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

November 15, 2017

To:

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

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Ave.
Racine, WI 53403

Paul G. Bonneson
Law Offices of Paul G. Bonneson
Third Floor, Ste. 407
10909 W. Bluemound Rd.
Wauwatosa, WI 53226

Patricia J. Hanson
District Attorney
730 Wisconsin Ave.
Racine, WI 53403

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

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

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

2017AP844-CRNM State of Wisconsin v. Iryin Keth Vaughn (L.C. # 2012CF171)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Iryin Keth Vaughn appeals from a judgment of conviction for first-degree intentional homicide. He also appeals from an order denying his postconviction motion to withdraw his no contest plea. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE

809.32 (2015-16),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Vaughn has filed responses to the no-merit report and counsel 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 there is no arguable merit to any issue that could be raised on appeal. However, the judgment of conviction incorrectly reflects that Vaughn was convicted of the crime with use of a dangerous weapon and repeater enhancers. Those enhancers were dismissed when Vaughn entered his no contest plea. Therefore, we modify the judgment and the judgment, as modified, and the order are summarily affirmed; the cause is remanded with directions for an entry of an amended judgment of conviction which removes the reference to the enhancers. *See* WIS. STAT. RULE 809.21.

Vaughn stabbed his girlfriend, Gwynevere Wright, to death at her Racine apartment on February 7, 2012. Police observed over twenty-five stab wounds to Wright's back, neck, and head. Wright's twelve-year-old son was home and told police that Vaughn and Wright were arguing loudly in their bedroom. Wright's son heard her screaming in pain and then it was quiet. The boy reported that after about five minutes, Vaughn left the apartment and took his two-year-old daughter with him. The boy went to the bedroom and saw his mother lying face-up on the bed covered in blood. He went to the downstairs neighbors for help. Vaughn was later located in Chicago, Illinois and taken into custody.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Vaughn was charged as a repeater with first-degree intentional homicide by use of a dangerous weapon, causing mental harm to a child, and two counts of felony bail jumping. His pretrial motion to suppress statements from his interview with police was granted in part and denied in part; the court excluded anything Vaughn said after he unequivocally indicated he wanted to talk to an attorney. Three days before the scheduled jury trial, Vaughn entered a no contest plea to first-degree intentional homicide. Under the plea agreement, the penalty enhancers were dismissed, the other counts in this case and eight other pending cases were dismissed as read-ins at sentencing, and the prosecution agreed not to make any recommendation on Vaughn's eligibility for release on extended supervision.

At sentencing, the prosecution adhered to the plea agreement and made no recommendation on the possibility of release to extended supervision. Vaughn told the court he was not "in my right state of mind," was on heavy medication, and did not know how powerful the pain pills Wright had given him were. However, he disavowed being intoxicated.[2] He indicated that he was attempting to sleep when Wright got on top of him armed with two butcher knives and that he simply "failed" in his attempt to disarm her. Focusing on the need to protect the community and Wright's children, Vaughn was sentenced to life without the possibility of release on extended supervision.

A previous no-merit appeal resulted in rejection of the no-merit report because Vaughn asserted in his response that before entry of his plea, his trial counsel lied to him about the

[2] Vaughn's responses to the no-merit report indicates that his statement at sentencing confused separate incidents. He explains that when he said he only had two beers and was not drunk, he was referring to a prior incident when Wright attacked him with butcher knives and he was able to disarm her.

existence of a "heat of passion" or adequate provocation defense under WIS. STAT. § 939.44. ***State v. Vaughn***, No. 2014AP2652-CRNM, unpublished op. and order (WI App June 17, 2015). After dismissal of the appeal, a timely postconviction motion for plea withdrawal was filed. The motion alleged that during the plea colloquy the circuit court failed to inform Vaughn that it was possible that trial counsel could discover defenses of mitigating circumstance not apparent to a layman, that Vaughn's plea was not voluntarily, knowingly or intelligently entered because his trial counsel failed to inform him of the defense of adequate provocation and he would not have plead but would have gone to trial if he had been informed, and that Vaughn was denied the effective assistance of trial counsel. Vaughn's affidavit in support of the motion states that on the night of the murder, he discovered that Wright was having an affair with his cousin, an argument ensued, Wright attacked him with two knives, as Vaughn tried to grab the knives, Wright told him, "I fucked him and will fuck him in your face. You won't do anything about it, bitch," and that "[h]er having an affair and attacking me with knives provoked me and I lost self-control." The affidavit also stated that on that evening he had a headache, he laid down and took two OxyContin pills, one hour later he took three Percocets, and during his argument with Wright, she tried to take all the pills in a bottle of OxyContin and he tried to grab the pills from her.

A ***Machner***[3] hearing was held. Trial counsel testified that Vaughn had consistently maintained that he had acted in self-defense when Wright came at him with a knife. Trial counsel did not recall ever discussing an adequate provocation defense with Vaughn and

[3] 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).

indicated he did not do so because what Vaughn told him happened amounted only to self-defense. Trial counsel testified that Vaughn did not tell counsel that he had found out Wright was having an affair or about the medication he took that night. Vaughn testified that early in trial counsel's representation, Vaughn learned about adequate provocation from a law book and spoke to trial counsel about it. He stated he told trial counsel about learning that Wright was having an affair, the medication he had taken, and Wright attacking him with two knives. He maintained that when he repeated to trial counsel that he had lost control, counsel told him that the law of adequate provocation did not exist anymore.

The circuit court found that trial counsel did not speak to Vaughn about an adequate provocation defense. It found incredible Vaughn's testimony that he had raised the defense with trial counsel and trial counsel advised him that it was no longer a legal defense. It found trial counsel's testimony credible, including counsel's testimony that Vaughn did not tell counsel about learning of the affair and the medication Vaughn took.[4] The court concluded that trial counsel acted reasonably on the information provided to him by Vaughn, made a strategic decision to focus only on self-defense, and did not perform deficiently by not discussing an adequate provocation defense with Vaughn. The postconviction motion was denied.

The no-merit report addresses the potential issues of whether Vaughn's plea was freely, voluntarily and knowingly entered, including whether there is arguable merit to the denial of Vaughn's motion to withdraw his plea. The report correctly concludes that the plea colloquy

[4] The circuit court observed that at sentencing, when Vaughn took the opportunity to tell the court what happened, Vaughn did not mention learning of Wright's affair.

was appropriate in that the circuit court 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.

Regarding Vaughn's motion to withdraw his plea, the circuit court did not make a ruling on Vaughn's first claim that the circuit court failed to inform Vaughn that it was possible that an attorney could discover defenses or mitigating circumstances not apparent to a layman. ***Bangert***, 131 Wis. 2d at 262, requires the plea-taking court to "alert the accused to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to a layman such as the accused." The directive is primarily for the benefit of defendants not already represented by counsel. *See* ***State ex rel. Burnett v. Burke***, 22 Wis. 2d 486, 494, 126 N.W.2d 91 (1964) (in accepting a guilty plea from an unrepresented defendant the court must ascertain that the defendant has freely and intelligently waived the right to counsel). Vaughn was represented by counsel and his counsel was prepared to present a self-defense defense. Also, Vaughn acknowledged that he was giving up other potential defenses. There is no arguable merit to a claim that the plea was unknowing because Vaughn was not apprised that an attorney might discover defenses or mitigating circumstances.

Vaughn's claim for plea withdrawal based on ineffective assistance of trial counsel because of counsel's failure to advise Vaughn about the adequate provocation defense lacks merit. The circuit court's credibility and factual findings establish that trial counsel was not told about the facts Vaughn relies on as suggesting provocation and Vaughn never raised the potential defense with counsel. Specifically, Vaughn's assertion, repeated in his no-merit responses, that trial counsel lied and told him that laws that retain adequate provocation were no longer in effect, was found to not be true. Vaughn now claims in his no-merit responses that his trial counsel was

also ineffective for not investigating insanity, intoxication, alibi, coercion, and necessity defenses. Yet the trial court found that trial counsel was given information by Vaughn that only suggested that Vaughn acted in self-defense.[5] We agree with the circuit court that counsel's strategic decision to focus on self-defense was reasonable and based on the facts and the law. *See* ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) ("A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel."). Thus, there is no arguable merit to the claim for plea withdrawal based on ineffective assistance of counsel.

The no-merit report fails to discuss whether there is any arguable challenge to the circuit court's ruling on Vaughn's motion to suppress statements he made to police before requesting an attorney.[6] Despite Vaughn's no contest plea, the potential issue is preserved for appeal. *See* WIS. STAT. § 971.31(10) (a defendant may challenge the denial of a motion to suppress evidence or a statement of a defendant despite a guilty or no contest plea). When seeking admission of statements made during custodial questioning, the state must make two separate showings:

[5] Vaughn explains in his responses to the no-merit report that he had been drinking and was intoxicated, and for that reason his brother drove him from Racine to Chicago on the night of the murder. He claims that his trial counsel was aware of these facts. At the postconviction hearing, Vaughn testified he told his trial counsel that both he and Wright had been drinking. But then he testified he had one beer that he drank slowly, that he "didn't really feel like drinking," and that he "didn't want to drink with her because I know how things can get." The trial court's finding that trial counsel was only aware of facts suggesting self-defense is not clearly erroneous. Vaughn's own testimony disclaimed intoxication. Vaughn's assertion that trial counsel failed to investigate a viable intoxication defense lacks merit.

[6] Prior to his request to speak to an attorney, Vaughn had denied that he had been in Racine on the night of the murder and he became emotional when shown a picture of Wright's body.

(1) that the defendant was informed of his ***Miranda***[7] rights, understood them and intelligently waived them; and (2) that under ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 264, 133 N.W.2d 753 (1965), the defendant's statement was voluntary. The evidence at the ***Miranda-Goodchild*** hearing reflects that the state met its burden in this case.

The only possible issue is at what point in the interview Vaughn made a request for counsel. The cessation of questioning is not required when a suspect subject to custodial interrogation makes an ambiguous or equivocal reference to an attorney. ***State v. Long***, 190 Wis. 2d 386, 395, 526 N.W.2d 826 (Ct. App. 1994). The reference is ambiguous or equivocal when, under the circumstances, a reasonable officer would have understood only that the suspect might be invoking the right to counsel. ***Id.*** Further, an officer is not required to ask clarifying questions when an ambiguous reference is made. ***Id.*** The circuit court's findings regarding the facts surrounding the interview are reviewed under the clearly erroneous standard. ***Id.*** at 393. We independently consider the related constitutionality of the interview. ***Id.*** The circuit court found that Vaughn first stated, "I am going to talk to my attorney." Then moments later Vaughn said "I want to talk to a lawyer." These findings are not clearly erroneous. As the circuit court assessed, Vaughn's first reference to an attorney was for a future event and his second reference was an unequivocal assertion of his right to an attorney. There is no arguable merit to a claim that whatever Vaughn said before his second reference to an attorney was admissible at trial.

The final potential issue discussed by the no-merit report is whether the sentencing court properly exercised its discretion in determining that Vaughn serve his life term without the

[7] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

possibility of release on extended supervision. The no-merit report properly analyzes the issue as without merit and we need not discuss it further.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report and discharges appellate counsel of the obligation to represent Vaughn further in this appeal. On remand, an amended judgment of conviction shall be entered which removes the reference to the penalty enhancers.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction, as modified, and order are summarily affirmed, and the cause remanded with directions. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Paul G. Bonneson is relieved from further representing Iryin Keth Vaughn in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals