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May 7, 2013

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

2011AP527-CRNM State of Wisconsin v. William J. Reese (L.C. #2009CF1137)

Before Curley, P.J., Fine and Brennan, JJ.

On March 7, 2011, Attorney Michael Backes filed a notice of no-merit appeal on behalf of William J. Reese. *See* WIS. STAT. RULE 809.32 (2011-12). Following a lengthy delay that Attorney Backes explained stemmed from issues surrounding Reese's questionable competency, appellate counsel filed a no-merit report on Reese's behalf. For the reasons that follow, we reject the no-merit report, dismiss this appeal without prejudice, and extend the deadline for Reese to file a postconviction motion or notice of appeal.

After Attorney Backes filed the no-merit report in this matter in January 2012, Reese submitted documents, some of which we deemed too incomprehensible to accept and some of which we construed as responses to the no-merit report. At our request, Attorney Backes filed supplemental reports as well as status reports concerning Reese's mental health and the proceedings to treat Reese to competency that remained underway in a related probation revocation proceeding. Although Attorney Backes evidently believed that Reese was competent when he invoked the no-merit option, it appeared that, at that time, Reese had most recently been found not competent and was being treated in anticipation of a competency review hearing. In July 2012, Attorney Backes advised that Reese was found not competent to proceed in the revocation matter and not likely to regain competency. Attorney Backes suggested that Reese might regain competency in the future, and advised that Reese would receive "little benefit" from a temporary guardian to assist him in the instant appeal, but we concluded that additional fact-finding was required regarding Reese's competency, prognosis, and need for a guardian's assistance in postconviction and appellate proceedings. Accordingly, we remanded the matter to the circuit court to determine whether Reese was competent when he was counseled about the decision to appeal and about the option for a no-merit report. In the event that Reese was found not competent to proceed, we directed the circuit court to make findings regarding Reese's likelihood of regaining competency and whether Reese should be appointed a temporary guardian to assist him with postconviction and appellate decision-making.

The record has now returned to us. It reflects that, following remand, Reese was examined by a court-appointed psychiatrist, Dr. Robert Rawski, who has treated and assessed Reese intermittently over the past several years. Dr. Rawski diagnosed Reese with schizoaffective disorder. Further, Dr. Rawski concluded to a reasonable degree of medical certainty that Reese was not

competent to proceed when the appeal in this matter was filed, is not competent to proceed now, and is not likely to regain competency in the future. The State did not challenge these conclusions.

The circuit court made findings and entered an order that: (1) “Reese was not competent at the time when he decided to appeal, [and] was counseled in regard to his appeal and appellate options. (2) That [] Reese is not currently competent to assist counsel or to make decisions committed by law to him with a degree of rational understanding.” The circuit court also appointed an attorney to act as temporary guardian for Reese, “to instruct defense counsel whether to initiate postconviction relief and, if so, what objectives to seek.”

The decision to appeal rests with the defendant. *State v. Debra A.E.*, 188 Wis. 2d 111, 125-26, 523 N.W.2d 727 (1994). The record here establishes that the appeal in this matter was launched and the no-merit option invoked at a time when Reese could not make those decisions. *See id.* at 126 (defendant is incompetent to pursue postconviction relief when defendant is unable to assist counsel or make decisions committed by law to the defendant). Accordingly, this court concludes that the pending no-merit proceeding should be dismissed. The involvement of a temporary guardian will permit postconviction and appellate counsel to determine how to proceed, including whether to initiate postconviction relief and, if so, what objectives to seek. *See id.* The court assumes that the guardian and postconviction counsel will proceed in light of the entire record, including Dr. Rawski’s most recent report regarding Reese’s competence and capabilities at the time of trial.

Therefore, we reject the no-merit report and we dismiss this appeal. To permit the temporary guardian to consult with counsel regarding how to proceed, we will extend the deadline for Reese to file a postconviction motion or notice of appeal. Additionally, we refer this matter to the Office of the State Public Defender for the possible appointment of new counsel. The public defender shall have thirty days within which to determine whether new counsel shall be appointed. After that

determination is made, counsel shall have sixty days to file a notice of appeal or postconviction motion in this matter.¹

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 this matter is referred to the Office of the State Public Defender for the possible appointment of new counsel, any such appointment to be made within thirty days.

IT IS FURTHER ORDERED that the Office of the State Public Defender shall notify this court when new counsel is appointed or when it concludes that no change in counsel will be made.

IT IS FURTHER ORDERED that counsel for Reese may file a postconviction motion or notice of appeal within sixty days of either the date on which new counsel is appointed or the date on which the public defender's office advises this court that new counsel will not be appointed, whichever is applicable.

Diane M. Fremgen
Clerk of Court of Appeals

¹ Counsel may of course move the court to extend appellate deadlines, if appropriate. *See* WIS. STAT. RULE 809.82 (2011-12).