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**DISTRICT III/IV**

October 24, 2016

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

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2016AP901-CRNM State of Wisconsin v. Evan T. Mooney (L.C. # 2014CF431)

Before Kloppenburg, P.J., Higginbotham and Blanchard, JJ.

Attorney Dennis Schertz, appointed counsel for Evan Mooney, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to Mooney's plea or sentencing. Mooney was sent a copy of the report, but he has not filed a response. Upon independently reviewing the entire record, as well

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Mooney was charged with multiple criminal counts based on an incident in which the car Mooney was driving struck and killed a pedestrian. Pursuant to a plea agreement, Mooney pled no contest to an amended charge of homicide by use of a motor vehicle with a detectable amount of a controlled substance in the blood, and the remaining counts were dismissed and read in for sentencing purposes. The court sentenced Mooney to eight years of initial confinement and ten years of extended supervision.

The no-merit report addresses whether there would be arguable merit to a challenge to the validity of Mooney's plea. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that satisfied the court's mandatory duties to personally address Mooney and determine information such as Mooney's understanding of the nature of the charge and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. There is no indication of any basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Mooney's plea would lack arguable merit.

The no-merit report also addresses whether there would be arguable merit to a challenge to Mooney's sentence. A challenge to a circuit court's exercise of its sentencing discretion must overcome our presumption that the sentence was reasonable. ***State v. Ramuta***, 2003 WI App 80,

¶23, 261 Wis. 2d 784, 661 N.W.2d 483. Here, the court explained that it considered facts relevant to the standard sentencing factors and objectives, including the seriousness of the offense, Mooney's character, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶25, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was well within the maximum Mooney faced, and therefore was not so excessive or unduly harsh as to shock the public's conscience. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. We discern no erroneous exercise of the court's sentencing discretion.

At sentencing, the circuit court stated that Mooney "is to submit a DNA sample and pay the requisite surcharge." Thus, it appears that the $250 DNA surcharge was imposed as mandatory. Mooney committed the felony offense in this case in October 2013, and he was sentenced in October 2015. The imposition of the DNA surcharge for a felony conviction was discretionary at the time Mooney committed his offense, *see* WIS. STAT. § 973.046(1g) (2011-12), but was mandatory for each felony conviction at the time of his sentencing, *see* 2013 Wis. Act 20, §§ 2355, 9426(1)(am). However, there would be no arguable merit to a challenge to imposition of the surcharge. The record shows that this is Mooney's first felony conviction in Wisconsin. In ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, *review granted* (WI Mar. 7, 2016) (No. 2014AP2981-CR), we rejected an *ex post facto* challenge to imposition of the mandatory DNA surcharge under this scenario. ***Id.***, ¶1. We held that imposition of the DNA surcharge was not intended to be punitive, "but rather an administrative charge to pay for the collection" of DNA samples, "along with the expenditures needed to administer the DNA data bank." ***Id.***, ¶13.

Moreover, even if there were arguable merit to a claim that the DNA surcharge should not have been imposed as mandatory, there would be no arguable merit to a claim that the circuit

court erroneously exercised its discretion under the law in effect at the time Mooney committed his offense. *See* WIS. STAT. § 973.046(1g) (2011-12) (providing that a circuit court may impose a DNA surcharge for felony convictions). If the circuit court fails to explain its exercise of discretion, this court will search the record for reasons to support the court's decision. *See* ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983). Thus, "[r]egardless of the extent of the trial court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion." ***State v. Payano***, 2009 WI 86, ¶41, 320 Wis. 2d 348, 768 N.W.2d 832 (quoted source omitted). We have held that the circuit court need not explicitly describe its reasons for imposing a DNA surcharge or otherwise use "magic words." ***State v. Ziller***, 2011 WI App 164, ¶¶12, 13, 338 Wis. 2d 151, 807 N.W.2d 241. Rather, we examine the circuit court's entire sentencing to determine if imposition of the DNA surcharge is a proper exercise of discretion. *See* ***id.***, ¶¶11-13. Here, the record supports the court's imposition of the surcharge as an exercise of its discretion. *See* ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393 (proper factor for circuit court to consider in deciding to impose DNA surcharge is "whether the defendant has provided a DNA sample in connection with the case so as to have caused DNA cost").

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of any further representation of Evan Mooney in this matter. *See* WIS. STAT. RULE 809.32(3).

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