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October 9, 2013

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

2013AP64-CRNM State of Wisconsin v. Justin R. Gonzales (L.C. #2009CF2070)

Before Brown, C.J., Reilly and Gundrum, JJ.

Justin R. Gonzales appeals from a judgment of conviction entered upon his guilty plea to one count of possession with intent to deliver an amount of THC greater than 10,000 grams, as a party to the crime and by use of a dangerous weapon, contrary to WIS. STAT. §§ 961.41(1m)(h)5., 939.05, and 939.63(1)(b) (2011-12).[1] Gonzales's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32, and ***Anders v. California***, 386 U.S. 738 (1967). Gonzales

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the no-merit report and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

In March 2009, officers received information from a confidential informant that Gonzales and two others were returning to Milwaukee from another state with a large quantity of marijuana in Gonzales's vehicle. Officers set up surveillance on the highway and, expecting that Gonzales would drive directly to his storage locker, applied for a warrant to search the vehicle and locker. Officers eventually spotted and followed Gonzales's Lincoln Aviator. Instead of heading to the storage unit, the Aviator pulled into the parking lot of a large hotel. Gonzales and his two passengers went inside the hotel carrying several pieces of luggage. The lead investigator contacted the State to begin arranging for a search warrant specific to the hotel. Gonzales's female passenger, S.S., soon exited the hotel, retrieved items from the Aviator, and drove off in a red jeep. Officers stopped the jeep and S.S. was found in possession of one pound of marijuana. She informed officers that Gonzales and the third passenger, A.D.,[2] were in the hotel with a firearm and about fifty pounds of marijuana. She told officers that the men were cutting and packaging the marijuana and making phone calls. Officers seized S.S.'s cell phone.

Back at the hotel, officers used a drug detection dog to search the area around Gonzales's Aviator, and the dog alerted to the presence of drugs by the driver's door. Officers learned that Gonzales had booked one hotel room for that night and another room for the next day. Soon,

[2] There was detailed testimony concerning A.D.'s ties to the Latin Kings, an organized street gang.

Gonzales's wife, C.G., along with a small child, arrived in a van. They entered the hotel and C.G. soon returned to the parking lot alone and drove away in the Aviator. C.G. went through the drive-through at a nearby fast food restaurant and officers then pulled her over. In the Aviator was a gun case for a Glock .45 caliber pistol. While officers were speaking with C.G., her cell phone rang ten to fifteen times, and police prevented her from answering the calls. As events unfolded, officers maintained contact with the State in an attempt to procure a search warrant.

Officers soon determined that further delay in entering the hotel room would unreasonably jeopardize the public safety and allow for the destruction of evidence. Without a warrant, officers knocked on the hotel room and announced their presence. There was no response and officers entered the room with a master key provided by the hotel. In the back bedroom, officers discovered Gonzales, the young child, and A.D. Over eleven pounds of marijuana and a .45 caliber semi-automatic firearm were sitting out in plain view. Further search of the room yielded a suitcase with forty individually packaged bags of marijuana as well as $3,550.60 in cash.[3] The total weight of the seized marijuana was about fifty-nine pounds. Gonzales admitted travelling to North Carolina with S.S. and A.D. and returning to Milwaukee with sixty pounds' worth of marijuana.

Gonzales moved to suppress the evidence on the ground that the warrantless hotel room entry was unlawful. Several evidentiary hearings were held between September 2009 and May 2010, and the trial court ultimately denied Gonzales's motion to suppress. Gonzales pled to the

[3] Officers testified that the suitcase was searched later on, at the police station, with Gonzales's consent.

crime as charged and received an imposed and stayed six-year bifurcated sentence, with a two-year term of probation.[4]

The no-merit report addresses the potential issues of whether the trial court properly denied Gonzales's suppression motion, whether Gonzales's plea was freely, voluntarily, and knowingly entered, and whether the sentence was the result of an erroneous exercise of discretion. Our review of the record persuades us that no issue of arguable merit could arise from any of these points.

There is no arguably meritorious challenge to the trial court's decision denying Gonzales's motion to suppress.

Generally, the Fourth Amendment to the United States Constitution prohibits the warrantless entry by law enforcement into a private residence or hotel room. *See* ***State v. Stout***, 2002 WI App 41, ¶¶10, 15, 250 Wis. 2d 768, 641 N.W.2d 474. Here, the trial court concluded that the warrantless entry into Gonzales's hotel room was justified by the existence of probable cause and exigent circumstances. ***State v. Hughes***, 2000 WI 24, ¶17, 233 Wis. 2d 280, 607 N.W.2d 621 (an exception to the warrant requirement exists "where the government can show both probable cause and exigent circumstances that overcome the individual's right to be free from governmental interference"). On appellate review, we will uphold a trial court's findings of fact unless clearly erroneous, but we independently apply the law to those facts. ***Id***., ¶15.

[4] According to the electronic circuit court docket entries, Gonzales successfully completed and was discharged from his probationary term.

We agree with appointed counsel that any challenge to the trial court's suppression ruling is without arguable merit. The trial court applied the proper legal standard and determined that probable cause existed based on the information received from confidential informants, the officers' ability to verify key elements of that information, the statements of S.S., and the trained canine's positive alert on Gonzales's vehicle. The trial court's findings of fact are not clearly erroneous, and based on those facts, we conclude there was a fair probability that evidence of a crime would be found in Gonzales's hotel room. ***Id***., ¶21 (the probable cause requirement is satisfied where there is a fair probability that evidence of a crime will be found).

Similarly, we agree with appointed counsel's analysis and conclusion that the trial court properly determined the existence of exigent circumstances. Exigent circumstances justifying a warrantless entry include (1) a threat to the safety of a suspect or others, (2) a risk that evidence will be destroyed, and (3) a likelihood that suspects will flee. ***State v. Phillips***, 2009 WI App 179, ¶8, 322 Wis. 2d 576, 778 N.W.2d 157. The trial court applied the correct objective legal test and determined that under the facts known at the time of the entry, the police officers could reasonably believe that the delay necessary to procure a warrant would endanger lives and risk the destruction of evidence. *See* ***Hughes***, 233 Wis. 2d 280, ¶24. The trial court listed and considered the circumstances known to the officers at the time of entry, including that: there was about fifty pounds of marijuana and at least one firearm in the hotel room; a young child was in the room; the drug transaction was gang-related and carried an associated risk of violence and organized participation; officers had arrested S.S. soon after she left the hotel and could not be sure the suspects did not know something was amiss; officers stopped C.G. soon after she left the hotel to get food and prevented her from answering her repeatedly ringing cell phone or returning to the hotel room; officers were concerned this may have alerted Gonzales and A.D. to

the fact that something had gone wrong and would lead them to destroy evidence or attempt a dangerous escape involving gunfire; officers could not know whether other coconspirators were already inside the hotel; and officers were unable to completely control the flow of traffic in and out of the hotel, increasing the risk of a gunfire exchange in a public building.

Additionally, the trial court found that the officers were not intentionally seeking to subvert the warrant requirement and that they did not themselves create the exigent circumstances relied on to justify their entry. This is supported by ample testimony that the lead officer was in frequent contact with a representative of the State, attempting to obtain a judicially authorized search warrant as events unfolded. Our review of the exigent circumstances is "directed by a flexible test of reasonableness under the totality of the circumstances." ***Phillips***, 322 Wis. 2d 576, ¶8 (citation omitted). Based on the evidence and the trial court's findings of fact, we conclude that the warrantless entry was justified by the exigent circumstances exception to the warrant requirement.

There are no arguably meritorious grounds on which to challenge the taking of Gonzales's plea.

We also agree with appellate counsel's assessment that no arguable issue of merit exists from the taking of Gonzales's guilty plea. Our review of the record—including the plea questionnaire, its addendum, and the plea hearing transcript—confirms that the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Two issues require further discussion. First, we note that during the plea colloquy, the trial court summarized the

possible deportation consequences instead of reading to Gonzales the statutory warning required by WIS. STAT. § 971.08(1)(c).[5] However, because the record reflects that Gonzales was born in Wisconsin, Gonzales cannot show that his plea is likely to result in deportation, and the failure to give the deportation warning provides no grounds for relief. *See* ***State v. Douangmala***, 2002 WI 62, ¶4, 253 Wis. 2d 173, 646 N.W.2d 1. Second, though the court correctly recited the maximum penalty as fifteen years' imprisonment for a Class E felony plus five additional years due to the weapon enhancer, shortly after, it stated that Gonzales was facing "21 possible years in prison." The trial court's one-year penalty overstatement does not constitute arguable grounds for plea withdrawal. *See* ***State v. Cross***, 2010 WI 70, ¶4, 326 Wis. 2d 492, 786 N.W.2d 64 ("[w]here a defendant pleads guilty with the understanding that he [or she] faces a higher, but not substantially higher, sentence than the law allows, the circuit court has still fulfilled its duty to inform the defendant of the range of punishments.").[6] There is no arguable merit to a claim that Gonzales's plea was anything other than knowing, intelligent, and voluntary.

There is no arguably meritorious challenge to Gonzales's sentence.

The final issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion.[7] At sentencing, the State abided by the terms of the plea agreement and

[5] We cannot simply rely on the inclusion of that warning in the plea questionnaire form Gonzales signed because the trial court did not question Gonzales about his execution and understanding of the plea questionnaire, and the plea questionnaire may not substitute for a personal, in-court colloquy when one is required. ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794.

[6] The signed plea questionnaire and waiver of rights form correctly states the maximum with the enhancer as twenty years of imprisonment.

[7] If Gonzales has successfully completed his probation, any sentencing issues are likely moot. However, we cannot be certain that the docket entries accurately reflect his status.

recommended a six-year bifurcated sentence consisting of three years of initial confinement and three years of extended supervision. The defense recommended an imposed and stayed prison sentence. Ultimately, after concluding that there were "so many mitigating factors here," the trial court imposed but stayed the State's recommended sentence in favor of probation.

In fashioning the sentence, the trial court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. *See* ***State v. Ziegler,*** 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The trial court acknowledged the "very serious" nature of the offense but concluded that probation was appropriate given Gonzales's cooperation with law enforcement, his character, history and demeanor in court, and his relatively small role in a much larger drug enterprise. In imposing its sentence, the trial court considered the relevant facts and the appropriate sentencing factors. Further, an imposed and stayed six-year bifurcated sentence is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive as to shock the public's sentiment, ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no arguably meritorious challenge to the sentencing court's exercise of discretion.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to represent Gonzales 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 Mark A. Schoenfeldt is relieved of further representation of Justin R. Gonzales in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals