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DISTRICT I/II

February 19, 2014

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

2013AP1147-CRNM State of Wisconsin v. Miguel Angel Torres (L.C. #2011CF5388)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Miguel Angel Torres appeals from a judgment convicting him of possessing heroin with intent to deliver as a second or subsequent offense contrary to WIS. STAT. § 961.41(1m)(d) and 961.48(1)(b) (2011-12).[1] Torres' appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Torres received a copy of the report and was advised of his right to file a response. He has not done so. Upon

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

consideration of the report and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Torres' guilty plea was knowingly, voluntarily, and intelligently entered and had a factual basis; (2) whether the circuit court misused its sentencing discretion; and (3) whether the circuit court erroneously denied Torres' motion to suppress evidence found during a warrantless search of his residence. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of his guilty plea, Torres answered questions about the plea and his understanding of his constitutional rights during a colloquy with the circuit court that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The record discloses that Torres' guilty plea was knowingly, voluntarily, and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that it had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the plea questionnaire and waiver of rights form Torres signed is competent evidence of a knowing and voluntary plea. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32. We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Torres' guilty plea.

With regard to the sentence, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. The court adequately discussed the facts and factors relevant to sentencing Torres to a four-year term. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In fashioning the sentence, the court considered the seriousness of the offense, Torres' character and history of other offenses, Torres' previous failure on probation and his lack of credibility, and the need to protect the public. The felony sentence complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. The court stated reasons for declaring Torres ineligible for the Challenge Incarceration and Substance Abuse Programs. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentence.

We agree with appellate counsel that a challenge to the circuit court's denial of Torres' motion to suppress evidence found during a warrantless search would lack arguable merit for appeal. Consent to search is an 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. Whether consent was given voluntarily is a question of constitutional fact. ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998) (citation omitted). We will uphold the circuit court's findings of historical fact unless they are clearly erroneous. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995).

After an evidentiary hearing, the circuit court found the police officers credible when they testified that Torres consented to a search of his residence. The circuit court's finding that Torres consented to the search is not clearly erroneous based upon the suppression hearing record. The court also properly declined to suppress any evidence an officer observed Torres

throw from his residence into the neighbors' yard because the evidence was recovered outside of an area over which Torres exercised any control.

The circuit court required Torres to pay the DNA surcharge under WIS. STAT. § 973.046 if he had not already done so. The court stated reasons for this decision. ***State v. Cherry***, 2008 WI App 80, ¶¶8-9, 312 Wis. 2d 203, 752 N.W.2d 393. No issue of arguable merit could arise from a challenge to the imposition of the DNA surcharge.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment of conviction and relieve Attorney John Wasielewski of further representation of Torres in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney John Wasielewski is relieved of further representation of Miguel Angel Torres in this matter.

Diane M. Fremgen
Clerk of Court of Appeals