



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 II

December 16, 2015

To:

Hon. Timothy D. Boyle
Circuit Court Judge
730 Wisconsin Avenue
Racine, WI 53403

Mark A. Schoenfeldt
Attorney at Law
135 W. Wells St., Ste. 604
Milwaukee, WI 53203

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

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

W. Richard Chiapete
District Attorney
730 Wisconsin Avenue
Racine, WI 53403

Maurice L. Smith 622744
Redgranite Corr. Inst.
P.O. Box 925
Redgranite, WI 54970-0925

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

2015AP1576-CRNM State of Wisconsin v. Maurice L. Smith (L.C. #2013CF1674)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Maurice L. Smith appeals from a judgment of conviction for party to the crime of armed robbery and attempted armed robbery. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)¹ and *Anders v. California*, 386 U.S. 738 (1967). Smith received a copy of the report, was advised of his right to file a response, and has elected not to do

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

so. Upon consideration of the report and an independent review of the record, we modify the judgment and summarily affirm the judgment as modified because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21. We remand for entry of an amended judgment of conviction.

On December 2, 2013, Smith participated with another in the daytime hold-up of a food store. During the robbery, a store customer was shot in the chest. Smith was charged as a party to the crime of attempted first-degree intentional homicide by use of dangerous weapon, armed robbery, and attempted armed robbery. He entered a no contest plea to the robbery counts and the attempted homicide charge was dismissed as a read in at sentencing. Smith was sentenced on October 31, 2014, to consecutive terms totaling ten years' initial confinement and nine years' extended supervision. Restitution was to be determined at a hearing to be held December 5, 2014. The hearing was not held and the judgment of conviction does not reflect any restitution.

The no-merit report addresses the potential issues of whether Smith's plea was freely, voluntarily, and knowingly entered; whether a factual basis for the plea exists; whether the sentence was the result of an erroneous exercise of discretion; and whether Smith was denied the effective assistance of trial counsel. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further.

At sentencing the court ordered Smith to provide a DNA sample and to pay "for its surcharge." When Smith committed his crimes, imposition of a \$250 DNA surcharge was a matter of discretion for the sentencing court. WIS. STAT. § 973.046(1g) (2011-12). The sentencing court exercised its discretion in imposing the single DNA surcharge and it was a

proper exercise of discretion since the surcharge was tied to the collection of a DNA sample. *See State v. Long*, 2011 WI App 146, ¶8, 337 Wis. 2d 648, 807 N.W.2d 12 (requiring payment of the cost when a sample has not previously been provided presents an acceptable rationale for imposing the surcharge). However, the judgment of conviction reflects DNA surcharges totaling \$500.² When there is a discrepancy between the sentencing court’s oral pronouncement and the written judgment of conviction, the oral pronouncement controls. *State v. Perry*, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987); *State v. Schordie*, 214 Wis. 2d 229, 231 n.1, 570 N.W.2d 881 (Ct. App. 1997). The error in the judgment is a mere defect in the form of the certificate of conviction, which may be corrected in accordance with the actual determination by the sentencing court. *See State v. Prihoda*, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857. The circuit court may either correct the clerical error in the DNA surcharge portion of the written judgment of conviction “or may direct the clerk’s office to make such a correction.” *Id.*, ¶5.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment of conviction as modified, discharges appellate counsel of the obligation to represent Smith further in this appeal, and remands for entry of a corrected judgment of conviction.

Upon the foregoing reasons,

² It appears the clerk of the circuit court assessed two DNA surcharges under WIS. STAT. § 973.046(1r)(a), which requires that a convicted felon pay a mandatory \$250 surcharge per felony conviction for sentences imposed on or after January 1, 2014. In *State v. Radaj*, 2015 WI App 50, ¶35, 363 Wis. 2d 633, 866 N.W.2d 758, 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, when the underlying crimes were committed before January 1, 2014.

IT IS ORDERED that the judgment of conviction is modified to conform to the oral sentencing pronouncement by reducing the DNA surcharge to \$250; the judgment is summarily affirmed as modified, and the cause remanded for entry of a corrected judgment of conviction. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Mark A. Schoenfeldt is relieved from further representing Maurice L. Smith in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals