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

**DISTRICT III/II**

May 22, 2013

*To*:

Hon. Rod W. Smeltzer
Circuit Court Judge
Dunn County Judicial Center
615 Stokke Parkway, Suite 1500
Menomonie, WI 54751

Clara Minor
Clerk of Circuit Court
Dunn County Judicial Center
615 Stokke Parkway, Suite 1500
Menomonie, WI 54751

Chris A. Gramstrup
Gramstrup Law Office
1409 Hammond Ave., Ste. 322
Superior, WI 54880

James M. Peterson
District Attorney
615 Stokke Parkway
Menomonie, WI 54751

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Cesar D. Zepeda 584911
New Lisbon Corr. Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

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

---

2012AP1484-CRNM State of Wisconsin v. Cesar D. Zepeda (L.C. # 2010CF67)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Cesar Zepeda appeals from a judgment convicting him of possessing tetrahydrocannabinols as party to the crime contrary to WIS. STAT. § 961.41(1m)(h)2. (2009-10). Zepeda's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Zepeda received a copy of the report and was advised of his right to file a response. He has not done so. Upon consideration of the

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

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 Zepeda's no contest plea was knowingly, voluntarily, and intelligently entered and had a factual basis; (2) whether the circuit court misused its sentencing discretion; and (3) whether Zepeda received effective assistance from his trial counsel.

Appellate counsel opines in the no-merit report that the plea colloquy was adequate. Although we disagree, we nevertheless conclude that the defect in the colloquy was an "insubstantial defect" pursuant to ***State v. Taylor***, 2013 WI 34, ¶39, ___ Wis. 2d ___, ___ N.W.2d ___. Therefore, we conclude that there would be no arguable merit to a claim that Zepeda's no contest plea was other than knowingly, intelligently, and voluntarily entered. ***Id.***, ¶28.

Zepeda pled no contest to possession of tetrahydrocannabinols with intent to deliver 200-1000 grams as party to the crime. During the plea colloquy, the circuit court did not inform Zepeda of one of the elements of the crime: Zepeda had to know that he possessed tetrahydrocannabinols. WIS JI—CRIMINAL 6035. The circuit court asked Zepeda's counsel if she discussed the elements of the crime with Zepeda, and she responded that she did. But, the court did not then ask counsel to make a record of her discussion with Zepeda.

The plea colloquy is defective on its face because the circuit court did not discuss the knowledge element of the crime. In ***State v. Bangert***, 131 Wis. 2d 246, 268, 389 N.W.2d 12 (1986), the court stated that the circuit court can discharge its duties at the colloquy by asking

defense counsel whether he or she explained the required material to the defendant and having counsel summarize the extent of explanation. Here, the court did not ask counsel to summarize the elements discussion she had with Zepeda.

Despite this error, we conclude that the circuit court's failure to advise Zepeda of the knowledge element is an "insubstantial defect" in the plea colloquy. In ***Taylor***, the supreme court affirmed the denial of a plea withdrawal motion without a hearing because the record showed that the defendant knew he was exposed to an eight-year sentence as a repeater even though the circuit court informed him at the plea colloquy that the maximum penalty was six years. ***Taylor***, 2013 WI 34, ¶¶1-8. The ***Taylor*** court held that a ***Bangert*** plea colloquy violation exists only when the plea was not entered knowingly, intelligently, and voluntarily. ***Taylor***, 2013 WI 34, ¶39. Where the record reflects that the plea was properly entered, no ***Bangert*** violation occurs. ***Taylor***, 2013 WI 34, ¶42.

We turn to the record in Zepeda's appeal. Zepeda stipulated that the criminal complaint was sufficient to support his plea. The complaint alleged that Zepeda admitted in an interview with law enforcement that he sold one pound of tetrahydrocannabinols to a confidential informant and that he had another pound of tetrahydrocannabinols at the house where he was staying. Zepeda did not challenge these admissions in the circuit court. Therefore, the record establishes that Zepeda knew that he possessed tetrahydrocannabinols. Consequently, the circuit court's failure to advise Zepeda of this element did not render Zepeda's plea improper. There would be no arguable merit to a motion to withdraw the no contest plea on this basis.

The record reveals that the circuit court did not determine that Zepeda understood the party to the crime liability to which he entered a no contest plea. We conclude that the court's

omission did not render the plea colloquy defective. In ***State v. Brown***, 2012 WI App 139, ¶1, 345 Wis. 2d 333, 824 N.W.2d 916, we held that a plea colloquy at which the circuit court fails to explain party to the crime liability is not defective if the defendant admits to directly committing the act. Such an admission renders superfluous the explanation of party to the crime liability. ***Id.*** Here, Zepeda stipulated to a complaint that alleged his admission that he sold one pound of tetrahydrocannabinols to a confidential informant and possessed another pound, i.e., he directly committed the crime of possession tetrahydrocannabinols with intent to deliver. Therefore, the circuit court's failure to explain party to the crime liability did not render the plea colloquy defective.

We have reviewed the balance of the plea colloquy. Zepeda answered questions about the plea and his understanding of his constitutional rights. The balance of the plea colloquy complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794.[2] After considering the record and ***Taylor***, we conclude that Zepeda's no contest plea was knowingly, voluntarily, and intelligently entered, ***State v. Bangert***, 131 Wis. 2d at 260, and that the plea 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 Zepeda signed is competent evidence of a knowing and voluntary plea. ***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

[2] We note that Zepeda, who is not a United States citizen, was advised of the deportation consequences of his no contest plea. ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794.

time a plea is taken. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32. There would be no arguable merit to a challenge to the entry of Zepeda's no contest plea.

With regard to the sentence, the record reveals that the sentencing court's discretionary decision 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 Zepeda to a five-year term. In fashioning the sentence, the court considered the seriousness of the offense, Zepeda's character, and the need to protect the public and rehabilitate and punish Zepeda. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The felony sentence 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 sentence.

The no-merit report addresses whether Zepeda received effective assistance from his trial counsel. We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a postconviction motion in the circuit court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether there such a claim would have sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner*** hearing.

The no-merit report does not relate any specific complaint about trial counsel's performance, and Zepeda has not responded to the no-merit report to elaborate on any such claim. Our independent review of the record does not reveal the existence of an ineffective assistance claim.

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 Chris Gramstrup of further representation of Zepeda 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 Chris Gramstrup is relieved of further representation of Cesar Zepeda in this matter.

---

*Diane M. Fremgen*
*Clerk of Court of Appeals*