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September 8, 2015

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

2015AP232-CRNM State of Wisconsin v. Quioness C. Butler (L.C. #2013CF34)

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

Quioness C. Butler appeals from a judgment of conviction entered after he pled guilty to two counts of burglary as a party to a crime. *See* WIS. STAT. §§ 943.10(1m)(a), 939.95 (2013-14).¹ His appellate counsel, Attorney Carl W. Chesshir, filed a no-merit report and a supplemental no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Butler did not file a response. Upon consideration of the reports and an

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

independent review of the record, we reject the no-merit report because the DNA surcharge imposed in this case gives rise to an arguably meritorious issue.

Butler pled guilty to two counts of burglary committed in January 2013. At that time, WIS. STAT. § 973.046(1g) (2011-12) provided that, when sentencing a defendant for felonies other than certain sex offenses, the circuit court had discretion to impose a \$250 DNA surcharge. See *State v. Cherry*, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 275 N.W.2d 393. When exercising discretion, the circuit court was required to consider “any and all factors pertinent to the case before it and ... [to] set forth in the record the factors and the rationale underlying its decision for imposing the DNA surcharge in that case.” *Id.*, ¶9.

Effective January 1, 2014, the legislature repealed WIS. STAT. § 973.046(1g). See 2013 Wis. Act 20, §§ 2353, 9426. The legislature also amended WIS. STAT. § 973.046(1r) and made the amendment applicable to sentences imposed after January 1, 2014. See 2013 Wis. Act 20, §§ 2355, 9426. The amended statute provides, in pertinent part: “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.” See WIS. STAT. § 973.046(1r) (2014).

The circuit court sentenced Butler for the 2013 burglaries on January 17, 2014. When sentencing Butler, the court said: “pay the [c]ourt costs and one DNA surcharge on count one.” Appellate counsel does not suggest that the circuit court further addressed the issue of the DNA surcharge and this court has not identified any further discussion of the issue.

An *ex post facto* law is one that, *inter alia*, ““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, in circuit courts throughout the State, parties are litigating the issue of whether a mandatory DNA surcharge can be applied at sentencing after January 1, 2014, to crimes committed before that date. Further, the issue of whether the circuit court may impose a mandatory DNA surcharge under the circumstances here is presently pending in this court pursuant to the State's cross-appeal in *State v. Monahan*, No. 2014AP2187-CR. In *Monahan*, the State challenges a circuit court order that relieved a defendant of a mandatory DNA surcharge imposed after January 1, 2014, for a crime committed before that date. The circuit court agreed with Monahan that imposing a mandatory DNA surcharge when the law allowed only a discretionary surcharge at the time of the crime violated the *ex post facto* clauses. See *id.*, No. 2014AP2187-CR (combined brief of respondent cross-appellant State of Wisconsin). Under these circumstances, we cannot conclude that further proceedings to challenge the DNA surcharge imposed on Butler would be frivolous within the meaning of *Anders*. 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 and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the deadline for filing a postconviction motion pursuant to WIS. STAT. RULE 809.30 is reinstated and extended through October 15, 2015. See WIS. STAT. RULE 809.82(2)(a).

Diane M. Fremgen
Clerk of Court of Appeals