



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

August 31, 2022

To:

Hon. John A. Jorgensen
Circuit Court Judge
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Winn S. Collins
Electronic Notice

Walter W. Stern
Electronic Notice

Brian Borkowicz
Borkowicz Law, LLC
Suite 5
1784 Barton Ave
West Bend, WI 53090

Joseph N. Ehmann
State Public Defender's Office Appellate
Division
P.O. Box 7862
Madison, WI 53707

Mark R. Petersen
I-308
1225 Doctors Dr., #206
Neenah, WI 54956

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

2022AP443-CRNM State of Wisconsin v. Mark R. Petersen (L.C. #2020CF635)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Mark R. Petersen appeals from a judgment convicting him of operating a motor vehicle while under the influence (OWI) as a fourth offense with an alcohol fine enhancer. His appointed appellate counsel, Brian Borkowicz, filed a no-merit report pursuant to WIS. STAT.

RULE 809.32 (2019-20)¹ and *Anders v. California*, 386 U.S. 738 (1967). Petersen did not file a response.

After the no-merit case was submitted, Petersen filed a “Substitution of Attorney” indicating that Walter W. Stern, a privately retained attorney, will be substituted for Attorney Borkowicz. We construed the document as Attorney Borkowicz’s motion to withdraw and required the State Public Defender to file a response.

In its response, the State Public Defender acknowledges Petersen’s right to proceed without public defender representation. However, it warns that by discharging Attorney Borkowicz in favor of Attorney Stern, Petersen will be waiving his right to public defender representation, and no new or successor attorney will be appointed. Petersen has not filed a reply to the State Public Defender’s response. In light of the foregoing, we will relieve Attorney Borkowicz of further representation of Petersen in this matter. Attorney Stern is substituted as counsel of record.

Attorney Stern, meanwhile, has filed a motion to remand the case so that he can pursue a postconviction motion on behalf of Petersen in the circuit court. Given the case’s changed circumstances, we will dismiss the appeal without prejudice and extend the time for Attorney Stern to file a WIS. STAT. RULE 809.30 motion. Accordingly, we deny the Motion to Remand as moot.

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

Finally, we note that the no-merit process of WIS. STAT. RULE 809.32 “does not apply to privately retained counsel.” *State ex rel. Smalley v. Morgan*, 211 Wis. 2d 795, 798 n.2, 565 N.W.2d 805 (Ct. App. 1997), *overruled on other grounds by State ex rel. Lopez-Quintero v. Dittmann*, 2019 WI 58, 387 Wis. 2d 50, 928 N.W.2d 480. Thus, if Attorney Stern is unsuccessful in litigating his postconviction motion, he cannot file a no-merit appeal with this court. If the unavailability of the no-merit process for retained counsel causes Petersen to reconsider his decision to discharge Attorney Borkowicz and retain Attorney Stern, he must move this court for reconsideration within twenty days of the date of this opinion and order.

Upon the foregoing reasons,

IT IS ORDERED that Attorney Brian Borkowicz is relieved of further representation of Mark R. Petersen in this matter. Attorney Walter W. Stern is substituted as counsel of record.

IT IS FURTHER ORDERED that the appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the time to file a postconviction motion under WIS. STAT. RULE 809.30 is extended sixty days from the date of this opinion and order. *See* WIS. STAT. RULE 809.82(2)(a).

IT IS FURTHER ORDERED that the motion to remand is denied as moot.

IT IS FURTHER ORDERED that if the unavailability of the no-merit process for retained counsel causes Mark R. Petersen to reconsider his decision to discharge Attorney Brian Borkowicz and retain Attorney Walter W. Stern, he must move this court for reconsideration within twenty days of the date of this opinion and order.

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

Sheila T. Reiff
Clerk of Court of Appeals