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DISTRICT I/IV

February 21, 2013

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

2012AP2506-NM In re the termination of parental rights to Richard G., Jr., a person under the age of 18: State of Wisconsin v. Richard G. (L.C. # 2010TP148)

Before Lundsten, P.J.

Richard G. appeals an order terminating his parental rights to Richard G., Jr. Appellate counsel for Richard filed a no-merit report pursuant to WIS. STAT. RULES 809.107(5m) and 809.32.¹ The notice of appeal and the no-merit report were filed without consultation with

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Richard because appellate counsel has not spoken with Richard.² We conclude that the appeal must be dismissed because Richard did not make the decision to appeal and abandoned his right to an appeal by not making himself available for consultation with counsel necessary to commence an appeal.

Richard G., Jr., has not seen his father since he was four months old. Richard G., Jr., was removed from his mother's home in 2003, when he was five years old. The petition to terminate parental rights of the child's mother and father was filed in May 2010. It alleged that the child remained in continuing need of protection and services (CHIPS) because Richard failed to meet conditions established for return of the child to his home and was unlikely to meet those conditions in the next nine months, that Richard had failed to assume parental responsibility, and that Richard had abandoned the child by not visiting or communicating with the child for a period of three months or longer. *See* WIS. STAT. § 48.415(1)(a), (2), and (6). After a four-day trial to the court, the circuit court found the alleged grounds were proven. At the May 7, 2012 dispositional hearing, the circuit court determined that termination of Richard's parental rights was in the child's best interest.³ On May 11, 2012, a notice of intent to pursue post-termination relief was filed on Richard's behalf by his appointed trial counsel. On May 31, 2012, appellate counsel was appointed by the state public defender, and notice of the appointment was sent to

² Appointed counsel's no-merit certification, required by WIS. STAT. RULE 809.32(1)(c), states that counsel has "attempted to discuss" with Richard the potential appellate issues and that counsel informed Richard of his three appellate options outlined in RULE 809.32(1)(b). The certification concludes: "[Richard] has not made himself available for contact."

³ The termination of the mother's parental rights was affirmed in a no-merit appeal. *See State v. Patricia S.*, No. 2012AP2628-NM, unpublished op. and order (WI App Feb. 20, 2013). The no-merit review in the mother's appeal was based on the record shared with Richard's appeal.

Richard. As indicated, appointed appellate counsel did not have any contact with Richard but nonetheless filed a timely notice of appeal on November 5, 2012.

The no-merit report explains that appointed appellate counsel has never spoken with Richard and that Richard has not contacted counsel.⁴ Although Richard invoked the post-termination process by filing a notice of intent to pursue post-termination relief and requesting appointed counsel, Richard took no steps to exercise his right to appeal, a decision that lies solely with him. *See State v. Debra A.E.*, 188 Wis. 2d 111, 125-26, 523 N.W.2d 727 (1994) (the client must decide whether to appeal); *State ex rel. Van Hout v. Endicott*, 2006 WI App 196, ¶24, 296 Wis. 2d 580, 724 N.W.2d 692 (“A defendant who has been informed of his or her options by counsel bears the burden to exercise one of those options and so inform counsel.”), *State v. Lamontae D.M.*, 223 Wis. 2d 503, 505 n.1, 510, 589 N.W.2d 415 (Ct. App. 1998) (appellate court questioned jurisdiction because defendant escaped and there may have not been actual consultation with counsel and the directive to bring the appeal and the appeal was dismissed); *State ex rel. Flores v. State*, 183 Wis. 2d 587, 617, 516 N.W.2d 362 (1994) (once informed of the right to appeal, the defendant “must act in accordance with that information in exercising the

⁴ As required by our January 14, 2013 order, appellate counsel filed an affidavit detailing attempts he has made to locate and contact Richard G. Counsel’s first letter to Richard at his last known address was sent June 12, 2012. Counsel sent seven more letters after that. None of counsel’s correspondence was returned to counsel as undelivered. Counsel visited Richard’s last known address and was informed by residents at the address that Richard had moved out of state but mail was still being accepted for Richard at that address. (The record reflects that during the pendency of this case, Richard married Richard G., Jr.’s biological mother, Patricia S., and the two resided together at the address known as Richard’s last known address. Patricia still resides at that address. This explains why mail was not returned undelivered.) Counsel was informed by the assistant district attorney that prosecuted this case that Richard might be residing in the southern part of the United States. Counsel contacted the Wisconsin Department of Corrections and was informed that Richard was not in custody. Counsel also contacted Richard’s trial counsel who indicated that he had not heard from Richard since the end of the circuit court proceeding. Counsel has made reasonable efforts to locate and communicate with Richard.

right to appeal”). *See also* WIS. STAT. RULES 809.107(5)(am) (if after filing a notice of intent to appeal and requesting transcripts, a person decides not to file a notice of appeal, notice of the decision not to appeal shall be given), 809.32(1)(a) (a no-merit report need not be filed unless the client “requests that a no-merit report be filed or declines to consent to have the attorney close the file without further representation by the attorney”).

A prerequisite to filing a no-merit report is consultation with the client. *See State ex rel. Ford v. Holm*, 2004 WI App 22, ¶4, 269 Wis. 2d 810, 676 N.W.2d 500 (after appointed counsel has reviewed the transcript and record, counsel must confer with the client). WISCONSIN STAT. RULE 809.107(6)(am) permits an appellant to seek a remand from this court for fact finding on issues outside the record. Appointed counsel’s consultation with his client is necessary to determine whether or not there is merit to any possible claims outside the record.

Because counsel has not been able to contact Richard, the prerequisites to the filing of a notice of appeal and no-merit report have not been met. Richard has abandoned his right to appeal. *Cf. State v. Braun*, 185 Wis. 2d 152, 164, 516 N.W.2d 740 (1994) (that escape “disentitles the defendant to call upon the resources of the Court” (quoting *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970)); *State v. John*, 60 Wis. 2d 730, 736, 211 N.W.2d 463 (1973) (when, by escape, a defendant “puts himself in a position where he cannot aid the court ... he has frustrated the administration of justice, made it impossible for the court to consider his petition, and has abandoned his application for relief”); *Van Hout*, 296 Wis. 2d 580, ¶36 (“a defendant, by actions designed to obfuscate and frustrate the judicial review process, can give up” the right to appeal); *State v. Woods*, 144 Wis. 2d 710, 715-16, 424 N.W.2d 730 (Ct. App. 1988) (waiver of right to counsel may occur by operation of law based on a defendant’s own actions). We will not permit the appeal to languish until Richard makes himself available because to do so would violate the

legislature's directive to expedite and achieve finality in termination of parental rights proceedings. *See Rhonda R.D. v. Franklin R.D.*, 191 Wis. 2d 680, 698-99, 530 N.W.2d 34 (Ct. App. 1995) (an expedited appeals process is desirable to permit adoption or other placement).

Upon the foregoing reasons,

IT IS ORDERED that the appeal is dismissed.

IT IS FURTHER ORDERED that no action is taken on Attorney David J. Lang's request to be relieved of further representation of Richard G.; the request to this court is moot.

Diane M. Fremgen
Clerk of Court of Appeals