



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

December 17, 2015

To:

Hon. Dennis P. Moroney
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

Katie Babe
Lakeland Law Firm, LLC
N27W23957 Paul Rd., Ste. 206
Pewaukee, WI 53072

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

Ronnie L. McAfee 134937
New Lisbon Corr. Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

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

2015AP619-CRNM	State of Wisconsin v. Ronnie L. McAfee (L.C. #2013CF3157)
2015AP620-CRNM	State of Wisconsin v. Ronnie L. McAfee (L.C. #2014CF383)
2015AP621-CRNM	State of Wisconsin v. Ronnie L. McAfee (L.C. #2014CF622)

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

Ronnie L. McAfee appeals from judgments of conviction, entered upon his guilty pleas, on one misdemeanor and six 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).¹ McAfee has filed a response. Upon this court's independent review of the records,

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

counsel's report, and McAfee's response, we conclude that an arguably meritorious issue exists with respect to four of the DNA surcharges imposed upon McAfee. We reject the no-merit report and extend the time for McAfee to file a postconviction motion under WIS. STAT. RULE 809.30.

McAfee was charged in three cases. In Milwaukee County Circuit Court case No. 2013CF3157 (appeal No. 2015AP619-CRNM), the underlying offenses were committed between December 2011 and July 2012, and McAfee pled guilty to two felonies in that case. In Milwaukee County Circuit Court case No. 2014CF383 (appeal No. 2015AP620-CRNM), the offenses were committed in January 2014, and McAfee pled guilty to three felonies in that case. In Milwaukee County Circuit Court case No. 2014CF622 (appeal No. 2015AP621-CRNM), the offenses were committed between October 2012 and October 2013, and McAfee pled guilty to one misdemeanor and one felony in that case. At sentencing, the circuit court required McAfee to pay DNA surcharges on all seven counts.²

Through 2013, 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

² Relative to case No. 2013CF3157, the circuit court said regarding the first count, "The court will also order on that count —well, it'll be a DNA count. You probably have had a DNA test against you, so it'll end up being strictly a felony surcharge for what would be a DNA testing in that matter under the law as now indicated." For the second count, the circuit court said, "You will have the same conditions as in count one of 3157 except there will be a consecutive as to the surcharge of the DNA under the circumstances here." The circuit court additionally ordered McAfee to pay a "consecutive surcharge" on the other four felonies and the "misdemeanor surcharge" for the misdemeanor.

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). McAfee was sentenced on April 17, 2014.

Subsequently, this court, in *State v. Elward*, 2015 WI App 51, 363 Wis. 2d 928, 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. *See id.*, ¶¶2, 7. Further, 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 for felony convictions, 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. It therefore appears that a postconviction motion to vacate the dual felony surcharges in case No. 2013CF3157 and the misdemeanor and felony surcharges in case No. 2014CF622 would not lack arguable merit.

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

cannot conclude that further postconviction proceedings on McAfee's behalf would lack arguable merit.³ 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 Nos. 2015AP619-CRNM, 2015AP620-CRNM, and 2015AP621-CRNM is rejected and the appeals are dismissed without prejudice.

IT IS FURTHER ORDERED that the deadline for filing a postconviction motion or notice of appeal in these matters is extended to February 15, 2016.

Diane M. Fremgen
Clerk of Court of Appeals

³ We note that there was significant restitution imposed in this case. At sentencing, the circuit court and the parties frequently referenced a four-page document listing the restitution amounts. That document was not included in any of the records on appeal, despite the circuit court's indication that it was incorporating the document by reference. In the event that McAfee pursues further appellate proceedings in these cases, counsel would be well-advised to ensure that the document is part of the record of any future appeals.