**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

January 9, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-2935-CR-NM**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**CARLOS FACUNDO,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Carlos Facundo appeals from a judgment of conviction resulting from a three-day jury trial. Facundo was found guilty of possession of a controlled substance (cocaine) with intent to deliver, in an amount of over 400 grams, a felony contrary to §§ 161.16(2)(b) and 161.41(cm)5, STATS.

The state public defender appointed Attorney Ruth Downs to represent Facundo. Attorney Downs has filed a no merit appeal. RULE 809.32, STATS. In accordance with ***Anders v. California***, 386 U.S. 738 (1967), counsel, as well as the clerk of this court, informed Facundo that he could reply to the no merit report, and he has done so.[1]

Counsel's report examines whether any merit exists to the following issues: (1) whether the evidence was sufficient to sustain the verdict; (2) whether the case should have been dismissed for prosecutorial misconduct; (3) whether the circuit court erred in excluding from evidence a statement by the former district attorney; (4) whether the circuit court erred in denying Facundo's motion to suppress incriminating statements; (5) whether the circuit court correctly ruled regarding a bailiff's statement—presumptively overheard by some jurors—that Facundo had absconded on the third (and last) day of trial; (6) whether the circuit court improperly denied motions for mistrial; and (7) whether the sentence imposed was not a correct exercise of the circuit court's discretion.

Facundo also raises several questions, chief among which is the disparate punishment which he received compared to a police officer who tampered with the cocaine evidence.

We have closely examined each question raised by counsel, and concur with counsel that none of these issues has merit. We have carefully examined each of Facundo's arguments and find them meritless. In addition, our independent review of the record, mandated by ***Anders***, reveals no other potential issue.

With Facundo's written consent, police searched a mobile home Facundo shared with another. Over 400 grams of cocaine were found. Facundo volunteered to police officers that the cocaine was his.

[1] Facundo moves for permission to file only one copy of his brief. We grant the motion.

This appeal presents an unusual feature—after the evidence was recovered, it was tampered with by a police officer, who took some of the cocaine for his own use. As reprehensible as this behavior was, however, we conclude that it did not affect the result of this case, because the cocaine was taken after the state crime lab had weighed and analyzed the contraband.

We also conclude that this action did not "enmesh" the government into the criminal activity so as to make repugnant defendant's prosecution. ***State v. Gibas***, 184 Wis.2d 355, 516 N.W.2d 785 (Ct. App. 1994). This is because the police officer's action of taking the cocaine was not part of any scheme to prejudice Facundo's case.

In addition, although we acknowledge a discrepancy in sentencing the police officer and Facundo, we conclude there is no merit to Facundo's argument based on the discrepancy. Facundo was found with over 400 grams of cocaine. The police officer's misdeed involved less than 100 grams. Facundo hid the cocaine, the police officer voluntarily alerted the authorities to his misdeed. These different fact situations support the district attorney's exercise of prosecutorial discretion in charging. *See* ***Harris v. State***, 78 Wis.2d 357, 254 N.W.2d 291 (1977).

A closer question is the district attorney's behavior in concealing for nineteen days—during a period when plea negotiations were still theoretically open—her knowledge that a police officer had tampered with the evidence. However, we conclude, as did the circuit court and appointed counsel, that Facundo's case was not prejudiced by this lapse. This is especially so in that the district attorney did not communicate with Facundo during this time, but sought advice on how to handle the situation from the state's attorney general, among others.[2]

Because we find no merit to any argument raised by counsel or appellant personally, and because we find no merit to any independently discovered issue, we affirm.

---

[2] This case was eventually prosecuted by the Attorney General's Office, rather than the District Attorney's Office

*By the Court.*—Judgment affirmed.