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January 3, 2018

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

2015AP1186-CRNM State of Wisconsin v. Jeffrey J. Vogelsberg (L.C. # 2012CF2119)

Before Sherman, Kloppenburg and Fitzpatrick, JJ.

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).

Jeffrey Vogelsberg appeals a judgment convicting him of second-degree reckless homicide, as a domestic abuse incident, based upon a no contest plea. Attorney Tim Provis has filed a no-merit report seeking to withdraw as appellate counsel. The no-merit report addresses the following issues: whether counsel provided ineffective assistance by coercing Vogelsberg to

change his plea mid-trial; whether the circuit court was obligated to follow the prosecutor's sentencing recommendation; whether the circuit court exhibited bias against Vogelsberg when it found that his mental illness had nothing to do with the crime; and, finally, whether Vogelsberg's plea was involuntary due to medications he was taking at that time. Vogelsberg was sent a copy of the no-merit report, and filed a response disputing counsel's characterization of his potential issues and alleging facts outside the record. Provis then filed a supplement to his no-merit report that objected to what counsel viewed as unwarranted attacks on his character but that did not address the merits of Vogelsberg's assertions, and Vogelsberg filed an additional response. Upon reviewing the entire record, as well as counsel's no-merit report and supplement and Vogelsberg's responses, we conclude that counsel's discussion of the potential merit of an appeal is inadequate in two respects.

First, as to the voluntariness of Vogelsberg's plea, the record shows that, on the third day of a trial for first-degree intentional homicide, Vogelsberg needed to be taken by ambulance to the hospital for a medical emergency because he was bleeding internally from a duodenal ulcer. The jury was sent home for the rest of that day, which was a Thursday, all of the next day, and all of the following Monday, while Vogelsberg remained in the hospital. When Vogelsberg finally appeared in court again on the following Tuesday pursuant to medical clearance from the jail doctor and the hospital, he complained that the night before, jail medical staff had "discontinued" and refused to give him his antipsychotic medicine, Seroquel, for his schizophrenia, perhaps as being contraindicated due to either the ulcer or treatment for the ulcer, which in turn kept Vogelsberg from sleeping well. Vogelsberg told his attorney that he was not really feeling well and was ambiguous as to whether he was ready to proceed. In response to questioning from the circuit court about whether Vogelsberg was physically and/or mentally

competent to resume trial, trial counsel advised the court that he could not tell whether Vogelsberg was suffering from any psychotic symptoms, but that “[h]e does seem different today, let’s put it that way.” After a recess, the parties informed the court that rather than proceeding with the trial, they had negotiated a plea agreement.

Vogelsberg now asserts that jail personnel had ignored his attempts to get treatment for his ulcer in the two and a half months leading up to trial; that the jail doctor who opined that Vogelsberg was ready to resume trial was the same one who had failed to treat Vogelsberg’s ulcer previously and who Vogelsberg feels had a motive to cover up his own incompetence by minimizing Vogelsberg’s condition; that in the days immediately preceding his plea agreement, Vogelsberg had lost half of his blood and had six blood transfusions and surgery; and that Vogelsberg had spent the night before the plea experiencing vomiting, diarrhea, and “the full brunt of the terrors” the medicine he was not given was intended to ameliorate, while also cold and naked in segregation “for a fictitious suicide attempt.” Vogelsberg contends that he was entitled to a mistrial due to illness, and that he agreed to the plea deal only because he was sedated and scared due to the treatment he had received from jail personnel and because he feared continued mistreatment if he did not accept the deal. Vogelsberg further alleges that trial counsel led him through what to say at the plea hearing.

Provis concludes that Vogelsberg has no grounds to challenge his plea because he told the circuit court during the plea hearing that he had not been threatened; that he had received his medication the morning of the plea and was not experiencing any psychiatric symptoms at that time; and that he was satisfied with trial counsel’s representation. Provis appears to be confusing the standard for a ***Bangert*** motion with that required for a ***Bentley*** motion. *Cf.* ***State v. Bangert***,

131 Wis. 2d 246, 389 N.W.2d 12 (1986) and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

Under ***Bangert***, a defendant who makes a prima facie showing that the procedures outlined in WIS. STAT. § 971.08 (2015-16)[1] or other court-mandated duties were not followed at the plea colloquy, and further alleges that he did not understand the omitted information, is entitled to a hearing on his plea withdrawal motion at which the State will carry the burden of showing that the plea was nonetheless knowing and voluntary. ***State v. Hampton***, 2004 WI 107, ¶¶46-65, 274 Wis. 2d 379, 683 N.W.2d 14. However, 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. ***Id.***, ¶48. A defendant who seeks to withdraw his plea on other grounds constituting a manifest injustice must still be given an evidentiary hearing when he alleges nonconclusory facts which, if true, would entitle him to relief — although he maintains the burden of proof throughout the hearing. ***Id.***, ¶60; *see also* ***Bentley***, 201 Wis. 2d at 309-10.

To the extent Provis may be suggesting that Vogelsberg's current allegations are not credible because they may contradict in part what he said at the plea hearing, we note that ***Bentley*** motions can encompass situations where a defendant is asserting facts outside the record that may contradict statements made at a plea hearing. ***Hampton***, 274 Wis. 2d 379, ¶61. For instance, it may be the case that a person who is actually experiencing psychotic symptoms may not have the insight to be able to recognize them at the time, or that a person who feels threatened will deny the threat for fear of retaliation. We also remind counsel that: "Except in

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

the rarest of cases, attorneys who adopt 'the role of the judge or jury to determine the facts,' pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment." ***Nix v. Whiteside***, 475 U.S. 157, 189 (1986) (Blackmun, J., concurring) (citation omitted). 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.

We conclude that it would not be frivolous to argue that the circumstances Vogelsberg describes would, if true, entitle Vogelsberg to relief, either on the grounds that his plea was not actually voluntary due to his physical condition or state of mind, or that it was manifestly unjust because counsel provided ineffective assistance by not moving for a mistrial. In other words, we are satisfied that Vogelsberg's allegations would be sufficient to obtain a hearing on the issue of plea withdrawal, if he still wishes to pursue it.[2]

Additionally, we note that Provis has entirely failed to address a suppression ruling that was preserved pursuant to WIS. STAT. § 971.31(10). The suppression motion was more complicated than the usual case because items were seized from a military base in another state pursuant to a military authorization to search, rather than by a search warrant. It appears that the circuit court decided the motion based upon its interpretation of the military justice code and its application to this case, rather than upon any adverse credibility or factual findings. Therefore, it

[2] We note that withdrawing the plea would reinstate the dismissed charges of first-degree intentional homicide, party to the crime of hiding a corpse, and felony intimidation of a witness, once again exposing Vogelsberg to a life sentence if he were to be convicted upon retrial.

would be no more frivolous to raise the suppression issue on appeal than it was to bring it in the first instance.

Because we have identified two arguably meritorious issues for appeal, we reject the no-merit report and deny counsel's request to withdraw his representation. We emphasize that we take no position on any factual findings or credibility determinations that the circuit court may need to make in order to resolve a plea withdrawal motion, if Vogelsberg decides to pursue one.

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice. Attorney Tim Provis or a successor appointed by the State Public Defender shall continue to represent Jeffrey Vogelsberg.

IT IS FURTHER ORDERED that unless, upon further consultation, Vogelsberg decides to close the file rather than pursue a plea withdrawal motion that would significantly increase his sentence exposure, counsel or successor counsel shall file a plea withdrawal motion on Vogelsberg's behalf. The suppression issue does not need to be further litigated in the circuit court to be preserved for a future appeal.

IT IS FURTHER ORDERED that the time for Vogelsberg to file a postconviction motion or notice of appeal shall be extended until sixty days from the date of this order.

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

Diane M. Fremgen
Acting Clerk of Court of Appeals