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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 II

December 23, 2014

To:

Hon. Thomas J. Gritton
Circuit Court Judge
Winnebago County Courthouse
P.O. Box 2808
Oshkosh, WI 54903-2808

Melissa M. Konrad
Clerk of Circuit Court
Winnebago County Courthouse
P.O. Box 2808
Oshkosh, WI 54903

Christian A. Gossett
District Attorney
P.O. Box 2808
Oshkosh, WI 54903-2808

Roberta A. Heckes
Attorney at Law
P.O. Box 295
Adell, WI 53001

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

Zechariah M. Mathe, #543679
Kettle Moraine Corr. Inst.
P.O. Box 282
Plymouth, WI 53073-0282

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

2014AP1328-CRNM State of Wisconsin v. Zechariah M. Mathe (L.C. #2013CF374)

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

Zechariah M. Mathe appeals from a judgment of conviction of two counts of being a party to the crime of burglary. His 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). Mathe received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, we reject the no-merit

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

report because an issue of arguable merit is presented by the record and not discussed in the no-merit report. The time for Mathe to file a postconviction motion under WIS. STAT. RULE 809.30 is extended.

Mathe entered a no-contest plea to the two counts of burglary without the charged repeater enhancer. Another count of burglary and a separate misdemeanor case were dismissed as read-ins at sentencing. On one count Mathe was sentenced to four years' initial confinement and four years' extended supervision to be served consecutive to a sentence he was already serving after the revocation of supervision in a previous case. On the second count, sentence was withheld in favor of eight and one-half years' probation. At sentencing the court noted that Mathe's DNA sample was already on file. It ordered Mathe to pay the \$250 mandatory DNA surcharge under WIS. STAT. § 973.046(1r) (through 2013 Wisconsin Act 380, December 13, 2014), which was made applicable by 2013 WI Act 20, §§ 2355, 9426 to sentences imposed after January 1, 2014.²

An issue of arguable merit exists as to whether the mandatory DNA surcharge imposed for crimes committed before the effective date of the statutory change violates the ex post facto clause of the Wisconsin and United States constitutions. An ex post facto law is one that

² WISCONSIN. STAT. § 973.046(1r) (through 2013 Wisconsin Act 380, December 13, 2014) provides:

If a court imposes a sentence or places a person on probation, the court shall impose a deoxyribonucleic acid analysis surcharge, calculated as follows:

- (a) For each conviction for a felony, \$250.
- (b) For each conviction for a misdemeanor, \$200.

“makes more burdensome the punishment of a crime, after its commission.” *State v. Thiel*, 188 Wis. 2d 695, 703, 524 N.W.2d 641 (1994) (citation omitted). This court is aware that the issue of whether the mandatory surcharge can be applied to crimes committed before January 1, 2014, is being litigated in some circuit courts within the state and that it may be presented by three appeals recently docketed in this court.³

The no-merit report does not discuss the mandatory DNA surcharge. The potential issue is not currently preserved for appellate review in this case because no postconviction motion was filed raising it. *See State v. Barksdale*, 160 Wis. 2d 284, 291, 466 N.W.2d 198 (Ct. App. 1991) (generally a motion to modify a sentence is a prerequisite to appellate review of a defendant’s sentence). We cannot conclude that further postconviction proceedings on Mathe’s behalf lack arguable merit.⁴ Therefore, the no-merit report is rejected.

Upon the foregoing reasons,

IT IS ORDERED that the WIS. STAT. RULE 809.32 no-merit report is rejected, appointed counsel’s motion to withdraw is denied, and this appeal is dismissed.

³ The three known appeals that may present the issue are: *State v. Elward*, 2014AP2569-CR, *State v. Radaj*, 2014AP2496-CR, *State v. Monahan*, 2014AP2187-CR.

⁴ We have considered whether the imposition of the DNA surcharge was a proper exercise of discretion under WIS. STAT. § 973.046(1g), which provides that the court “may” impose the surcharge when imposing a sentence for a felony conviction. *See State v. Cherry*, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393 (where the sentencing court has discretion to impose the DNA surcharge it must do something more than stating it is imposing the DNA surcharge simply because it can). The record does not reflect consideration of any factors that would support imposing the surcharge as a discretionary ruling.

IT IS FURTHER ORDERED that the WIS. STAT. RULE 809.30 deadline for filing a postconviction motion is reinstated and extended to thirty days after remittitur.

Diane M. Fremgen
Clerk of Court of Appeals