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

2012AP257-CRNM State of Wisconsin v. Benjamin M. Germano (L.C. #2010CF385)

Before Blanchard, P.J., Higginbotham and Kloppenburg, JJ.

Attorneys Jeremy Perri and John Breffleilh, appointed counsel for Benjamin Germano, have filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)¹ and *Anders v.*

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

California, 386 U.S. 738 (1967). Germano responded to the report, counsel filed a supplemental no-merit report, and we then ordered a second supplemental no-merit report, to which Germano also responded, followed by a third supplemental no-merit report and a further response from Germano. We conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. After our independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal.

Germano was originally charged with first-degree intentional homicide, to which a charge of hiding a corpse was added later. Pursuant to a plea agreement, the homicide charge was reduced to second-degree intentional homicide by use of unnecessary defensive force, and the hiding a corpse charge was dismissed. Germano pled guilty to the homicide charge, and was sentenced to twenty-five years of initial confinement and fifteen years of extended supervision.

The second-degree homicide offense to which Germano pled guilty is found in WIS. STAT. §§ 940.01(2)(b) and 940.05(1)(b), under which first-degree intentional homicide is mitigated to second-degree. Reading those provisions together, a person is guilty of a class B felony if he or she causes the death of another human being with intent to kill, and death was caused because the actor believed that he or she was in imminent danger of death or great bodily harm and that the force used was necessary to defend himself or herself, and either belief was unreasonable. By charging this form of second-degree intentional homicide, the State conceded that it is unable to prove beyond a reasonable doubt that the mitigating circumstances did not exist. § 940.05(1)(b).

The complaint alleged, in brief, that Germano strangled his ex-girlfriend. It alleged that he admitted to a friend that he killed her and hid her body; that Germano told the friend the

victim had attacked him at his house and he “just snapped”; and that he told the friend he was trying to find a safe place for his daughter before he was arrested. The complaint further alleged that Germano told the friend that the victim’s body was in a shipping container at a particular shop, and police later found the body there. The medical examiner determined the cause of death to be asphyxia due to manual strangulation. The complaint further alleged that another friend of Germano’s told police that Germano brought his daughter to the friend’s house and asked the friend to take care of the daughter because Germano had killed the child’s mother, the victim in this case.

At the preliminary hearing, a detective testified about his interview with Germano in Colorado, where Germano had been arrested. According to the detective, during that interview Germano admitted to killing the victim. Germano said that during an argument in his residence, the victim grabbed a steak knife and slashed at him. They struggled to the floor, ending up with Germano on top of her, controlling her knife hand with one hand, and strangling her with the other. The detective testified that Germano told him that “[a]t some point she quit fighting and he took the knife out of her hand.” Asked what Germano said he did next, the detective said: “He said he put both hands around her neck until she was dead.”

In Germano’s response to the no-merit report, he raises several possible issues. We begin our discussion with those, although not in the order that he presents them.

Suppression of Germano’s Statement

Germano argues that his statement to the police in Colorado should be suppressed because it was coerced and was taken in violation of his right to counsel. Normally the failure to

raise an issue before pleading guilty or no contest is considered a form of waiver. *See County of Racine v. Smith*, 122 Wis. 2d 431, 434-35, 362 N.W.2d 439 (Ct. App. 1984).

However, that waiver is not the end of the inquiry. Instead, it merely leads to the question of whether trial counsel was ineffective in some manner by allowing that waiver to occur. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

Here, Germano’s claim would have to be that counsel was ineffective by not moving to suppress Germano’s statement to police in Colorado. When plea withdrawal is sought based on ineffectiveness in not moving to suppress, a defendant must show that, if the evidence had been suppressed, he would not have pled guilty. *State v. Semrau*, 2000 WI App 54, ¶21, 233 Wis. 2d 508, 608 N.W.2d 376; *State v. Sturgeon*, 231 Wis. 2d 487, 503-04, 605 N.W.2d 589 (Ct. App. 1999). As part of this inquiry, the court considers:

- (1) the relative strength and weakness of the State's case and the defendant’s case;
- (2) the persuasiveness of the evidence in dispute;
- (3) the reasons, if any, expressed by the defendant for choosing to plead guilty;
- (4) the benefits obtained by the defendant in exchange for the plea; and
- (5) the thoroughness of the plea colloquy.

Semrau, 233 Wis. 2d 508, ¶22.

In the third supplemental no-merit report, counsel correctly cites case law to the effect that a claim of coercion must include coercive or improper conduct by police. Here, Germano’s

claim of coercion appears to be founded mainly on his claim that the police did not respect his desire to remain silent, and that they took advantage of his emotional state at that time. However, we are not aware of any legal basis on which to say that either of these qualifies as police misconduct for the purpose of suppressing a statement as having been the product of coercion.

As to the claim that the Colorado statement was taken in violation of Germano's right to counsel, current counsel notes that the State had already agreed to use this statement only for impeachment, which is the same remedy that would flow from any successful suppression motion. Therefore, Germano did not suffer prejudice from the lack of a suppression motion.

Suppression of telephone call

Germano seeks suppression of information gained from "an illegally listened to phone conversation." The conversation occurred between Germano and a person we will call M. We obtain the following facts from the complaint and the preliminary hearing testimony.

M. called police and told them she had spoken to Germano and that he admitted killing the victim. Police then went to M.'s residence. There, they found M. on the phone with Germano, and police listened to and recorded both sides of the conversation. During that conversation they heard Germano tell M. that he hid the victim's body in a specific industrial location. Police then also took a statement from M. about what Germano said earlier in M.'s conversations with him.

Like the previous issue, this one would have to be raised as ineffective assistance of counsel. And, as we stated above, a defendant must show that if the evidence had been suppressed he would not have pled guilty.

In the third supplemental no-merit report, counsel acknowledges that if M.'s consent to having the police listen to the conversation was coerced, arguably the telephone conversation and its fruits are suppressible under WIS. STAT. § 968.30(9)(a). However, on this issue we conclude that Germano could not plausibly argue that suppression of the telephone conversation and its fruits would have led him to reject the plea offer.

Suppression of the evidence could not reasonably have caused Germano to seek a trial on whether he caused the victim's death. Even without the conversation and its fruits, there was substantial other evidence that Germano caused her death, such as his statements to friends. And, if Germano were to attempt to testify himself that he did not cause her death, his Colorado statement could be used for impeachment. In light of that evidence, it would be frivolous for Germano to claim that he would have rejected the plea offer and gone to trial to present a defense that he did not kill the victim.

Next, although Germano has not clearly stated this in his response, he may intend to argue that if the telephone conversation and its fruits were suppressed, he would have gone to trial and sought acquittal on grounds of reasonable self-defense, rather than pleading guilty to unreasonable self-defense. However, again, the availability of the Colorado statement for impeachment purposes prevents Germano from making a nonfrivolous argument that he would have sought a trial on this basis. As far as we know, his own testimony at trial would be the only significant evidence with which he could present a claim of reasonable self-defense. However, if

he were to testify to a version of the victim's death that was inconsistent with his Colorado statement, the Colorado statement could be used for impeachment. And, ultimately, the Colorado statement does not appear to support a claim of reasonable self-defense.

Use of dismissed charge at sentencing

As part of the plea deal, a count of hiding a corpse was dismissed but not read-in. Germano asserts that he did not properly understand the agreement, or that counsel was ineffective, because counsel told him that this dismissed charge was not being read in, and therefore could not be considered by the court at sentencing. However, at sentencing the court briefly noted that after the victim's death, Germano "treated her like a piece of garbage," and that this is "something that I have to take into consideration with the serious nature of the crime."

Again, we focus on whether it is plausible that Germano would have rejected the plea deal if he had known that the court could consider the hiding of the corpse. We conclude that Germano could not reasonably make that assertion. The plea deal enabled Germano to prevent the potential of being found guilty of first-degree intentional homicide and receiving its life penalty. The most favorable outcome Germano might expect at trial is the second-degree homicide charge to which he eventually pled. Dismissing the hiding of the corpse charge removed an additional ten years of potential exposure that could have been imposed on top of the class B sentence for the homicide. Even with the court being allowed to consider the hiding of the corpse in sentencing for the homicide, the eventual sentencing outcome following the plea deal was very likely to be better than he would have obtained by going to trial.

DVD played at sentencing

Germano raises several issues regarding a DVD that was played in chambers before sentencing, and then in open court at sentencing. The DVD contained photographs of the victim, and of the victim with her and Germano's child, set to music.

Germano asserts that the DVD was used without "a proper hearing." It is not clear what kind of hearing Germano believes was necessary, or how the absence of that hearing caused him prejudice. We see no basis on which the DVD would have been inadmissible. Germano asserts that the photos were obtained from Germano's camera, which was taken into evidence by police and later given to the victim's family. Again, it is not clear how these facts would lead to the court not viewing the photos at sentencing.

Germano argues that the photos were intended to sway the court's emotions and cause bias against him. Although the court stated that it would not be swayed by emotion, Germano states that he finds that "impossible to believe." However, he does not refer to any other aspect of the sentencing hearing that would cast doubt on whether the court was able to avoid being swayed by emotion generated by the DVD. We see no arguable merit to any issues regarding the DVD photos.

Other issues raised by Germano

Germano states that he has been denied access to discovery material. To the extent that he is referring to denials by trial counsel before the conviction, Germano does not explain how access to more discovery materials would have changed the outcome. To the extent that Germano may be referring to denial of access by current appellate counsel, Germano is not specific about what information he believes he has not received.

A section of Germano's response discusses "the castle rule and self-defense." The purpose of this discussion is not clear. At this point, the potential strength or merits of these defenses are not relevant. Germano waived his right to present those defenses when he pled no contest.

Germano objects to certain remarks by the court at sentencing. There is no merit to this issue. The court's comments were appropriate to the matter before it. Germano also objects that the prison he is currently confined at does not have the programs that the sentencing court ordered for him. This would not qualify as a new factor for sentencing purposes.

The no-merit report addresses whether the sentence is within the legal maximum and whether the court erroneously exercised its sentencing discretion. The standards for the circuit court and this court on sentencing issues are well established and need not be repeated here. *See State v. Gallion*, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

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

Therefore,

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

IT IS FURTHER ORDERED that Attorneys Jeremy Perri and John Breffeilh are relieved of further representation of Germano in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals