



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 I/IV

December 9, 2015 - notification
language corrected
December 7, 2015

To:

Hon. John Siefert
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Timothy L. Baldwin
233 N. Water St., Ste. 302
Milwaukee, WI 53202

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

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

Miguel A. Smith 00457380
Fox Lake Corr. Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

Dan Barlich
Juvenile Clerk
Children's Court Center
10201 W. Watertown Plank Rd.
Milwaukee, WI 53226

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

2014AP1839-CRNM	State of Wisconsin v. Miguel A. Smith (L.C. #2012CM1234)
2014AP1902-CRNM	State of Wisconsin v. Miguel A. Smith (L.C. #2012CM4556)

Before Higginbotham, J.¹

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Attorney Timothy Baldwin, appointed counsel for Miguel Smith, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Counsel provided Smith with a copy of the report, and both counsel and this court advised him of his right to file a response. Smith has not responded. We conclude that these cases are appropriate for summary disposition. See WIS. STAT. RULE 809.21. After our independent review of the records, we order one of the judgments modified to remove a DNA surcharge that constitutes an illegal *ex post facto* penalty, and we otherwise conclude that there is no arguable merit to any additional issues that could be raised on appeal.

Smith pled guilty to two counts of retail theft and one count of misdemeanor bail jumping, all class A misdemeanors. The court imposed consecutive nine-month jail sentences on two of the counts, and on the third count the court imposed and stayed a nine-month sentence and ordered two years of probation.

The no-merit report informs us that Smith does not want to withdraw his pleas. Therefore, we do not further address issues related to the validity of the pleas.

The no-merit report addresses whether the sentence is within the legal maximum and whether the court erroneously exercised its sentencing discretion. The sentences and probation period are within the legal maximum. The standards for the circuit court and this court on sentencing issues are well established and need not be repeated here. See *State v. Gallion*, 2004 WI 42, ¶¶17-51, 270 Wis.2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

At sentencing, the court waived the DNA surcharge as to two of the counts, but ordered it imposed on one of the counts underlying appeal No. 2014AP1902-CRNM. By statute, the surcharge is mandatory for misdemeanor cases, effective January 1, 2014. WIS. STAT. § 973.046(1r); 2013 Wis. Act 20, § 9426(1)(am). However, we have held that this surcharge is an unconstitutional *ex post facto* punishment when imposed for misdemeanor crimes committed before January 1, 2014, if sentencing occurs after that date and before April 1, 2015. *State v. Elward*, 2015 WI App 51, ¶7, 363 Wis. 2d 628, 866 N.W.2d 756. In *Elward*, we concluded that if the surcharge is imposed before the April 1, 2015, effective date of the mandate to collect DNA samples for misdemeanor convictions, the surcharge is a fine and not a fee. *Id.* In Smith's case, the crime was committed in August 2012 and sentencing occurred in March 2014.

It does not appear that the State could make an argument against the vacating of Smith's surcharge on this ground. Therefore, we modify the judgment of conviction for bail jumping in circuit court case No. 2012CM4556 to vacate the DNA surcharge. In doing so, we recognize that we have not provided the State with an opportunity to argue the point. Therefore, if the State wants to contest this issue, it should promptly advise us within the time provided for reconsideration under WIS. STAT. RULE 809.24.

Our review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgments of conviction are modified as described below, and otherwise are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that, after remittitur, the clerk of the circuit court shall enter an amended judgment on the bail jumping count in case No. 2012CM4556 to remove the DNA surcharge.

IT IS FURTHER ORDERED that Attorney Baldwin is relieved of further representation of Smith in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals