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

2015AP247-CRNM State of Wisconsin v. Leroy Love
(L.C. # 2013CF2130)

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

Leroy Love appeals from a judgment of conviction for fleeing or attempting to elude a traffic officer and for operating a motor vehicle without the owner's consent. *See* WIS. STAT. §§ 346.04(3), 943.23(3) (2013-14).¹ He also appeals an order denying his motion for postconviction relief. Love's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Love received a copy of the

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

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

The crimes for which Love was convicted are both felonies and were committed in May 2013. On the charge of fleeing or attempting to elude a traffic officer, the circuit court sentenced Love to one year and six months of initial confinement with the same amount of time on extended supervision. The circuit court ordered that he serve an identical sentence on the charge of operating a motor vehicle without the owner's consent and ordered the sentences to run consecutively.

Additionally, the circuit court ordered Love to submit a DNA sample, if he had not previously done so, and ordered him to pay the surcharges associated with both felonies.² The judgment of conviction reflects the imposition of \$500 for DNA surcharges (i.e., \$250 for each

² Love was sentenced in April 2014. In imposing the DNA surcharge on the charge of fleeing or attempting to elude a traffic officer, the circuit court stated:

I'm going to tell you you are going to have a DNA surcharge—a DNA sample taken if one has not been. I'm assuming one has been. If that has [been] done, well, so be it, you won't have another DNA sample taken but, yes, you'll still pay the surcharge because that's the law.

In imposing the surcharge on the charge of operating a motor vehicle without the owner's consent, the circuit court again stated, "there will be another surcharge that you're going to have to pay because that's the law."

of the two felonies). This is consistent with WIS. STAT. § 973.046(1r), which was made applicable by 2013 Wis. Act 20, §§ 2355, 9426, to sentences imposed after January 1, 2014.³

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 “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, 363 Wis. 2d 633, 866 N.W.2d 758, 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. See *id.*, ¶¶1, 3, 7 (italics added). In this case, Love committed two felonies before January 1, 2014, but was sentenced after January 1, 2014. Following *Radaj*, there appears to be arguable merit to pursue a postconviction motion based on a potential *ex post facto* violation for imposition of a \$250 DNA surcharge for each of the two felonies.

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.

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

Diane M. Fremgen
Clerk of Court of Appeals