro se, and the no-merit procedure, and that Fillyaw had decided to “proceed with the No Merit process.” We then issued an order converting the merit appeal originally filed by Attorney Buffum into a no-merit appeal.

Upon review, we now determine that there was no basis for this court to convert the merit appeal to a no-merit appeal. Nothing in Attorney Buffum’s motion or response to our order indicated that Attorney Buffum had determined that further proceedings would be wholly frivolous. Rather, Attorney Buffum’s motion and response indicated that Fillyaw wished to retain private counsel to pursue a different strategy than Attorney Buffum intended to pursue, but that Fillyaw lacked the resources to do so. We should have clarified at that point that, if Attorney Buffum had identified issues with arguable merit, he was required to pursue those issues rather than file a no-merit report.

Additionally, Attorney Buffum has now filed a no-merit report that does not satisfy us that Attorney Buffum has determined that further proceedings would be wholly frivolous. Attorney Buffum indicates that he filed a merit appeal because he determined there were meritorious appellate issues, but that he read our order as requiring a no-merit report if Fillyaw did not waive his right to counsel. However, Attorney Buffum does not explain in the no-merit report what issues he believed had merit, why he believed he could not pursue those issues on Fillyaw’s behalf if he were not allowed to withdraw, or what caused him to change his mind as

to the arguable merit of those issues. Because the no-merit report is ambiguous as to whether further appellate proceeding would be wholly frivolous, we reject the no-merit report.

Therefore,

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice. Attorney Buffum or a successor appointed by the State Public Defender shall continue to represent Fillyaw.

IT IS FURTHER ORDERED that the time for Fillyaw to file a postconviction motion or notice of appeal is extended to January 16, 2015.

Diane M. Fremgen
Clerk of Court of Appeals