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**DISTRICT II**

February 4, 2015

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

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2014AP1135-CRNM      State of Wisconsin v. Sean M. Regan (L.C. # 2013CF350)

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

Sean Regan appeals from judgments convicting him of two counts of first-degree recklessly endangering safety contrary to WIS. STAT. § 941.30(1) (2011-12)<sup>1</sup> and one count of criminal damage to property contrary to WIS. STAT. § 943.01(2)(d). Regan's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Regan 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

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<sup>1</sup> All subsequent references to the Wisconsin Statutes are to the 2011-12 version.

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

Regan pled no contest. At sentencing the court ordered Regan to provide a DNA sample and pay a \$250 DNA surcharge under WIS. STAT. § 973.046(1r). As grounds for ordering Regan to pay the DNA surcharge, the court stated, “The law changed effective January 1, 2014. And the surcharge of \$250 is mandatory. And that surcharge is ordered.” The crimes of conviction, which Regan committed in August 2013, were not crimes subject to a mandatory DNA surcharge under the law at the time Regan committed the crimes. Regan was sentenced in January 2014.

WISCONSIN STAT. § 973.046(1r) (through January 1, 2015)<sup>2</sup> was amended by 2013 WI Act 20, § 2355, to make mandatory the DNA surcharge for a felony conviction. The mandatory DNA surcharge was made applicable to sentences imposed on or after January 1, 2014. 2013 WI Act 20, § 9426(1)(am).

An issue of arguable merit exists as to whether the mandatory DNA surcharge imposed on Regan 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

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<sup>2</sup> WISCONSIN. STAT. § 973.046(1r) (through January 1, 2015) 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.

that ““makes more burdensome the punishment of the crime, after its commission.”” *State v. Thiel*, 188 Wis. 2d 695, 703, 524 N.W.2d 56 (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.<sup>3</sup>

The no-merit report does not discuss the imposition of 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 Regan’s behalf lack arguable merit.<sup>4</sup> 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.

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

<sup>4</sup> We have considered whether the imposition of the DNA surcharge was a proper exercise of discretion under the version of WIS. STAT. § 973.046(1g) (2011-12) that existed before the revisions made by 2013 WI Act 20, §2355. The former version of the statute 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 on Regan 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.

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