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DISTRICT III/IV

December 8, 2015

To:

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

2015AP558-CRNM State of Wisconsin v. Willie D. Banks (L.C. # 2013CF995)

Before Higginbotham, Sherman and Blanchard, JJ.

Attorney Daniel R. Goggin II has filed a no-merit report seeking to withdraw as appellate counsel for Willie D. Banks. See WIS. STAT. RULE 809.32 (2013-14)¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). Banks was sent a copy of the report and did not file a response. Because an arguably meritorious issue exists with regard to the court-imposed DNA surcharge, we reject the no-merit report.

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

Banks pled no contest to one count of possession of heroin with intent to deliver; one count of manufacture or delivery of heroin, second or subsequent offense; and one count of manufacture or delivery of THC, second or subsequent offense, party to a crime. *See* WIS. STAT. §§ 961.41(1m)(d)1; 961.41(1)(d)1; 961.41(1)(h)1; 961.48(1)(b); and 939.05. The court sentenced Banks to a total sentence of eleven years, with six years of initial confinement and five years of extended supervision. The court imposed a DNA surcharge of \$750.

The underlying crimes were committed on June 19, 2013, July 11, 2013 and July 25, 2013. Banks was sentenced on August 25, 2014. Because he was sentenced after January 1, 2014, Banks was subject to the revised DNA surcharge statute, WIS. STAT. § 973.046(1r)(a). *See* 2013 Wis. Act 20, §§ 2355, 9426(1)(am). That revision provides for a mandatory DNA surcharge of \$250 per felony conviction. *See State v. Radaj*, 2015 WI App 50, ¶1, 363 Wis. 2d 633, 866 N.W.2d 758. If Banks had been convicted and sentenced before January 1, 2014, he would have been subject to a discretionary \$250 DNA surcharge rather than a mandatory surcharge of \$750. *See id.*, ¶¶4-5.

In *Radaj*, we held that the new mandatory, per-conviction, DNA surcharge was an unconstitutional ex post facto law as applied to a defendant convicted of multiple felonies after January 1, 2014, in a case in which the underlying crimes were committed before January 1, 2014. *Id.*, ¶35. The timeline for Banks' crimes and convictions mirrors that found unconstitutional in *Radaj*. Thus, it appears that a challenge to the imposition of a \$750 DNA surcharge would be meritorious and, accordingly, we reject the no-merit report.

Therefore,

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice. Attorney Goggins or successor counsel appointed by the State Public Defender shall continue to represent Banks.

IT IS FURTHER ORDERED that the time for Banks to file a postconviction motion is extended to February 1, 2016.

Diane M. Fremgen
Clerk of Court of Appeals