OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

June 17, 2015

To:

Hon. Charles H. Constantine
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Ave.
Racine, WI 53403

Rose Lee
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Ave.
Racine, WI 53403

Paul G. Bonneson
Law Offices of Paul G. Bonneson
631 N. Mayfair Rd.
Wauwatosa, WI 53226

W. Richard Chiapete
District Attorney
730 Wisconsin Ave.
Racine, WI 53403

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Iryin Keth Vaughn, #606642
Waupun Corr. Inst.
P.O. Box 351
Waupun, WI 53963-0351

Joseph N. Ehmann
State Public Defenders Office
P.O. Box 7862
Madison, WI 53707-7862

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

2014AP2652-CRNM State of Wisconsin v. Iryin Keth Vaughn (L.C. #2012CF171)

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

Iryin Keth Vaughn entered a no-contest plea to the charge of first-degree intentional homicide by use of a dangerous weapon, as a repeat offender. His appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Vaughn filed a response to the report which asserts that his

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

trial counsel lied to him about the existence of laws recognizing adequate provocation as an affirmative defense to first-degree intentional homicide, and that had he known such a defense was available, he would not have entered a no-contest plea and would have insisted on going to trial. Appointed counsel indicated that after reading Vaughn's response, he would not file a supplemental no-merit report. *See* RULE 809.32(1)(f). We reject the no-merit report, dismiss the appeal, and extend the time for Vaughn to file a postconviction motion or notice of appeal under WIS. STAT. RULE 809.30.

Vaughn entered a no-contest plea to the first-degree intentional homicide charge in the criminal complaint. He stabbed his girlfriend to death after a night of drinking, drugs, and fighting.[2] She was stabbed twenty-nine times. Vaughn's pretrial motion to admit other acts evidence about the victim indicated that his theory of defense was self-defense. Three days before the scheduled jury trial, Vaughn entered his no-contest plea.[3] Under the plea agreement, charges of causing mental harm to a child, felony bail jumping, and pending charges in at least eight other criminal cases were dismissed as read-ins. Vaughn was sentenced to life in prison without the possibility of parole.

[2] At sentencing Vaughn stated that he was not intoxicated but that he was not in the right state of mind because he was on heavy medication—pain pills the victim gave to him and which he did not know were so powerful. He further stated he tried to leave when violence erupted but the victim did not want him to leave and the victim was on top of him armed with butcher knives. The no-merit report indicates that Vaughn said he had learned that the victim had an affair with another man, that discovery of the affair upset him, and that during a physical confrontation with the victim, he lost his self-control.

[3] The no-merit report indicates that at a status hearing held October 30, 2012, the case was set for jury trial on January 29, 2013. The record does not support the assertion. No status hearing was held October 30, 2012, the case was never set for jury trial on January 29, 2013, and Vaughn's competency to proceed was not even resolved until November 19, 2012. Ultimately the case was set for a jury trial on July 29, 2013. Vaughn entered his plea on July 26, 2013.

The no-merit report discusses the plea colloquy, Vaughn's belief that he has a meritorious defense of adequate provocation, and whether the sentencing court properly exercised its discretion in denying the possibility of parole. The no-merit report concludes that Vaughn had no viable adequate provocation defense because an "ordinarily constituted person would [not] have been provoked merely by the news that [the victim] was having an affair" and Vaughn had no defensive wounds from an alleged knife attack by the victim.

Vaughn asserts his trial counsel lied to him about the existence of a "heat of passion" defense or what is now known as an adequate provocation defense under WIS. STAT. § 939.44. Vaughn has asserted a fact outside of the record, the veracity of which this court cannot make any judgment, and therefore we must assume is true. *See* WIS. STAT. RULE 809.32(1)(g) (recognizing that a no-merit determination may be inappropriate if a defendant's version of facts regarding matters outside the record is true). The right to effective assistance of counsel applies to advice as to whether a defendant should forgo a trial by pleading guilty or no contest. *See* ***State v. Fritz***, 212 Wis. 2d 284, 293, 569 N.W.2d 48 (Ct. App. 1997). "[A] 'defendant can be expected to rely on counsel's independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of trial.'" ***Id.*** at 293-94; *see also* ***State v. Dillard***, 2014 WI 123, ¶90, 358 Wis. 2d 543, 859 N.W.2d 44.

Because appointed counsel's no-merit report seeks counsel's discharge from the duty of representation, we must independently determine whether the defendant's ineffective assistance claim has sufficient merit to require appointed counsel to file a postconviction motion and request a

Machner[4] hearing. The discussion in the no-merit report suggesting that an adequate provocation defense is not viable has no bearing on Vaughn's assertion that he did not have the correct information when making his decision to enter a plea or go to trial. Further, we cannot simply conclude that by his no-contest plea Vaughn waived his right to assert defenses because the validity of the plea is put in issue by Vaughn's claim that trial counsel's deficient performance caused his plea to be unknowing. The no-merit report fails to demonstrate why Vaughn would not be entitled to further postconviction proceedings on his claim that he was denied the effective assistance of trial counsel with respect to entry of his plea.

Upon the foregoing reasons,

IT IS ORDERED that the WIS. STAT. RULE 809.32 no-merit report is rejected, appointed counsel's motion to withdraw is denied, and this appeal is dismissed.

IT IS FURTHER ORDERED that the WIS. STAT. RULE 809.30 deadline for filing a postconviction motion or notice of appeal is reinstated and extended to sixty days after remittitur.

Diane M. Fremgen
Clerk of Court of Appeals

[4] 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).