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January 7, 2020

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

2017AP2114-CRNM State of Wisconsin v. Clarence J. Wilson (L.C. # 2014CF117)

Before Brash, P.J., Kessler and Dugan, 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).

Clarence J. Wilson appeals a judgment convicting him of first-degree reckless homicide by delivery of a controlled substance. *See* WIS. STAT. § 940.02(2)(a) (2013-14).[1] His appellate counsel, Erica L. Bauer, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Anders v. California, 386 U.S. 738 (1967). Wilson filed a response to the no-merit report, counsel filed a supplemental no-merit report, and Wilson filed an additional no-merit response. RULE 809.32(1)(e), (f). Upon consideration of these submissions and an independent review of the record as required by ***Anders***, we summarily affirm the judgment because there is no arguable merit to any issue that could be pursued on appeal. *See* WIS. STAT. RULE 809.21.

In 2014, the State filed a criminal complaint against Wilson alleging that he caused the death of the victim in this matter by delivering heroin to him. As detailed in the complaint, police officers were dispatched in response to a possible overdose at a cabin in Marinette County. Despite attempts by rescue personnel to revive the victim, he died at the scene. The police officers observed drug paraphernalia and suspected controlled substances in the bathroom where the victim was found.

According to the complaint, the victim's girlfriend reported to police officers that she and the victim purchased heroin from Wilson the afternoon before the victim's death. Shortly thereafter, the victim used the heroin and overdosed immediately. The victim's girlfriend took him to the hospital where he was revived but refused additional medical treatment. Afterward, the victim and his girlfriend went to her family's cabin in Marinette County. The girlfriend's mother found the victim, unconscious, in the bathroom the next morning.

Wilson went to trial, and a jury found him guilty of first-degree reckless homicide by delivery of a controlled substance. The trial court sentenced him to thirteen years of initial confinement and twelve years of extended supervision.

This appeal follows. The no-merit report is comprehensive and addresses, among other things, the pretrial proceedings including the ***Wallerman*** stipulation,[2] the jury instructions,[3] Wilson's waiver of his right to testify, and the sufficiency of the evidence to support the guilty verdict. The report also addresses various issues related to sentencing. This court is satisfied that the no-merit report properly analyzes the issues it raises as being without merit and that no procedural trial errors occurred. We discuss these matters further only insofar as they relate to an issue Wilson presents in his submissions; namely, the alleged ineffectiveness of his trial counsel for not retaining an expert. Additionally, we explain why Wilson cannot claim that his trial counsel was ineffective for not pursuing a change of venue motion on his behalf.

Claims of ineffective assistance of trial counsel must first be raised in the circuit 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 questions in the context of a no-merit review if the issue was not first raised in a postconviction motion in the trial court. However, because appellate counsel asks to be discharged from her duty of representation, we must determine whether an ineffective

[2] *See* ***State v. Wallerman***, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996), *overruled in part by* ***State v. Veach***, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447. Here, Wilson stipulated to the first three elements of the crime of first-degree reckless homicide by delivery of a controlled substance, which prevented the State from introducing other acts evidence against him. The trial court accepted the stipulation.

[3] This court placed this appeal on hold because the Wisconsin Supreme Court granted a petition for review in ***State v. Trammell***, 2017AP1206-CR, unpublished slip op. (WI App May 8, 2018). At issue in ***Trammell*** was the continued viability of jury instruction WIS JI—CRIMINAL 140, an instruction that was given in Wilson's case. The supreme court has since issued a decision in ***Trammell***, holding "that WIS JI—CRIMINAL 140 does not unconstitutionally reduce the State's burden of proof below the reasonable doubt standard." *See* ***State v. Trammell***, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564. Consequently, there would be no arguable merit to pursue postconviction proceedings based on the use of jury instruction WIS JI—CRIMINAL 140 at Wilson's trial.

assistance of trial counsel claim has sufficient merit to require appellate counsel to file a postconviction motion and request a ***Machner*** hearing.

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 ultimate determination[s] of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently." *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

Wilson contends that his trial counsel should have retained "an expert in pharmacology" to explain that the level of norpropoxyphene in the victim's system exceeded therapeutic levels and to further explain that norpropoxyphene could have caused the victim's death, even in the absence of heroin.[4]

Dr. Mark Witeck, the forensic pathologist who conducted the autopsy in this matter, testified that the victim "died from poly-substance toxicity. In other words, there's a mixture of drugs in his system that would have worked together to cause his death." Dr. Witeck additionally explained that based on the level of morphine, a heroin metabolite, found in the victim's system, he "would expect that to be lethal in most individuals." When questioned about whether the heroin metabolites alone, at the levels indicated, would have caused the

[4] Trial testimony revealed that norpropoxyphene is a breakdown product of propoxyphene, which is also referred to as Darvon or Darvocet. The State's forensic toxicologist explained that Darvon or Darvocet is a central nervous system depressant drug, "like any other opioid, but it was actually removed from the market [in] approximately 2010 or 2011."

victim's death, Dr. Witeck responded: "In all likelihood yes." Conversely, Dr. Witeck testified that if the victim did not have the heroin metabolites in his blood, the other substances that were found "[i]n all likelihood" would not have killed the victim.

Wilson's trial counsel challenged the bases for Dr. Witeck's conclusion that the level of morphine was a lethal level for the victim. Trial counsel, through his cross-examination, asked Dr. Witeck about the interaction between morphine and norpropoxyphene. Dr. Witeck explained that both substances are taken as pain killers, and both act on the central nervous system—and "[i]f there's enough of the different drugs, they will actually suppress the central nervous system which can lead to death." Later, on redirect, Dr. Witeck testified that in his opinion, the level of norpropoxyphene in the victim's blood was "[a]s far as I know … not a lethal level by itself."

During his closing argument, trial counsel argued that the heroin delivered by Wilson was not a substantial factor in the victim's death. Trial counsel questioned how other substances, beyond morphine, got into the victim's blood and suggested to the jury that somewhere along the line the victim obtained other street drugs. Trial counsel directed the jury's attention to an empty brown pill bottle that was found in the bathroom at the cabin with the other drug paraphernalia. According to trial counsel, Dr. Witeck, in arriving at his conclusions in this case, completely ignored the other drugs that were found in the victim's system. Trial counsel stressed that it was the mixture of the drugs in the victim's system that caused his death. The heroin in the victim's system, trial counsel argued, could not be isolated.

In her supplemental no-merit report, appellate counsel highlights—among other things—that the quantity of heroin metabolite in the victim's body was more than three times the maximum therapeutic range and explains that she does not believe any expert opinion would

have contradicted that finding. Counsel also explains that the issue was whether the heroin the victim ingested was a *substantial factor* in causing his death, not whether it was the sole factor. We agree with counsel that the record before us would not support an arguably meritorious claim that Wilson was denied the effective assistance of trial counsel because trial counsel did not secure an expert in pharmacology to offer testimony about the level of norpropoxyphene in the victim's system.

Next, we note there are various *pro se* filings by Wilson in the record wherein Wilson expressed dissatisfaction that trial counsel would not move for a change of venue based on Wilson's concerns that he would not have a jury of his peers. Wilson explained to the trial court: "I think this town is small maybe not used to minorities in this town, so I think—I don't think I will get a fair trial here." Such a motion was never pursued on Wilson's behalf. However, we do not see support for it in the record before us. The law does not entitle a defendant to change venue in an effort to provide him with a jury pool containing certain racial demographics. Even if Marinette County has a small minority population, this would not necessarily constitute nor create a denial of an impartial jury. *See* ***Sanders v. State***, 69 Wis. 2d 242, 260, 230 N.W.2d 845 (1975). Again, the record does not support an arguably meritorious claim that trial counsel was deficient for not pursuing a motion that would not necessarily have been successful. *See* ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12 ("Trial counsel's failure to bring a meritless motion does not constitute deficient performance.").

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 her obligation to represent Wilson further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Erica L. Bauer is relieved from further representing Clarence J. Wilson in this appeal. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals