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May 14, 2014

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

2013AP633-CRNM State of Wisconsin v. Nathan N. Williams (L.C. #2010CF334)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Nathan N. Williams appeals from a judgment of conviction for first-degree reckless injury by use of a dangerous weapon, felon in possession of a firearm, and being a party to the crimes of possession of marijuana with intent to deliver and armed robbery. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Williams has filed a response to the no-merit report and

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

counsel then filed a supplemental no-merit report. RULE 809.32(1)(e), (f). Upon consideration of these submissions and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Williams and Corey Moore-Morrison got into the backseat of a car for the purpose of selling marijuana to the driver of the vehicle. Williams pulled a gun and stated, "You know what time it is?" The driver fought with Williams and the gun discharged multiple times, with one shot striking the driver in the back. The driver was also bitten during the fight. Williams and Moore-Morrison fled on foot to Williams' car at another location. They fled in the car and then on foot through some woods. Moore-Morrison was captured on a roadway. Williams was discovered hiding in a home nearby. Williams was convicted at a jury trial. He was sentenced on three counts to consecutive sentences totaling twenty-four years and six months' initial confinement and seventeen years' extended supervision. Sentence was withheld on the felon in possession conviction and Williams was ordered to serve three years' probation on that conviction consecutive to his other sentences.

The no-merit report addresses the potential issues of whether Williams was properly bound over after the preliminary hearing,[2] whether Williams was denied the effective assistance of trial counsel by counsel's failure to have Williams testify at trial, to challenge bite mark DNA evidence, and to adequately prepare for trial and develop a trial strategy, whether the sentence

[2] The no-merit report is based on counsel's conclusion that Williams had an error-free trial. An error-free trial cures defects at the preliminary hearing. ***State v. Webb***, 160 Wis. 2d 622, 628, 632, 467 N.W.2d 108 (1991); ***State v. Noll***, 160 Wis. 2d 642, 645, 467 N.W.2d 116 (1991). It was not necessary for the no-merit report to discuss the bindover.

was the result of an erroneous exercise of discretion, and whether any new factors would support a motion for sentence modification. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further except as necessary to address Williams' response.

At his arraignment, Williams appeared by video teleconferencing.[3] WISCONSIN STAT. § 971.04(1)(a) requires the defendant to be present at the arraignment. ***State v. Soto***, 2012 WI 93, ¶27, 343 Wis. 2d 43, 817 N.W.2d 848, holds that under § 971.04(1), a defendant has a statutory right to be present in the same courtroom as the judge. However, a defendant may waive the right to be in the same courtroom. ***Soto***, 343 Wis. 2d 43, ¶44. ***Soto*** determined that to waive the right to be present in the same courtroom during a plea hearing at which judgment is pronounced, the circuit court should ascertain, by either personal colloquy with the defendant or some other means, that the defendant knowingly, intelligently, and voluntarily consents to the use of videoconferencing. ***Id.***, ¶46. In ***Soto***, waiver was established by a personal colloquy with the defendant. ***Id.***, ¶48. Here, the circuit court asked Williams' attorney if there was an objection to proceeding via the modified video teleconference and no objection was made. Because of the difference in the method used to ascertain a waiver of the right to be present between ***Soto*** and this case, we have considered whether there is arguable merit to a claim that Williams was denied his statutory right to be present.[4] We conclude there is not.

[3] Although Williams could see and hear what was taking place in the courtroom, the video conferencing equipment was not working correctly and the circuit court could only hear Williams.

[4] The no-merit report does not observe that Soto only appeared by video teleconferencing and does not address the potential issue.

