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**DISTRICT I**

November 16, 2015

To:

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

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2015AP184-CRNM      State of Wisconsin v. Devin Antwon Fayne (L.C. #2013CF4410)

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

Devin Antwon Fayne appeals from a judgment of conviction, entered upon a jury's verdicts, on five misdemeanor and two felony counts. Appellate counsel, Katie Babe, has filed a no-merit report, pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).<sup>1</sup> Fayne was advised of his right to file a response, and he has not responded. Upon this court's independent review of the record and counsel's report, we conclude that an

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

arguably meritorious issue exists as to whether Fayne should have been assessed \$1500 in mandatory DNA surcharges. We reject the no-merit report and extend the time for Fayne to file a postconviction motion under WIS. STAT. RULE 809.30.

Fayne committed the seven underlying offenses between April 23, 2012, and August 21, 2013. He was sentenced on June 27, 2014. At sentencing, the circuit court stated in part, “I will require Mr. Fayne to pay the surcharge for the DNA[.]” When defense counsel asked whether the surcharge could be contingent on whether Fayne had already paid it, the circuit court responded that “the surcharge is still mandatory.” As a result, the judgment of conviction reflects five \$200 surcharges for Fayne’s misdemeanor convictions and two \$250 surcharges for his felony convictions.

Under the law in effect at the time Fayne committed his crimes, a circuit court sentencing a defendant for a felony conviction could impose a \$250 DNA surcharge as an exercise of discretion unless the crime was one for which the surcharge was mandatory. *See* WIS. STAT. § 973.046(1g) (2011-12); *State v. Cherry*, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. The law did not permit or require imposition of a DNA surcharge for misdemeanor sentences.

In July 2013, the legislature repealed the discretionary surcharge under WIS. STAT. § 973.046(1g) and revised § 973.046(1r) to require the circuit court to impose a \$250 surcharge for each felony conviction and a \$200 surcharge for each misdemeanor conviction. *See* 2013 Wis. Act 20, §§ 2353-55. The mandatory surcharges were first applicable to defendants sentenced after January 1, 2014, irrespective of when they committed their crimes of conviction. *See id.*, § 9426(1)(am).

Subsequently, this court, in *State v. Elward*, 2015 WI App 51, 363 Wis. 2d 628, 866 N.W.2d 756, held that the mandatory \$200 DNA surcharge for misdemeanor convictions was an unconstitutional *ex post facto* punishment when imposed at sentencing hearings after January 1, 2014, for crimes committed before that date.<sup>2</sup> See *id.*, ¶¶2, 7. Thus, regarding the DNA surcharges imposed for Fayne's five misdemeanor convictions, a postconviction motion to vacate the surcharges would be appropriate.

Additionally, in *State v. Radaj*, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, this court held that the mandatory \$250 DNA surcharge, imposed on a per-count basis, was an unconstitutional *ex post facto* punishment as applied to defendants sentenced for multiple felonies after January 1, 2014, for crimes committed before that date. See *id.*, ¶35. Thus, it appears that a postconviction motion challenging the imposition of the multiple felony DNA surcharges in this case would be meritorious.

The no-merit report does not discuss the DNA surcharges imposed in this case, and the potential issue is not preserved for appellate review because no postconviction motion was filed. See *State v. Barksdale*, 160 Wis. 2d 284, 291, 466 N.W.2d 198 (Ct. App. 1991) (generally, a motion to modify sentence is prerequisite to appellate review of sentence). We cannot conclude

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<sup>2</sup> Part of the reason for this holding is that the legislature set the starting date for the collection of DNA specimens from misdemeanants as April 1, 2015. See *State v. Elward*, 2015 WI App 51, ¶7, 363 Wis. 2d 628, 866 N.W.2d 756; see also WIS. STAT. § 973.047(1f) (2015); 2013 Wis. Act 20, § 9426(1)(bm).

that further postconviction proceedings on Fayne's behalf would lack arguable merit. *See McCoy v. Court of Appeals*, 486 U.S. 429, 437 (1988) (no-merit report only appropriate if further proceedings would be wholly frivolous).

Upon the foregoing, therefore,

IT IS ORDERED that the no-merit report in appeal No. 2015AP184-CRNM is rejected and the appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the deadline for filing a postconviction motion or notice of appeal in Milwaukee County Circuit Court case No. 2013CF4410 is extended to January 15, 2016.

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