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DISTRICT IV

January 28, 2014

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

2012AP1082-CRNM	State of Wisconsin v. Gerrod R. Bell (L.C. #2001CF239)
2012AP1083-CRNM	State of Wisconsin v. Gerrod R. Bell (L.C. #2001CF249)

Before Lundsten, Higginbotham and Sherman, JJ.

These were consolidated no-merit appeals from cases that were filed separately, but tried and sentenced together. The appeals were unconsolidated on January 27, 2014. We now dismiss one of them for further postconviction proceedings, and hold the other in abeyance.

Counsel for appellant Gerrod Bell has filed a combined no-merit report addressing both appeals. However, as to appeal No. 2012AP1083-CRNM, the no-merit report asserts that there

is an issue with arguable merit related to sentencing. The report asserts that Bell was not properly classified as a persistent repeater in that case, and therefore should not have been given a life sentence.

It is not apparent why counsel filed a no-merit report in a situation where it is obviously not appropriate. A no-merit report, by definition, is to be filed in cases where counsel concludes there are *no* issues with arguable merit. WIS. STAT. RULE 809.32(1)(a) (2011-12).¹ These convictions from 2002 have a lengthy history that includes a largely retroactive implicit extension totaling approximately ten years for the filing of this no-merit report, which were granted, in part, based on current counsel's earlier inaccurate description of the procedural options available to Bell. Current counsel was copied on that extension motion filed by the Office of the State Public Defender, and has represented Bell since it was granted, but at no time before the no-merit report does it appear that counsel indicated he had changed his analysis and believed there was an issue with arguable merit. Why counsel chose to bury that change of mind in a document labeled as a no-merit report, rather than move for an extension of the time to file a postconviction motion, is difficult to understand.

We now take steps to place these cases closer to the position they would have been if counsel had properly pursued the arguable issue in circuit court. By doing so, we express no opinion about the merits of the intended issue.

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

We began by unconsolidating the appeals. Then, as to appeal No. 2012AP1083-CRNM, we dismiss the appeal without prejudice and extend the time for Bell to file a postconviction motion raising the sentence issue that counsel has identified as having arguable merit.

As we understand the no-merit report's description of the issue, the need for resentencing is limited to that case. Often, when counts are sentenced together, the need for resentencing on one count makes it appropriate to consider resentencing on other counts. However, here the no-merit report asserts that, in the other case, the circuit court correctly concluded that a mandatory life sentence was required by law. Furthermore, the sentence which is arguably erroneous was made consecutive to the other one, rather than the reverse. If these assertions are true, it does not appear that resentencing on the consecutive case would cause or permit modification of any aspect of the life sentence in the other case.

Accordingly, as to appeal No. 2012AP1082-CRNM, we do not take further action at this time. That case will remain pending in this court as a no-merit appeal, held in abeyance pending further developments on Bell's motion for resentencing.

After Bell files that motion, the circuit court will have the usual sixty days provided by rule to decide it. After the court decides that motion, there are probably several possible paths Bell could pursue. If the court denies the motion, Bell may file a regular appeal seeking reversal of that decision, if counsel still believes the issue has arguable merit. If counsel does not so believe, a new no-merit appeal may be proper. A new no-merit appeal may also be proper if the court grants the sentence motion, but Bell still seeks review of the underlying conviction. There may also be other possibilities, such as Bell agreeing to close the file without further action.

To facilitate coordination with the no-merit appeal that will not be dismissed, we order counsel to inform us by letter how the circuit court decides his sentence motion, and how counsel intends to proceed in that case. The subject line of that letter should include only appeal No. 2012AP1082-CRNM, because the other appeal will no longer be active. After receiving that letter, we will issue whatever further order may be needed to re-consolidate or otherwise coordinate any new appeal with the one that remains pending.

IT IS ORDERED that in appeal No. 2012AP1083-CRNM, the no-merit report is rejected and the appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that in appeal No. 2012AP1083-CRNM (circuit court case No. 2001CF249) the time to file a postconviction motion is extended to twenty-one days from the date of this order.

IT IS FURTHER ORDERED that appeal No. 2012AP1082-CRNM is held in abeyance pending further order.

IT IS FURTHER ORDERED that after the circuit court decides the postconviction motion, appellant's counsel shall advise this court by letter of how he intends to proceed in response to that decision. Counsel shall file that letter in this court, captioned for appeal No. 2012AP1082-CRNM, within twenty days after the circuit court decision on the postconviction motion, or by April 30, 2014, whichever is earlier.

Diane M. Fremgen
Clerk of Court of Appeals