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 I

November 23, 2022

To:

Hon. Jeffrey A. Wagner
Circuit Court Judge
Electronic Notice

George Christenson
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Winn S. Collins
Electronic Notice

John D. Flynn
Electronic Notice

Pamela Moorshead
Electronic Notice

Joshua B. Kapfhamer 655777
Fox Lake Correctional Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

2019AP1703-CRNM State of Wisconsin v. Joshua B. Kapfhamer (L.C. # 2015CF4836)

Before Brash, C.J., Donald, P.J., and Dugan, J.

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).

Joshua B. Kapfhamer appeals a judgment convicting him after a jury trial of one count of homicide by operation of a motor vehicle with a detectable amount of a restricted controlled substance in his blood. Appointed appellate counsel, Pamela Moorshead, filed a no-merit report. *See* WIS. STAT. RULE 809.32 (2019-20);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967). Kapfhamer filed a response. Moorshead then filed a supplemental no-merit report, to which

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

Kapfhamer also responded. Moorshead then filed a second supplemental no-merit report. After considering the no-merit reports and the responses, and after conducting an independent review of the record as mandated by ***Anders***, we conclude that there are one or more issues of arguable merit—not wholly frivolous.[2] Therefore, we reject the no-merit report, dismiss this appeal, and extend the deadline for filing a postconviction motion pursuant to WIS. STAT. RULE 809.30.

Kapfhamer was driving his car through an intersection when he collided with a motorcycle driven by James Pulkkila. The State charged Kapfhamer with reckless driving, causing great bodily harm. Pulkkila subsequently died from his injuries. The State filed an amended information charging Kapfhamer with homicide by operation of a motor vehicle with a detectable amount of a restricted controlled substance in his blood in violation of WIS. STAT. § 940.09(1)(am). Kapfhamer was convicted after a jury trial. The circuit court sentenced him to twelve years of initial confinement and eight years of extended supervision.

After conducting our ***Anders*** review, we conclude that this appeal presents a non-frivolous claim: whether Kapfhamer knowingly, intelligently, and voluntarily waived his constitutional right to testify on his own behalf. Kapfhamer contends that he wanted to testify on his own behalf but his trial attorneys incorrectly advised him against testifying based on their incorrect belief that Kapfhamer's two prior driving while intoxicated convictions would be used against him if he testified.[3] Attorney Moorshead acknowledges in her supplemental no-merit

[2] We address one issue of arguable merit in this opinion and remand for further proceedings. On remand, counsel is not limited to raising only the issue we address here.

[3] Kapfhamer contends that family members heard his trial attorneys advise him not to testify based on the trial attorneys' incorrect understanding of the law. Kapfhamer's appointed appellate counsel, Attorney Moorshead, corroborates Kapfhamer's assertion in her supplemental no-merit report and attached affidavit. Moorshead states that she had an investigator contact Kapfhamer's father, who (continued)

report that if Kapfhamer's trial attorneys told him his two prior convictions for driving while intoxicated would be used against him if he testified, this advice was legally incorrect; the jury would have learned that Kapfhamer had prior convictions, but would not have learned that he had prior convictions for operating while intoxicated. *See* WIS. STAT. § 906.09(1) ("For the purpose of attacking character for truthfulness, a witness may be asked whether the witness has ever been convicted of a crime ... and the number of such convictions…. [N]o further inquiry may be made unless it is for the purpose of rehabilitating the witness's character for truthfulness.").

Kapfhamer has at least one postconviction non-frivolous claim that stems from the alleged error his attorneys made. He may be able to argue that he did not knowingly, intelligently, and voluntarily waive his constitutional right to testify on his own behalf because his trial attorneys provided him with incorrect information. A criminal defendant has a constitutional right to testify and "present his own version of events in his own words." ***State v. Nelson***, 2014 WI 70, ¶19, 355 Wis. 2d 722, 849 N.W.2d 317 (citation omitted). This constitutional right is grounded in the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. ***Id.*** "The fundamental nature of the right to testify means that it is not subject to forfeiture." ***Id.***, ¶20. Further, this means that a defendant must expressly waive this right in a knowing, intelligent, and voluntary manner. ***Id.***

We will dismiss this no-merit appeal and remand for postconviction proceedings to determine whether Kapfhamer's trial attorneys gave him incorrect advice that resulted in

---

confirmed that he heard trial counsel give Kapfhamer this advice and said this was the reason Kapfhamer decided not to testify on his own behalf.

Kapfhamer making a decision to waive his right to testify that was not knowing, intelligent, and voluntary.[4]

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed.

IT IS FURTHER ORDERED that successor counsel shall be appointed by the State Public Defender's Office within fifteen days of the date of this order.

IT IS FURTHER ORDERED that the deadline for successor counsel to file a postconviction motion pursuant to WIS. STAT. RULE 809.30 is extended until sixty days from the date of this order.

Sheila T. Reiff
Clerk of Court of Appeals

[4] As a final matter, we note that Attorney Moorshead did not address whether Kapfhamer's constitutional right to testify was violated. Instead, she analyzed the issue solely in the context of a claim of ineffective assistance of counsel. We have previously held that a defendant's claim that he did not knowingly and voluntarily waive the right *not to* testify—which is the direct corollary to the right *to* testify at issue here—was not confined to a claim of ineffective assistance of counsel. *See* ***State v. Jaramillo***, 2009 WI App 39, ¶13, 316 N.W.2d 538, 765 N.W.2d 855. ("[W]hether a defendant has been denied effective assistance of counsel is an inquiry directed at the *attorney's* behavior; whereas whether a defendant knowingly and voluntarily waived the right not to testify asks what the *defendant* knew and understood.").