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DISTRICT III

August 24, 2021

To:

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Circuit Court Judge
Electronic Notice

Shirley Lang
Clerk of Circuit Court
Marathon County
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Angela Dawn Wenzel
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Kristopher Torgerson 545043
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You are hereby notified that the Court has entered the following opinion and order:

2018AP2102-CRNM State of Wisconsin v. Kristopher Torgerson
(L. C. No. 2014CF860)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Angela Wenzel, counsel for Kristopher Torgerson, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20),[1] concluding that no grounds exist to challenge Torgerson's convictions for first-degree intentional homicide and hiding a corpse. This no-merit appeal follows an eleven-day jury trial, after which Torgerson was sentenced to life in prison. Torgerson has filed several responses, and Wenzel has filed a supplemental no-merit report.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Upon consideration of these filings, as well as an independent review of the record as mandated by RULE 809.32, we are unable to conclude that there would be no arguable merit to Torgerson's claim that he did not make a knowing, voluntary and intelligent waiver of his right to testify. We therefore summarily reject the no-merit report, dismiss the appeal without prejudice, and extend the deadline for Torgerson to file a postconviction motion or notice of appeal. *See* WIS. STAT. RULE 809.21.

A defendant's right to testify at trial is a fundamental right. ***State v. Garcia***, 2010 WI App 26, ¶5, 323 Wis. 2d 531, 779 N.W.2d 718. In ***State v. Weed***, 2003 WI 85, ¶¶39-40, 263 Wis. 2d 434, 666 N.W.2d 485, our supreme court held that a circuit court should conduct a colloquy to ensure that the defendant is knowingly and voluntarily waiving that right. In addition, when a defendant desires to testify at a pretrial hearing, fundamental considerations of fairness and justice embodied in the concept of due process dictate that the defendant be granted every reasonable opportunity to do so. ***Franklin v. State***, 74 Wis. 2d 717, 722, 247 N.W.2d 721 (1976).

Here, the record demonstrates that the circuit court held an on-the-record colloquy with Torgerson at trial, and it found that his waiver of the right to testify was freely, voluntarily, and knowingly made. Despite the on-the-record colloquy, however, Torgerson asserts that his decision not to testify was not freely and voluntarily made because he relied on the inaccurate or incomplete advice of his trial counsel, Thomas Wilmouth, when he elected not to testify at a pretrial hearing and at trial.

Torgerson asserts that he wanted to testify at a pretrial hearing held on January 26, 2017, but that Wilmouth would not "allow" him to take the stand. The subject of the hearing was

whether the circuit court would permit Torgerson to present evidence under ***State v. Denny***, 120 Wis. 2d 614, 624, 357 N.W.2d 12 (Ct. App. 1984), that a third party, Artaze Williams, committed the homicide for which Torgerson was charged. Before the defense can present evidence that a third party committed an offense, a defendant must show that the third party had motive and opportunity to commit the crime and that there was a direct connection between the third party and the crime. ***Id.*** at 623-24. Here, the court denied Torgerson's ***Denny*** motion. The court found that Torgerson had shown that Williams had motive and opportunity to commit the crime, under the first two prongs of the ***Denny*** test, but he failed to establish a direct connection between Williams and the victim's death.

Torgerson asserts that Wilmouth would not "allow" him to take the stand either at the January 26, 2017 hearing or at trial, and that Wilmouth threatened either to withdraw or cease all communications if Torgerson chose to testify. Attached as an exhibit to Torgerson's supplemental no-merit response is correspondence from his appellate counsel, Angela Wenzel, indicating that Wilmouth disbelieved Torgerson's story about Williams' connection to the crime, such that he would have been ethically prohibited from presenting the story to the court in a pretrial motion or to the jury at trial.

According to Torgerson, Wilmouth never explained to him that disbelief of Torgerson's version of the events was the reason Wilmouth would not "allow" Torgerson to testify. Torgerson asserts that he later learned he could have testified in narrative form, but that his trial counsel did not advise him of that option. *See* ***State v. McDowell***, 2004 WI 70, ¶¶45-47, 272 Wis. 2d 488, 681 N.W.2d 500 (if counsel knows a client is not going to testify truthfully, counsel should proceed with narrative form, advising the defendant beforehand of what that process would entail). Torgerson asserts that, had he known that testifying in narrative form was an

option, he would have insisted on testifying at the hearing on January 26, 2017. He argues that his testimony would have established the "direct connection" between Williams and the victim's death that the circuit court concluded was lacking under the ***Denny*** standard.

Torgerson argues that, as a result of Wilmouth's failure to advise him fully regarding his right to testify at the hearing, he was prejudiced because he was unable to present a full defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Torgerson further asserts that his counsel's deficient performance impacted his decision not to testify at trial. The circuit court had ruled that evidence about Williams as a third-party perpetrator would not be admitted, and Torgerson claims that the ruling weighed heavily in his decision not to testify.

In sum, Torgerson claims that he relied on his trial counsel's incomplete or inaccurate advice when he made the decision not to exercise his fundamental right to testify at pretrial and trial proceedings. Accordingly, he argues that his waiver was not free and voluntary.

We generally decline to address an ineffective assistance of trial counsel claim if the claim was not raised in a postconviction motion in the circuit court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether such a claim would have sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner*** hearing.

Torgerson has asserted facts outside of the record, the veracity of which this court cannot determine, and we therefore must assume they are true. *See* WIS. STAT. RULE 809.32(1)(g) (recognizing that a no-merit determination may be inappropriate if a defendant's version of facts regarding matters outside the record is true). The record is devoid of any testimony from

attorney Wilmouth regarding the issues discussed herein, and the no-merit report and supplemental response filed by appellate counsel lack sufficient information to satisfy this court that it would be wholly frivolous to file a postconviction motion requesting a ***Machner*** hearing.

We therefore reject the no-merit report filed by appellate counsel, dismiss this appeal, and extend the deadline for filing a postconviction motion in this matter. Torgerson may, of course, pursue postconviction relief on grounds other than those discussed in this order.

Upon the foregoing reasons,

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the deadline for filing a postconviction motion or notice of appeal is reinstated and extended to sixty days after remittitur. *See* WIS. STAT. RULE 809.30.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals