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DISTRICT I

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

2019AP749-CR	State of Wisconsin v. Craig L. McNeal (L.C. # 2016CF4611)
2019AP750-CR	State of Wisconsin v. Craig L. McNeal (L.C. # 2016CF4612)
2019AP751-CR	State of Wisconsin v. Craig L. McNeal (L.C. # 2017CF926)

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

Craig L. McNeal appeals from judgments, entered upon his guilty pleas, convicting him on two counts of burglary and one count of possession of a firearm by a felon. McNeal also appeals from an order denying his postconviction motion. Based upon our review of the briefs

and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] The judgments and order are summarily affirmed.

In 2016, McNeal was charged with one count of burglary and one count of possession of a firearm by a felon, each in a separate case; in 2017, McNeal was charged with two additional counts of burglary, each in a separate case. In the 2016 cases, a competency concern was raised. The first examiner, Dr. Jenna Niess, was "unable to offer an opinion regarding [McNeal's] current functional capacities as a defendant" due to his "refusal to productively submit" to the evaluation. McNeal was ordered committed for inpatient evaluation, and the second examiner, Dr. Elliot Lee, concluded to a reasonable degree of medical certainty, that McNeal "does not lack substantial mental capacity to understand court proceedings and assist in his own defense." McNeal did not challenge this conclusion, and the cases continued.

In the possession case, McNeal moved to suppress the gun, alleging it was recovered during an unlawful stop. After an evidentiary hearing, the circuit court denied the motion. McNeal ultimately agreed to resolve all the charges through a plea agreement in which he would plead guilty to two of the burglary charges and the possession charge, with the remaining burglary charge to be dismissed and read in. The State agreed to recommend "substantial" prison time without specifying a term. The circuit court accepted McNeal's pleas and ultimately imposed concurrent sentences, with a controlling sentence of seven and one-half years of initial confinement and five years of extended supervision, the maximum for each burglary conviction.

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

McNeal subsequently filed a postconviction motion seeking to withdraw his pleas. He alleged that his pleas were not knowing, intelligent, and voluntary because "he was no longer taking his psychiatric medications at the time of trial." He also alleged that trial counsel had been ineffective for failing to retain an independent expert to challenge McNeal's competency determination and for failing to request a presentence investigation report. The circuit court denied the motion without a hearing. McNeal moved for reconsideration, but that was also denied. McNeal appeals.

A defendant who seeks to withdraw his plea after sentencing must demonstrate, by clear and convincing evidence, that withdrawal of the pleas is necessary to correct a manifest injustice. *See* ***State v. Sulla***, 2016 WI 46, ¶24, 369 Wis. 2d 225, 880 N.W.2d 659. One way to demonstrate a manifest injustice is by showing a plea was not knowingly, intelligently, or voluntarily entered. *See* ***id.*** Another way to demonstrate a manifest injustice is to establish that the defendant received ineffective assistance of counsel. *See* ***State v. Dillard***, 2014 WI 123, ¶84, 358 Wis. 2d 543, 859 N.W.2d 44.

"A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. However, the supporting facts "must be alleged in the [motion,] and the defendant cannot rely on conclusory allegations, hoping to supplement them at a hearing." *See* ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). Whether the motion alleges sufficient material facts is a question of law that we review *de novo*. *See* ***Allen***, 274 Wis. 2d 568, ¶9. If the motion does not raise sufficient facts, if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not

entitled to relief, then the decision whether to grant a hearing is committed to the circuit court's discretion. *See* ***id.*** We review such a decision for an erroneous exercise of discretion. *See* ***id.***

McNeal first alleged that he "did not knowingly enter his plea because he was no longer taking his psychiatric medications[.]" He listed his various diagnoses and prior institutional admissions, then asserted that without proper medication, he could not enter a valid plea because the "type and amount of diagnoses [he] faces daily are too severe to do so. Auditory and visual hallucinations are distracting at best and debilitating at worst…. [T]his is only one set of symptoms derivative of [his] mental heath difficulties."

These allegations, however, are wholly conclusory. As the circuit court noted in denying the motion, "the guilty plea transcript reveals that the defendant's responses to the court were cogent and intelligible, each pertaining to the questions he was asked…. [T]here is no showing that he was anything but coherent on the day that he entered his plea." The circuit court further noted that McNeal did not allege that he did not understand what was happening when he entered his plea; rather, he asserted only that Dr. Lee's report showed that he had mental health difficulties, which does not establish that he did not understand the circuit court's questions on the day he entered his pleas. The circuit court stated that the motion "merely assumes that the absence of medication produced no understanding of what he was doing, but that notion is belied by the plea transcript. The court rejects this claim." We reject it as well, and for the same reasons.[2]

[2] Though our review is constrained to the allegations within the four corners of the motion, *see* ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433, we note that McNeal's appellant's brief is not any less conclusory than the motion.

