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DISTRICT I/III

January 15, 2013

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

2012AP2226-CRNM State of Wisconsin v. Andrew Joseph Mendoza
(L.C. #2010CF5147)

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

Counsel for Andrew Mendoza has filed a no-merit report concluding no grounds exist to challenge Mendoza's conviction for attempted armed robbery with use of a dangerous weapon, as a party to a crime. Mendoza was advised of his right to respond and has not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no merit to any issue that could be raised and summarily affirm.

Mendoza and Phillip Mora attempted to rob two members of the Mexican Posse criminal street gang, and during a struggle the two victims were shot and killed. DNA from hair found

imbedded in one victim's fingernail implicated Mendoza in the crime. Mendoza was charged with two counts of first-degree intentional homicide with use of a dangerous weapon, as a party to a crime, and one count of attempted armed robbery with use of a dangerous weapon, as a party to a crime. Mendoza subsequently pled guilty to an amended Information charging attempted armed robbery with use of a dangerous weapon, as a party to a crime. The circuit court imposed a sentence of eight years' initial incarceration and four years' extended supervision.

The no-merit report addresses whether an issue of arguable merit arises concerning the circuit court's granting of a motion in limine seeking to admit statements Mora made to police, and during telephone calls with a confidential informant. Mora appeared at the motion hearing and asserted his Fifth Amendment right not to testify. Mora also rejected the State's offer of immunity, indicated he would refuse to comply with a court order to testify, and thereby was rendered unavailable.

The court limited the admissibility to statements Mora made during a telephone conversation on February 23, 2010, and "to the things he did." The court concluded Mora's statements to the effect that "Mendoza was just there with me and I did all the popping, which is the shooting," were neither testimonial statements nor hearsay. The court concluded these statements were admissible as admissions against penal interest. The court also concluded, "to the extent that in the same statement they [mention Mendoza], those would come in."

Here, there is no question that Mora was unaware that he was speaking to a confidential informant or that his statements might later be used at trial. Mora's statements were therefore not testimonial in nature. *See* ***Crawford v. Washington***, 541 U.S. 36, 51-52 (2004); *see also* ***United States v. Farhane***, 634 F.3d 127, 162-63 (2d Cir. 2011). Mora's statement also squarely

implicated his own involvement in the shooting and thereby rendered his statements reliable. As the circuit court properly observed, "people don't just go around telling people they shot other people." Moreover, the statement that "Mendoza was just there with me," did not implicate Mendoza as the shooter and resulted in the State amending the Information. There is no arguable basis upon which Mendoza could challenge the court's ruling on the motion in limine.

There is also no arguable basis upon which Mendoza could withdraw his guilty plea. *See* ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court's colloquy, buttressed by the plea questionnaire and waiver of rights form, informed Mendoza of the constitutional rights he waived by pleading guilty, the elements of the offense and the potential penalty. The court specifically advised Mendoza it could impose the maximum penalty and was not bound by the parties' agreement. A proper factual basis supported the conviction. Mendoza's plea was freely, voluntarily and intelligently entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Entry of a valid guilty plea constitutes a waiver of nonjurisdictional defects and defenses. ***Id.*** at 265-66.

The record also discloses no basis for challenging the court's sentencing discretion. The court considered the proper factors, including Mendoza's character, the seriousness of the offense and the need to protect the public. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The sentence imposed was far less than the maximum allowable by law and therefore presumptively neither harsh nor excessive. *See* ***State v. Grindemann***, 2002 WI App 106, ¶32, 255 Wis. 2d 632, 648 N.W.2d 507.

Our independent review of the record discloses no other issues of arguable merit. Therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2009-10).

IT IS FURTHER ORDERED that attorney Sara Eberhardy is relieved of further representing Mendoza in this matter.

Diane M. Fremgen
Clerk of Court of Appeals