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DISTRICT I

November 1, 2013

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

2012AP1639-CRNM State of Wisconsin v. Xiomara Rodriguez (L.C. #2010CF1707)

Before Curley, P.J., Kessler and Brennan, JJ.

Xiomara Rodriguez appeals a judgment convicting her of armed robbery, as a party to a crime. She also appeals an order denying her motion to withdraw her guilty plea. Attorney Paul G. Bonneson filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12),¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). Rodriguez filed a response. After considering the no-merit report and the response, and after conducting an

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

independent review of the record, we conclude that there are no issues of arguable merit that Rodriguez could raise on appeal. Therefore, we summarily affirm the judgment of conviction and the order denying postconviction relief. *See* WIS. STAT. RULE 809.21.

The no-merit report first addresses whether Rodriguez's guilty plea was made voluntarily, knowingly, and intelligently. In order to ensure that a defendant is knowingly, intelligently, and voluntarily waiving the right to trial by entering a guilty plea, the circuit court must conduct a colloquy with a defendant to ascertain that the defendant understands the elements of the crimes to which she is pleading guilty, the constitutional rights she is waiving by entering the plea, and the maximum potential penalties that could be imposed. *See* WIS. STAT. § 971.08, and *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986).

During the plea hearing, the circuit court reviewed with Rodriguez the constitutional rights she was waiving by entering a plea. Rodriguez told the circuit court that she understood. The circuit court asked Rodriguez's attorney whether he explained the elements of the crimes to her, including the meaning of being charged as a party to a crime, and he said that he had explained them. The circuit court then asked Rodriguez if she had any questions with regard to that, and she replied that she did not. The circuit court reviewed the potential maximum penalties Rodriguez faced by entering her plea and asked her whether she understood that she could be sentenced to the maximum because the circuit court did not have to follow the recommendation of the prosecutor, her attorney, or the presentence investigation report. Rodriguez said she understood. Rodriguez filled out and signed a plea questionnaire and waiver-of-rights form that listed the elements of the crime, which Rodriguez initialed individually, the constitutional rights Rodriguez was waiving by entering the plea, and the maximum penalties

Rodriguez faced. The circuit court did not, however, specifically ask Rodriguez whether she had read, understood, and signed the documents.

The plea agreement was stated on the record and Rodriguez and her attorney both told the circuit court that the agreement as stated was in accord with their understanding; in exchange for Rodriguez's guilty plea and her willingness to testify against one of her co-defendants, the State agreed to drop the other charges against her stemming from the same incident and to recommend no more than fifteen years of imprisonment. The circuit court informed Rodriguez that she could be deported after her conviction if she was not a U.S. citizen. The circuit court told Rodriguez that she would be giving up all of the defenses she could assert at a trial, and she said she understood that information. The circuit court asked Rodriguez if she had enough time to talk to her attorney before she decided to plead guilty, and she said that she did. The circuit court asked Rodriguez's attorney whether Rodriguez stipulated to the facts in the criminal complaint as a factual basis for the plea, and her attorney said that she did. The circuit court then accepted Rodriguez's plea.

In her postconviction motion, Rodriguez argued that she should be allowed to withdraw the plea because she did not understand the elements of armed robbery and the concept of being charged as a party to a crime. She also argued that her attorney provided ineffective assistance of counsel because he did not explain the elements to her. At the postconviction motion hearing, Rodriguez's attorney testified that he did not have an independent recollection of reviewing the elements of the crime and explaining the meaning of party-to-a-crime liability to Rodriguez due to the passage of time, but that it was his standard practice to do so. In contrast, Rodriguez testified that her attorney did not explain the elements of armed robbery and did not explain what it meant to be charged as a party to a crime to her and she did not understand those concepts.

She acknowledged that she signed the plea questionnaire and waiver-of-rights form and attached documents, which included placing her initials by each element of the crime, but testified that she did not understand the documents because she had a learning disability. She also testified that when she was previously convicted of armed robbery as a party to a crime, her attorney in that case did not explain the elements of the crime to her either and she did not understand them. The circuit court found the testimony of Rodriguez's attorney that it was his standard practice to review the elements of each crime with his clients to be credible, noting that he had been representing clients in criminal cases for almost twenty-five years. The circuit court found Rodriguez's testimony that she did not understand the elements of armed robbery, as a party to a crime, to be incredible, especially because she had previously been convicted of the exact same crime. Based on the circuit court's credibility determination, the circuit court properly concluded that Rodriguez understood the elements of the crime and, therefore, knowingly, intelligently, and voluntarily entered her plea. There would be no arguable merit to an appellate challenge to the plea.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its discretion when it sentenced Rodriguez to twenty years of imprisonment, with fifteen years of initial confinement and five years of extended supervision. The circuit court placed particular emphasis on the fact that Rodriguez was on extended supervision for a previous armed robbery committed with one of the same co-defendants when she committed this crime, and had an abysmal record of failure with regard to that supervision; she was supposed to work on getting her GED, but never enrolled or started taking classes; she was supposed to make restitution payments and had the ability to do so from her Social Security checks, but never made a payment; she never earned her drivers permit, but was arrested for

driving without a license on two separate occasions; she was involved in a physical altercation; she was twice given formal alternatives to revocation; she was placed on home detention for her conduct, but continued to violate the rules of her supervision; and multiple other problems. The circuit court concluded that Rodriguez's experience with supervision outside of prison was a complete failure. The circuit court also placed heavy weight on the fact that Rodriguez was one of the masterminds of this home invasion armed robbery and the crime itself was extremely violent. The men working with Rodriguez to commit the robbery burst into the home with a gun, terrorized the people in the home, including a three-year-old child, and knocked one of the victims completely unconscious for the duration of the crime. The circuit court concluded that Rodriguez was a danger to the public and had very strong rehabilitative needs that demanded a lengthy sentence. The circuit court explained its application of the various sentencing considerations in depth in accordance with the framework set forth in *State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197, and its decision was a reasonable exercise of discretion in light of the circumstances presented. Therefore, there would be no arguable merit to a challenge to the sentence on appeal.

In her response, Rodriguez renews the contention she made in her postconviction motion that she did not understand the elements of the crime and states that she suffers from a learning disability. We have thoroughly addressed this claim above and conclude that there would be no arguable merit to an appellate challenge to the circuit court's conclusion that Rodriguez understood the elements of the crime. In her response, Rodriguez also states that she thinks her sentence was too harsh and that she is very remorseful for her actions. Given the facts and circumstances of this case, especially the prior "second-chances" Rodriguez has been given to conform her conduct to the law and her failure to do so, the sentence is not too harsh. Finally,

Rodriguez states that she suffers from postpartum depression, anxiety, and bi-polar disorder, and that her young child needs her. Rodriguez's mental illness is not an excuse for her conduct, and while her child is certainly also a victim of her actions in that Rodriguez will not be able to care for him while she is in prison, the circuit court has concluded that Rodriguez is a danger to the community and must be incarcerated for a lengthy period of time. There would be no arguable merit on any of the issues that Rodriguez has raised in her response.

Our independent review of the record reveals no arguable basis for reversing the judgment of conviction and order denying postconviction relief. Therefore, we affirm the judgment and order, and relieve Attorney Paul G. Bonneson of further representation of Rodriguez.

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

IT IS FURTHER ORDERED that Attorney Paul G. Bonneson is relieved of any further representation of Rodriguez in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals