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DISTRICT I

January 26, 2016

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

2015AP1053-CRNM State of Wisconsin v. Isaiah A. Gilmore
(L.C. #2013CF1971)

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

Attorney Michael S. Holzman has filed a no-merit report seeking to withdraw as appellate counsel for appellant Isaiah A. Gilmore. *See* WIS. STAT. RULE 809.32 (2013-14)¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). Gilmore was sent a copy of the report and did not file a response. Because an arguably meritorious appellate 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.

Gilmore pled guilty to two felonies: (1) first-degree reckless injury; and (2) possession of a firearm by a felon. The trial court sentenced Gilmore to six years of initial confinement and four years of extended supervision for the first-degree reckless injury count, and it imposed a consecutive sentence of three years of initial confinement and two years of extended supervision for the firearm count. The trial court also noted: “By statute, the defendant will have the felony DNA surcharge applied.” Consistent with that pronouncement, the judgment of conviction reflects that Gilmore was ordered to pay a DNA surcharge of \$250 for each of the two counts, and the summary of obligations listed on the judgment of conviction reflects a total DNA surcharge of \$500.

The crimes were committed on April 14, 2013.² Gilmore was sentenced on January 7, 2014. Because he was sentenced after January 1, 2014, Gilmore 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 Gilmore had been convicted and sentenced before January 1, 2014, he would have been subject to a discretionary \$250 DNA surcharge rather than a mandatory DNA surcharge of \$500 (two felonies x \$250). *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

² The judgment of conviction and the amended judgment of conviction erroneously state that the two crimes were committed on April 4, 2013, rather than on April 14, 2013. Appellate counsel is directed to seek correction of this error when the postconviction motion is filed.

January 1, 2014, when the underlying crimes were committed before January 1, 2014. *See id.*, ¶35. The timeline for Gilmore's crimes and convictions mirrors that found unconstitutional in *Radaj*. Thus, it appears that a challenge to the imposition of the \$500 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 Holzman or a successor counsel appointed by the State Public Defender shall continue to represent Gilmore.

IT IS FURTHER ORDERED that the time for Gilmore to file a postconviction motion is extended to March 29, 2016.

Diane M. Fremgen
Clerk of Court of Appeals