



OFFICE OF THE CLERK  
**WISCONSIN COURT OF APPEALS**

110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT I**

June 14, 2019

To:

Hon. Daniel L. Konkol  
Circuit Court Judge  
Safety Building Courtroom, # 502  
821 W. State Street  
Milwaukee, WI 53233-1427

John Barrett  
Clerk of Circuit Court  
821 W. State Street, Room G-8  
Milwaukee, WI 53233

Karen A. Loebel  
Deputy District Attorney  
821 W. State St.  
Milwaukee, WI 53233

Pamela Moorshead  
Assistant State Public Defender  
735 N. Water St., Ste 912  
Milwaukee, WI 53202-4116

Criminal Appeals Unit  
Department of Justice  
P.O. Box 7857  
Madison, WI 53707-7857

Mark A. Espanol 608932  
Oregon Correctional Inst.  
P.O. Box 25  
Oregon, WI 53575-0025

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

---

2015AP2478-CRNM      State of Wisconsin v. Mark A. Espanol (L.C. # 2012CF5789)

Before Kessler, P.J., Brennan and Brash, 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).**

Mark A. Espanol appeals from a judgment of conviction for two counts of delivery of between fifteen and forty grams of cocaine. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18),<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967).

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Espanol has filed several responses to the no-merit report. *See* RULE 809.32(1)(e). Counsel was ordered to file a supplemental no-merit report. *See* RULE 809.32(1)(f). Thereafter, Espanol filed several more responses to the no-merit report.<sup>2</sup> Upon consideration of these submissions and an independent review of the record, the judgment is summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Espanol twice made sales of cocaine to undercover drug investigators. On a third occasion Espanol delivered to an undercover agent what he represented to be heroin for \$1540 and an additional \$100 for setting up the transaction. The substance was not heroin. No further sales were made after the fake delivery of heroin. Espanol was arrested and charged several months later at the close of the drug investigation.

Espanol entered guilty pleas. Under the plea agreement, the prosecution would recommend “substantial prison” at sentencing.<sup>3</sup> At sentencing, the prosecutor just recommended prison and did not request “substantial prison.” Espanol was sentenced to consecutive terms totaling ten years of initial confinement and six years of extended supervision and awarded 124 days of sentence credit. The sentencing court indicated that Espanol would not be eligible for

---

<sup>2</sup> Mark Espanol filed correspondence construed to be responses to the no-merit report on March 14, 2016, May 16, 2016, September 13, 2016, October 31, 2016, December 14, 2016, January 5, 2017, January 23, 2017, March 22, 2017, and November 9, 2017. In October 2018, Attorney Robert E. Haney, appointed counsel and author of the no-merit report and supplemental no-merit report, was substituted and successor appointed counsel assigned from the Office of the State Public Defender. A second substitution of appointed counsel was made in February 2019. Assistant State Public Defender Pamela Moorshead is now counsel of record.

<sup>3</sup> A misdemeanor charge in a separate case was dismissed as part of the disposition of this case.

the Substance Abuse Program or Challenge Incarceration Program because the court wanted Espanol to serve every day of initial confinement to which he was sentenced.

The no-merit report addresses the potential issues of whether Espanol's plea was knowingly, voluntarily, and intelligently entered, whether the prosecution breached the plea agreement, whether the sentence was the result of an erroneous exercise of discretion, whether the circuit court properly denied postconviction counsel's motion to withdraw after Espanol indicated he did not want counsel to withdraw, and whether the circuit court properly denied Espanol's pro se postsentencing motion for an order directing the Department of Corrections to stop taking money from Espanol's inmate account to pay costs and restitution.<sup>4</sup> This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit.

In his initial response to the no-merit report, Espanol asserts that the plea agreement required him to work as a confidential informant for the Bureau of Alcohol, Tobacco, and Firearms (ATF), and that he only agreed to the plea deal so that he could be released on bond in time to be with his mother as she was dying.<sup>5</sup> He claims that when he entered his plea, he was under severe duress due to his mother's condition and said anything necessary to get to the point where release was a possibility. He writes that "never in my right mind would I have plead

---

<sup>4</sup> As to Espanol's pro se motion to stop collection from his inmate account, this court recently held that "[o]nce the [circuit] court orders restitution, it is within the [Department of Corrections'] authority to collect it from an inmate." See *State v. Williams*, 2018 WI App 20, ¶7, 380 Wis. 2d 440, 909 N.W.2d 177. Moreover, "the circuit court, acting as the sentencing court, lacks the competency to address an allegedly improper disbursement of funds by the DOC." *Id.*, ¶4.

<sup>5</sup> Espanol entered his plea on January 17, 2013, and at the conclusion of the hearing it was confirmed that bail would continue to be \$5000 cash. On April 4, 2013, the prosecution sought and obtained modification of bail to a \$5000 personal recognizance bond. Espanol indicates that his mother died March 28, 2013 and that he was not released on the personal recognizance bond until April 10, 2013, two weeks after his mother's funeral.

guilty on an open plea deal knowing that no promises were made” in exchange for the life risking work he promised federal investigators. On May 16, 2016, this court ordered appointed counsel to file a supplemental no-merit report addressing whether there are additional terms to the plea agreement that were not recorded in the record and, if so, whether the State substantially and materially breached the plea bargain and whether there were factors extrinsic to the plea colloquy that may have rendered the plea unknowing, unintelligent, or involuntary.

In the supplemental no-merit report, appointed counsel provided a proffer letter signed by the prosecutor and Espanol which outlined terms of any assistance Espanol would give police.<sup>6</sup> The letter required Espanol to first take full responsibility for the crimes with which he was charged and put the case “in the posture of resolution.” The letter indicated that any cooperation given to law enforcement would be brought to the attention of the appropriate prosecutor’s office and the court. It stated: “Mr. Espanol has not been made any promises regarding any criminal charges that are presently pending against him or which could be issued against him in the future.” The supplemental no-merit report also describes investigation appointed counsel conducted to ascertain whether the police officer assigned to the ATF taskforce made any promise to protect Espanol or his family and that the officer reported no such promise unless Espanol or his family were actually threatened with harm. Based on the letter and appointed counsel’s conversation with the police officer, the supplemental no-merit report concludes there is no merit to claims that additional promises were made to Espanol to induce his guilty pleas, that perceived promises were broken, or that any factors extrinsic to the plea colloquy rendered the plea unknowing, unintelligent, or involuntary. We agree that neither the record nor facts

---

<sup>6</sup> The letter was signed by Espanol on January 17, 2013, the same day he entered his guilty pleas.

which could be developed give rise to any arguable claim that Espanol's plea is suspect. Although Espanol was motivated to enter his guilty pleas by a desire to obtain release to see his dying mother, it was not part of the plea agreement.

We now set forth the remaining themes within Espanol's multiple responses to the no-merit report and the reason that no issues of arguable merit exist:

- Espanol could not be charged with manufacturing when he simply provided packaged drugs as a middle man. This contention has no merit because the complaint charges Espanol only with delivery, not manufacturing.
- Trial counsel was ineffective for recommending a plea deal which was of no benefit to Espanol and for advising Espanol that he would get little to no jail time because of the work he was doing with investigators. This claim has no merit because the plea deal had the benefit of the prosecution agreeing to not recommend a certain or severe sentence and also the dismissal of the other misdemeanor case. That counsel misjudged the likely sentence is not a basis for an ineffective assistance of counsel claim. *State v. Provo*, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272.
- Espanol received a "tremendously unfair" sentence totally out of proportion to sentences of other defendants who committed more severe crimes and had worse criminal records. Also, Espanol should have been made eligible for earned release programs because he committed non-violent drug offenses and it was his first time being sent to prison. This claim has no merit because the mere fact that a defendant's sentence is different than others is insufficient to support a

conclusion that it is unduly disparate. See *State v. Perez*, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992). “A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). Espanol’s eight-year sentence on each count is well within the twenty-five year maximum. Imposing consecutive sentences was also within the sentencing court’s discretion. See *State v. Paske*, 163 Wis. 2d 52, 62, 471 N.W.2d 55 (1991). The sentencing court explained that the offenses, which occurred on separate occasions, were serious because they demonstrated Espanol’s willingness to bring drugs into the community. The sentencing court also indicated that there was no eligibility for earned release programs because it wanted Espanol to serve every day of those periods of initial confinement. That again was within the court’s discretion. See WIS. STAT. § 973.01(3g).

- Espanol was treated unfairly because the investigation which resulted in charges against him was discredited by the federal government and was illegal as investigating agents set up a store front selling knock-off and pirated goods. The discrediting of the investigation resulted in the release of more than twenty people charged during the investigation. Espanol thinks he should have been one of those individuals because he had little involvement in drug trafficking. This claim has no merit because Espanol’s perception that he was treated unfairly does not mean his constitutional rights were in fact violated and there is nothing in the

record to suggest that they were. At the plea hearing, Espanol admitted he committed the crimes. Flaws in the investigation as to other defendants do not change that.

- Trial counsel was ineffective at sentencing because he did not object when the prosecutor outlined Espanol's past record, including a felony conviction that was thirteen years old and charges made but dismissed. This claim has no merit because there is no suggestion that the information was inaccurate or that there was a basis to object. Also, the sentencing court was made aware that the charges were dismissed. A sentencing court may consider offenses which were uncharged and unproven. See *Elias v. State*, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980).
- Appellate counsel was ineffective in not pursuing a motion for sentence modification. This claim has no merit because the record does not show any basis for sentence modification. Although Espanol lists his accomplishments in prison, the strides he has made in his desire to remain drug free and better himself for good, and his desire to help his family and others upon release, rehabilitation and success in prison is not a new factor justifying a sentence reduction. See *State v. Crochiere*, 2004 WI 78, ¶22, 273 Wis. 2d 57, 681 N.W.2d 524, *abrogated on other grounds by State v. Harbor*, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828. Further, a no merit report is an approved method by which appointed counsel discharges the duty of representation. See *State ex rel. Flores v. State*, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362 (1994). This court's acceptance of the no-merit report and discharge of appointed counsel of any further duty of representation

rests on the conclusion that counsel provided the level of representation constitutionally required.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Espanol further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Pamela Moorshead is relieved from further representing Mark A. Espanol in this appeal. *See* WIS. STAT. RULE 809.32(3).

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

---

*Sheila T. Reiff*  
*Clerk of Court of Appeals*