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DISTRICT II

March 27, 2013

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

2012AP1712-CRNM State of Wisconsin v. Jose L. Garcia, Jr. (L.C. # 2011CF204)

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

Jose Garcia, Jr. appeals from a judgment convicting him as party to the crime of manufacturing/delivering cocaine contrary to WIS. STAT. § 961.41(1)(cm)2. (2011-12)[1] and possessing cocaine with intent to deliver contrary to § 961.41(1m)(cm)4. Garcia'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). Garcia received a copy of the report and was advised of his

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

right to file a response. He has not done so. Upon consideration of the report and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Garcia's no contest pleas were knowingly, voluntarily and intelligently entered; and (2) whether the circuit court misused its sentencing discretion. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of his no contest pleas, Garcia answered questions about the pleas and his understanding of his constitutional rights during a colloquy with the circuit court that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The record discloses that Garcia's no contest pleas were knowingly, voluntarily and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that they had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the plea questionnaire and waiver of rights form Garcia signed is competent evidence of knowing and voluntary pleas. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the

time a plea is taken. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32. We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Garcia's no contest pleas.[2]

With regard to the sentences, the record reveals that the sentencing court's discretionary decisions had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. The court adequately discussed the facts and factors relevant to sentencing Garcia to a ten-year term for manufacturing/delivering cocaine and a concurrent eleven-year term for possessing cocaine with intent to deliver. In fashioning the sentences, the court considered the seriousness of the offenses, Garcia's character, history of other offenses, need for punishment and rehabilitation, 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 sentences complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentences.

The circuit court required Garcia to pay the DNA surcharge under WIS. STAT. § 973.046 unless he has already done so. The court stated reasons for this discretionary decision. ***State v. Cherry***, 2008 WI App 80, ¶¶8-9, 312 Wis. 2d 203, 752 N.W.2d 393. No issue of arguable merit could arise from a challenge to the imposition of the DNA surcharge.

[2] Two counts were dismissed and read in as part of the plea agreement. At a March 30, 2011 hearing, the court commissioner advised Garcia that dismissed and read-in counts could be considered at sentencing. We conclude that Garcia was advised of the effect of the read-ins. ***Garski v. State***, 75 Wis. 2d 62, 77, 248 N.W.2d 425 (1977).

Our independent review of the record does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment of conviction and relieve Attorney Mark Rosen of further representation of Garcia in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Mark Rosen is relieved of further representation of Jose Garcia, Jr. in this matter.

Diane M. Fremgen
Clerk of Court of Appeals