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November 19, 2014

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

2014AP1341-CRNM State of Wisconsin v. Coleon M. Gallion (L.C. #2012CF479)

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

Coleon Gallion appeals from a judgment of conviction for first-degree reckless homicide by delivery of a controlled substance. 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). Gallion

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

has filed a response to the no-merit report[2] and 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.

Justin Schulthess died of a heroin overdose on February 21, 2012. Schulthess was in the company of his friend Brandon Ward at the time. Ward reported that Schulthess asked Ward to get him some heroin. Schulthess and Ward drove to Milwaukee where Ward purchased two $20 packages of heroin from a person he knew as "Little C." Schulthess injected the heroin while in the car and while driving became unresponsive. Ward drove the car back to his residence in Waukesha, called 911, and Schulthess was pronounced dead at a Waukesha hospital. On February 29, 2012, Ward participated in a controlled drug buy in Milwaukee from "Little C." Upon arrest, Gallion was identified as "Little C." Gallion told Waukesha police that he sold Ward heroin on February 21, 2012, in the amount and time frame reported by Ward.

Gallion entered a guilty plea. Under the plea agreement the prosecution agreed to recommend a sentence of not more than eight years initial confinement, eight years of extended supervision, and restitution. At sentencing the prosecution's recommendation complied with the plea agreement. Gallion was sentenced to eight years' initial confinement and seven years' extended supervision.

[2] Gallion's response consists of a six-page summary of arguments but incorporates by reference an attached sixteen-page proposed motion to withdraw Gallion's guilty plea. Although this court may decline to consider arguments incorporated only by reference to another document, *see* ***Calaway v. Brown Cnty.***, 202 Wis. 2d 737, 750, 553 N.W.2d 809 (Ct. App. 1996), we have reviewed the entirety of Gallion's response. Gallion also filed a reply to counsel's supplemental no-merit. Although no reply is allowed, we have read Gallion's reply.

The no-merit report first addresses the potential issues of whether Gallion's plea was freely, voluntarily and knowingly entered. The record shows that the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14, in ascertaining that Gallion's plea was freely, voluntarily and knowingly made. In his response, Gallion complains that the colloquy was inadequate to establish Gallion's education and comprehension and had a sufficient inquiry been made, the trial court would have questioned Gallion's competency to enter the plea. However, Gallion relies on statements made at sentencing about his educational difficulties or limitations. Nothing during the plea colloquy suggested Gallion lacked sufficient comprehension and intelligence to understand the proceeding or to put Gallion's competency to proceed in question. Gallion had never been treated for emotional or mental issues and he expressed, more than once, his understanding of proceeding.

Gallion also asserts that the trial court's plea colloquy failed to uncover that his trial attorney did not consult with Gallion about the decision to forego a jury trial and enter a plea.[3] He also points out that when there was confusion at the hearing about whether a no-contest or

[3] Gallion points out that he was not present at a status hearing at which the defense asked that the case be set for a plea hearing. It is true that Gallion did not appear at the January 11, 2013 status hearing because videoconferencing equipment to permit his appearance from the Green Bay Correctional Institution was not working. Gallion's trial counsel waived Gallion's appearance. The hearing only consisted of the attorneys reporting that discovery had been completed and meetings had been conducted to try and resolve the case. A defendant has a constitutional right to be present "at any stage of the criminal proceeding that is critical to its outcome if [the accused's] presence would contribute to the fairness of the procedure." ***State v. Carter***, 2010 WI App 37, ¶19, 324 Wis. 2d 208, 781 N.W.2d 527. The status hearing was not a critical stage of the criminal proceeding. That the defense requested a plea hearing was not critical because the request was not dispositive. Gallion could still have refused to enter a plea at the next hearing.

guilty plea would be entered, it was trial counsel, and not Gallion personally, that opted to make it a guilty plea. Gallion's assertions conflict with what transpired at the plea hearing. The plea colloquy established Gallion's satisfaction with his attorney's performance, that he had enough time to discuss the case and the plea decision with counsel, that he had not been pressured into entering a guilty plea, and that he understood the plea procedure. Additionally, Gallion confirmed that the facts in the criminal complaint were substantially true and that he had reviewed the elements of the offense with his attorney. There was no suggestion of coercion. Gallion himself uttered the word "guilty" when asked what his plea was.

Gallion claims his plea was unknowingly entered because he was not aware that the Waukesha county prosecutor could not use his confession made after he was taken into custody as a result of the controlled drug buy in Milwaukee. Gallion's assertion that Waukesha police had no right to question him because they were outside their jurisdiction is unfounded. First, Gallion was not arrested by Waukesha police for selling drugs. Rather, the sale resulted in identifying Gallion as the person who supplied the heroin which caused Schulthess's death. His arrest took place after the identification was made for a crime committed in Waukesha. Additionally, it was not unlawful for the Waukesha officers to be present when the controlled drug buy took place in Milwaukee. Under WIS. STAT. § 66.0313, law enforcement personnel of any other law enforcement agency may assist a requesting agency within the latter's jurisdiction. A request for assistance may be implicit. *See* ***United States v. Mattes***, 687 F.2d 1039, 1041 (7th Cir. 1982). Where, as here, officers from different jurisdictions meet, plan a strategy for dealing with a situation, and accompany one another in carrying out that plan, a request for assistance is implied. *See* ***id.*** Thus, Milwaukee police implicitly requested the assistance of the Waukesha police in the plan to identify a heroin supplier. The Waukesha police were properly involved in

the apprehension of Gallion at the controlled drug buy in Milwaukee. Gallion's subsequent transport to the Waukesha police department was lawful. The claim of extra-territorial action was not a basis to challenge Gallion's statement to the Waukesha police.[4] Gallion's plea was not unknowing on that ground. Further, as the no-merit report concludes, venue in Waukesha was proper under WIS. STAT. § 971.19(5).

In relation to his guilty plea, Gallion asserts that his trial counsel was ineffective in several ways and, thus, he is automatically entitled to withdraw his plea under the manifest injustice standard. *See* ***State v. Washington***, 176 Wis. 2d 205, 213-14, 500 N.W.2d 331 (Ct. App. 1993) (ineffective assistance of counsel is a recognized factual scenario that could constitute manifest injustice supporting plea withdrawal). 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 Gallion's claims have sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner***[5] hearing.

[4] Consequently, Gallion's claim that because his statement was inadmissible there was no factual basis for his plea also lacks arguable merit.

[5] 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).

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 reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. In the context of a plea, "to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

Gallion first claims that his trial counsel was ineffective for waiving the time limit for the preliminary hearing and that he was prejudiced by the delay because it allowed a new statute permitting hearsay evidence to apply to his preliminary hearing.[6] By his guilty plea, Gallion

[6] A hearsay objection was made when the police officer was asked about what Ward said about what transpired before the death of Schulthess. Ward admitted to the officer that he had purchased the heroin consumed by Schulthess. Ward's statement to the officer was admissible as an exception to the hearsay rule for a statement against interest. *See* WIS. STAT. § 908.045(4). This is an alternative reason why Gallion's claim that trial counsel was ineffective for waiving the preliminary hearing time limit lacks merit.

forfeited the right to claim ineffective assistance of counsel on this point because he does not tie the conduct to his decision to enter a guilty plea. *See* ***id.***; ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886 (a guilty or no-contest plea forfeits the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights).

Gallion claims that his trial counsel was ineffective for not making an adequate argument in opposition to the prosecution's motion to admit other acts evidence. He asserts that he decided to plead guilty based on the ruling that evidence of the controlled drug buy in Milwaukee would be admitted at trial. First, it is disingenuous for Gallion to claim that the other acts evidence ruling compelled his guilty plea when he makes repeated assertions that his trial counsel did not consult with him about foregoing a jury trial and entering a plea was not his decision. Those two positions are inconsistent and cannot be maintained simultaneously as Gallion attempts to do. In any event, the ruling on the other acts evidence was a proper exercise of discretion. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998) (a ruling on other acts evidence is reviewed for an erroneous exercise of discretion). Evidence of the controlled drug buy was relevant to establishing Gallion's identity and knowledge. It was highly probative. As to Gallion's claim that the evidence was unfairly prejudicial, we observe:

> Nearly all evidence operates to the prejudice of the party against whom it is offered. The test is whether the resulting prejudice of relevant evidence is *fair or unfair*. In most instances, as the probative value of relevant evidence increases, so will the *fairness* of its prejudicial effect. Thus, the standard for unfair prejudice is not whether the evidence harms the opposing party's case, but rather whether the evidence tends to influence the outcome of the case by "improper means."

State v. Johnson, 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994) (citations omitted). Unfair prejudice results when the evidence has a tendency to influence the jury by improper

means, appeal to its sympathy, arouse its sense of horror, promote its desire to punish or otherwise cause the jury to base its decision on extraneous considerations. *See* ***Sullivan***, 216 Wis. 2d at 789-90. On this record, the evidence of the controlled drug buy was not unfairly prejudicial and no further or better argument by trial counsel on the point could have established otherwise. Gallion's claim of ineffective trial counsel with respect to argument made on the motion to admit other acts evidence lacks merit.

Gallion's other claim of ineffective assistance of trial counsel is that counsel failed to investigate OnStar® and phone data prior to allowing Gallion to accept the plea deal and enter a guilty plea. It is Gallion's theory that phone records or OnStar® tracking information from Schulthess's vehicle would have suggested that after buying heroin from Gallion, Schulthess and Ward stopped at a second location to buy more heroin. At sentencing, trial counsel reported that he had looked at cell phone records and cell tower information and found it to be inconclusive because of the way cell phone signals bounced between towers. Trial counsel also noted that because Schulthess's father lamented in his victim's statement that Ward failed to activate the OnStar® emergency button in order to save Schulthess, it was learned for the first time after entry of the plea that Schulthess's vehicle was equipped with OnStar®. Counsel reported that Schulthess did not have an active OnStar® account but that had someone pushed the OnStar® emergency button, OnStar® would have been able to locate the vehicle and send assistance. Gallion complains that trial counsel did no more than discover that information and did not attempt to retrieve OnStar® data that would have mapped out the entire driving history of the vehicle. The no-merit report and supplemental no-merit report concludes that trial counsel was not ineffective for not pursuing OnStar® data because OnStar® does not continually track and

record a vehicle's location and no information would have been available that would have assisted Gallion's defense.[7]

Gallion's claim that trial counsel should have investigated phone and OnStar® data is without merit. First, Gallion was aware when he entered his plea that counsel's examination of the cell phone records was deemed inconclusive. Yet Gallion elected to proceed with his plea and he forfeited his right to claim counsel was ineffective on this point. Although Gallion now claims counsel's conclusion that the phone records were inconclusive was based on a lack of adequate investigation, he cannot identify what more counsel could have done.[8]

At sentencing trial counsel suggested the late information about the car being equipped with OnStar® might be a basis to seek plea withdrawal. Gallion proceeded to sentencing aware of the limited information counsel had about potential OnStar® data and the suggestion that it might support plea withdrawal. A defendant forfeits a claim when he proceeds to sentencing after the basis for the claim of error is known to the defendant. ***State v. Smith***, 153 Wis. 2d 739, 741, 451 N.W.2d 794 (Ct. App. 1989). "He chose which road he would walk down and is not to

[7] The no-merit report explains that OnStar® does not function as a GPS and does not constantly monitor and track a vehicle's movements. Counsel explains in the supplemental no-merit report that he talked to an OnStar® manager to obtain the information explained in the report. In his reply to the supplemental no-merit, Gallion complains that appointed appellate counsel did not file a proper affidavit bringing this information to the court. *See* WIS. STAT. RULE 809.32(2)(f). We do not rely on counsel's explanation of OnStar® and, therefore, do not require an affidavit regarding this information outside of the record.

[8] Gallion claims he has not been provided with complete and properly authenticated discovery regarding the phone records subpoenaed by police. Appointed appellate counsel reports that he provided Gallion with all written discovery in this case. It appears that Gallion's repeated requests for discovery are a fishing expedition. By entry of a guilty plea, Gallion forfeited his right to present a defense or contest the facts.

be returned to the fork or crossing so he can try the other one." ***Farrar v. State***, 52 Wis. 2d 651, 662, 191 N.W.2d 214 (1971).

Even if Gallion were to now claim that he merely followed trial counsel's advice to proceed with sentencing and that advice was bad because counsel had not investigated potential OnStar® data, a meritorious claim of ineffective assistance of counsel does not exist. This court examines whether counsel's conduct was reasonable under the circumstances. Trial counsel was faced with a case in which Gallion had admitted selling the heroin at a time and place corroborated by Ward. The heroin purchased from Gallion was consumed immediately and Schulthess's death resulted within an hour and one-half. It is merely speculative that OnStar® data would produce the driving history of Schulthess's vehicle after the purchasing of heroin from Gallion when it was known that Schulthess did not have an OnStar® account and that the emergency button was not pushed. It is equally speculative that any prolonged stop of the vehicle that might have been reflected by OnStar® data would have meant another purchase of heroin had taken place, particularly since Ward did not report any other purchase. Moreover, even if Schulthess consumed heroin purchased from another within an hour of obtaining heroin from Gallion, Gallion could still be convicted because the heroin he supplied would have been a substantial factor to Schulthess's overdose. *See* WIS JI—CRIMINAL 1021 (proof that the victim used the substance alleged to have been delivered by the defendant and died as a result of that use requires only that use of the controlled substance was a substantial factor in causing the death). Rather than pursue speculative prospects that the OnStar® data would have produced exculpatory evidence, it was reasonable for trial counsel to proceed under the plea agreement which included the prosecution's sentencing recommendation for a twenty-year sentence out of a potential maximum of forty years.

The other issues discussed in the no-merit report are whether the sentence was the result of an erroneous exercise of discretion or unduly harsh and whether Gallion's re-arrest after being arrested and released was unlawful.[9] This court is satisfied that the no-merit report properly analyzes these issues as without merit, and this court will not discuss them further.

The record includes a pro se motion for sentence credit in which Gallion sought 416 days sentence credit for the time between his arrest on April 9, 2012, and sentencing in this case on June 10, 2013. The trial court denied the motion because Gallion was given a consecutive sentence. That the sentence imposed in this case was to be served consecutive to any other sentence Gallion was then serving was also the reason given at sentencing for setting sentence credit at zero. The record demonstrates that as of the date of his arrest Gallion was under a "VOP" (violation of probation) hold and that his extended supervision in two other cases was subsequently revoked. A defendant is not entitled to dual credit where he already received credit against a sentence served separately. ***State v. Boettcher***, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988); ***State v. Jackson***, 2000 WI App 41, ¶19, 233 Wis. 2d 231, 607 N.W.2d 338.

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 Gallion further in this appeal. Gallion's response criticizes appointed appellate counsel for advocating against him and not providing competent representation on

[9] Gallion asserts that because he was released after his first arrest (after the controlled drug buy) which was based on probable cause, the State lost jurisdiction over him and could not re-arrest him. He cites ***Laasch v. State***, 84 Wis. 2d 587, 590, 267 N.W.2d 278 (1978). ***Laasch*** held that the trial court did not acquire personal jurisdiction over the defendant when she was released by the discretion of the district attorney without having made an appearance before the court such that it was not necessary to examine the circumstances of a second warrantless arrest. ***Id.*** ***Laasch*** has no application in Gallion's case because the second arrest was based on a warrant.

appeal. A no-merit report is an approved method by which appointed counsel discharges the duty of representation. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362 (1994). We have concluded that there is no arguable merit to further postconviction or appellate proceedings in this case. This court's decision accepting the no-merit report and discharging appointed counsel of any further duty of representation rests on the conclusion that counsel provided the level of representation constitutionally required.

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 S. Holzman is relieved from further representing Coleon Gallion in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals