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January 7, 2016

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

2015AP1164-CRNM State of Wisconsin v. Jeffrey J. Wickman (L.C. #2013CF1363)

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

Jeffrey J. Wickman pled guilty as a repeat offender to one count of felony murder, an unclassified felony, and one count of possessing a firearm as a felon, a class G felony. *See* WIS. STAT. §§ 940.03 (2013-14),[1] 941.29(2)(a), 939.62. The circuit court imposed twenty-seven years of initial confinement and nine years of extended supervision for felony murder as a repeat

offender, and the court imposed a consecutive sentence of nine years of initial confinement and five years of extended supervision for possessing a firearm as a repeat offender. The circuit court also imposed a DNA surcharge. Attorney Ana Babcock filed a no-merit report stating that no arguably meritorious issues exist for appeal, Wickman filed a response, and Attorney Babcock filed two supplemental no-merit reports. Upon review of the record and the submissions regarding the merits of an appeal, we conclude that Wickman can pursue an arguably meritorious challenge to the legality of his sentence for felony murder as a repeater and to the DNA surcharge. Therefore, we reject the no-merit reports, dismiss the appeal without prejudice, and extend the deadline for Wickman to file a postconviction motion.

Felony murder sentence. Pursuant to WIS. STAT. § 940.03, the maximum term of imprisonment for felony murder is fifteen years more than the maximum term of imprisonment provided by law for the underlying felony. Here, the underlying felony was armed burglary, carrying a maximum fifteen years of imprisonment. *See* WIS. STAT. § 943.10(2); 939.50(3)(e). Therefore, the maximum statutory term of imprisonment for the felony murder charged in this case was thirty years. The maximum term of initial confinement for the crime was seventy-five percent of the total possible sentence, or twenty-two and one-half years. *See* ***State v. Mason***, 2004 WI App 176, Wis. 2d 434, 687 N.W.2d 526. The balance of seven and one-half years was available for extended supervision. *See* WIS. STAT. § 973.01(2). Additionally, because Wickman pled guilty to the crime as a repeat offender who had previously been convicted of a felony, he faced an additional six years of incarceration. *See* WIS. STAT. § 939.62(1)(c). In the

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

initial no-merit report, appellate counsel explained why, in her view, Wickman faced a maximum of twenty-eight and one-half years of initial confinement under the foregoing circumstances.

"Wis[consin] Stat. § 973.01(2)(c) does not authorize a sentencing court to impose any portion of a penalty enhancer as extended supervision." ***State v. Volk***, 2002 WI App 274, ¶2, 258 Wis. 2d 584, 654 N.W.2d 24. We therefore asked appellate counsel to file a supplemental no-merit report to address a question that counsel did not discuss, namely, whether Wickman could mount an arguably meritorious challenge to the nine-year term of extended supervision imposed.

Appellate counsel filed a response that did not analyze the propriety of the nine-year term of extended supervision. Instead, counsel explained that, upon receipt of our order, she conducted additional research and determined that Wickman faced a maximum term of twenty-seven years of initial confinement, not twenty-eight and one-half years as she originally contended. In support, counsel discussed ***State v. Jackson***, 2004 WI 29, 270 Wis. 2d 113, 676 N.W.2d 872. As counsel explains, ***Jackson*** describes the mechanics of calculating the maximum term of confinement for unclassified felonies when the statutory maximum is increased by penalty enhancers.[2] Under ***Jackson***, appellate counsel says, the maximum term of confinement here is determined by adding the six-year penalty enhancer under WIS. STAT. § 939.62 together with the underlying thirty-year maximum term of imprisonment under WIS. STAT. § 940.03, and

[2] In ***State v. Jackson***, 2004 WI 29, 270 Wis. 2d 113, 676 N.W.2d 872, the supreme court considered sentencing issues under the first phase of Truth-in-Sentencing, TIS-I. *See* ***id.***, ¶2 & n.2. Appellate counsel indicates that ***Jackson*** continues to control under the current phase of Truth-in-Sentencing, TIS-II. The ***Jackson*** court itself indicated that its decision would have ongoing but limited vitality under TIS-II. *See* ***id.***, ¶37 n.8.

multiplying the sum by seventy-five percent. *See* ***Jackson***, 270 Wis. 2d 113, ¶42. That total, counsel explains, is twenty-seven years.

Unfortunately, appellate counsel's discussion of ***Jackson*** is insufficient to resolve whether Wickman can pursue an arguably meritorious challenge to the nine-year term of extended supervision that he received. ***Jackson*** confirms that "the legislature did not intend the sentencing court to bifurcate penalty enhancers between confinement and extended supervision.... Rather, [the legislature] intended courts to add them to the maximum term of confinement." ***Id.***, ¶30. ***Jackson***, however, does not discuss the mechanics of constructing a bifurcated sentence. *See* ***State v. Kleven***, 2005 WI App 66, ¶24, 280 Wis. 2d 468, 696 N.W.2d 226 (describing the limited scope of ***Jackson***).

In ***Kleven***, this court considered how to calculate a maximum period of extended supervision when a defendant is convicted of an enhanced, unclassified felony.[3] *See* ***id.***, 280 Wis. 2d 468, ¶¶19-28. We concluded in ***Kleven*** that the defendant "could be ordered to serve, at most, the maximum term of extended supervision available for his base offense." *See* ***id.***, ¶¶26-27. Although more than one way of calculating the maximum term of extended supervision may be possible in Wickman's case, nothing in appellate counsel's no-merit reports persuades us that Wickman is unable to pursue an arguably meritorious claim that ***Kleven*** applies. If ***Kleven*** governs the construction of Wickman's sentence, then Wickman may contend that the maximum term of extended supervision for his base offense is seven and one-half years and that his nine-

[3] ***State v. Kleven***, 2005 WI App 66, 280 Wis. 2d 468, 696 N.W.2d 226, like ***Jackson***, arose under TIS-I.

year term of extended supervision is excessive.[4] *Cf.* ***id.***, ¶¶26-27. In light of the foregoing, we must conclude that Wickman can pursue an arguably meritorious claim that the extended supervision portion of his sentence is unlawful.

DNA surcharge. We also conclude that Wickman can pursue an arguably meritorious challenge to the DNA surcharge in this case. Wickman committed his crimes in 2013, when any DNA surcharge imposed for them would have rested in the circuit court's discretion. *See* ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 275 Wis. 2d 393. When exercising discretion, the sentencing court was required to consider "any and all factors pertinent to the case before it, and... [to] set forth in the record the factors it considered and the rationale underlying its decision for imposing the DNA surcharge in that case." ***Id.***, ¶9. The circuit court sentenced Wickman in August 2014, after a change in the law governing DNA surcharges took effect on January 1, 2014. *See* 2013 Wis. Act 20, §§ 2353- 2355, 9426. As relevant here, the applicable statute now provides: "If a court imposes a sentence or places a person on probation, the court shall impose a deoxyribonucleic acid analysis surcharge, calculated as follows: (a) For each conviction for a felony, $250." *See* WIS. STAT. § 973.046(1r)(2014). At the conclusion of Wickman's sentencing, the circuit court imposed a DNA surcharge without stating reasons for doing so.

[4] We note appellate counsel's statement in the second supplemental no-merit report that "[w]hile [WIS. STAT.] § 973.01(2)(d) provides a minimum period of extended supervision for unclassified felonies, there is no maximum period outlined for unclassified felonies." To the extent that appellate counsel suggests the circuit court has unlimited discretion to impose extended supervision in any amount for an unclassified felony, we cannot agree. *See* WIS. STAT. § 973.01(2)(a) (providing that the total length of a bifurcated sentence for an unclassified felony may not exceed the maximum term of imprisonment provided by statute for the crime plus additional imprisonment authorized by any applicable penalty enhancement statutes).

An *ex post facto* law is one that, *inter alia*, '"makes more burdensome the punishment of a crime, after its commission.'" ***State v. Thiel***, 188 Wis. 2d 695, 703, 524 N.W.2d 641 (1994) (citation omitted). We determined in ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, that multiple mandatory DNA surcharges simultaneously imposed after January 1, 2014, for crimes committed before that date are barred as *ex post facto* punishment. On the other hand, we determined in ***State v. Scruggs***, 2015 WI App 88, ¶¶2, 19, ___ Wis. 2d ___, ___ N.W.2d ___, that a single mandatory DNA surcharge imposed after January 1, 2014, for a felony committed before that date does not raise *ex post facto* concerns in circumstances where the defendant is required to provide a DNA sample to the DNA data bank. We explained in ***Scruggs***: "[t]he relatively small size of the surcharge also indicates that the fee applied here was not intended to be a punishment, but rather an administrative charge to pay for the collection of the sample from Scruggs, along with the expenditures needed to administer the DNA data bank.... The connection between the fee and the costs it is intended to cover 'need not be perfect to be rational.'" ***Id.***, ¶13 (citation omitted). In light of the foregoing, we asked appellate counsel to determine whether Wickman previously donated a DNA sample or paid a surcharge and, if so, to file a supplemental no-merit report explaining why he could not pursue an arguably meritorious challenge to the DNA surcharge here on the ground that it violates the bar to *ex post facto* punishment.

In response, appellate counsel states that Wickman previously donated a DNA sample but did not pay a surcharge. Counsel concludes: "applying the reasoning of ***Radaj*** and ***Scruggs*** and considering that Wickman has not paid a DNA surcharge, counsel believes there is no arguable merit to raise [sic] an *ex post facto* challenge to the single DNA surcharge in this case." Unfortunately, appellate counsel's response does not discuss her analysis regarding why

"applying the reasoning" of either ***Radaj*** or ***Scruggs*** leads to the conclusion that a challenge to the DNA surcharge here lacks arguable merit. Moreover, we observe, as we did in our prior order, that neither case squarely addresses whether a mandatory DNA surcharge is appropriate in circumstances where the defendant has previously provided a DNA sample. Rather, 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 or paid a surcharge. Counsel's supplemental no-merit report does not demonstrate that the open question must be or will be resolved against the defendant.

When appointed counsel files a no-merit report, the question presented to this court is whether, upon review of the entire proceedings, any potential argument would be wholly frivolous. *See* ***Anders***, 386 U.S. at 744. The test is not whether the lawyer should expect the argument to prevail. *See* SCR 20:3.1, comment (action is not frivolous even though the lawyer believes his or her client's position will not ultimately prevail). Rather, the question is whether the potential issue so lacks a basis in fact or law that it would be unethical for the lawyer to prosecute the appeal. *See* ***McCoy v. Court of Appeals***, 486 U.S.429, 436 (1988).

We cannot conclude that further proceedings in this matter would lack arguable merit. We therefore will reject the no-merit report filed by appellate counsel. We observe that the potential issues we discuss are not currently preserved for appellate review because no postconviction motion was filed raising them. *See* ***State v. Barksdale***, 160 Wis. 2d 284, 291, 466 N.W.2d 198 (Ct. App. 1991) (generally a motion challenging the defendant's sentence is a

prerequisite to appellate review of that sentence). We therefore will dismiss this appeal and extend the deadline for filing a postconviction motion in this matter.[5]

Upon the foregoing reasons,

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender to consider appointment of new counsel for Wickman, any such appointment to be made within forty-five days after this order.

IT IS FURTHER ORDERED that the State Public Defender's Office shall notify this court within five days after either a new lawyer is appointed for Wickman or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED the deadline for Wickman to file a postconviction motion is extended until forty-five days after the date on which this court receives notice from the State Public Defender's Office that it has appointed new counsel for Wickman or that new counsel will not be appointed.

Diane M. Fremgen
Clerk of Court of Appeals

[5] Wickman may, of course, pursue postconviction relief on grounds in addition to those discussed in this order.