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**DISTRICT I**

February 25, 2016

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

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2015AP95-CRNM      State of Wisconsin v. Robert Nathaniel Forney, Jr.  
(L.C. #2013CF1736)

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

Attorney Michael J. Backes has filed a no-merit report seeking to withdraw as appellate counsel for appellant Robert Nathaniel Forney, Jr. *See* WIS. STAT. RULE 809.32 (2013-14)<sup>1</sup> and *Anders v. California*, 386 U.S. 738, 744 (1967). Forney was sent a copy of the report and he filed a response, which prompted Backes to file a supplemental no-merit report. Because an

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

arguably meritorious appellate issue exists with regard to the court-imposed DNA surcharge, we reject the no-merit report.

A jury found Forney guilty of two felonies: (1) first-degree recklessly endangering safety, by use of a dangerous weapon, as a habitual criminal; and (2) possession of a firearm by a felon, as a repeater. *See* WIS. STAT. §§ 941.30(1), 939.63(1)(b), 939.62(1)(c), 941.29(2)(a), and 939.62(1)(b). The trial court sentenced Forney to nine years of initial confinement and five years of extended supervision for the first count, and it imposed a consecutive sentence of five years of initial confinement and five years of extended supervision for the firearm count. The trial court also stated: “Regarding DNA, the new statute requires that I order a DNA surcharge for each felony count, so Counts 1 and 2 have the DNA surcharge order and, of course, you are ordered to provide a DNA sample.” Consistent with that pronouncement, the judgment of conviction reflects that Forney was ordered to pay the DNA surcharge on both counts, and the summary of obligations listed on the judgment of conviction reflects a total DNA surcharge of \$500.

The crimes were committed on June 22, 2012. Forney was sentenced on January 9, 2014. Because he was sentenced after January 1, 2014, Forney 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 Forney had been convicted and sentenced before January 1, 2014, he would have been subject to a discretionary \$250 DNA surcharge on each count 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 January 1, 2014, when the underlying crimes were committed before January 1, 2014. See *id.*, ¶35. The timeline for Forney’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 Backes or a successor counsel appointed by the State Public Defender shall continue to represent Forney.

IT IS FURTHER ORDERED that the time for Forney to file a postconviction motion is extended to April 20, 2016.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*