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**DISTRICT I**

September 2, 2015

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

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2014AP2713-CRNM State of Wisconsin v. Trayvon M. Smith
2014AP2714-CRNM (L.C. # 2013CF005646 and L.C # 2014CM000334)

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

In these consolidated appeals, Trayvon M. Smith appeals from a judgment of conviction for one count of being an adjudged delinquent in possession of a firearm (a felony), and from a judgment of conviction for one count of intimidating a victim, with the domestic abuse modifier (a misdemeanor), contrary to WIS. STAT. §§ 941.29(2)(b), 940.44(2) and 968.075(1)(a) (2013-14).[1] Both crimes were committed in December 2013. Smith's appellate counsel has filed a no-

[1] These were Smith's first criminal convictions, but he had numerous prior juvenile adjudications.

(continued)

merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Smith 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 report because at least two issues of arguable merit are presented by the record and not discussed in the no-merit report.[2] The time for Smith to file a postconviction motion under WIS. STAT. RULE 809.30 is extended.

Pursuant to a plea agreement, Smith pled guilty to the felony and misdemeanor noted above, and one other felony and two other misdemeanors were dismissed and read in. The State agreed to recommend a prison sentence, with the length and conditions left to the court. The trial court sentenced Smith to three years of initial confinement and four years of extended supervision for the felony, and it imposed a consecutive nine-month sentence for the

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

[2] In addition, we have identified another issue which, if we were not rejecting the no-merit report on other grounds, would have necessitated the filing of a supplemental no-merit report. As explained in this order, Smith's convictions were the result of a plea agreement. When the trial court conducted its plea colloquy with Smith, it did not advise him that the court was not bound by the plea agreement, even though it was required to do so. *See* ***State v. Hampton***, 2004 WI 107, ¶32, 274 Wis. 2d 379, 683 N.W.2d 14 ("If the [trial] court discovers that 'the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court.'") (citation and emphasis omitted). ***Hampton*** did not carve out exceptions to its requirement that a trial court advise the defendant that it is not bound by sentence and charge concessions, and we are bound by that case.

A defendant may move to withdraw a guilty plea based on a deficient plea colloquy by making a two-prong showing. The defendant must demonstrate that: (1) the colloquy did not conform with WIS. STAT. § 971.08 or other duties mandated during a plea hearing; and (2) the defendant did not know or understand the information that should have been provided at the hearing. ***Hampton***, 274 Wis. 2d 379, ¶46. In this case, it appears that Smith may be able to satisfy the first prong of a plea withdrawal motion by making a prima facie showing that the trial court did not comply with one of its mandatory duties. As to the second prong, the no-merit report did not discuss whether Smith understood that the plea agreement did not bind the court. We encourage postconviction/appellate counsel to discuss with Smith whether there would be any basis to seek plea withdrawal and, if so, whether Smith wishes to pursue a postconviction motion.

misdemeanor. The trial court also addressed the payment of DNA surcharges, stating: "You'll have to give a DNA sample. You are required to pay for all costs, fees and surcharges including one domestic abuse assessment, two DNA's and all the other costs, fees and surcharges." The judgments of conviction reflect that Smith was ordered to pay a $250 DNA surcharge for the felony case and a $200 DNA surcharge for the misdemeanor case. This is consistent with 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.[3]

There are two potential issues of merit related to the imposition of DNA surcharges in this case. First, we consider the $200 DNA surcharge imposed for the misdemeanor. In ***State v. Elward***, 2015 WI App 51, __ Wis. 2d __, __ N.W.2d __, we held that the imposition of the $200 DNA surcharge for defendants found guilty of misdemeanors and sentenced prior to April 1, 2015, was an *ex post facto* violation because the applicable statute required courts "to wait until April 1, 2015, before they could actually order misdemeanants to provide a biological specimen for DNA analysis." *See* ***Elward***, 2015 WI App 51, ¶2. Smith was sentenced on May 13, 2014. Therefore, it would appear that, pursuant to ***Elward***, there would be arguable merit to pursue a postconviction motion challenging the $200 DNA surcharge imposed in Smith's misdemeanor case.

[3] 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.

(continued)

Second, we consider the $250 DNA surcharge imposed for the felony. It remains an open question whether imposing a *mandatory* $250 DNA surcharge for a single felony committed prior to January 1, 2014, 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) (citations and one set of quotation marks omitted). In ***State v. Radaj***, 2015 WI App 50, __ Wis. 2d __, __ N.W.2d __, we concluded there was an *ex post facto* violation when the new mandatory DNA surcharge was applied four times to a defendant who committed four felonies before the effective date and was sentenced after the effective date, but we explicitly did "not resolve whether there is an *ex post facto* problem if all of the facts were the same except that [the defendant] had been convicted of a single crime."[4] *See* ***id.***, ¶¶1, 3, 7 (italics added). In this case, Smith committed a felony before January 1, 2014, but was sentenced after January 1, 2014. There appears to be arguable merit to pursue a postconviction motion based on a potential *ex post facto* violation for imposition of the single $250 DNA surcharge.

The no-merit report does not discuss the mandatory DNA surcharges applied in this case. The potential issues with the two DNA surcharges 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

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(b) For each conviction for a misdemeanor, $200.

[4] Resolution of that issue is pending in ***State v. Scruggs***, 2014AP2981-CR and ***State v. Monahan***, 2014AP2187-CR.

modify a sentence is a prerequisite to appellate review of a defendant's sentence). We cannot conclude that further postconviction proceedings on Smith's behalf lack arguable merit.[5]

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.

IT IS FURTHER ORDERED that the deadline to file a postconviction motion is extended to sixty days from the date of this order.[6]

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

[5] We have considered whether the imposition of the DNA surcharge for the felony 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.

[6] Counsel may, if necessary, move to extend this deadline. *See* WIS. STAT. RULE 809.82(2)(a).