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April 27, 2021

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

2019AP949-CR State of Wisconsin v. Byron Edward Hopkins (L.C. # 2016CF2103)

Before Dugan, Graham 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).

Byron Edward Hopkins, *pro se*, appeals a judgment of conviction entered upon his guilty plea to one count of first-degree reckless homicide by delivery of a controlled substance. He also appeals an order denying his motion for postconviction relief. *See* WIS. STAT. RULE

809.30(2)(j) (2019-20).[1] He alleges that: he is entitled to withdraw his plea; the circuit court should have suppressed his custodial statement; the State did not comply with its obligation to disclose exculpatory evidence; and his trial counsel was ineffective in a variety of ways. The circuit court rejected his claims without a hearing. Based upon a review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.[2]

According to the criminal complaint, Justin Huber was found dead in his home shortly after midnight on May 6, 2016. Heroin in a paper fold and paraphernalia used to prepare and ingest heroin were found nearby. Police determined that Huber died of a heroin overdose and, following an investigation, they concluded that Hopkins supplied the heroin. Police subsequently executed a search warrant at Hopkins's home. The search uncovered heroin, cocaine, two digital scales, paper folds commonly used for packaging controlled substances for

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] Hopkins filed a postconviction motion pursuant to WIS. STAT. RULE 809.30(2)(h) on February 13, 2019, and the circuit court denied the motion eighty-four days later, on May 8, 2019. In the decision and order denying the motion, the circuit court suggested that Hopkins's appellate rights under RULE 809.30 had expired because he failed to obtain an extension of the circuit court's statutory decisional deadline. *See* RULE 809.30(2)(i) (requiring the circuit court to decide a postconviction motion within sixty days after it is filed unless this court grants an extension). The circuit court went on to say that it would treat Hopkins's motion as filed under WIS. STAT. § 974.06. We are satisfied, however, that Hopkins's appeal is properly proceeding under RULE 809.30. A defendant's appellate rights under that rule do not lapse when the circuit court is unable to meet its decisional deadline. Rather, the circuit court loses competency to decide the motion. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 516, 451 N.W.2d 759 (Ct. App. 1989). Here, Hopkins timely filed a postconviction motion under RULE 809.30(2)(h) and, as required by RULE 809.30(2)(j), filed a notice of appeal within twenty days after the circuit court entered an order denying that postconviction motion. Accordingly, he is entitled to a review of his claims. *See* ***Scherreiks***, 153 Wis. 2d at 517. To facilitate that review, we retroactively extended the circuit court's April 14, 2019 deadline to May 8, 2019, by order dated June 14, 2019.

sale, and Dormin, which is a cutting agent used to dilute heroin and cocaine. Police arrested Hopkins.

Hopkins gave a statement to police after they advised him of his ***Miranda*** rights.[3] He admitted that he sold heroin and that he packaged his product in paper. Hopkins identified Huber from a booking photo and said that Huber had purchased heroin from Hopkins "off and on for the last three years." Hopkins then admitted that he sold heroin to Huber on May 5, 2016. The State charged Hopkins with first-degree reckless homicide by delivery of a controlled substance, possession with intent to deliver three grams or less of heroin, possession with intent to deliver one gram or less of cocaine, and keeping a place used to deliver controlled substances, the latter three as second or subsequent offenses.

Hopkins requested a trial and moved to suppress his custodial statement. The State's response to the motion included a CD containing an audio recording of the interrogation. On the date set for the suppression hearing, Hopkins's trial counsel notified the circuit court that Hopkins was withdrawing his motion because he had decided to accept a plea agreement.

Hopkins subsequently entered a guilty plea to first-degree reckless homicide by delivery of a controlled substance. The remaining charges were dismissed and read in for sentencing purposes. At sentencing, he faced maximum penalties of a forty-year term of imprisonment and a $100,000 fine. *See* WIS. STAT. §§ 940.02(2)(a), 939.50(3)(c) (2015-16). The circuit court

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966) (holding that before questioning a suspect in custody, officers must inform the person of, *inter alia*, the right to remain silent, the fact that any statements made may be used at trial, the right to have an attorney present during questioning, and the right to have an attorney appointed if the person cannot afford one).

imposed a twenty-year term of imprisonment, bifurcated as thirteen years of initial confinement and seven years of extended supervision.

Hopkins chose to represent himself in postconviction proceedings. He filed a postconviction motion alleging that he was entitled to withdraw his guilty plea because the circuit court neglected to inform him during the plea colloquy that, upon conviction, he faced a $100,000 fine in addition to a term of imprisonment. He also alleged that the circuit court should have suppressed his custodial statement and that the State failed to provide exculpatory evidence, specifically, alleged videotape of Hopkins confined in the Milwaukee County Criminal Justice Facility and records of the medical treatment he received following his arrest. Finally, Hopkins alleged that his trial counsel was ineffective for failing to: (1) move to suppress his custodial statements; (2) allege a violation of his right to receive exculpatory evidence; (3) obtain video footage of his interrogation, depose the interrogating officers, or "research[]/investigat[e] every possible circumstance of the custodial interrogation"; and (4) obtain Hopkins's phone records "which clearly show[] [that Hopkins] was in Chicago and not at the scene of the crime on the day the crime was committed."

Following additional briefing by the State and by Hopkins, the circuit court denied the postconviction motion without a hearing. Hopkins appeals.

Hopkins first alleges that he is entitled to withdraw his guilty plea. Because he raised that claim after sentencing, he must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See **State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. "One way the defendant can show manifest injustice is to

prove that his plea was not entered knowingly, intelligently, and voluntarily." *See* ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482.

To ensure that a defendant's guilty plea is knowing, intelligent, and voluntary, the circuit court must, on the record, perform certain statutory and court-mandated duties during the plea hearing. *See* ***id.***, ¶31. If the defendant believes that the circuit court did not fulfill those duties, the defendant may seek plea withdrawal based on the alleged deficiencies in the colloquy. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986).

A defendant moving for plea withdrawal pursuant to ***Bangert*** must both: (1) make a prima facie showing that the plea colloquy was defective because the circuit court failed to complete its duties; and (2) allege that the defendant did not know or understand the information that the defendant should have received at the plea hearing. *See* ***Brown***, 293 Wis. 2d 594, ¶39. If the defendant's postconviction motion fails to make both showings required by ***Bangert***, the circuit court may deny the motion for plea withdrawal without a hearing. *See* ***State v. Brown***, 2012 WI App 139, ¶¶10-11, 345 Wis. 2d 333, 824 N.W.2d 916.

In this case, Hopkins alleged in his postconviction motion that the plea colloquy was defective because the circuit court failed to advise him that he faced a $100,000 fine upon conviction. Assuming without deciding that Hopkins satisfied the first ***Bangert*** prong by identifying this omission, his postconviction motion was nonetheless inadequate to require a hearing because he failed to include any allegations to satisfy the second ***Bangert*** prong, namely,

that he lacked knowledge and understanding of the potential financial penalty.[4] In ***Brown***, our supreme court explained that "[i]n the absence of a claim by the defendant that he lacked understanding with regard to the plea, any shortcoming in the plea colloquy is harmless." *See* ***Brown***, 293 Wis. 2d 594, ¶63. Thus, because Hopkins failed to allege that he lacked knowledge and understanding of the potential financial penalty, any shortcoming in his plea colloquy is harmless. Accordingly, the circuit court properly denied the ***Bangert*** motion without a hearing.

In this court, Hopkins seeks to rectify the omission in his postconviction motion by alleging in his appellant's brief that he was unaware when he pled guilty that he faced a fine upon conviction. This allegation comes too late. We normally do not consider claims raised for the first time on appeal. *See* ***State v. Champlain***, 2008 WI App 5, ¶17, 307 Wis. 2d 232, 744 N.W.2d 889. We will not depart from that rule here.

Hopkins next alleged in his postconviction motion that his custodial statements should have been suppressed and that the State violated his right to receive exculpatory evidence. Hopkins, however, did not preserve those claims for postconviction review. "The general rule is that a guilty ... plea 'waives all nonjurisdictional defects, including constitutional claims[.]' Courts refer to this as the guilty-plea-waiver rule."[5] *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (citation and footnote omitted). A narrow exception to the rule is set forth in WIS. STAT. § 971.31(10), which provides that a person who has pled guilty or no

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[4] We observe that Hopkins signed and filed a plea questionnaire that included his acknowledgment that upon conviction he faced both a forty-year term of imprisonment and a $100,000 fine.

[5] Our supreme court has noted that the effect of a guilty plea is more accurately labeled a forfeiture rather than a waiver of the right to appeal particular issues. *See* ***State v. Kelty***, 2006 WI 101, ¶18 n.11, 294 Wis. 2d 62, 716 N.W.2d 886.

contest may obtain appellate review of an order denying a suppression motion. In this case, however, the circuit court did not enter such an order. Hopkins filed a suppression motion, but he withdrew it without obtaining a ruling. Accordingly, he is not entitled to appellate review of any of his evidentiary claims.

Hopkins urges this court to ignore his forfeiture and address his evidentiary claims. We decline to do so. "[T]he 'normal procedure' in criminal cases is to address forfeiture within the rubric of an ineffective assistance of counsel analysis." *See* ***State v. Benson***, 2012 WI App 101, ¶17, 344 Wis. 2d 126, 822 N.W.2d 484 (citation omitted).

We turn, then, to Hopkins's allegations of trial counsel's ineffectiveness. The standards governing our review are multi-faceted but familiar. A defendant who claims that trial counsel was ineffective must prove both that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

To demonstrate deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***Strickland***, 466 U.S. at 688. In making that showing, the defendant must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *See* ***id.*** at 689. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See*

id. at 694. If a defendant fails to satisfy one component of the analysis, a reviewing court need not address the other. *See* ***id.*** at 697.

When, as here, a defendant files a postconviction motion alleging ineffective assistance of counsel, the circuit court must grant a hearing only if the motion contains sufficient allegations of material fact that, if true, would entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This presents an additional question of law for our independent review. *See* ***id.*** If, however, the motion does not include sufficient allegations of material fact that, if true, entitle the defendant to relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a hearing. *See* ***id.*** We review discretionary decisions with deference. *See* ***id.***

Finally, when we assess the sufficiency of postconviction claims, we consider only the four corners of the postconviction motion, not the movant's briefs. *See* ***id.***, ¶27. Our inquiry is whether the defendant alleges, within the four corners of the postconviction motion itself, "the five 'w's and one 'h'; that is, who, what, where, when, why, and how." *See* ***id.***, ¶23.

Hopkins first claims that his trial counsel was ineffective for failing to file a motion to suppress his custodial statement. The record conclusively shows that Hopkins is not entitled to relief on that claim because trial counsel in fact filed a suppression motion.

To the extent, if any, that Hopkins's claim could be construed as an allegation that trial counsel was ineffective for withdrawing the suppression motion instead of litigating it, that allegation was insufficient to earn Hopkins a hearing. Hopkins did not explain in his postconviction motion who was involved in making the strategic choice to withdraw the

suppression motion, or when the decision was made. Most importantly, Hopkins did not explain why withdrawing the suppression motion constituted deficient performance. A lawyer's advice to abandon an adversarial stance may fall within the broad range of reasonable professional assistance when the lawyer concludes that a plea agreement is in the best interests of the defendant. *See* ***State v. Provo***, 2004 WI App 97, ¶17, 272 Wis. 2d 837, 681 N.W.2d 272.

As to prejudice, a "defendant who alleges that counsel was ineffective for withdrawing a suppression motion must show that the motion would have succeeded." *See* ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999). However, "'cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of ***Miranda*** are rare.'" ***State v. Ward***, 2009 WI 60, ¶61, 318 Wis. 2d 301, 767 N.W.2d 236 (citations omitted). Here, Hopkins received ***Miranda*** warnings at the outset of the interrogation, and he failed to demonstrate that his was the rare case where his statement was nonetheless compelled. Instead he claimed that he was suffering from heroin withdrawal when he spoke to police. Wisconsin law is clear, however, that questioning a suspect who is injured or ill is not improper or coercive police conduct and does not render a statement involuntary. *See* ***State v. Clappes***, 136 Wis. 2d 222, 238, 401 N.W.2d 759 (1987). Accordingly, Wisconsin courts do not assess the voluntariness of custodial statements "based solely on the [suspect's] physical and mental condition." *See* ***State v. Dobbs***, 2020 WI 64, ¶74, 392 Wis. 2d 505, 945 N.W.2d 609.

In sum, the postconviction motion was insufficient to require that Hopkins receive a hearing on his claim that trial counsel was ineffective in regard to either filing or withdrawing the suppression motion. The circuit court therefore properly denied the claim without a hearing.

Hopkins next alleged that his trial counsel was ineffective for not pursuing a claim that the State violated his rights under ***Brady v. Maryland***, 373 U.S. 83 (1963). Pursuant to ***Brady***, the State is required to disclose evidence that is favorable to the defendant. *See* ***State v. Harris***, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737. If the State did not run afoul of ***Brady***, however, then trial counsel was not ineffective for forgoing a ***Brady*** claim. *See* ***State v. Sanders***, 2018 WI 51, ¶29, 381 Wis. 2d 522, 912 N.W.2d 16.

To prove a ***Brady*** violation, a defendant must establish that the evidence at issue is favorable to him or her, the State suppressed the evidence, and the defense was thereby prejudiced. *See* ***Harris***, 272 Wis. 2d 80, ¶15. Here, Hopkins alleged that the State destroyed a video showing him in the Milwaukee County jail after his interrogation. He further alleged that the video shows that he was experiencing "drug withdrawal." Although Hopkins submitted a letter he received from his trial counsel to support his claim that the jail cell video had been destroyed, he failed to explain why the video was favorable to him or how he was prejudiced by its loss.

As the State pointed out in the postconviction proceedings, Hopkins's submissions reflect that police brought him to the Milwaukee County jail more than six hours after the conclusion of his interrogation at the West Allis police station. Hopkins therefore was required to allege material facts showing why video footage of him in his jail cell hours after his interrogation would aid his defense. He failed to do so.

Hopkins did not include any allegations in his postconviction motion stating precisely what the video showed. When the State identified this omission, he filed a circuit court reply brief alleging that the video would have demonstrated that his "interrogation is inadmissible"

because the video contained "visual proof" that he was "going through drug withdrawal" and experiencing "symptoms including the inability to sleep, vomiting, and hot and cold flashes."

For the sake of argument only, we will assume that the allegations in Hopkins's circuit court reply brief supported a claim that jail cell video, if preserved, would have demonstrated that Hopkins experienced heroin withdrawal after his arrest. Hopkins, however, failed to show that his alleged withdrawal symptoms were relevant to his challenge to the admissibility of the interrogation. As we have seen, long-established Wisconsin law provides that an interrogation is not rendered inadmissible merely because the suspect is questioned while sick or injured.[6] *See* ***Clappes***, 136 Wis. 2d at 237-39.

In sum, Hopkins failed to demonstrate either that the video evidence was favorable to him, or that he suffered prejudice from the loss of that evidence, as required to prove a ***Brady*** violation. He therefore failed to show that his trial counsel was ineffective by forgoing a ***Brady*** motion. *See* ***Sanders***, 381 Wis. 2d 522, ¶29. Accordingly, the circuit court properly denied this claim without a hearing.

Hopkins next alleged that his trial counsel was "ineffective for not obtaining the video footage of the interrogation, for not [t]aking deposition(s) of the interrogating officers, and/or for not further researching/investigating every possible circumstance of the custodial interrogation."

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[6] Hopkins repeatedly directs our attention to ***State v. Jackson***, 2015 WI App 49, 363 Wis. 2d 554, 866 N.W.2d 768, which he appears to view as holding that custodial statements are inadmissible when the defendant feels sick during questioning. Hopkins misunderstands ***Jackson***. That case considered, and ultimately reversed, a circuit court order suppressing items of physical evidence. *See* ***id.***, ¶2. The decision also acknowledged, but did not review, the circuit court's order suppressing custodial statements on the ground that the defendant was not timely advised of her ***Miranda*** rights. *See* ***Jackson***, 363 Wis. 2d 554, ¶¶11-13. The defendant's physical condition during portions of the interrogation was part of the background of the case, *see* ***id.***, ¶¶5-6, not the basis for any holding of the ***Jackson*** court.

As to the first of these claims, Hopkins failed to demonstrate that a video recording of his custodial interrogation exists. Indeed, Hopkins placed in the record his trial counsel's letter explaining to Hopkins that his "interrogation never was video recorded." Accordingly, the record conclusively refutes Hopkins's claim that his trial counsel was ineffective for failing to obtain such a video.

As to the claim that trial counsel failed to take depositions of the officers who interrogated Hopkins, a person alleging failure to investigate "must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case." *See* ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126. Hopkins failed to set forth with specificity exactly what the interrogating officers would have said at a deposition, let alone how their statements would have helped him. We add that he also failed to explain why trial counsel would have been able to obtain such depositions, given the limitations imposed by WIS. STAT. § 967.04(1).[7] In short, the claim was conclusory, and the circuit court therefore properly denied the claim without a hearing.

Similarly conclusory was Hopkins's claim that trial counsel failed to "research[]/investigat[e] every possible circumstance" in regard to the custodial interrogation. Hopkins did not identify the steps that should have been taken, who should have been investigated, what the investigation would have uncovered, or why the investigation would have been relevant to the defense. *See* ***Allen***, 274 Wis. 2d 568, ¶¶23, 30. Moreover, an attorney is not

[7] Pursuant to WIS. STAT. § 967.04(1), a circuit court may permit a party to take a prospective witness's deposition "[i]f it appears that a prospective witness may be unable to attend or prevented from attending a criminal trial or hearing." Nothing in the record suggests that the interrogating officers would have been unable to attend a trial or hearing in Hopkins's case.

ineffective for omitting some imaginable step in pursuit of a defense. To the contrary, a defendant alleging that counsel was ineffective must show that any "omissions were outside the wide range of professionally competent assistance." *See* ***State v. Pitsch***, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985) (citation omitted). Because Hopkins failed to make such a showing, the circuit court properly denied this claim without a hearing.

Finally, Hopkins alleged that:

> Trial counsel was ineffective for not obtaining [his] phone records which clearly show[] the defendant was in Chicago and not at the scene of the crime on the day the crime was committed. One can see the phone logs have the tower number of Chicago and such shows Hopkins was in Chicago during such time and not in the State of Wisconsin.

This claim was also conclusory. Although Hopkins asserted that "one can see" certain information on telephone logs, his motion did not include telephone logs or any other documents to support this claim, as the State pointed out in its circuit court response. In reply, Hopkins filed logs apparently reflecting telephone activity on May 5, 2016, but he did not explain the source of these logs, and it appears that trial counsel in fact obtained them because they are dated February 27, 2017, a date on which the circuit court proceedings were underway and unresolved.[8] Absent a showing that trial counsel did not obtain the logs, Hopkins clearly cannot prevail on a claim that trial counsel "was ineffective for not obtaining" them. Further, Hopkins

[8] This court observes that February 27, 2017, was the date on which the State filed its response to Hopkins's motion to suppress his custodial statements. It appears that trial counsel also obtained the telephone records on that day. If, however, Hopkins obtained the telephone records himself on February 27, 2017, he cannot complain that trial counsel did not have them. *See* ***State v. Jones***, 2010 WI App 133, ¶33, 329 Wis. 2d 498, 791 N.W.2d 390 (stating that an attorney is "not ineffective for not pursuing something the defendant knew but did not reveal").

failed to offer any evidence—lay or expert—reflecting that the May 5, 2016 telephone logs demonstrate that his phone was in Chicago on that date, let alone that Hopkins himself was there.

Moreover, Hopkins admitted to police that he sold heroin to Huber on May 5, 2016, and Hopkins did not allege that he told trial counsel that his confession was false. *See* ***Pitsch***, 124 Wis. 2d at 637 (citation omitted) (stating that "'[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions'"). He also did not allege that he told his trial counsel that he was in Chicago on May 5, 2016, or during any other possibly relevant time period. *See* ***id.***; *see also* ***State v. Jones***, 2010 WI App 133, ¶33, 329 Wis. 2d 498, 791 N.W.2d 390. Indeed, Hopkins's postconviction submissions did not include an allegation that he was, in fact, in Chicago on the day that Huber bought the fatal dose of heroin. Accordingly, Hopkins fails to show that trial counsel acted unreasonably in forgoing any further exploration of his telephone records.

Hopkins suggested in his circuit court reply brief, as he similarly suggests in this court, that the telephone records show that he and Huber were in different locations on May 5, 2016, and therefore Hopkins could not have sold heroin to Huber on that day. Our focus, however, is on the four corners of Hopkins's postconviction motion. *See* ***Allen***, 274 Wis. 2d 568, ¶27. Moreover, Hopkins's restated claim is no less conclusory than his original allegation. Assuming for the sake of argument that the phone logs suggest that Hopkins and Huber were in different locations at times on May 5, 2016, Hopkins fails to explain why that means the two men could not have been in the same place at other times, or how additional telephone records would have assisted Hopkins in making that showing. Accordingly, Hopkins fails to show that his trial counsel's performance fell outside the broad range of reasonable professional assistance when

trial counsel did not pursue telephone records15. The circuit court therefore properly denied this claim without a hearing.

We are satisfied that none of Hopkins's claims provide a basis for any form of relief. For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgment and postconviction 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