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

2012AP1401-CRNM State of Wisconsin v. Raul M. Mendoza (L.C. #2010CF3737)

Before Brown, C.J., Reilly and Gundrum, JJ.

Raul M. Mendoza appeals from a judgment of conviction for one count of second-degree reckless homicide while armed with a dangerous weapon, as a party to the crime, contrary to WIS. STAT. §§ 940.06(1), 939.63(1)(b), and 939.05 (2009-10). Upon Mendoza's guilty plea, the trial court imposed a twenty-seven year bifurcated sentence, with seventeen years of initial confinement and ten years of extended supervision. The trial court did not impose a fine, but

ordered that Mendoza pay the discretionary WIS. STAT. § 973.046(1g) (2011-12)[1] DNA surcharge. Mendoza's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Mendoza received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The no-merit report addresses the potential issues of whether the trial court properly denied Mendoza's suppression motion, whether Mendoza's plea was freely, voluntarily and knowingly entered, and whether the sentence was the result of an erroneous exercise of discretion. Our review of the record persuades us that no issue of arguable merit could arise from any of these points.

The criminal complaint alleged that in July 2010 Mendoza and three other individuals, including the victim, had been drinking beer all day in Mendoza's basement, when the victim made comments that upset Mendoza. With the assistance of his codefendants, Mendoza repeatedly hit, kicked, and stabbed the victim. Rather than rendering assistance, the defendants left the victim on the floor where he eventually died. The next day, Mendoza and a codefendant dumped the victim's body in an alley. Police officers questioned Mendoza and the two

[1] All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

codefendants, and each admitted to having participated in the attack. Mendoza was charged with one count of first-degree reckless homicide as a party to the crime.

Trial counsel filed a motion to suppress statements, alleging that Mendoza's custodial statements to police were involuntary due to "promises and misrepresentation by the interviewing detectives." At the evidentiary hearing, the State presented the testimony of one of the interviewing detectives. The detective testified that prior to asking questions, he read Mendoza his ***Miranda***[2] rights in Spanish, and that Mendoza stated he understood those rights and wished to make a statement. The detective testified that there were three officers present during the interview and that it lasted about an hour and was conducted primarily in Spanish. The detective testified that Mendoza never asked for an attorney, that he was cooperative throughout the interrogation, and that his answers were responsive to the officers' questions. A recording of the interview was entered into evidence. Mendoza did not testify at the suppression hearing. Trial counsel explained:

> I have spent much time with Mr. Mendoza in the jail and with the assistance of an interpreter sometimes and sometimes not.
>
> It is his belief that because he was still suffering from the effects of intoxication during this interview, that is a relevant issue. I have however to the best of my ability explained to him the parameters of the voluntariness and Miranda test for admissibility of the statement.
>
> I believe he now understands that, and he based on that understanding does not feel that it is necessary to testify.

The trial court then ascertained from Mendoza that he agreed with trial counsel's representation and that after discussing the matter with her, had personally decided not to testify. The trial

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

court found that the detective's undisputed testimony was credible and denied Mendoza's suppression motion. The trial court found that the detective provided the ***Miranda*** warnings to Mendoza, and that Mendoza unequivocally indicated his desire to waive those rights and to make a statement. From the detective's testimony, the trial court determined that the officers did not threaten, coerce or promise anything to Mendoza during the interview, and that Mendoza was cooperative, coherent and talkative. The trial court found that Mendoza did not appear to be intoxicated, and had informed the officers that he was not under the influence of an intoxicant and did not suffer from a mental illness. The trial court found that Mendoza never appeared to be in any pain or discomfort and noted that there was no evidence presented that Mendoza had any personal characteristics that would render him unduly susceptible to police pressure. The trial court concluded that Mendoza's ***Miranda*** waiver and his subsequent statements were knowingly and voluntarily made.

We agree with appellate counsel's conclusion that any challenge to the trial court's denial of Mendoza's suppression motion would be without arguable merit. A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice. ***State v. Clappes***, 136 Wis. 2d 222, 235-36, 401 N.W.2d 759 (1987). In determining whether a statement is voluntary, we consider the totality of the circumstances and balance the personal characteristics of the defendant against the pressures imposed by law enforcement in inducing the statement. ***State v. Hoppe***, 2003 WI 43, ¶38, 261 Wis. 2d 294, 661 N.W.2d 407. On review, we will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Berggren***, 2009 WI App 82, ¶23, 320 Wis. 2d 209, 769 N.W.2d 110. This court independently applies constitutional principles to the trial court's factual findings to determine whether the statement was voluntary. ***Hoppe***, 261 Wis. 2d 294, ¶35.

