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April 2, 2014

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

2013AP74-CRNM

State of Wisconsin v. Alonzo Jeremiah Hall (L.C. # 2009CF5758)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Alonzo Jeremiah Hall appeals from a judgment of conviction entered after a jury found him guilty of maintaining a drug trafficking place, and two counts of possessing a firearm as a convicted felon. Hall's appellate counsel has filed a no-merit report and supplemental no-merit

report pursuant to WIS. STAT. RULE 809.32 (2011-12),¹ and *Anders v. California*, 386 U.S. 738 (1967). Hall received copies of the reports and filed two responses. Upon consideration of the reports, responses, and an independent review of the record, this court concludes that the no-merit report must be rejected.²

Hall's first jury trial commenced on April 4, 2011. On that day, a jury was selected, empaneled, sworn and given its preliminary instructions. The parties completed their opening arguments and the case was set to reconvene at 9:00 a.m. the next day. By 10:45 a.m. on April 5, 2011, trial counsel had not appeared, and the trial court went on the record, explaining that it was unable to reach trial counsel by telephone. As the defendant sat unrepresented in the courtroom, the court declared a mistrial:

We may be sending a squad out to [trial counsel's] workplace, which is the only address we do have. In any event, I can't keep the jury here. I don't have any hopes of finding [trial counsel] right now. I don't know if something terrible has happened to him. I have no idea. Given the circumstances here, obviously, we can't go forward with this trial at this point. So I am going to declare a mistrial. I don't think I have a choice based on the failure of [trial counsel] to appear on behalf of his client. What I am going to do is set this for a status date, Mr. Hall. I am going to have you come back. Hopefully, we will find your attorney and he will be able to

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

² Appointed counsel filed a supplemental no-merit report pursuant to this court's order questioning the trial court's award of sentence credit on only one of two concurrent counts. Thereafter, Hall filed a response claiming that he did not receive the credit on both concurrent counts, though the basis for his claim is unclear. We have reviewed the supplemental no-merit report and attachments and are satisfied that Hall received 501 days of sentence credit on both concurrent counts. Hall was sentenced on December 22, 2011 and, with the 501 days of credit, his release dates are, on count one, August 1, 2013, and on count two, August 1, 2014. Because of its consecutive nature, Hall is not entitled to any credit on count three. *State v. Boettcher*, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988) (a defendant is not entitled to receive dual credit on more than one consecutive sentence). Hall has received all of the credit to which he is entitled. Thus, the previously identified sentence credit issue is not the basis for the court's rejection of the no-merit report.

come back on that date. If there is some issue with him I can always appoint someone else. We can deal with all of that when it happens. At this point I need to know why. Maybe he is in the hospital somewhere. I have no idea. So we are going to set it for a status date, and we will try to get back on the trial calendar as quickly as we can. I apologize, Mr. Hall. This is no fault of your own. ...

Trial counsel called the court at around 11:20 a.m., after the mistrial was declared but before police were dispatched to his office. He appeared in court that afternoon to make a record, explaining that he had been up late preparing for trial, and overslept. Given his apparent history of alcohol abuse, after calling the court, trial counsel went to a local medical facility and submitted to a breath test, the results of which were provided to the court. Trial counsel asserted that he had not been drinking and was highly invested in his recovery. When asked, the defendant indicated that he “would like to stay with [trial counsel].” Though the court at first seemed open to this idea, after a brief recess, it ordered the removal of trial counsel from the defendant’s case in order to ensure proper representation and because “there was a real problem with being here which caused us to have a mistrial.”

Hall eventually proceeded to trial with a new attorney in front of a new judge and was convicted of all three counts. Appointed postconviction counsel filed a no-merit report in which she concluded that there was no arguably meritorious issue concerning the prior mistrial because “Mr. Hall was prejudiced by not being able to continue with his trial at that time but it was not through the fault of the Trial Court or the State and the prejudice was remedied by Mr. Hall having a trial at a different time.” We conclude that whether the retrial of Mr. Hall was proper given the circumstances of this case presents an arguably meritorious issue.

A mistrial must be “manifestly necessary,” or, supported by a “high degree of necessity.” *State v. Moeck*, 2005 WI 57, ¶37, 280 Wis.2d 277, 695 N.W.2d 783. Because of the constitutional protections against double jeopardy, an appellate court must satisfy itself that a trial court exercised sound discretion in declaring a mistrial. *Id.*, ¶42. Sound discretion includes giving both parties a full opportunity to explain their positions, considering any alternatives to a mistrial, and “ensur[ing] that the record reflects that there is an adequate basis for a finding of manifest necessity.” *State v. Seefeldt*, 2003 WI 47, ¶¶36-37, 261 Wis. 2d 383, 661 N.W.2d 822. The retrial of a defendant following a mistrial that was not manifestly necessary may violate the defendant’s constitutional right to be free from being placed in jeopardy twice for the same offense. *State v. Collier*, 220 Wis. 2d 825, 833-34, 584 N.W.2d 689 (Ct. App. 1998).

There is no doubt that Hall was placed in jeopardy twice for the same crime. We cannot conclude on this record that Hall’s second trial, which occurred following a mistrial ordered by the trial court *sua sponte* and in the absence of defense counsel, presents no arguably meritorious issue for appeal.³ Similarly, we cannot conclude on this record that there is no nonfrivolous challenge to the trial court’s order removing trial counsel as Hall’s attorney of record.

Upon the foregoing reasons,

³ In a no-merit appeal, the question for this court is whether, upon review of the entire proceedings, any potential argument would be wholly frivolous. See *Anders v. California*, 386 U.S. 738, 744 (1967). The standard guiding appointed counsel is whether a potential issue so lacks a basis in law or fact that it would be unethical for counsel to prosecute the appeal. See *McCoy v. Court of Appeals*, 486 U.S. 429, 436-38 (1988).

IT IS ORDERED that the no-merit report is rejected and the appeal is dismissed.

IT IS FURTHER ORDERED that the time for filing a postconviction motion is extended to June 3, 2014.

Diane M. Fremgen
Clerk of Court of Appeals