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DISTRICT IV

April 7, 2016

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

2014AP2173-CRNM State of Wisconsin v. Marcus J. Thomas (L.C. #2013CF59)

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

Marcus Thomas appeals a judgment convicting him of a second or subsequent offense of delivering heroin, as a repeat offender. Assistant State Public Defender Susan Alesia has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2013-14);¹ *see also Anders v. California*, 386 U.S. 738, 744 (1967); *State ex rel. McCoy v. Wisconsin Court of Appeals*, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The

¹ All further references in this order to the Wisconsin Statutes are to the 2013-14 version, unless otherwise noted.

no-merit report addresses the plea colloquy and sentence. Thomas was sent a copy of the report, and has filed a response alleging ineffective assistance of counsel. Specifically, Thomas contends that counsel failed to share discovery with him, misled him about the State's sentencing recommendation, told him that the State had witnesses who would lie against him, and directed him to agree with everything at the plea hearing. Thomas has attached a letter from Alesia indicating that trial counsel had also not turned the discovery materials at issue over to her.

Alesia's discussion of the potential merit of an appeal is inadequate. *See McCoy v. Court of Appeals*, 486 U.S. 429, 438, 440 (1988) (noting that "a defense attorney has a duty to advance all colorable claims and defenses" (quoted source omitted)). A defective plea colloquy is but one subset of the ways in which a plea may be demonstrated to have been unknowing or involuntary or otherwise manifestly unjust. A defendant who seeks to withdraw his plea on other grounds constituting a manifest injustice—notwithstanding an ostensibly proper plea colloquy—must still be given an evidentiary hearing when he alleges nonconclusory facts which, if true, would entitle him to relief. *See State v. Hampton*, 2004 WI 107, ¶¶46-65, 274 Wis. 2d 379, 683 N.W.2d 14; *see also State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Ineffective assistance of counsel is one of the grounds that may constitute a manifest injustice.

Here, Thomas has alleged facts outside of the record that would, if true, render his plea manifestly unjust. It appears that the factual basis for the allegations would be Thomas's own testimony. Alesia has not filed a supplemental report addressing Thomas's allegations. Moreover, if Alesia has not reviewed the discovery for herself, it is difficult to see how she could evaluate whether trial counsel misled Thomas about the strength of the State's case. If Alesia has by now reviewed the discovery materials, and simply does not believe that Thomas would prevail at an evidentiary hearing, we remind her that, absent a client's expressed admission of an

intent to testify untruthfully, an attorney cannot conclude that the client's proffered testimony would be perjury. *State v. McDowell*, 2004 WI 70, ¶43, 272 Wis. 2d 488, 681 N.W.2d 500.

Therefore,

IT IS ORDERED that the no-merit report is rejected and the appeal is dismissed without prejudice. Assistant State Public Defender Susan Alesia or a successor appointed by the State Public Defender shall continue to represent Marcus Thomas in this matter.

IT IS FURTHER ORDERED that the time for Thomas to file a postconviction motion shall be extended until May 10, 2016.

Diane M. Fremgen
Clerk of Court of Appeals