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DISTRICT I

November 8, 2013

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

2013AP960-CRNM State of Wisconsin v. Charles D. Odom (L.C. #2011CF1631)

Before Curley, P.J., Kessler and Brennan, JJ.

Charles D. Odom is pursuing an appeal from a judgment, entered upon his guilty plea, convicting him of one count of first-degree reckless homicide. Attorney Mark S. Rosen filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32 (2011-12).[1] Odom filed a letter response to the initial no-merit report and, at our request, Attorney Rosen filed a supplemental no-merit report to address whether Odom could pursue an

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

arguably meritorious challenge to the DNA surcharge. Upon review of the no-merit report, the supplement, Odom's letter, and the record, we conclude that a challenge to the DNA surcharge would be arguably meritorious. Therefore, we reject the no-merit report, dismiss this matter without prejudice, and extend the deadline for Odom to file a postconviction motion or notice of appeal.

In the supplemental no-merit report, appellate counsel appears to conclude that the circuit court erroneously exercised its discretion when it imposed a DNA surcharge based on "the severity of the offense." Appellate counsel indicates, however, that "a postconviction motion would be arguably meritless" because the circuit court might impose the surcharge for an alternative reason. Appellate counsel, however, does not demonstrate that a proper exercise of discretion requires a DNA surcharge or that the circuit court would necessarily reject a challenge to the surcharge upon considering the appropriate factors and the arguments of counsel as to why a surcharge should be vacated.

When appellate counsel files a no-merit report, the question presented to this court is whether, upon review of the entire proceedings, any potential argument would be wholly frivolous. *See* ***Anders***, 386 U.S. at 744. The test is not whether the attorney should expect the argument to prevail. *See* SCR 20:3.1, comment (action is not frivolous even though the lawyer believes his or her client's position will not ultimately prevail). Rather, the question is whether the potential issue so lacks a basis in fact or law that counsel's pursuit of the appeal would be unethical. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 436 (1988).

We conclude that further proceedings to challenge the DNA surcharge would not lack arguable merit based on the record presented here. Therefore, we reject the no-merit report. We

additionally encourage appellate counsel to consider whether he declined to pursue any other issues based on his ability to formulate an opposing argument. If so, we urge counsel to consider whether further proceedings would nonetheless be arguably meritorious within the meaning of ***Anders*** and ***McCoy***.

IT IS ORDERED that the no-merit appeal is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the deadline for appellate counsel to file a postconviction motion or a notice of appeal is extended through the date forty-five days after this order. *See* WIS. STAT. RULE 809.82(2)(a).

Diane M. Fremgen
Clerk of Court of Appeals