



OFFICE OF THE CLERK
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

April 8, 2015

To:

Hon. David M. Reddy
Circuit Court Judge
Walworth County Courthouse
P.O. Box 1001
Elkhorn, WI 53121

Sheila Reiff
Clerk of Circuit Court
Walworth County Courthouse
P.O. Box 1001
Elkhorn, WI 53121-1001

Ellen J. Krahn
Assistant State Public Defender
P. O. Box 7862
Madison, WI 53707

Daniel A. Necci
District Attorney
P.O. Box 1001
Elkhorn, WI 53121-1001

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

Fred J. Schneider, #286438
Racine Corr. Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

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

2014AP2612-CRNM	State of Wisconsin v. Fred J. Schneider (L.C. #2012CF355)
2014AP2613-CRNM	State of Wisconsin v. Fred J. Schneider (L.C. #2012CT546)

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

In these consolidated cases, Fred J. Schneider appeals from judgments convicting him of operating while intoxicated (OWI) as a twelfth offense and operating after revocation (OAR). Schneider's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)¹ and *Anders v. California*, 386 U.S. 738 (1967). Schneider 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

¹ All references to the Wisconsin Statutes are to the 2013-14 version.

the report and an independent review of the record, we reject the no-merit report because issues of arguable merit are presented by the record and not discussed in the no-merit report. The time for Schneider to file a postconviction motion under WIS. STAT. RULE 809.30 is extended.

Schneider entered guilty pleas to OWI as a twelfth offense and OAR. The charges stemmed from actions occurring in August 2012. Schneider was not sentenced until March 2014. On the OWI charge, the circuit court imposed a sentence of seven and a half years of initial confinement and five years of extended supervision, as well as a fine of \$6400.² On the OAR charge, the court imposed one year in jail and no fine, running the jail time consecutive to the prison sentence. Finally, the court ordered Schneider to pay the mandatory DNA surcharges for his crimes under WIS. STAT. § 973.046(1r), which were made applicable by 2013 WI Act 20 §§ 2355, 9426 to sentences imposed after January 1, 2014.³

An issue of arguable merit exists as to Schneider’s ability to pay the fine of \$6400. As noted in *State v. Ramel*, 2007 WI App 271, ¶15, 306 Wis. 2d 654, 743 N.W.2d 502, it is “necessary that a sentencing court determine at the time of sentencing whether a defendant has the ability to pay a fine if the court intends to impose one.” Here, the court made no such

² The circuit court explained that its fine was “based upon the guidelines for a 6th offense at a .179 BAC [which was] \$3,200 and it’s double that amount.”

³ WISCONSIN STAT. § 973.046(1r) 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.

determination, and the record contains facts questioning Schneider's ability to pay. For example, Schneider was twice appointed counsel by the State Public Defender due to his indigent status. Furthermore, Schneider filed a motion for reduction of bail on the ground that a \$5000 cash bond was "beyond his means."⁴

An issue of arguable merit also exists as to whether the mandatory DNA surcharges 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 "makes more burdensome the punishment for 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 surcharges 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.⁵

The no-merit report does not discuss either Schneider's ability to pay the fine or the mandatory DNA surcharges. The potential issues are not currently preserved for appellate review in this case because no postconviction motion was filed raising them. *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

⁴ We are not concluding that Schneider does not have the ability to pay the fine. Rather, we are simply observing that the circuit court needed to make a record on the issue. It should be noted that Schneider's conviction for OWI as a twelfth offense allows for a fine of up to \$25,000.

⁵ 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.

conclude that further proceedings on Schneider's behalf lack arguable merit. 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 these appeals are dismissed.

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