McNeal next alleged in his postconviction motion that trial counsel was "deficient for failing to retain an independent expert to evaluate [him]" and that he was prejudiced because "there was a reasonable probability that competency would have been successfully challenged but for trial counsel's deficient performance."

"Although a defendant may have a history of psychiatric illness, a medical condition does not necessarily render the defendant incompetent to stand trial. To determine legal competency, the court considers a defendant's present mental capacity to understand and assist at the time of the proceedings." ***State v. Byrge***, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477 (citation omitted). The circuit court noted that McNeal "has not given the court an inkling of what an expert would have said or how it would have altered the defendant's course of action in these cases" and denied the claim as conclusory. We agree.

When a defendant alleges that counsel was ineffective for failing to call a witness—which is what trial counsel would have had to do to challenge Dr. Lee's report concluding McNeal was competent—he must identify the witness whom counsel failed to call and must show, with specificity, what their testimony would have been. *See* ***State v. Leighton***, 2000 WI App 156, ¶42, 237 Wis. 2d 709, 616 N.W.2d 126. Otherwise, the motion is based on mere speculation, which is inadequate. *See* ***Allen***, 274 Wis. 2d 568, ¶¶15, 23-24.

Moreover, McNeal's argument that trial counsel was deficient for not retaining an expert to evaluate him and "successfully challenge[]" his competency assumes that there was an expert willing to give such testimony. However, McNeal's motion does not provide any averments to support that assumption, and trial counsel is not required to seek repetitive exams of a defendant

until an expert with a favorable opinion is found. *See* ***State v. Oswald***, 2000 WI App 2, ¶77, 232 Wis. 2d 62, 606 N.W.2d 207.

In his reconsideration motion, McNeal urged the circuit court to review Dr. Niess's competency evaluation report because she had "insufficient data" for reaching a conclusion about his competency. However, Dr. Niess lacked that data because McNeal "was not very forthcoming with her." As the circuit court noted, "Dr. Niess's report does nothing to establish that [McNeal] did not understand the nature of the proceedings" at the time of his plea.[3]

McNeal's third postconviction contention was that trial counsel was ineffective for failing to request a presentence investigation report "that would have detailed McNeal's current mental health status and his need for psychiatric medication" and demonstrated that McNeal needed medication at the time of his plea. The circuit court noted that this allegation was completely conclusory and, in any event, the court was "aware of his particular issues," "knew he had been previously medicated," and "had read the doctor's report prior to the sentencing proceeding and extensively acknowledged all of the issues that would have been set forth in a presentence report."

McNeal's appellant's brief, however, does not mention the presentence investigation report issue. Arguments made in the circuit court but not renewed on appeal are deemed

[3] The reconsideration motion also asserts that McNeal was incompetent "on the prior four dates of violation." This implies a claim that McNeal was not guilty by reason of mental disease or defect (NGI), *see* WIS. STAT. § 971.15(1), which is a related but distinct concept from competency to proceed to trial. However, any claim relative to an NGI defense was not preserved and was not developed; we do not discuss it further. *See* ***State v. King***, 205 Wis. 2d 81, 87, 555 N.W.2d 189 (Ct. App. 1996); ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

abandoned, *see* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998), so we decline to address this issue further.

On appeal, McNeal's third claim of ineffective assistance is that trial counsel was ineffective for failing to "combat joinder" of his cases. The State asserts that this issue has been raised for the first time on appeal, which McNeal does not dispute, so we could decline to consider the issue. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997). We note, however, that the cases were never formally joined. They were not initially charged in the same complaint, *see* WIS. STAT. § 971.12(1), and, while the State moved to join the matters for trial, *see* § 971.12(4), the circuit court never had to rule on the joinder motion because McNeal entered pleas rather than proceeding to trial. Indeed, when the parties ultimately set the case for a projected guilty plea, the circuit court noted that the joinder motion had become moot. Therefore, trial counsel is not ineffective for failing to challenge a joinder that never happened. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance.").

Finally, McNeal contends the circuit court erred in denying his motion to suppress the gun underlying the felon-in-possession charge. This issue is preserved notwithstanding McNeal's guilty pleas. *See* WIS. STAT. § 971.31(10).

According to the applicable criminal complaint:

> On or about Monday, October 10, 2016, at 3229 North 93rd Street, in the City of Milwaukee, Milwaukee County, Wisconsin, MPD officers were dispatched to a complaint of a suspicious person and vehicle at 3239 N. 79th St. The caller/complainant described the person as a black male and the vehicle as a silver Kia

> with Dealer plates saying GOOD DEAL. While enroute, officers received a second call describing the same behavior and a silver Kia this time in the alley between N. 93rd St. and N. 94th St. Officers proceeded to that area.
>
> Upon arrival, officers observed a silver Kia operating northbound in the above-referenced alley. The Kia was seen to park on a slab behind 3229 N. 93rd St. Officers conducted a high-risk traffic stop on the Kia.
>
> Vehicle operator DeWayne A. Hill and passenger Craig L. McNeal, m/b, dob: 10/28/94 were both ordered from the vehicle and detained for investigative purposes.
>
> A records/wanted check revealed McNeal to be a suspect in a Burglary complainant, MPD Incident #161640137. Officers requested a finger-print examination of McNeal and McNeal was identified as the suspect in the afore-mentioned Burglary. Further, it was learned that McNeal was on Probation for a prior Burglary conviction.
>
> In a custodial search incident to arrest, officers located a black, semi-automatic .22 caliber Beretta handgun located in the front crotch area of McNeal's pants.

McNeal moved to suppress the gun, alleging that police lacked reasonable suspicion for the stop, in part because police had no reason to suspect McNeal as the passenger had committed any offense. Following an evidentiary hearing at which one of the responding patrol officers testified, the circuit court denied the motion. It explained that case law allows police to conduct an investigatory stop of a vehicle for a noncriminal traffic or equipment violation, which was the case here because the Kia lacked a valid license plate. Case law further allows police to order all occupants out of a car during a lawful traffic stop. The circuit court concluded that the police had reasonable suspicion based on the information—which was more substantive than what was included in the complaint—from the two callers, each of whom independently but similarly described the Kia.

On appeal, McNeal argues that the lack of a valid license plate "was an excuse made by the State for the real reason McNeal was stopped." He further asserts:

> McNeal was stopped for being black. Many new vehicles have not had license plates, and McNeal's vehicle was exhibiting the behavior of a lost person looking for the right way to go. The report the officers followed was a call about a vehicle exhibiting the behavior of someone lost, that happened to be driven by two black men. Being black is not sufficient for an experienced police officer to suspect McNeal of committing a crime.

A circuit court's decision on a motion to suppress evidence presents a mixed question of fact and law. *See* ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. We do not reverse the circuit court's factual findings unless clearly erroneous, but the application of constitutional principles to those findings is reviewed *de novo*. *See* ***id.*** McNeal's claim of racial profiling utterly ignores the testimony given at the motion hearing about the callers' concerns, the circuit court's findings of fact, and our standard of review.

The first caller reported that an occupant of the vehicle came to her door, looking for someone named Adam. This person put his foot in the door to try to stop her from closing it, though she was eventually able to do so, and the person and the vehicle fled the scene. This information was relayed to the officers over their computer system. Less than ten minutes later, the second caller, who was located about fifteen blocks from the first caller, reported that a suspicious vehicle was "traveling through the alleys in the area and was stopping by vehicles as it passed by those vehicles." The testifying officer explained that this behavior was suspicious because:

> the fact that they were driving with no plates on the vehicle; the fact that the caller didn't recognize them from the neighborhood; the fact that the dispatcher, along with us and the other squad, believed that this was the same exact vehicle that was 15 blocks

> east approximately eight minutes earlier putting a foot in the door of somebody's house when they answered the door and asking for somebody that did not live there. So there was a lot of circumstances that led me to believe that this was a vehicle that didn't belong in the neighborhood and was up to no good.

When the State asked whether the vehicle's behavior could be described as "casing," the officer answered affirmatively. The circuit court, in denying the motion, noted that it found the officer to be "very, very credible."

While McNeal would have us believe that the "casing" behavior was simply that of a lost driver, "police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." *See* ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). The record more than adequately supports a finding of reasonable suspicion for the stop and McNeal's subsequent detention, so the circuit court did not err in denying the suppression motion.

Upon the foregoing, therefore,

IT IS ORDERED that the judgments and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals