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DISTRICT III

June 21, 2016

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

2015AP969-CR

State of Wisconsin v. Julio D. Gonzalez (L.C. # 2012CF974)

Before Stark, P.J., Hruz and Seidl, JJ.

Julio Gonzalez appeals an order denying his motion for reconsideration of an earlier order denying his request for appointment of postconviction counsel. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. The circuit court concluded Gonzalez knowingly waived his right to postconviction counsel. Because the record conclusively supports that finding, we summarily affirm the order. *See* WIS. STAT RULE 809.21.

Pursuant to a plea agreement, Gonzalez entered no-contest pleas to first-degree reckless homicide and second-degree recklessly endangering safety, both as a party to a crime. The

circuit court imposed concurrent sentences totaling forty years' initial confinement and twenty years' extended supervision. Gonzalez filed a notice of intent to pursue postconviction relief, and the state public defender appointed Attorney Steven Miller to represent Gonzalez in postconviction proceedings. Finding no arguable basis for postconviction relief, Miller moved to withdraw from representation, and the circuit court granted the motion without a hearing and without requiring that notice of the motion to withdraw be sent to the state public defender as required by WIS. STAT. RULE 809.30(4).¹ Gonzalez filed a pro se postconviction motion and requested appointment of counsel. The First Assistant State Public Defender sent the court a letter declining to appoint new counsel, but pointed out defects in the manner in which Miller was allowed to withdraw. The circuit court concluded a colloquy regarding Miller's withdrawal was necessary and ordered a hearing on the motion to withdraw.

At the hearing, Miller stated he was willing to represent Gonzalez but, because he believed there was no arguable merit to any issue he could raise, he would have no option but to file a no-merit report. The court informed Gonzalez that if he chose to discharge Miller, the court would not appoint counsel at the county's expense. Gonzalez stated his desire to proceed pro se. The court then conducted a colloquy as required by *State v. Thornton*, 2002 WI App 294, ¶¶21-22, 259 Wis. 2d 157, 656 N.W.2d 45. The court informed Gonzalez of his right to appeal and to the assistance of counsel for the appeal, and his right to opt for a no-merit report if his counsel concluded there was no arguable merit. The court further warned Gonzalez of the dangers and disadvantages of proceeding pro se, and again informed him that successor counsel would not be appointed if he discharged Miller. When directly asked whether he wanted the

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

order allowing Miller to withdraw to remain in effect, and whether that decision was free, voluntary, knowing, and intelligent, Gonzalez responded, “Yes,”

Gonzalez then filed a motion for reconsideration alleging ineffective assistance of counsel (Miller), implicitly arguing he had other options besides requiring Miller to file a no-merit report or proceeding pro se or with privately retained counsel. The circuit court denied the motion for reconsideration, and Gonzalez appeals.

Gonzalez focuses on the defects in the procedures regarding Miller’s initial motion to withdraw. The court cured those defects by conducting a hearing. At that hearing, after being fully advised of his options, Gonzalez chose to confirm the earlier order allowing Miller to withdraw. Contrary to Gonzalez’s argument in his motion for reconsideration, he did not have the option of compelling appointment of replacement counsel. When appointed counsel concludes there is no merit to further postconviction proceedings, a defendant’s options are: (1) to require counsel to file a no-merit report; (2) to proceed pro se or with privately retained counsel; or (3) to allow counsel to close the file without further proceedings. *See State ex rel. Flores v. State*, 183 Wis. 2d 587, 616-17, 516 N.W.2d 362 (1994). The law does not require appointment of successor counsel who will agree with the appellant’s legal positions.

Finally, for the first time in his reply brief, Gonzalez questions whether the circuit court appropriately considered whether he was capable of self-representation. Issues cannot be raised for the first time in a reply brief. *State v. Jacobs*, 2007 WI App 155, ¶4 n.1, 302 Wis. 2d 675, 735 N.W.2d 535. In any event, nothing in the record suggests that Gonzalez lacks the minimal competency required for self-representation. *See State v. Klessig*, 211 Wis. 2d 194, 212-13, 564 N.W.2d 716 (1997).

IT IS ORDERED that the order is summarily affirmed. WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals