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DISTRICT III

March 24, 2015

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

2014AP1661-CRNM State of Wisconsin v. Adrian A. Burciaga-Santillan
(L. C. #2012CF1170)

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

Counsel for Adrian Burciaga-Santillan has filed a no-merit report concluding no grounds exist to challenge Burciaga-Santillan's convictions for one count of delivering between one and five grams of cocaine; three counts of delivering between five and fifteen grams of cocaine; and two counts of delivering between fifteen and forty grams of cocaine. Burciaga-Santillan was informed of his right to file 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 judgment of conviction. *See* WIS. STAT. RULE 809.21.[1]

The State charged Burciaga-Santillan with three counts of delivering between one and five grams of cocaine; five counts of delivering between five and fifteen grams of cocaine; and five counts of delivering between fifteen and forty grams of cocaine. In exchange for his no contest pleas to the six counts for which Burciaga-Santillan was ultimately convicted, the State agreed to dismiss and read in the remaining counts and cap its sentence recommendation at eight years' initial confinement and eight years' extended supervision. Out of a maximum possible sentence of one-hundred seven years and six months, the court imposed consecutive sentences resulting in a total of thirty years, consisting of ten years' initial confinement followed by twenty years' extended supervision. Burciaga-Santillan filed a postconviction motion to modify the sentence and remove the DNA surcharge. After a hearing, the circuit court ordered the DNA surcharge removed, but denied the motion for sentence modification.

The record discloses no arguable basis for withdrawing Burciaga-Santillan's no contest pleas. With the help of an interpreter, the court's plea colloquy, as supplemented by a Spanish-language plea questionnaire and waiver of rights form that Burciaga-Santillan completed, informed Burciaga-Santillan of the elements of the offenses, the penalties that could be imposed, and the constitutional rights he waived by entering no contest pleas. The court confirmed Burciaga-Santillan'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 advised

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Burciaga-Santillan of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c). Additionally, the court found that a sufficient factual basis existed in the criminal complaint to support the conclusion that Burciaga-Santillan 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).

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; Burciaga-Santillan's character; the need to protect the public; and the mitigating factors Burciaga-Santillan raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Under these circumstances, it cannot reasonably be argued that Burciaga-Santillan'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).

There is likewise no arguable basis for challenging the denial of Burciaga-Santillan's postconviction motion for sentence modification. A circuit court may modify a defendant's sentence upon a showing of a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties." ***Id.***, ¶40. The existence of a new factor, however, does not automatically entitle the defendant to sentence modification. ***Id.***, ¶37. Rather, if a new factor is present, the circuit court determines, in the exercise of its discretion, whether the new factor justifies modification of the sentence. ***Id.***

Here, Burciaga-Santillan argued that after his sentencing, a similarly situated defendant—Roberto Morales—received a significantly lower sentence than Burciaga-Santillan. Though Burciaga-Santillan conceded Morales was "not quite a codefendant," he argued Morales was "interconnected," as Burciaga-Santillan was investigated in order to further an investigation of Morales. Although the court accepted the information as a new factor, it determined the new factor did not justify modifying Burciaga-Santillan's sentence. Specifically, the court concluded that given the nature of the offenses and the breadth of Burciaga-Santillan's involvement, the fact that another judge gave a similarly situated defendant less time did not warrant modifying what it deemed "a reasonable if not modest sentence" that was "at the lesser end" of the penalty range. The court properly exercised its discretion in this regard.

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 Michelle L. Velasquez is relieved of further representing Burciaga-Santillan in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals