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September 22, 2017

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

2016AP397-CRNM State of Wisconsin v. Rodrigo Gallegos Guzman
(L.C. # 2013CF3316)

Before Brennan, P.J., Brash and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Rodrigo Gallegos Guzman appeals a judgment convicting him of conspiracy to commit possession of more than forty grams of cocaine, with intent to deliver. Guzman also appeals the circuit court's orders denying his motions for postconviction relief. Appointed appellate counsel,

Jon A. LaMendola, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2015-16).[1] Guzman was informed of his right to respond, but he has not done so. After reviewing the no-merit report and conducting an independent review of the record, we conclude that there are no issues of arguable merit that could be pursued on appeal. Therefore, we affirm.

After a jury trial, Guzman was convicted of the charge on January 17, 2014. Appointed appellate counsel filed a no-merit appeal on Guzman's behalf. On July 21, 2015, we directed counsel to file a supplemental no-merit report discussing several potential issues. We informed counsel that in lieu of filing a supplemental no-merit report, counsel could move to voluntarily dismiss the no-merit appeal and file a postconviction motion. Guzman's counsel moved to dismiss the appeal and filed a postconviction motion. The circuit court denied the motion without a hearing. Guzman's counsel then filed the current no-merit appeal.

The no-merit report first addresses whether there would be arguable merit to a claim that the verdict is not supported by sufficient evidence. Guzman was convicted of conspiracy to possess more than forty grams of cocaine with intent to deliver. *See* WIS. STAT. §§ 961.41(1m)(cm)4., 939.31. "A person is a member of a conspiracy if, with intent that a crime be committed, the person agrees with or joins with another for the purpose of committing that crime." WIS JI—CRIMINAL 570.

We view the evidence in the light most favorable to the verdict, and if more than one inference can be drawn from the evidence, we must accept the one drawn by the jury. *See* ***State***

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

v. Poellinger, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The verdict "will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." *See* ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation omitted).

Confidential informant T.H. testified that he contacted Elias Hernandez multiple times attempting to purchase a kilogram of cocaine. Hernandez did not have the cocaine, but said he knew someone who could get it. T.H. told the jury that after several days Hernandez told him to come over to his house with the money because he could get T.H. the cocaine. T.H. testified that when he arrived with money at the house to purchase the cocaine, Hernandez was there with Guzman. T.H. testified that the three of them—T.H., Hernandez and Guzman—sat in the kitchen and waited until the cocaine arrived. Shortly thereafter, a person brought the cocaine to the house, and Hernandez opened up the package with a knife to inspect the cocaine. T.H. testified that he told the men after looking at the cocaine that he did not want to purchase it, as he had been instructed by the police. He then left the house. T.H. testified that he was wearing audio and video surveillance equipment, which had been placed on him by the police. The recordings were introduced as evidence and played for the jury.

Victor Perea testified that Guzman, who is his brother-in-law, contacted him about obtaining a kilogram of cocaine for another person who wanted to buy it. Perea testified that he contacted his friend, Jesus Mancinas Villareal, who got the cocaine. Perea testified that he and Villareal took the cocaine to the house where T.H., Guzman and Hernandez were waiting with the money. Perea testified that he did not know T.H. or Hernandez. Perea said that T.H. told him he did not like the quality of the cocaine. Perea testified that Guzman told T.H. that the

cocaine was "good," but T.H. decided not to buy it. Perea testified that he and Villareal left the house and drove away with the cocaine. They were then pulled over and arrested by the police, who seized the cocaine.

Multiple police officers and detectives testified about the investigation they conducted, about their observations from nearby during the sale, and about the arrests and seizure of the cocaine after the men left the house. The parties stipulated that the police seized a kilogram of cocaine. The State also introduced a series of phone calls between T.H. and Hernandez during which T.H. attempted to arrange the purchase. The testimony and other evidence was sufficient to support the guilty verdict. There would be no arguable merit to a challenge to the sufficiency of the evidence.

The no-merit report next addresses whether Guzman knowingly, intelligently, and voluntarily waived his right to testify. A criminal defendant has a fundamental constitutional right to testify. ***State v. Weed***, 2003 WI 85, ¶40, 263 Wis. 2d 434, 666 N.W.2d 485. Because the right to testify is a fundamental constitutional right, a defendant who chooses not to testify must intentionally relinquish that right. ***Id***. To that end, "[a] circuit court should conduct a colloquy with the defendant in order to ensure that the defendant is knowingly and voluntarily waiving his or her right to testify." ***Id***. During the on-the-record colloquy outside the presence of the jury, the circuit court should ascertain that: "(1) the defendant is aware of his or her right to testify and (2) the defendant has discussed this right with his or her counsel." ***Id.***, ¶43. Here, the circuit court advised Guzman of his right to testify and gave him the opportunity to confer with his counsel with the assistance of a translator. The circuit court asked Guzman if anyone had pressured him not to testify and asked him whether he had any questions. Based on the

record, there would be no arguable merit to a claim that Guzman did not knowingly and voluntarily waive his right to testify.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court erroneously exercised its discretion when it sentenced Guzman to thirteen years of imprisonment, consisting of eight years of initial confinement and five years of extended supervision. "The principal objectives of a sentence include, but are not limited to, the protection of the community, the punishment of the defendant, 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. "A sentencing court should indicate the general objectives of greatest importance and explain how, under the facts of the particular case, the sentence selected advances those objectives." ***Id***. A circuit court properly exercises its discretion when it engages in a process of reasoning based on the facts of record and the appropriate legal standards, and reaches a conclusion founded on a logical rationale. *See* ***State v. Gallion***, 2004 WI 42, ¶¶19, 21, 270 Wis. 2d 535, 678 N.W.2d 97.

The circuit court began its remarks by discussing the gravity of the crime. The circuit court stated that Guzman was involved in selling an extremely large quantity of cocaine, one of the largest amounts the court had seen in recent years, which had a negative effect on the community in many different ways. The court pointed out that although Guzman was convicted of possessing more than forty grams of cocaine, he had in excess of *one thousand* grams of cocaine. The circuit court considered mitigating circumstances, noting that despite the large quantity of cocaine involved, it did not believe that Guzman was the main supplier; he was not living a fancy lifestyle, he was working hard at a foundry to support his family, he was actively involved in his church, and he was known to help others. Nevertheless, the court reasoned that a

serious punishment was necessary to deter Guzman and others who would sell drugs. The circuit court stated that it wanted to send a clear message that this activity would not be tolerated. Because the circuit court applied the appropriate legal standard to the facts of this case and reached a result that was reasoned and reasonable, we conclude that there would be no arguable merit to a challenge to the sentence on appeal. *See* ***id***.

We next turn to the circuit court's decision that Guzman was not eligible for the substance abuse program. When we ordered a supplemental no-merit report addressing the circuit court's decision in this respect, we stated:

> At sentencing, the circuit court ordered, *inter alia*, that Guzman was ineligible for the Wisconsin substance abuse program, stating Guzman does "not have a substance abuse problem." The record that reached this court includes documents indicating that Guzman was an active participant in Alcoholics Anonymous. Trial counsel's sentencing remarks included information that Guzman entered AA in 2008 based on his alcohol abuse. The court would be assisted by trial counsel's discussion of why this does not provide an arguably meritorious basis for further postconviction proceedings to seek sentence modification. Relevant case law may include ***State v. Steele***, 2001 WI App 160, 246 Wis. 2d 744, 632 N.W.2d 112 and ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1. Other statutes and case law may also be relevant.

As previously mentioned, appellate counsel voluntarily dismissed the first no-merit appeal and filed a postconviction motion challenging, among other things, the circuit court's ruling making Guzman ineligible for the substance abuse program. In denying Guzman's argument on this point, the circuit court explained:

> The defendant's alternative motion for sentence modification alleges that "had counsel further clarified or reinforced for the court the defendant's documented alcohol or other drug issues, the defendant would have been found eligible for the Substance Abuse Program." The court found the defendant ineligible for this program at the time of sentencing, stating that the

> defendant "[does not] have a substance abuse problem. You have a substance distribution problem. And that's a big problem for the community." This does not mean to say that the court was unaware of the defendant's history of alcohol abuse. Trial counsel discussed the defendant's alcoholism at length, and his remarks included information that the defendant was a "very active participant" in Alcoholics Anonymous and that he is "very involved in that." The fact of the matter is that the defendant's alcoholism was under control, but his criminality was not. The defendant involved himself in trafficking an inordinately large quantity of cocaine, and it is that behavior that the court considered in making its sentencing decision in this case and when it found him ineligible for the early release programs. Further emphasizing the defendant's past alcohol abuse would not have changed the court's eligibility determination in any respect, and therefore, counsel did not provide ineffective assistance in this regard.

Because the circuit court explained why it declined to make Guzman eligible for the substance abuse program, there would be no arguable merit to a claim that the circuit court misused its sentencing discretion.

The no-merit report next addresses whether there would be arguable merit to a claim that Guzman is entitled to resentencing based on a new factor. 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." ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). "Whether a fact or set of facts presented by the defendant constitutes a 'new factor' is a question of law." ***Id.***, ¶33. Whether a new factor justifies sentence modification is committed to the circuit court's discretion. ***Id***.

Guzman's appellate counsel states in the no-merit report that he is not aware of any new factor that would support a motion to modify Guzman's sentence. Counsel advises this court that Guzman has not suggested to him that any new factor exists. Therefore, we conclude that

there would be no arguable merit to a claim that Guzman is entitled to resentencing based on a new factor.

The no-merit report addresses whether there would be arguable merit to a claim that Guzman received constitutionally ineffective assistance from his trial counsel. "Whether a defendant received ineffective assistance of trial counsel is a two-part inquiry under ***Strickland v. Washington***, 466 U.S. 668 (1984)." ***State v. Jenkins***, 2014 WI 59, ¶35, 355 Wis. 2d 180, 848 N.W.2d 786. "A defendant must show both (1) that counsel performed deficiently; and (2) that the deficient performance prejudiced the defendant." ***Id***. A defendant is prejudiced if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.***, ¶37.

Guzman's appellate counsel explains that "[a]fter an independent review of the court record, the transcripts, trial counsel's file, and discussing the case" with Guzman, he concluded that there is no arguable basis for a claim that trial counsel provided ineffective assistance of counsel. Counsel also notes: "Trial counsel made necessary and appropriate objections during the trial which were properly ruled upon." Appellate counsel also detailed a few circumstances in which trial counsel could have made an objection during trial, but did not do so. After reviewing those circumstances, we agree with appellate counsel that trial counsel did not perform deficiently by failing to raise those objections either because they would have been overruled or because the matters discussed were not sufficiently significant to warrant objections. Moreover, the result of the trial would not have been different if the circuit court had sustained the objections given the weighty evidence implicating Guzman. *See* ***id.*** (a defendant is prejudiced when there is a reasonable probability that the result of the proceeding would have been different

but for counsel's omission). Therefore, Guzman cannot show that he was prejudiced. There is no arguable merit to a claim that Guzman received ineffective assistance of trial counsel.

Finally, we agree with the circuit court's analysis and rejection of the evidentiary issue raised in the supplemental postconviction motion and conclude that it does not warrant additional discussion. Our independent review of the record reveals no other potential issues of arguable merit. Therefore, we affirm the judgment of conviction and orders denying postconviction relief. We also relieve Attorney LaMendola of further representation of Guzman.

IT IS ORDERED that the judgment and orders of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jon A. LaMendola is relieved of further representation of Rodrigo Gallegos Guzman. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals