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August 23, 2022

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

2019AP1435-CRNM State of Wisconsin v. Francisco Delgadillo-Perez
(L. C. No. 2016CF559)

Before Stark, P.J., Hruz and Gill, 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).

Counsel for Francisco Delgadillo-Perez filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20),[1] concluding that no grounds exist to challenge Delgadillo-Perez's conviction for attempted first-degree intentional homicide with use of a dangerous weapon as an act of domestic abuse. Delgadillo-Perez filed a response raising several challenges to his

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

conviction and sentence. 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.

The State charged Delgadillo-Perez with attempted first-degree intentional homicide; two counts of strangulation and suffocation; felony intimidation of a victim; and two counts of mental harm to a child, all six counts with use of a dangerous weapon and the first four counts as acts of domestic abuse. The charges arose from allegations that Delgadillo-Perez repeatedly stabbed his live-in ex-girlfriend, Chloe.[2]

According to the complaint, Delgadillo-Perez stabbed a knife into Chloe's neck before covering her mouth with his hand and attempting to choke her. Chloe removed the knife from her neck and yelled for her two children, then ages eight and twelve, asking them to call 911. As the older child was calling 911, Delgadillo-Perez "fell on him" and tried to slice him with another knife. In their efforts to protect their mother, each child received minor injuries as Delgadillo-Perez attempted to stab Chloe with a second knife. Delgadillo-Perez ultimately dropped that knife when he pulled Chloe to the floor and started choking her. Delgadillo-Perez then used a third knife to stab Chloe in the face and neck area. As she attempted to defend herself, Delgadillo-Perez cut the index and middle fingers of Chloe's right hand, severing her tendons. The twelve-year-old child was eventually able to push Delgadillo-Perez away from

[2] Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

Chloe, and Delgadillo-Perez then stated he was sorry and began cutting his own neck and stabbing himself before fleeing the residence.

Police responded to the home, and Chloe was transported to the hospital with lifethreatening injuries. Delgadillo-Perez was found by law enforcement in a field approximately one and one-half miles from the residence, with self-inflicted life-threatening injuries.

In exchange for Delgadillo-Perez's no-contest plea to attempted first-degree intentional homicide with use of a dangerous weapon as an act of domestic abuse, the State agreed to recommend that the circuit court dismiss and read in the remaining counts. The parties remained free to argue at sentencing, but the State agreed to recommend no more than twenty-five years of initial confinement. Out of a maximum possible sentence of sixty-five years, including the five-year sentence enhancer for using a dangerous weapon, the court imposed a thirty-year sentence consisting of twenty years of initial confinement followed by ten years of extended supervision.

As an initial matter, we note that the no-merit report acknowledges Delgadillo-Perez can read and understand the Spanish language, and the record reflects that a sworn interpreter was utilized during circuit court proceedings. The no-merit report addresses whether: (1) Delgadillo-Perez knowingly, intelligently, and voluntarily entered his no-contest plea; (2) whether the circuit court properly exercised its sentencing discretion; (3) whether Delgadillo-Perez was sentenced on the basis of accurate information; and (4) whether there are any new factors justifying sentence modification. Upon our review of the record, we agree with counsel's description, analysis, and conclusion that none of these issues has arguable merit. The

no-merit report sets forth an adequate discussion of these potential issues to support the no-merit conclusion.

In his response to the no-merit report, Delgadillo-Perez challenges the effectiveness of his trial counsel. To establish ineffective assistance of counsel, Delgadillo-Perez must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the deficient performance resulted in prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, Delgadillo-Perez must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

First, Delgadillo-Perez faults his trial counsel for failing to pursue his release on bond at his initial appearance. Because the bond issue is now moot, we refrain from addressing it on appeal. *See generally* ***State v. Witkowski***, 163 Wis. 2d 985, 988, 473 N.W.2d 512 (Ct. App. 1991) (appellate courts act only to determine actual controversies and will not consider moot questions). Delgadillo-Perez also claims there was insufficient evidence to support a bindover; however, Delgadillo-Perez waived his preliminary hearing. To the extent Delgadillo-Perez suggests his trial counsel waived the preliminary hearing without Delgadillo-Perez's permission, the record belies this claim. During a colloquy with the circuit court, Delgadillo-Perez confirmed that it was his intent to waive the preliminary examination; that he read and understood the waiver form before signing it; that he had no questions about the contents of the form; and that no threats or promises were made to prompt the waiver. Even if Delgadillo-Perez had not waived the preliminary hearing, any claimed defect in a preliminary hearing is moot in light of a valid guilty or no-contest plea. *See* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991).

Delgadillo-Perez also claims his trial counsel was ineffective by failing to pursue a jury trial and coercing him into entering a no-contest plea by telling him he "better take the deal" or "end up getting a life sentence." Again, the record belies his claims. As discussed in the no-merit report, the record reflects that Delgadillo-Perez knowingly, intelligently, and voluntarily entered his no-contest plea. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). The court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Delgadillo-Perez completed, informed Delgadillo-Perez of the elements of the offense, the penalties that could be imposed, and the constitutional rights he waived by entering a no-contest plea, including his right to a jury trial. The court confirmed Delgadillo-Perez'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 Delgadillo-Perez of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c). Further, Delgadillo-Perez confirmed that no one had made any threats or promises to him to ensure the entry of his no-contest plea, and that he was satisfied with the representation he had received from his attorney.

Delgadillo-Perez additionally asserts that his trial counsel was ineffective by failing to pursue a motion to suppress statements Delgadillo-Perez made to law enforcement. During pretrial proceedings, his trial counsel noted that Delgadillo-Perez made several statements "regarding employment, immigration status, things of that nature, before he was" read his ***Miranda***[3] rights. When the circuit court inquired whether a ***Miranda-Goodchild***[4] hearing was

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

necessary, counsel responded that the statements that are "arguably subject to exclusion, are not particularly relevant and would not affect … our posture for trial one way or another." After the circuit court explained the purpose of a ***Miranda-Goodchild*** hearing, Delgadillo-Perez waived his right to such a hearing.

Next, Delgadillo-Perez contends his trial counsel was unaware of local rules of the court. During pretrial proceedings, the circuit court acknowledged that trial counsel had "not practiced before me, or at least taken [a case] up to a jury trial before." The court then explained its expectations with respect to when any motions in limine and proposed jury instructions should be filed. Nothing in the record suggests that any initial unfamiliarity with the court's expectations on trial counsel's part prejudiced Delgadillo-Perez.

Delgadillo-Perez also claims that "[i]f his [trial counsel] would have brought to the attention of the [circuit] [c]ourt that when he was arrested, he was found laying in a field, and he tried to kill himself[,], [t]hen a [m]ental [c]ompetency [h]earing would have taken place." It appears that Delgadillo-Perez may be asserting that his trial counsel was ineffective by failing to pursue a plea of not guilty by reason of mental disease or defect (NGI). WISCONSIN STAT. § 971.15(3) provides: "Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence." Delgadillo-Perez's valid no-contest plea waives all non-jurisdictional

[4] A circuit court holds a ***Miranda-Goodchild*** hearing to determine whether a suspect's rights under ***Miranda*** were honored and also whether any statement the suspect made to the police was voluntary. *See* ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

defects and defenses. *See* ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

Moreover, the presence of a mental disease or defect does not automatically excuse a defendant from the legal consequences of his or her conduct. ***State v. Duychak***, 133 Wis. 2d 307, 316-17, 395 N.W.2d 795 (Ct. App. 1986). The critical inquiry is "whether, as a result of a certain mental condition, a defendant lacks substantial capacity to either appreciate the wrongfulness of the defendant's conduct or conform the defendant's conduct to the requirements of the law." ***Id.*** Delgadillo-Perez's post-attack apology, combined with his self-inflicted wounds and decision to flee the scene, suggest a consciousness of guilt rather than an incapacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. Ultimately, the record does not support a nonfrivolous claim that defense counsel should have pursued an NGI plea.

To the extent Delgadillo-Perez suggests that he was not competent to enter a no-contest plea, there were approximately fifteen months between Delgadillo-Perez's arrest and the entry of his no-contest plea. Nothing in the record suggests that Delgadillo-Perez's conduct at the time of his arrest impacted his ability to understand the plea proceedings, especially in light of his responses during the plea colloquy.

Citing ***State v. Briggs***, 218 Wis. 2d 61, 579 N.W.2d 783 (Ct. App. 1998), Delgadillo-Perez next contends that the concept of attempt is not reconcilable with first-degree intentional homicide; therefore, his counsel was ineffective by failing to challenge the offense as unknown to law. Delgadillo-Perez's reliance on ***Briggs***, however, is misplaced. There, the court held that the crime of "attempted felony murder" did not exist in Wisconsin, as "one cannot

attempt to commit a crime which does not itself include an element of specific intent." ***Id.*** at 66. Here, first-degree intentional homicide includes the element of intent to kill. *See* WIS. STAT. § 940.01(1)(a). The crime of attempted first-degree intentional homicide is committed by one who, with intent to commit first-degree intentional homicide, does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor. *See* WIS. STAT. § 939.32. Because there is no arguable merit to Delgadillo-Perez's claim that the crime to which he pled does not exist, his derivative challenge to the effectiveness of his trial counsel fails. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (holding that counsel is not deficient for failing to raise a meritless claim).

In sum, nothing in the record suggests that Delgadillo-Perez was prejudiced by any claimed deficiency on the part of his trial counsel. Therefore, there is no basis for challenging trial counsel's performance and no grounds for appellate counsel to request a ***Machner***[5] hearing.

Next, Delgadillo-Perez alleges prosecutorial misconduct with respect to discovery—specifically, with respect to the victim's address and statements. The record reflects that the State moved for a protective order to withhold Chloe's address from the defense, as she was fearful of continued violence by Delgadillo-Perez and/or people acting on his behalf. According to the State, Chloe had been "receiving some pressure from the Mexican community in her area," and she took issue with contact made by an interpreter who previously worked with

[5] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Delgadillo-Perez. Defense counsel opposed the motion, emphasizing that the State's motion could not connect Delgadillo-Perez personally to any inappropriate behavior.

After balancing Delgadillo-Perez's right to conduct his defense against the rights of the victim, the circuit court ordered disclosure of Chloe's address to defense counsel for the purpose of trial preparation, with the understanding that the address would not be shared with Delgadillo-Perez. That the prosecutor believed protecting Chloe's address from Delgadillo-Perez was warranted under the circumstances does not establish a nonfrivolous claim of prosecutorial misconduct. From Delgadillo-Perez's response, it is unclear what victim statements were denied to him. The statements made by Chloe and her children to law enforcement were attached to the criminal complaint.

Delgadillo-Perez also asserts it was an "abuse of discretion" for the prosecutor to "bring charges on counts of doubtful merit for the purpose of coercing" Delgadillo-Perez to plead guilty to a less serious offense. Delgadillo contends that because he thought he was being charged with first-degree intentional homicide, he pled to the "lesser" charge. The record, however, reflects that Delgadillo-Perez was initially charged with the same crime to which he ultimately pled no contest: attempted first-degree intentional homicide with use of a dangerous weapon and as an act of domestic abuse. That Delgadillo-Perez initially may have misunderstood the offense with which he was charged does not support a nonfrivolous challenge to the prosecutor's charging discretion.

To the extent Delgadillo-Perez also claims the State breached the plea agreement, the record belies his claim. As noted above, the State agreed to recommend no more than twenty-five years of initial confinement under the plea agreement. Although Delgadillo-Perez

emphasizes that the State recommended a forty-five-year sentence, he concedes that the State recommended twenty-five years of initial confinement and twenty years of extended supervision. Any claim of prosecutorial misconduct as alleged by Delgadillo-Perez's response would lack arguable merit.

Delgadillo-Perez also asserts "judicial error," claiming that the circuit court should not have permitted waiver of the preliminary hearing. As discussed above, Delgadillo-Perez confirmed his desire to waive the preliminary hearing after a colloquy with the court. To the extent Delgadillo-Perez contends that the court should have suppressed statements made to law enforcement before he was read his ***Miranda*** rights, there was no suppression motion filed and Delgadillo-Perez personally waived his right to a ***Miranda-Goodchild*** hearing.

Delgadillo-Perez also appears to challenge the circuit court's sentencing discretion, claiming he "should have been sentenced under a lesser included offense because nobody died in this case." However, Delgadillo-Perez pled no contest to *attempted* first-degree intentional homicide. As discussed in the no-merit report, the court considered proper sentencing factors before imposing a sentence authorized by law. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. There is a presumption that Delgadillo-Perez's sentence, which is well within the maximum allowed by law, is not unduly harsh or unconscionable, nor "so excessive and unusual" as to shock public sentiment. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507; *see also* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Finally, Delgadillo-Perez contends that his appointed appellate counsel was ineffective by failing to challenge jury instructions. There was no trial at which jury instructions would

have been given. If Delgadillo-Perez is challenging the jury instruction that was attached to the plea questionnaire form, Delgadillo-Perez fails to identify any error in the instruction, and we discern none.

To the extent Delgadillo-Perez challenges the effectiveness of his appellate counsel generally and seeks the assistance of a "competent attorney," a no-merit report is an approved method by which appointed counsel may discharge his or her duty of representation. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362 (1994). Delgadillo-Perez is not entitled to the appointment of new counsel merely because he disagrees with counsel's no-merit conclusion. As discussed above, we have concluded there is no arguable merit to further postconviction or appellate proceedings in this case. This court's decision accepting the no-merit report and discharging appointed counsel of any further duty of representation rests on the conclusion that counsel provided the required level of representation.

Our independent review of the record discloses no other potential issue for appeal.[6]

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Ellen J. Krahn is relieved of her obligation to further represent Francisco Delgadillo-Perez in this matter. *See* WIS. STAT. RULE 809.32(3).

[6] To the extent the no-merit response makes other claims that are not discussed with specificity in this opinion, they are also rejected because we discern no potential issues of arguable merit. *See generally* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996); ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

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

Sheila T. Reiff
Clerk of Court of Appeals