

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 30, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1465

STATE OF WISCONSIN

Cir. Ct. Nos. 2001CF3910, 2007CV6205

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. ANDREW ROBERTS,

PETITIONER-APPELLANT,

v.

MICHAEL THURMER, WARDEN, WAUPUN CORRECTIONAL INSTITUTION,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
JEAN W. DI MOTTO, Judge. *Affirmed.*

Before Curley, P.J., Fine, J., and Daniel L. LaRocque, Reserve
Judge.

¶1 PER CURIAM. Andrew Roberts appeals *pro se* from a circuit court order denying his petition for a writ of habeas corpus, which was filed under *State v. Knight*, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992) (to bring a claim

of ineffective assistance of appellate counsel, a defendant must petition the appellate court that heard the appeal for a writ of habeas corpus). Roberts contends that his appellate counsel failed to properly advise him of his appellate rights and abandoned him without pursuing an appeal. The record establishes that: (1) counsel properly advised Roberts of his postconviction and appellate options; and (2) Roberts failed to inform counsel as to how he wished to proceed. We conclude that Roberts waived his appellate rights by that conduct. We therefore affirm the circuit court's order.

¶2 In 2001, Roberts pled guilty to felony murder as a party to a crime. He was sentenced to a sixty-year prison term, of which he was to serve a minimum of thirty-five years in initial confinement.

¶3 The state public defender appointed counsel for Roberts. Counsel filed a postconviction motion on Roberts' behalf seeking plea withdrawal. The circuit court denied the motion without holding a hearing.

¶4 By letter dated December 6, 2002,¹ counsel wrote to Roberts regarding his analysis of the circuit court's postconviction decision. Counsel stated that he believed an appeal would have "no legal merit" and that "the only appellate representation I could provide at this time would be in the form of a no-merit report pursuant to [WIS. STAT. RULE 809.32 (1999-2000)]."² Counsel advised Roberts as to the contents and purpose of a no-merit report, Roberts'

¹ Counsel indicated that the letter memorialized a telephone conversation with Roberts held the prior day.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

opportunity to file a response, and this court's subsequent independent review of the filings and record. Counsel further advised Roberts that if this court found issues of arguable merit, it could order further postconviction or appellate proceedings. Counsel noted, however, that if this court agreed with his analysis, it would affirm the conviction and release him from further representation of Roberts.

¶5 Counsel then explained to Roberts that, in light of that analysis, he had three options:

1. You could have me file a no-merit report as detailed above;
2. You could have me close the file without an appeal; or
3. You could discharge me and proceed on your own (pro se) or with an attorney retained at your own expense.

Counsel noted that Roberts had indicated in their prior telephone discussion that he had not yet made a decision as to how he wished to proceed. He further stated that should Roberts instruct him "to close my file without an appeal or further court action, this choice would end your direct appeal" and would also limit or eliminate Roberts' postconviction and appellate options in state and federal court. Counsel also advised Roberts that should he choose to close the file without action "[n]o other lawyer [would] be appointed to represent" him.

¶6 After counsel invited Roberts to contact him with questions, he stated that he expected to hear from Roberts no later than January 6, 2003 "with instructions as to how to proceed in this case." Counsel concluded: "Should I not hear from you by Monday, January 6, 2003, please be advised that I will interpret

that to mean that you do not wish to have me file a no-merit report as outlined above, and I will close my file without an appeal or further court action.”

¶7 The record indicates that Roberts had no further contact with counsel, and Roberts concedes as much in his petition. Roberts argued in his petition, however, that counsel provided ineffective representation by closing his file “without bringing a motion to withdraw or a no-merit appeal after having filed a RULE 809.30 motion.” He further argued that counsel’s “no-response” assumption as specified in his letter “cannot be interpreted as an [express] waiver of the petitioner’s right to a direct appeal or counsel.” He argued that counsel’s representation was “deficient for attempting to obtain waiver in that fashion.” He maintained that he had not been fully informed of his postconviction and appellate rights, that he had not knowingly, intelligently, and voluntarily waived his right to a direct appeal or counsel, and that counsel improperly abandoned him. The circuit court disagreed, and Roberts appeals.

¶8 Roberts first argues that the decision to transfer his petition from the civil division, where it was filed, to the criminal division was improper. We disagree. The underpinning of Roberts’ petition was his 2001 criminal conviction. WISCONSIN STAT. § 782.01(1) provides that a habeas corpus petition is subject to the limitations of WIS. STAT. § 974.06. Section 974.06 was adopted to replace habeas corpus as the primary method for attacking a criminal conviction once the time for appeal had expired. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 176,

517 N.W.2d 157 (1994). We agree with the State that Roberts’ habeas corpus petition was properly transferred to the criminal court.³

¶9 We also agree with the State that Roberts’ proper remedy was by filing a *Knight* petition in this court. See *State ex rel. Smalley v. Morgan*, 211 Wis. 2d 795, 798-99, 565 N.W.2d 805 (Ct. App. 1997) (counsel’s failure to commence a direct appeal under WIS. STAT. RULE 809.30 or a no-merit appeal under WIS. STAT. RULE 809.32 is cognizable in a *Knight* petition “because counsel’s inaction in this court is at issue”) *abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900. Nonetheless, because Roberts’ claims are now squarely before this court, we conclude that it is most efficient to address the merits of the appeal, rather than affirming the circuit court’s order on a technicality and forcing Roberts to re-file his habeas corpus petition in this court.

¶10 The rules governing waiver of postconviction counsel are set out in *State ex rel. Ford v. Holm*, 2004 WI App 22, ¶32, 269 Wis. 2d 810, 676 N.W.2d 500:

We concluded in [*State v. Thornton*], 2002 WI App 294, ¶21, 259 Wis. 2d 157, 656 N.W.2d 45,] that a knowing and intelligent waiver of postconviction counsel requires a showing that the defendant was aware (1) of the rights discussed in [*State ex rel. Flores v. State*, 183 Wis. 2d 587, 516 N.W.2d 362 (1994)] (“to an appeal, to the

³ Even if Roberts had demonstrated some error in the transfer, he did not show that he was prejudiced in any way.

assistance of counsel for the appeal, and to opt for a no-merit report”); (2) of “the dangers and disadvantages of proceeding pro se”; and (3) that if appointed counsel withdraws from representation, successor counsel would not be appointed to represent the defendant in postconviction proceedings.

“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 ex rel. Van Hout v. Endicott*, 2006 WI App 196, ¶24, 296 Wis. 2d 580, 724 N.W.2d 692. “A defendant cannot remain mute in the face of a request from counsel for direction or when his or her rights to appeal and to counsel are at stake.” *Id.* A corollary to this rule is that a “defendant can waive the right to counsel by conduct.” *Id.*, ¶34 (citation omitted).

¶11 In this instance, postconviction counsel thoroughly specified Roberts’ postconviction and appellate options in his letter of December 6, 2002. In addition, counsel thoroughly described the no-merit process to Roberts, and then informed Roberts to inform him in one month as to how he wished to proceed. There is nothing in the record to indicate that Roberts took any action in response to the letter. Significantly, although Roberts claims his failure to respond should not be construed as a knowing, intelligent, and voluntary waiver of appellate counsel and his appellate rights, he does not identify anything that he did not know or understand regarding his appellate options.

¶12 In *Flores*, the supreme court stated that a valid waiver of the right to appeal requires that the waiver decision be made by the defendant. *See Flores*, 183 Wis. 2d at 617. The court opined that “no formalized waiver procedures are required,” but it stated that “it must be apparent that the defendant ‘either suggested, acquiesced in or concurred with the decision to dismiss the appeal.’” *Id.* (citation omitted). If the requirements are met, it will then be presumed “that a

waiver of the right to appeal was made voluntarily, knowingly, and intelligently.” *See id.* In this regard, once a defendant is informed of the no-merit option, “the defendant will be presumed to have validly waived the No Merit report option unless the defendant activates the No Merit report requirement by actually disagreeing with counsel’s advice and expressing the desire to appeal. Once a defendant is so informed, it is incumbent upon the defendant to actually express disagreement.” *Id.* at 617-18.

¶13 Rather than responding to counsel’s letter, Roberts remained mute. By that conduct, he waived his right to counsel and to a direct appeal.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

