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DISTRICT I

February 13, 2015

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

2014AP2195-CRNM State of Wisconsin v. Salvador Ochoa (L.C. #2005CF6986)
2014AP2196-CRNM State of Wisconsin v. Salvador Ochoa (L.C. #2006CF3662)

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

Salvador Ochoa appeals from judgments of conviction, entered upon his guilty pleas, on one count of second-degree reckless homicide and one count of second-degree sexual assault of a child. Appellate counsel, Thomas J. Erickson, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] Ochoa was advised of his right to file a response but he has not responded. Upon this court's independent review of

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

the record, as mandated by ***Anders***, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgments.

On December 12, 2005, two-month-old R. O.-C. was pronounced dead from multi-system organ failure. Her bowel had ruptured and become necrotic, which caused her stomach, kidneys, and uterus to necrotize as well. The medical examiner determined that the ruptured bowel was consistent with blunt-force trauma to the abdomen. On December 14, 2005, by which point the death had been deemed a homicide, R. O.-C.'s mother overheard Ochoa, the victim's father, on the phone with his brothers. Ochoa told them he needed to get to Mexico quickly. Ochoa also told R. O.-C.'s mother that the baby had been crying and would not stop, so he punched R. O.-C. in the stomach. Ochoa was charged with one count of second-degree reckless homicide, but he had fled the United States and was not arrested and returned to this country until 2008.

Subsequent to R. O.-C.'s death, police received a complaint from S.O., another of Ochoa's children. She reported that sometime after she turned eight in July 2005, Ochoa would call her into his bedroom while he was watching pornography and touch her vaginal area over her clothes. S.O. recalled this happening four times. She would tell Ochoa she wanted to leave, but he would tell her, "in a little bit." S.O. said she was afraid of disobeying Ochoa because he would hit her in the stomach if she did not listen to him. Ochoa was charged in July 2006 with one count of repeated sexual assault of the same child.

Ochoa was extradited to the United States from Mexico. His attorney first filed a motion to suppress an incriminating statement that Ochoa had given to police. He argued that the investigating detective had not used the preprinted Spanish-language card for advising Ochoa of

his ***Miranda***[2] warnings, "and, thus, confused Ochoa with a shoddy, off-the-cuff rendition of required warnings that did not clearly and accurately convey them to Ochoa." The circuit court heard testimony and argument, but denied the suppression motion.

Ochoa then agreed to resolve his cases with a plea agreement. In exchange for his guilty pleas, the State would recommend significant but concurrent prison sentences, with extended supervision left to the circuit court. The State would be free to comment on mitigating or aggravating factors. In exchange, the repeated sexual assault charge would be amended to allege one count of sexual assault of a child, by sexual contact, and Ochoa would be free to argue for any sentence he thought appropriate. The circuit court accepted the plea agreement and sentenced Ochoa to twelve years' initial confinement and three years' extended supervision on the second-degree reckless homicide, and fifteen years' initial confinement and four years' extended supervision on the second-degree sexual assault, to be served consecutively.

One of the potential issues counsel discusses is whether there is any arguable merit to a challenge to the circuit court's denial of the motion to suppress Ochoa's statement. He had alleged that the ***Miranda*** warnings were insufficient because of translation issues. At the hearing on the motion, the circuit court listened to the taped recording of Ochoa's interview, which was conducted in Spanish. An interpreter relayed to the court in English what the detective and Ochoa were saying.

Miranda requires police to provide certain warnings to individuals taken into custody; one of these warnings is that if the person cannot afford an attorney, one will be appointed before

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

questioning if the person so desires. *See* ***State v. Stevens***, 2012 WI 97, ¶45, 343 Wis. 2d 157, 822 N.W.2d 79. Part of the controversy at the suppression hearing related to this warning. The detective had used the word "cobrar" when he was trying to tell Ochoa that if he could not *afford* an attorney, one would be appointed for him at no cost. While the interpreter relaying the interview thought that everyone understood what the detective meant, the interpreter who was interpreting proceedings for Ochoa explained that "cobrar" really meant "to charge," like charging a payment, and was not interchangeable with "afford." The detective then testified that he knew he had not used proper grammar, but he grew up speaking a Mexican dialect of Spanish, and Ochoa appeared to understand what he meant.

The circuit court, in denying the suppression motion, explained that there is no legal requirement for ***Miranda*** warnings to be given a certain way. It noted that Ochoa did not seem to understand the court's "legalese," so using the preprinted Spanish-language card might have confused Ochoa compared to the detective's less formal explanation of the rights. The circuit court also noted that Ochoa had not been shy about telling the court when he did not understand something, and Ochoa had specifically told the detective he understood his rights.

A decision on a motion to suppress evidence presents a mixed question of fact and law. *See* ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. Similarly, the sufficiency of ***Miranda*** warnings is a question of constitutional fact. *See* ***State v. Santiago***, 206 Wis. 2d 3, 18-19, 556 N.W.2d 687 (1996). In both cases, we do not reverse the circuit court's factual findings unless clearly erroneous, and we review *de novo* the application of constitutional principles to those facts. *See* ***Casarez***, 314 Wis. 2d 661, ¶9 (motions to suppress); *see also* ***State v. Dearborn***, 2010 WI 84, ¶13, 327 Wis. 2d 252, 786 N.W.2d 97 (questions of constitutional fact). The State has the burden of establishing that the defendant was adequately advised of, and

understood, his ***Miranda*** warnings before knowingly, intelligently, and voluntarily waiving them. *See* ***Santiago***, 206 Wis. 2d at 18.

Here, the detective's warning to Ochoa adequately conveyed the warnings required by ***Miranda***, even if the detective may have used a colloquial word rather than an exact parallel. The circuit court's finding, based in part on its ability to observe Ochoa directly, that Ochoa understood the detective's warning is not clearly erroneous. Accordingly, we agree with appellate counsel that there is no arguable merit to a claim that the circuit court erroneously denied the suppression motion.

Counsel also addresses whether there is any arguable merit to a challenge to the validity of Ochoa's pleas. Because of a misunderstanding, Ochoa had two separate plea colloquies with different judges. The first colloquy was with regard to the homicide and the second was regarding the sexual assault.

There is no arguable basis for challenging whether Ochoa's pleas were knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Ochoa completed a plea questionnaire and waiver of rights form in both cases, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), acknowledging that his attorney had explained the elements of the offenses. Both cases had appropriate jury instructions attached, listing those elements. Defense counsel confirmed in both cases that the forms had been read to Ochoa by an interpreter. The forms correctly acknowledged the maximum penalties Ochoa faced, along with the constitutional rights he was waiving with his pleas. *See* ***Bangert***, 131 Wis. 2d at 262.

The circuit court conducted plea colloquies, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Our review of the records satisfies us that the circuit court complied with the necessary requirements for taking guilty pleas in both cases, as set out in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. There is no arguable merit to a challenge to the validity of either of Ochoa's guilty pleas.

The other issue counsel addresses is whether there is any arguable merit to a challenge to the circuit court's sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court explained that concurrent time, as the State agreed to recommend, did not satisfy the public interest: Ochoa had committed two separate, serious crimes warranting consecutive sentences. Because Ochoa is also an undocumented Mexican national who has been removed from the United States and returned to Mexico before, the circuit court explained that lengthy imprisonment was necessary to protect the public: it would be better, the court reasoned, to incarcerate Ochoa for a long time than to give him a short sentence and hope he would return

to Mexico and stay there. The circuit court considered Ochoa's offenses to be horrific and very serious—in particular, it noted that it was unusual to have both a sexual assault and homicide against different children in the same family. It also noted that, based on the presentence investigation report, Ochoa tended to minimize his responsibility for his offenses. He had suggested that, because R. O.-C. cried all the time, perhaps "it was best that she was never born." He also suggested that it might have been S.O. and not him who was watching pornography. The circuit court did, however, note that by entering pleas, Ochoa had spared S.O. from having to testify.

The maximum possible sentence Ochoa could have received was sixty-five years' imprisonment. The sentence totaling thirty-four years' imprisonment 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 so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Thomas J. Erickson is relieved of further representation of Ochoa in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals