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December 22, 2020

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

2020AP264-CRNM State of Wisconsin v. Jose Dj Galvan (L.C. # 2017CF3644)

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

Jose Dj Galvan appeals from a judgment of conviction for first-degree reckless homicide and an order denying his postconviction motion for sentence modification. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18),[1] and ***Anders v.***

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

California, 386 U.S. 738 (1967). Upon consideration of the report, Galvan's response, and an independent review of the record, as mandated by ***Anders***, the judgment and order are summarily affirmed because we conclude that there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Police were called to an accident scene and found a car that had crashed into a light pole. The car had front end damage consistent with hitting the pole; however, the damage was not severe and the pole was still standing, even though the pole was designed to fall over when struck with significant force. Galvan was the driver of the car, and the female passenger in the car was declared dead at the scene of the accident. An autopsy concluded that the passenger died from strangulation. When interviewed by police, Galvan admitted he had choked the passenger while driving and while the two were arguing over an alleged affair. Galvan said he choked her first with one hand and then with two hands. At one point the passenger grabbed the steering wheel and the car veered into a tree. Galvan continued driving on while the passenger gasped for breath. Galvan denied steering the car into the light pole to make it look like the passenger died as a result of the accident involving the light pole.

Galvan entered a guilty plea. The prosecution promised to and did cap its sentencing recommendation at twenty years of initial confinement. Galvan was sentenced to twenty-five years of initial confinement and fifteen years of extended supervision. A postconviction motion for sentence modification alleged that the sentencing court had relied on inaccurate information at sentencing, specifically the prosecutor's representation that it took more than a short time to cause the passenger's death by strangulation and the sentencing court's own comment that the

passenger had fought for her life. The postconviction motion was denied. Subsequently, appellate counsel was appointed to represent Galvan in this appeal.[2]

The no-merit report addresses the potential issues of whether Galvan's plea was knowingly, voluntarily, and intelligently entered; whether the sentence was the result of an erroneous exercise of discretion or unduly harsh or excessive; and whether the denial of the postconviction motion for sentence modification was error. This court is satisfied that the no-merit report properly analyzes the issues it raises as being without merit, and this court will not discuss them further.

Galvan's response suggests he was denied the effective assistance of counsel, that there was prosecutorial misconduct, and that there was judicial error. Before we address each category of claims, we turn to overlapping claims that trial counsel was ineffective and the trial court violated Galvan's constitutional rights because Galvan was not present for every in-court proceeding held in this case. It is true that Galvan was not produced for an initial scheduling conference, three status conferences, the final pretrial, and the adjourned sentencing hearing.[3] His trial counsel waived Galvan's personal appearance on each occasion. Any possible claim arising from Galvan's absence at the in-court proceedings lacks arguable merit. First, by his guilty plea Galvan forfeited any such claims. A guilty plea forfeits the right to raise non-jurisdictional defects and defenses, including claimed violations of constitutional rights. ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; ***State v. Lasky***, 2002 WI App

[2] Galvan was represented on his postconviction motion by retained counsel who had also served as trial counsel.

[3] Galvan also claims he was not present for the hearing on the postconviction motion for sentence modification, but no hearing was held on the postconviction motion.

126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. Second, a defendant's right to be present is applicable only to the critical stages of the criminal proceeding. *See* ***State v. Carter***, 2010 WI App 37, ¶19, 324 Wis. 2d 208, 781 N.W.2d 527. A proceeding is critical if the defendant's presence would contribute to the fairness of the procedure. *See* ***Kentucky v. Stincer***, 482 U.S. 730, 745 (1987). The proceedings at which Galvan was absent were not critical stages of the proceeding; they all amounted to short status conferences where nothing of substance was discussed and proceedings were continued to another date.

As to other possible ineffective assistance of counsel claims, Galvan first suggests that the attorney that appeared with him at the initial appearance[4] was ineffective because he did not "demand a Bill of Particulars because the evidence of the alleged crime did not support the charge." "Whether a criminal complaint sets forth probable cause to justify a criminal charge is a legal determination this court reviews de novo." ***State v. Reed***, 2005 WI 53, ¶11, 280 Wis. 2d 68, 695 N.W.2d 315. The facts and reasonable inferences drawn from facts in a complaint must allow a reasonable person to conclude that a crime was probably committed and that the defendant was probably culpable. ***State v. Grimm***, 2002 WI App 242, ¶15, 258 Wis. 2d 166, 653 N.W.2d 284. Here the complaint stated sufficient facts to establish probable cause. Because there was no basis to challenge the sufficiency of the complaint, there is no arguable merit to a claim that counsel performed deficiently in not doing so.[5] *See* ***State v. Cummings***, 199 Wis. 2d

[4] Galvan was first represented by an attorney appointed by the Office of the State Public Defender. Galvan retained other trial counsel who continued to represent Galvan through the decision on the postconviction motion.

[5] Galvan cites ***State ex rel. Dowe v. Circuit Court for Waukesha County***, 184 Wis. 2d 724, 516 N.W.2d 714 (1994), a case addressing the sufficiency of evidence to support a bindover. Any claim Galvan may be asserting that his trial counsel should have challenged the bindover also lacks arguable merit. The officer's testimony at the preliminary hearing established probable cause.

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.").

Next, Galvan claims his trial counsel was ineffective because counsel lied at the plea hearing when counsel indicated that he had spent a significant amount of time with Galvan and provided Galvan with all the reports, investigations, and the expert's opinion. Galvan asserts he entered a guilty plea only after his trial attorney told him the case could not be won and that Galvan would only get eight years. Galvan suggests his plea was compelled by his fear that he would get a life sentence. He also claims that if the expert's psychological evaluation had been done at the early stage of the prosecution, he would not have entered a plea and would have insisted on a jury trial.

The plea colloquy established that Galvan entered his plea knowing that the maximum sentence was sixty years and not a life sentence, that the prosecution was going to recommend twenty years of initial confinement, and that the trial court was not bound by the recommendation of any party and could impose the sixty year maximum. During the plea colloquy, Galvan also confirmed that his trial counsel went over the police reports and discovery with him and that other than the plea agreement, no promises had been made to induce his guilty plea. The record establishes that the psychological evaluation was conducted on December 12, 2017, and with the assistance of an interpreter.[6] The expert's report was dated February 6, 2018, before the entry of Galvan's guilty plea on March 16, 2018. During the plea colloquy, trial counsel specifically noted that he and Galvan reviewed the expert's opinion before the plea. In

[6] Galvan's claim that he did not understand half of what was being said during the evaluation interview is belied by the use of an interpreter.

short, Galvan's claims of ineffective assistance of trial counsel with respect to trial counsel's advice on whether to accept the plea agreement lacks factual support, and therefore lacks arguable merit.

Galvan also claims that trial counsel was ineffective for not asserting a more vigorous defense such as a defense that Galvan was too intoxicated to form intent or a defense of "Renewed Rage or Heat-of passion." Voluntary intoxication is not a defense but can serve to negate the existence of a state of mind essential to the crime charged. WIS. STAT. § 939.42(2). The record establishes the Galvan's blood alcohol content was only .066 after police took him into custody. That was within the legal limit and not close to suggesting that intoxication could be presented as negating any element of the offense.

> The 'intoxicated or drugged condition' to which [§ 939.42] refers is not the condition of alcohol-induced incandescence or being well-lit that lowers the threshold of inhibitions or stirs the impulse to criminal adventures. It is that degree of complete drunkenness which makes a person incapable of forming intent to perform an act or commit a crime.

State v. Strege, 116 Wis. 2d 477, 483, 343 N.W.2d 100 (1984), quoting ***State v. Guiden***, 46 Wis. 2d 328, 331, 174 N.W.2d 488 (1970).

The "heat of passion" defense is now known as the adequate provocation defense under WIS. STAT. § 939.44. "Adequate provocation is an affirmative defense only to first-degree intentional homicide and mitigates that offense to 2nd-degree intentional homicide." Sec. 939.44(2). Galvan, however, was not charged with first-degree intentional homicide but only

first-degree reckless homicide.[7] Therefore, trial counsel could not be ineffective for not asserting a defense that cannot be used with respect to the charge of first-degree reckless homicide.

With respect to sentencing, Galvan claims his trial counsel was ineffective by admitting Galvan's guilt[8] and not requesting the promised eight-year sentence. It is of no consequence that trial counsel may have uttered words that admitted Galvan's guilt. Galvan had already done that by entering a guilty plea. Further, trial counsel's remark was an attempt to demonstrate that Galvan had accepted responsibility as a mitigating circumstance. Trial counsel's recommendation of a sentence of eight to ten years presented a reasonable alternative to the twenty-year sentence recommended by the prosecutor and the thirteen to sixteen year recommendation made by the presentencing investigation report. Merely because trial counsel's strategic arguments were not as successful as Galvan would have hoped does not mean that trial counsel's performance was legally insufficient. *See* ***State v. Teynor***, 141 Wis. 2d 187, 212, 414

[7] At several points in his response, Galvan suggests various theories of how he could have demonstrated that he lacked intent to kill. An intent to kill is not an element of the offense of first-degree reckless homicide.

[8] Trial counsel commenced his sentencing recommendation as follows:

> Thank you, Judge. I would like to start by echoing Mr. Galvan and his apology to the family and again as his attorneys we apologize on his behalf. I did want to start by addressing one aspect of this and—and I think that Your Honor can see that Mr. Galvan came here today to accept responsibility. He's not here putting this on anybody but himself. He is solely responsible for what happened….

N.W.2d 76 (Ct. App. 1987). There is no arguable merit to a claim that trial counsel was ineffective at sentencing.[9]

Galvan's claims of prosecutorial misconduct suggests that the prosecutor withheld information because at the preliminary hearing the prosecutor indicated that he would give Galvan's trial counsel discovery "at a later date." Galvan was not, as he suggests, entitled to full discovery at the time of his arrest or before the preliminary hearing. *See* WIS. STAT. § 971.23(1) (the district attorney shall provide discovery "within a reasonable time before trial"). The record establishes that the prosecutor provided the additional discovery.

Galvan also claims that the prosecution breached the plea agreement on two occasions. First, when the trial court inquired at the plea hearing whether the plea would be a no contest or a guilty plea, the prosecutor indicated the exact type of plea had not been agreed upon but that the prosecutor would "say later on that [a no contest plea] evidences to me a less than complete acceptance of responsibility." Galvan suggests this means that the prosecutor failed to support the plea agreement. There was no breach of the plea agreement on this point because there was no agreement as to whether the plea would be one of no contest or guilty. The prosecutor was not duty bound at that point to suggest a no contest plea was sufficient.

Galvan's other claim that the plea agreement was breached focuses on the argument the prosecutor made at sentencing. Galvan suggests that by pointing out a prior instance of domestic

[9] Galvan complains that his trial counsel's law partner appeared at the final pretrial conference and made the defense argument at sentencing. The record does not suggest any agreement that Galvan had retained trial counsel exclusively rather than his trial counsel's law firm. We fail to see how Galvan could establish any prejudice from trial counsel's choice to have his law partner do the sentencing argument.

violence between Galvan and his passenger and aggravating aspects of the crime, the prosecutor breached the agreement to recommend a twenty-year period of initial confinement. Where the facts are undisputed, whether the prosecution violated the terms of a plea agreement is a question of law which we address de novo. *See* ***State v. Wills***, 193 Wis. 2d 273, 276, 533 N.W.2d 165 (1995). There is no arguable merit to a claim that the prosecutor made a prohibited "end-run" around the agreement to cap the recommendation at twenty years. The prosecutor is allowed to make an argument that justifies the agreed upon recommendation. *See* ***State v. Ferguson***, 166 Wis. 2d 317, 325, 479 N.W.2d 241 (Ct. App. 1991).

Galvan claims prosecutorial misconduct because the charge should have been homicide by negligent operation of a vehicle rather than first-degree reckless homicide. The prosecutor has discretion in charging, and although it may be a misuse of prosecutorial discretion to charge a defendant with an offense "when the evidence is clearly insufficient to support a conviction," ***Thompson v. State***, 61 Wis. 2d 325, 330, 212 N.W.2d 109 (1973), that is not the case here. The autopsy report concluded the death was caused by strangulation and not the car accident. There is no arguable merit to a claim that the charge was a misuse of prosecutorial discretion.[10]

Related to claims of prosecutorial misconduct, Galvan suggests police misconduct with regard to his custodial interrogation. At various points in his response, Galvan asserts he was questioned by police even after he requested an attorney, he was not given ***Miranda***[11] rights and had he been given those rights, he would not have incriminated himself, and that the "[p]olice

[10] Additionally, to the extent Galvan thinks the prosecutor was obligated to reduce the charge as part of the plea agreement, that is simply not so. A prosecutor is not under any obligation to make any favorable plea offer.

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

made him give up his rights." The record does not lend any support to a suggestion that there were grounds to file a suppression motion. Indeed, at the preliminary hearing a police officer testified that Galvan made certain admissions "during a Mirandized interview" which occurred after the results of the autopsy were received by police. At no point did trial counsel suggest to the trial court that a suppression motion would be appropriate. Based on the record, there is no arguable merit to a claim that Galvan's statements should have been suppressed.

As to a claim of judicial error, Galvan asserts the trial court should have amended the charge to second-degree reckless homicide. No issue of arguable merit exists from this assertion because it is not the trial court's function to make the charging decision.

Galvan also asserts that the sentencing court should not have considered the expert's psychological evaluation report because it resulted in a harsher sentence. The defense offered the report as a means of explaining Galvan's personal traits, character, and state of his mental health. Specifically, defense counsel referred to the evaluation as evincing Galvan's remorse. The sentencing court was entitled to consider evidence presented to it. Therefore, there is no issue of arguable merit from the sentencing court's consideration of the report.

Finally, Galvan complains about the efforts of appointed appellate counsel and his disagreement with various parts of the no-merit report. A no-merit report is an approved method by which appointed counsel discharges the duty of representation. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362 (1994). This court's decision that there is no arguable merit to further postconviction or appellate proceedings, accepting the no-merit report, and discharging appointed counsel of any further duty of representation rests on the conclusion that counsel provided the level of representation constitutionally required.

Our review of the record discloses no other potential meritorious issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and order denying the postconviction motion, and discharges appellate counsel of the obligation to represent Galvan further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved from further representing Jose Dj Galvan 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