Soto recognizes that "different types of rights require different showings to demonstrate that the waiver is knowing, intelligent, and voluntary," and a formal colloquy "is not the only way in which waiver may be shown." ***Id.***, ¶45. What type of showing is necessary to waive the right to be present at the arraignment may be unclear. However, WIS. STAT. § 967.08(2)(d) expressly permits an arraignment to be conducted by telephone or live audiovisual if the defendant intends to plead not guilty. Williams entered a not guilty plea. Even if counsel's assurance that the defendant had no objection was not sufficient to establish waiver of the right to be in the same courtroom, violations of WIS. STAT. § 971.04(1) are subject to the harmless error rule. ***State v. Peterson***, 220 Wis. 2d 474, 489, 584 N.W.2d 144 (Ct. App. 1998). In ***Peterson***, the failure to have the defendant present when the court responded to the jury's questions was harmless error because the defendant's counsel was present and fully participated in the proceeding, the defendant himself did not suggest any contribution he would have made had he been present, and the court's re-instruction of the jury was correct. ***Id.***, 489-90. Here Williams' attorney was present, they were prepared to enter a not guilty plea, Williams' presence in the same courtroom would not have altered the proceeding, and there was no other significance to the proceeding. No attorney could argue that the violation of Williams' statutory right to be present in the same courtroom at the arraignment, if not validly waived, was other than harmless in the context of the entire case and subsequent jury trial.[5]

[5] Typically, because it is the State's burden to prove harmless error, ***State v. Sherman***, 2008 WI App 57, ¶¶8-9, 310 Wis. 2d 248, 750 N.W.2d 500, and a defendant may be entitled to advocacy of counsel with respect to the State's burden to prove harmless error, a harmless error analysis is not employed in no-merit appeals. This is a rare instance where we may conclude as a matter of law the error, if any, was harmless.

We have also considered other potential issues that the no-merit report does not discuss regarding the jury trial: jury selection, rulings on defense objections, waiver of the defendant's right to testify, propriety of the opening and closing arguments, jury instructions, and sufficiency of the evidence.[6] When the defense questioned the prosecution's strike of the "only person of color" from the jury, a race neutral reason was given. There is no basis to challenge jury selection. The trial court properly exercised its discretion on evidentiary objections made during the trial. A sufficient colloquy about Williams' decision not to testify was undertaken. Because the jury instructions properly stated the law, no issue of arguable merit exists regarding the instructions. No improper arguments were made to the jury. The jury was polled and confirmed that the verdict was unanimous. Our review of the sufficiency of the evidence is to determine whether the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law "that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Hayes***, 2004 WI 80, ¶56, 273 Wis. 2d 1, 681 N.W.2d 203. Here the evidence was sufficient to support the verdicts. We also conclude that sentence is not so excessive or unusual so as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

[6] The no-merit report states that counsel found no basis to challenge the representation Williams received before, during or after trial, that overwhelming evidence was introduced to sustain the verdicts, that no other errors occurred to justify a claim of an illegal or unfair trial, and that there was no basis to challenge the victim's identification of Williams at trial. Counsel is reminded that a no-merit report must satisfy the discussion rule which requires a statement of reasons why the appeal lacks merit. ***State ex rel. McCoy v. Appeals Ct.***, 137 Wis. 2d 90, 100, 403 N.W.2d 449 (1987). The discussion might include a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same result. ***Id.***

In his response, Williams asserts ineffective assistance of counsel claims.[7] Our consideration of his claims is limited because claims of ineffective assistance by trial counsel must first be raised in the trial court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). This court normally declines to address such claims in the context of a no-merit review if the issue was not raised postconviction in the trial court. However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether Williams' claims have sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner***[8] hearing.

A claim of ineffective assistance of counsel has two parts: the first part requires the defendant to show that his counsel's performance was deficient; the second part requires the defendant to prove that his defense was prejudiced by deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The deficient performance inquiry is "whether counsel's assistance was reasonable considering all the circumstances." ***Id.*** at 688. Every effort is made to avoid the effects of hindsight and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within a wide range of reasonable assistance and that some challenged conduct "'might be considered sound trial strategy.'" ***Id.*** at 689 (quoted source omitted). The prejudice test is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

[7] Williams also complains that his appellate attorney made a crucial error in the statement of facts in the no-merit report stating that a soda can with Williams' DNA on it was recovered from the victim's car. We recognize that the soda can was recovered from the car Williams was driving. Because we conduct an independent review, the misstatement in the no-merit report is of no import.

[8] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. The prejudice determination considers "the totality of the evidence before the judge or jury." ***Id.*** at 695.

Williams first focuses on the affidavit in support of the search warrant and he claims his trial and postconviction attorneys were ineffective for not challenging the warrant. The search warrant was issued to obtain a buccal DNA swab from Williams to confirm that Williams' DNA was found on the victim's bite mark. The search warrant was obtained three months after the criminal complaint was filed and was based on a report from the crime lab that DNA recovered from the victim's bite mark matched Williams' DNA profile in the database. Williams contends the warrant was invalid because the affidavit did not identify the affiant, did not attach police reports on which the affiant relied, and did not include indicators of reliability of the victim's report that he had been bitten and other reports relied on. He asserts the affidavit is just based on hearsay. His complaints about the affidavit do not present any issue of arguable merit. Although the affidavit did not state the affiant's name and the signature is not readable at its end, it does identify the affiant as a Walworth County deputy sheriff. The affidavit was submitted with the warrant for the judge's signature. The warrant identified the affiant as detective John Ennis and that was sufficient. The affidavit was also based on police reports and a crime lab report. Such reports are an exception to the hearsay rule.[9] WIS. STAT. § 908.03(8). Furthermore, assertions in the affidavit may be based on hearsay if one can conclude that the information is credible and

[9] Williams cites ***State v. Gilles***, 173 Wis. 2d 101, 113, 496 N.W.2d 133 (Ct. App. 1992), for the proposition that the hearsay exception requires all the declarants involved in making the report be part of the same organization which prepared it. The requirement recognized in ***Gilles*** does not apply here where one officer relied on various reports for a source of knowledge and the question of admissibility of the reports was not at issue.

reliable. ***Bast v. State***, 87 Wis. 2d 689, 694, 275 N.W.2d 682 (1979). The affidavit sets forth how detective Ennis came by the information that led him to believe the search would produce evidence confirming a match between the bite mark DNA and Williams' DNA. It was sufficient to permit an inference that the basis of his knowledge was sound. *See* ***State v. Romero***, 2009 WI 32, ¶22, 317 Wis. 2d 12, 765 N.W.2d 756 (basis of a declarant's knowledge may be shown directly or indirectly). "The fourth amendment does not deny law enforcement officers the support of the usual inferences which reasonable men draw from evidence." ***State v. Starke***, 81 Wis. 2d 399, 409, 260 N.W.2d 739 (1978). The warrant issuing judge could reasonably infer that the investigation work reported in the affidavit was reliably obtained and sufficiently credible. "[C]ounsel's failure to bring a meritless motion does not constitute deficient performance." ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441.

Next Williams asserts his trial counsel was ineffective for not obtaining a defense DNA expert or at least consulting with such an expert so counsel could educate himself on DNA analysis. He also contends that counsel should have investigated the possibility that the lab had mixed up the DNA samples because there had been reported mix-ups at the lab before. Even if we assume that counsel's performance was deficient with regard to the DNA evidence, the claim of ineffective assistance would fail on the prejudice prong. The DNA match was not the only evidence linking Williams to the crime. Indeed the victim, his passenger, and co-actor Moore-Morrison identified Williams as the man with the gun in the backseat of the car. Williams' flight and capture was also consistent with the manner the perpetrators left the crime scene. Confidence in the outcome is not undermined because of the absence of a defense DNA expert or further investigation into past mix-ups in the crime lab.

For the same reason, Williams' claim that his trial counsel was ineffective for failing to challenge the chain of custody of the DNA evidence also lacks arguable merit. Even if, as Williams contends, the evidence was contaminated because it was not properly bagged, tagged, and stored, Williams was not prejudiced. Non-DNA evidence supports the jury's verdicts.

Williams' final claim is that trial counsel was ineffective for not objecting to the victim's identification of Williams at the jury trial after seeing Williams led into the preliminary hearing bound by leg irons and handcuffs. Williams' claim rests on a false premise—that there was no identification of him prior to the preliminary hearing. In fact, Moore-Morrison identified Williams as the shooter after being shown a picture after Williams was taken into custody. Further, Williams was arrested in the vicinity of the crime and his physical appearance and condition was consistent with his flight from the crime scene. At trial, three property owners identified Williams as being in the area after the crime and Moore-Morrison's girlfriend confirmed that Moore-Morrison left the house that afternoon with Williams. The passenger in the car and Moore-Morrison identified Williams as the shooter. Even if the defense could have garnered suppression of the victim's identification at trial, confidence in the outcome would not have been undermined. Again, Williams could not demonstrate prejudice even if counsel performed deficiently in not challenging the victim's identification.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Williams further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michael J. Backes is relieved from further representing Nathan N. Williams in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals