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DISTRICT II/III

November 19, 2013

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

2012AP2259-CRNM State of Wisconsin v. Daniel Gonzalez (L. C. # 2009CF888)

Before Hoover, P.J., Mangerson and Stark, JJ.

Counsel for Daniel Gonzalez has filed a no-merit report concluding no grounds exist to challenge Gonzalez's convictions for felony murder and first-degree reckless injury with use of a dangerous weapon—both counts as party to the crime and as a repeater. Gonzalez has filed a response challenging his conviction and sentence. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit

to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21 (2011-12).[1]

An Amended Information charged Gonzalez with first-degree intentional homicide with use of a dangerous weapon, attempted first-degree intentional homicide with use of a dangerous weapon, armed robbery, and six counts of false imprisonment with use of a dangerous weapon, all nine counts as party to a crime and as a repeater. The court denied Gonzalez's pretrial motions to sever, change venue, and suppress statements he made to law enforcement.

In exchange for Gonzalez's cooperation and no contest pleas to amended charges of felony murder (during the commission of an armed robbery) and first-degree reckless injury with use of a dangerous weapon—both counts as party to the crime and as a repeater—the State agreed to dismiss and read in the armed robbery charge and dismiss the false imprisonment charges outright. Although it remained free to argue regarding the length of sentence, the State also agreed it would recommend that any prison time on the two counts run concurrently. Out of a maximum possible ninety-seven-year sentence, the court imposed concurrent sentences totaling fifty years, consisting of forty years' initial confinement and ten years' extended supervision.

Any challenge to the circuit court's denial of Gonzalez's suppression motion would lack arguable merit. In his motion, Gonzalez asserted that when he requested an attorney while being questioned, the questioning ceased, but the police did not contact the public defender's office for him. At the suppression motion hearing, detective Matt Hagen testified that Gonzalez's

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

Miranda[2] rights were read and waived before three of four interviews.[3] Detective Thomas Glassman testified that approximately ten minutes into the second interview, Gonzalez asked for an attorney. The interview ceased and Glassman left the room to do some paperwork. When Glassman returned to the interview room to tell Gonzalez he was being transported back to the jail, Gonzalez asked to speak with his mother. After meeting with his mother, Gonzalez requested to meet with Glassman to tell "the whole truth."

When a person in custody tells an interrogating officer that he or she wants a lawyer, that person "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." ***Edwards v. Arizona***, 451 U.S. 477, 484-85 (1981). Here, questioning ceased as soon as Gonzalez requested a lawyer, and further questioning was initiated only at Gonzalez's request. To the extent Gonzalez claimed the police had an obligation to call the public defender for him, "***Miranda*** does not require that attorneys be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one." ***Duckworth v. Eagan***, 492 U.S. 195, 204 (1989).

Gonzalez also claimed his statements were coerced because the police used his mother as a "go-between" to insist Gonzalez talk to the police. Glassman testified, however, that Gonzalez's mother was brought to the station because Gonzalez asked to speak with her.

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

[3] Although ***Miranda*** warnings were not read before the fourth of four total interviews, the State indicated it did not intend to introduce statements from the fourth interview into evidence.

Glassman further testified he did not tell Gonzalez's mother to tell Gonzalez he "needed to cooperate or anything to that effect." Based on this record, the circuit court found there was no police misconduct or failure to respect Gonzalez's ***Miranda*** rights. In denying the suppression motion, the court concluded Gonzalez was advised of his ***Miranda*** rights, and "freely, voluntarily and knowingly" waived those rights to speak to officers.

The record discloses no arguable basis for withdrawing Gonzalez's no contest pleas. The court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Gonzalez completed, informed Gonzalez of the elements of the offenses, the penalties that could be imposed, and the constitutional rights he waived by entering no contest pleas.[4] The court confirmed Gonzalez's understanding that it was not bound by the terms of the plea agreement. *See* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14. The court also found that a sufficient factual basis existed in the criminal complaint to support a conclusion that Gonzalez committed the crimes charged. The record shows the pleas were knowingly, voluntarily and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

Any challenge to the denial of Gonzalez's motions to sever and change venue was forfeited by his valid no contest pleas. *See* ***State v. Grayson***, 165 Wis. 2d 557, 561, 478 N.W.2d 390 (Ct. App. 1991) (valid no contest plea waives all nonjurisdictional defects and defenses).

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[4] Although the court did not advise Gonzalez of the deportation consequences of his pleas, as mandated by WIS. STAT. § 971.08(1)(c), it ascertained that Gonzalez is a United States citizen, not subject to deportation. Any challenge to the pleas on this basis would therefore lack arguable merit.

Likewise, Gonzalez's challenges to the credibility of witness statements have been forfeited by his valid no contest pleas.

The record discloses no arguable basis for challenging the sentence imposed. The court considered the seriousness of the offenses; Gonzalez's character, including his criminal history; the need to protect the public; and the mitigating factors Gonzalez raised. The court imposed a sentence authorized by law. *See* ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. Under these circumstances, it cannot reasonably be argued that Gonzalez's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Finally, there is no arguable merit to a claim that Gonzalez was denied the effective assistance of trial counsel. To establish ineffective assistance of counsel, Gonzalez must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the deficient performance affected the outcome of the case. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In his response to the no-merit report, Gonzalez alleges counsel was ineffective by failing to correct errors in the presentence investigation report. Counsel, however, corrected errors in the PSI at the sentencing hearing.

Gonzalez also claims counsel was ineffective by recommending that he accept the plea agreement because he ultimately received a more severe sentence than that propounded by his counsel. According to Gonzalez, counsel told him he would receive a sentence of fifteen to twenty years. During the plea colloquy, however, Gonzalez confirmed his understanding that the court could impose the maximum possible penalties for the crimes. Even assuming counsel predicted a fifteen- to twenty-year sentence, counsel's incorrect prediction concerning

Gonzalez's sentence is not a basis for an ineffective assistance of counsel claim. *See* ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272. Our review of the record and the no-merit report discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a ***Machner***[5] hearing.

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Faun M. Moses is relieved of further representing Gonzalez in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[5] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).