In this case, the detective's suppression hearing testimony was undisputed, and the trial court found the testimony to be credible. The trial court's findings were not clearly erroneous. In determining that Mendoza's custodial statement was voluntary, the court applied the correct legal standard and the relevant balancing test. The trial court's factual findings support a legal conclusion that Mendoza's statements were the product of his free will and deliberate choice, and were thus voluntary.

We also conclude that no arguable issue of merit exists from the taking of Mendoza's guilty plea. The record shows that with the assistance of a Spanish interpreter, the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1)(a), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. As part of the parties' plea agreement, the State filed an amended information reflecting a reduced charge of second-degree reckless homicide while armed with a dangerous weapon, as a party to the crime. The trial court ascertained from trial counsel that she had discussed the amended information and the offense elements with Mendoza. Mendoza stated that he understood the amendment and agreed with the court's statement that he expected to "plead guilty to second degree homicide as party to a crime while armed." The trial court also drew Mendoza's attention to the signed plea questionnaire reflecting the amended charge and the attached addendum indicating that by entering his plea, Mendoza was giving up his right to raise certain defenses. The trial court ascertained that Mendoza had reviewed and signed these documents with the assistance of his attorney and a Spanish interpreter. The trial court ascertained that Mendoza understood the contents of the plea questionnaire, including his constitutional rights, and that he wished to waive those rights and plead guilty.

The record demonstrates that the trial court informed Mendoza of the maximum penalty with the dangerous weapons enhancer and ascertained Mendoza's understanding that the court could impose that maximum penalty regardless of the plea agreement or the parties' recommendations. The trial court recited the essential elements of second-degree reckless homicide, including the definition of criminal recklessness, and the elements of party to a crime liability. The trial court ascertained that Mendoza understood the elements. The trial court personally ascertained the existence of a factual basis for the amended charge. *See* WIS. STAT. § 971.08(1)(b). Finally, the trial court read and ascertained Mendoza's understanding of the statutory deportation warning. No issue of merit exists from the plea taking.

At sentencing, as discussed in appellate counsel's no-merit report, the State adhered to the terms of the parties' plea agreement. Though the trial court had previously ordered the preparation of a presentence investigation (PSI), due to the lack of an available translator, the PSI was not completed. The parties affirmatively agreed to proceed without a PSI. In lieu of the PSI, the department of corrections provided the trial court with a memorandum concerning Mendoza's prior criminal history and correctional experience. Mendoza disputed the accuracy of the memo, specifically contesting the existence of any out-of-state prior record. With the State's consent, the trial court agreed to consider only the undisputed prior battery conviction from Wisconsin.

In fashioning the sentence, the court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The trial court considered mitigating factors relating to Mendoza's character, such as his prior work as an alcohol counselor, the positive impact he had on the community before his "fall from grace," the death of his mother weeks

before the incident, and his fairly insubstantial criminal record. However, the trial court considered the severity of the offense and Mendoza's leading or "primary" role to be aggravating factors. *See* ***State v. Lynch***, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981) (though the trial court must consider the proper sentencing factors, the weight to be given each factor lies within its discretion). The trial court cited to the extreme violence and brutality of the attack and noted that the victim died a "horrific" death and "survived for what's estimated to be at least an hour meaning while the three of you ignored his plea and his condition." The trial court stated:

> Considering the good you've done while important certainly doesn't outweigh the extremely violent nature of your actions, and again what is the real tragedy that is what happened to [the victim] that evening and your role and responsibility for that.

The trial court also determined that Mendoza posed "a risk of committing very dangerous acts" and that the community needed protection. The court explained that its sentence was the least restrictive alternative consistent with meeting its goals of punishment, honoring and appreciating the victim and the offense severity, and protecting the community through deterrence and rehabilitation. We conclude that the trial court properly exercised its discretion at sentencing. Further, given the facts of this case and the reduced charge,[3] we cannot conclude that the twenty-seven year sentence is so excessive or unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Mendoza's sentence was three years less than the maximum penalty for the crime of conviction and less than half of the statutory maximum for the crime as originally charged. *See* ***State v. Kaczynski***, 2002 WI App

[3] In determining its sentence, the trial court noted that Mendoza was originally charged with a sixty-year, Class B felony. The trial court stated that the bargained-for amendment to a Class D felony was appropriate, but that the "substantial" concession with its reduced exposure was a relevant consideration.

276, ¶13, 258 Wis. 2d 653, 654 N.W.2d 300 (where defendant received the benefit of a substantial charging concession, the trial court's imposition of the maximum sentence did not shock "the community's sense of justice").

Finally, we conclude that the trial court properly exercised its discretion in imposing the $250 DNA analysis surcharge. *See* WIS. STAT. § 973.046(1g); ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. The trial court explained that it was ordering the surcharge because it is "important for rehabilitative needs."

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 Raul M. Mendoza 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 Maayan Silver is relieved from further representing Raul M. Mendoza in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals