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July 14, 2015

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

2014AP277-CRNM State of Wisconsin v. Fernando Vasquez (L.C. # 2012CF345)

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

Fernando Vasquez appeals a judgment convicting him, after entry of a guilty plea, of possession of a firearm by a felon, as a repeater, and possession of cocaine with intent to deliver, as a second or subsequent offense. Attorney Andrea Taylor Cornwall has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2013-14);[1] *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report

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

addresses whether the circuit court erred in denying two suppression motions, whether Vasquez's plea was entered knowingly, voluntarily, and intelligently, and whether the circuit court properly exercised its sentencing discretion. Vasquez was sent a copy of the report and has filed a response that also addresses the two suppression motions as well as the related issue of whether his constitutional protections against illegal search and seizure were violated when a police officer searched his garbage. Upon consideration of the report and response, as well as our independent review of the record, we conclude that there are no arguably meritorious appellate issues.

First, we agree with counsel's assessment that a challenge to the circuit court's rulings on the suppression motions would be without arguable merit. Vasquez filed two suppression motions: one to suppress evidence originating from a search of his garbage and one to suppress Vasquez's statements to police. The court denied the motions after an evidentiary hearing. At the hearing, the State presented the testimony of police officer Monojlo Verzich, who stated that he performed a "garbage search" of garbage cans at Vasquez's residence as part of an investigation he was conducting. He testified that the garbage cans were at the end of the driveway, on the road, and that he believed there was garbage collection in the area on that day. Verzich found documents with Vasquez's name on them, charred marijuana "roaches," seeds and stems of marijuana plants, and possibly some cocaine, though he could not recall for certain. He testified that he field-tested the marijuana that day, and would have also tested any cocaine found, but that there were no reports generated from the garbage search or the testing. Verzich later obtained a search warrant for Vasquez's residence, which he executed on a different date. Verzich read the search warrant to Vasquez verbatim. Pursuant to the search, cocaine, two handguns, and a small amount of marijuana were found.

Vasquez testified at the hearing on the motions to suppress, after a colloquy with the court regarding his right not to testify. Vasquez confirmed that he and his girlfriend resided at the address where the warrant had been executed. He testified that garbage was normally picked up on Mondays between 3:30 and 4:30 in the morning, and that he would wheel the cans down to the right side of the end of the driveway, near the road, as the garbage collection company is not allowed to go onto the property to get his garbage. He testified, however, that when he went to bed on the night before Verzich searched his garbage, the cans were still located next to the back door staircase of his house and that he had not yet wheeled them out to the street. He testified that the cans were still next to the staircase when he woke up the next morning.

In denying Vasquez's motion to suppress evidence originating from the search, the circuit court found that Verzich was credible in his testimony that when he searched the garbage cans, they were set out near the road at the entrance to the driveway for collection. The court found Vasquez's testimony regarding the location of the cans next to the door of the house not to be credible. Generally, we will not overturn credibility determinations on appeal, and we see no reason in the no-merit report, response, or record to do so here. *See* ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. In addition, Vasquez appears to have abandoned his prior position that the garbage cans were located near the door when they were searched. Instead, he asserts in his no-merit response that he placed the garbage cans near the curb to comply with a local ordinance.

The Fourth Amendment does not prohibit a warrantless seizure of garbage left out for collection beyond the curtilage of a residence. ***California v. Greenwood***, 486 U.S. 35, 37 (1988). The test for assessing the constitutionality of a warrantless garbage search is: "(1) whether the individual by his or her conduct has exhibited an actual, subjective expectation

of privacy, and (2) whether that expectation is justifiable in that it is one which society will recognize as reasonable." ***State v. Sigarroa***, 2004 WI App 16, ¶19, 269 Wis. 2d 234, 674 N.W.2d 894. Given the circuit court's finding that Verzich's testimony—that the garbage cans were on the road at the end of the driveway—was credible, we are not persuaded that there would be arguable merit to arguing on appeal that Vasquez had an actual, subjective expectation of privacy as to the contents and, even if he had such an expectation, that the expectation was reasonable. The garbage cans in this case, like the dumpster in ***Sigarroa***, were "located in an area totally unassociated with activities that would normally be associated with notions of privacy." *See* ***id.***, ¶21. Accordingly, we agree with counsel that there would be no arguable merit to challenging the circuit court's denial of the motion to suppress evidence originating from the garbage search.

We turn next to the motion to suppress Vasquez's statements to police. Vasquez was arrested after the search warrant was executed. Verzich testified that he did not read Vasquez his rights at that time and that he did not question him at all at that time. Vasquez was taken to the police department by another officer. At the police department, Verzich spoke with Vasquez for several minutes in a garage area prior to his interview. Verzich offered Vasquez a cigarette and explained that when he was done with the cigarette they would go inside for an interview and Vasquez would "have an opportunity to help himself if he would." Verzich testified that no promises were made to Vasquez.

Verzich then interviewed Vasquez in the police department's interview room. Verzich read Vasquez his ***Miranda***[2] rights from a paper form, which they both signed. Verzich then questioned Vasquez regarding the items found in his home, which resulted in a confession from Vasquez. Verzich testified that he did not use any intimidation or display his gun. He acknowledged that he told Vasquez that there was a likelihood his girlfriend could be arrested for being a keeper of a drug house. However, he denied making any threat or telling Vasquez that his girlfriend would be arrested or that he would come down harder on him if Vasquez did not cooperate.

At a suppression hearing, the State bears the burden of showing that the defendant received and understood his ***Miranda*** warnings and that he knowingly and intelligently waived the rights protected by the warnings. ***State v. Jiles***, 2003 WI 66, ¶26, 262 Wis. 2d 457, 663 N.W.2d 798. The State also bears the burden of showing whether the warnings were sufficient in substance and that the defendant's statements were voluntary. ***Id.*** We review de novo the ultimate issue of waiver of ***Miranda*** rights, "benefiting from the circuit court's analysis, but will not set aside the court's findings of historical or evidentiary fact unless they are clearly erroneous." ***State v. Rockette***, 2005 WI App 205, ¶22, 287 Wis. 2d 257, 704 N.W.2d 382.

Here, the circuit court found that Vasquez had been read his rights, understood them, and freely, voluntarily, and intelligently waived them. The record supports this finding. Nothing in the testimony of Verzich or Vasquez indicates that any explicit threats were made by Verzich or that Vasquez was questioned about the offense prior to being read his ***Miranda*** rights. The

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

recording of the interview shows that Vasquez was read his rights and signed a form acknowledging that he understood them. A copy of the waiver form that Vasquez signed was introduced into evidence at the hearing; the form lists the constitutional rights being waived, and shows that Vasquez checked the appropriate blanks indicating that he understood the rights and was willing to answer questions or make a statement. The court found that Vasquez's demeanor during the recorded interview was cooperative and not aggravated. The court also noted that Verzich did not ask leading questions, but that Vasquez was volunteering information, including the fact that he had run down to the basement to hide twenty grams of cocaine when the police came, and that Vasquez gave an explanation as to why he was selling cocaine. In light of all of the above, we agree with counsel's assessment that there would be no arguable merit on appeal to challenging the circuit court's denial of the motion to suppress Vasquez's statements to police.

We also see no arguable basis for plea withdrawal. The court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Vasquez completed, informed Vasquez of the elements of the offense, the penalties that could be imposed, the constitutional rights he waived by entering a guilty plea, and the fact that the court was not bound by the terms of the plea agreement. Although the court did not specifically advise Vasquez of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c), counsel informs us in the no-merit report that Vasquez is a citizen of the United States, and this fact is supported by the record. Additionally, the court found that a sufficient factual basis existed in the criminal complaint to support a conclusion that Vasquez committed the crime charged. We are satisfied that the record demonstrates that the plea was knowingly, voluntarily, and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

The record also discloses no arguable basis for challenging the sentence imposed. The court considered the seriousness of the offense, Vasquez's background and rehabilitative needs, and the interests of the community. The court imposed a sentence of three years of initial confinement and five years of extended supervision on each count, to run concurrent to each other, but consecutive to the revocation term he was serving. The sentence is within the applicable penalty ranges. *See* WIS. STAT. §§ 941.29(2) (classifying possession of a firearm by a felon as a Class G felony); 961.48(1)(a) and 961.41(1m)(cm)3 (classifying possession of cocaine with intent to deliver, as a second or subsequent offense, as a Class D felony); 973.01(2)(b)7 and (d)4 (providing maximum terms of five years of initial confinement and five years of extended supervision for a Class G felony); 973.01(2)(b)4 and (d)3 (providing maximum terms of fifteen years of initial confinement and ten years of extended supervision for a Class D felony); 939.62(1)(b) (increasing maximum term of imprisonment by four additional years for habitual criminality for offense otherwise punishable by one to ten years). Under these circumstances, it cannot reasonably be argued that Vasquez'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).

We note that during the sentencing hearing, the court indicated that Vasquez must provide a DNA sample "unless it's already been submitted." A $250.00 DNA surcharge appears on the judgment of conviction. In ***State v. Cherry***, 2008 WI App 80, ¶¶9-10, 312 Wis. 2d 203, 752 N.W.2d 393, this court held that a sentencing court must exercise its discretion when determining whether to impose the DNA analysis surcharge. Although the record does not show that the court adequately exercised its discretion when conditionally imposing the surcharge, the court later amended the judgment to remove the surcharge. Therefore, we conclude that a postconviction motion on this issue would lack arguable merit.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgment of conviction is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Andrea Taylor Cornwall is relieved of any further representation of Fernando Vasquez in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals