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DISTRICT III

November 26, 2013

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

2013AP56-CRNM State of Wisconsin v. Jose Julio Machicote
2013AP57-CRNM (L.C. ## 2011CF705, 2011CF1189)

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

Counsel for Jose Machicote has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),[1] concluding no grounds exist to challenge Machicote's convictions for armed robbery, theft of movable property valued between $2,500 and $5,000, and criminal damage to property, the latter two offenses as party to a crime. Machicote was informed of his right to file

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

a response to the no-merit report and has not responded. 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 judgments of conviction. *See* WIS. STAT. RULE 809.21.

In Brown County Circuit Court case No. 2011CF705, the State charged Machicote with attempted armed robbery, armed robbery and possession of drug paraphernalia. The allegations arose from the attempted robbery of Mexicana Travel and the robbery of Super Mercado El Local Store, both businesses located in Green Bay. Drug paraphernalia and other evidence was discovered during a search of Machicote's residence. In Brown County Circuit Court case No. 2011CF1189, the State charged Machicote with theft of movable property and criminal damage to property, both counts as party to a crime. These charges arose from allegations that Machicote broke the window of a restaurant owner's truck and stole a money bag from the truck.

The court denied Machicote's motion to suppress evidence in case No. 2011CF705. Machicote subsequently entered into a plea agreement to dispose of both cases. In exchange for his guilty pleas to armed robbery, theft of movable property and criminal damage to property, the State agreed to dismiss and read in the remaining charges. Out of a maximum total sentence of forty-four years and three months, the court imposed a sixteen-year sentence for the armed robbery, consisting of eight years' initial confinement and eight years' extended supervision. With respect to the remaining offenses, the court withheld sentence and imposed two-year probation terms, consecutive to the sentence imposed for the armed robbery.

There is no arguable merit to challenge the denial of Machicote's pretrial motion to suppress evidence. Machicote moved to exclude evidence obtained from his bedroom during a

warrantless search after Machicote was already in custody. At the motion hearing, police officer Barbara Gerarden testified that she was dispatched to search an apartment rented by Shannon McVeigh. Upon arrival, McVeigh indicated that Machicote had been staying in one of the apartment bedrooms for a couple of weeks. McVeigh told the officer that Machicote was not on the lease. She gave both verbal and written consent to search the entire apartment. Although the officer could not recall if the door to Machicote's room was open or closed before executing the search, she testified the door was not locked. McVeigh told the officer that some of the items in the room, like the furniture, belonged to her and some belonged to Machicote. The court ultimately denied the suppression motion concluding that "the search was a consent search" and McVeigh had authority to authorize the search.

The Supreme Court has held that "[a person's] status as an overnight guest is alone enough to show that [the person] had an expectation of privacy in the home that society is prepared to recognize as reasonable." ***Minnesota v. Olson***, 495 U.S. 91, 96–97 (1990). Machicote, therefore, had a legitimate expectation of privacy under the Fourth Amendment. Consent to search, however, is a well-delineated exception to the requirement that law enforcement conduct searches pursuant to a warrant. ***State v. Krajewski***, 2002 WI 97, ¶24, 255 Wis. 2d 98, 648 N.W.2d 385.

"[C]onsent to search may be 'obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.'" ***State v. Tomlinson***, 2002 WI 91, ¶23, 254 Wis. 2d 502, 648 N.W.2d 367 (citation omitted). Moreover, "even if a third party lacks the actual authority to consent to a search, police may rely upon the third party's apparent common authority, if such reliance is reasonable." ***Id.***, ¶25. Here, police searched an unlocked room within McVeigh's apartment that contained property

belonging to both her and Machicote. Because McVeigh had apparent authority, at the very least, to consent to a police search of the room, the police could reasonably rely on that apparent authority. Therefore, any challenge to the denial of Machicote's suppression motion would lack arguable merit.

With respect to Machicote's pleas, the court's plea colloquy, supplemented by plea questionnaire and waiver of rights forms that Machicote completed, informed him of the elements of the offenses, the penalties that could be imposed, and the constitutional rights he waived by entering guilty pleas.[2] The court confirmed Machicote'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, and also found that a sufficient factual basis existed in the criminal complaints to support Machicote's pleas. 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).

The record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the court considered the seriousness of the offenses; Machicote's character, including his criminal history; the need to protect the public; and the mitigating factors Machicote raised. *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 Machicote's

[2] At the plea hearing, the circuit court failed to personally advise Machicote of the deportation consequences of his pleas, as mandated by WIS. STAT. § 971.08(1)(c). A potential issue therefore arises if Machicote can show that his pleas are likely to result in his "deportation, exclusion from admission to this country or denial of naturalization." WIS. STAT. § 971.08(2); *see also* ***State v. Douangmala***, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1. Although the court did not give Machicote deportation warnings, the court confirmed that Machicote is a United States citizen. Therefore, any challenge to the plea on this basis would lack arguable merit.

sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

The no-merit report addresses Machicote's challenge to the disparity between his sentence and that imposed for a co-defendant, Angel Rosa.[3] Disparity among co-defendants' sentences, however, is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation. ***State v. Toliver***, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994). Moreover, leniency in one case does not transform a reasonable punishment in another case into a cruel one. ***State v. Perez***, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992). Rosa was charged in two Brown County Circuit Court cases with two counts of burglary to a building or dwelling, and one count each of theft of movable property, armed robbery and attempted armed robbery, the latter three charges as party to a crime. In exchange for his no contest plea to the armed robbery charge, the remaining charges were dismissed and read in. The court sentenced Rosa to four years' initial confinement followed by four years' extended supervision.

Although both Machicote and Rosa were convicted of being party to the crime of armed robbery, Machicote was also convicted of theft and criminal damage to property, in addition to the read-in charges of attempted armed robbery and possession of drug paraphernalia. The court considered Machicote's criminal history, noting a pattern of thefts that had occurred during the previous nine years. Emphasizing Machicote's recent failure on probation, the court determined

[3] According to the no-merit report, Machicote also appears to challenge his waiver of the preliminary hearing for case No. 2011CF705. Any claimed defect in the preliminary hearing, however, is moot in light of the valid guilty pleas. *See* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991).

Machicote had a high risk to reoffend as even significant supervision had "very little deterrent effect." The court's sentence was based on considerations specific to Machicote. There is, therefore, no arguable merit to a claim that the court erroneously exercised its sentencing discretion when imposing a sentence that differed from that of Machicote's co-defendant.[4]

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgments are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Andrew H. Morgan is relieved of further representing Machicote in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[4] Our initial review of the sentencing transcript raised an issue regarding the requirement that Machicote provide a DNA sample and pay the surcharge. The transcript does not show that the sentencing court exercised any discretion when considering the payment issue. *See* ***State v. Cherry***, 2008 WI App 80, ¶¶9-10, 312 Wis. 2d 203, 752 N.W.2d 393. By order dated October 24, 2013, we directed counsel to either file a supplemental no-merit report addressing this possible issue or move to dismiss the appeal and extend the time for filing a postconviction motion challenging the surcharge. Counsel submitted an affidavit averring that after consideration of our order, Machicote opted against pursuing a motion to vacate the surcharge. Machicote has therefore waived any challenge to the imposition of the DNA analysis surcharge.