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DISTRICT II

June 9, 2023

To:

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Circuit Court Judge
Electronic Notice

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
Electronic Notice

Winn S. Collins
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You are hereby notified that the Court has entered the following opinion and order:

2020AP852-CRNM State of Wisconsin v. Romero D. Ellison (L.C. #2017CF919)

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).

The State Public Defender appointed Attorney Patrick Flanagan to represent Romero D. Ellison in this matter. Attorney Flanagan filed a no-merit report, Ellison filed a response, and Attorney Flanagan filed a supplemental no-merit report. Now before the court is a motion filed by Attorney Matthew S. Pinix titled "Notice of Voluntary Dismissal and Motion for Extension of

Time to File Notice of Appeal or Postconviction Motion.” The motion states that Attorney Pinix has been retained by Ellison to pursue a merits-based appeal.

By order dated May 9, 2023, we held the motion and the appeal in abeyance until further order of this court, and we directed service on the State Public Defender. We also directed the State Public Defender to file a report.

On May 19, 2023, the State Public Defender filed a report advising Ellison that if he chooses to discharge Attorney Flanagan so that he can proceed with Attorney Pinix as his counsel of choice, Ellison would be waiving his right to appointed counsel at public expense for his direct appeal in this case. The report advised Ellison that the State Public Defender would not reappoint counsel for Ellison in this direct appeal should he subsequently decide to discharge Attorney Pinix or should Attorney Pinix withdraw from the case.

The State Public Defender’s report indicates that it was served on Ellison, Attorney Flanagan, Attorney Pinix, and the State. To date, no one has filed a response. In light of the foregoing, we will relieve Attorney Flanagan of further representation of Ellison in this matter. Attorney Pinix is substituted as counsel of record. *See State v. Jones*, 2010 WI 72, ¶38, 326 Wis. 2d 380, 797 N.W.2d 378 (recognizing that a defendant has the right to counsel of choice if that counsel is retained). Further, we will dismiss the appeal, consistent with the notice of voluntary dismissal filed by Attorney Pinix. In addition, we will grant the motion to extend the time to file a postconviction motion or notice of appeal.¹

¹ Attorney Pinix seeks an extension of 120 days, which is longer than this court would generally grant. Based on the explanation in the motion, this court will grant the motion, but the length of this extension will be taken into account if an additional extension motion is filed.

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 Pinix is unsuccessful in litigating a postconviction motion, he cannot file a no-merit appeal with this court. If the unavailability of the no-merit process for retained counsel, or the fact that the State Public Defender will not reappoint counsel for Ellison, causes Ellison to reconsider his decision to discharge Attorney Flanagan and retain Attorney Pinix, 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 Patrick Flanagan is relieved of further representation of Romero D. Ellison in this matter. Attorney Matthew S. Pinix 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 or an appeal under WIS. STAT. RULE 809.30 is extended to 120 days from the date of this opinion and order. *See* WIS. STAT. RULE 809.82(2)(a).

IT IS FURTHER ORDERED that if the unavailability of the no-merit process for retained counsel, or the fact that the State Public Defender will not reappoint counsel, causes Ellison to reconsider his decision to discharge Attorney Flanagan and retain Attorney Pinix, 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