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December 16, 2015

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

2015AP406-CRNM State of Wisconsin v. Tynell D. McCoy
2015AP407-CRNM (L.C. #'s 2013CF002351, 2013CF004998)

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

In these consolidated appeals, Tynell D. McCoy appeals from judgments entered after he pled guilty to armed robbery with threat of force as a party to a crime in Milwaukee County Case No. 13CF2351 and to felony murder while committing armed robbery in Milwaukee County

Case No. 13CF4998.[1] *See* WIS. STAT. §§ 943.32(2), 939.05, 940.03 (2013-14).[2] McCoy's postconviction and appellate lawyer, Mark S. Rosen, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. McCoy did not respond. Upon consideration of the report and an independent review of the records, we reject the no-merit report because an issue of arguable merit is presented and not discussed in the no-merit report. The time for McCoy to file a postconviction motion under WIS. STAT. RULE 809.30 is extended.

In this case, the circuit court imposed the $250 DNA surcharge for the felonies in the two separate cases underlying these appeals.[3] There are two separate judgments of conviction and each reflects the imposition of $250 for the DNA surcharge. Effective January 1, 2014, the statutory authority for the discretionary imposition of the DNA surcharge, WIS. STAT. § 973.046(1g) (2011-12), was repealed and § 973.046(1r) (2011-12) was amended to make the imposition of the DNA surcharge mandatory for felonies. *See* 2013 Wis. Act 20, §§ 2353-2355

[1] The information charged McCoy with felony murder while committing armed robbery as a party to a crime. The plea questionnaire and waiver of rights form provides that in Case No. 13CF4998, McCoy pled guilty to felony murder as a party to a crime. Additionally, the attached jury instructions reflect that McCoy was charged as a party to a crime. However, there is no reference to party to a crime in the judgment of conviction in Case No. 13CF4998. This error is clerical. Courts may correct clerical errors at any time. ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857. Accordingly, upon remittitur, the circuit court shall direct the clerk of circuit court to enter a corrected judgment of conviction reflecting McCoy's conviction for felony murder as a party to a crime.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] The circuit court concluded:

> Because these matters are felonies, the defendant has to provide a DNA sample. And it's my understanding the most recent change in the law, the defendant has to pay a DNA surcharge on both of these cases. So he's required to pay a surcharge…. As he has no prior record, I'm sure he has not provided a sample previously.

& 9426. McCoy was sentenced on June 16, 2014; however, the underlying crimes in these matters were committed in April 2013, before the effective date of the new DNA surcharge statute.

An issue of arguable merit exists as to whether the circuit court's decision to order two separate surcharges resulted in an *ex post facto* violation. *See* ***State v. Thiel***, 188 Wis. 2d 695, 703, 524 N.W.2d 641 (1994) (An *ex post facto* law is one that "'makes more burdensome the punishment of a crime, after its commission.'") (citation 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, McCoy committed two felonies before January 1, 2014, but was sentenced after January 1, 2014. Although the charges stemmed from two separate cases, McCoy was sentenced at a combined sentencing hearing. 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.

We note, however, that an argument could also be made that the DNA surcharges in these cases comport with our recent decision in ***State v. Scruggs***, 2015 WI App 88, ____ Wis. 2d ____, ____ N.W.2d ___. There, we concluded that imposing a *mandatory* $250 DNA surcharge for a single felony committed prior to January 1, 2014—where no prior sample and surcharge have been collected—does not violate the *ex post facto* clause of the Wisconsin and United

States constitutions. *See* ***id.***, ¶19. The record reflects that McCoy had no prior criminal history; therefore, he would not have provided a prior sample or previously paid the surcharge.

The somewhat unique circumstances underlying these appeals—two felony convictions resulting in DNA surcharges in two separate cases, which were ordered during a combined sentencing hearing—do not fit neatly under either ***Radaj*** or ***Scruggs***. Moreover, at this time, it remains an open question whether a mandatory DNA surcharge is punitive in effect when applied to a defendant who previously gave a DNA sample and/or who previously was ordered to pay the DNA surcharge. Here, there could be arguable merit to asserting that one of the surcharges imposed was second to the other.

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 McCoy'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