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

April 27, 2016

To:

Hon. M. Joseph Donald
Circuit Court Judge
Children's Court Center
10201 W. Watertown Plank Rd.
Wauwatosa, WI 53226

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Thomas J. Erickson
Attorney at Law
316 N. Milwaukee St., Ste. 206
Milwaukee, WI 53202

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

Jacob Ace Flores 288865
Waupun Corr. Inst.
P.O. Box 351
Waupun, WI 53963-0351

Dan Barlich
Juvenile Clerk
Children's Court Center
10201 W. Watertown Plank Rd.
Milwaukee, WI 53226

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

2015AP2590-CRNM State of Wisconsin v. Jacob Ace Flores (L.C. #2013CF3915)

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

Jacob Ace Flores appeals from a judgment of conviction, entered upon his guilty plea, on one count of burglary. Appellate counsel, Thomas J. Erickson, 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] Flores was advised of his right to file a response, but he has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

According to the criminal complaint, a neighbor saw two Hispanic males attempting to enter J.B.'s home on August 17, 2013. One of the men had a pry bar, the other was kicking at the door. The men fled in a tan Toyota Camry when confronted by the neighbor, who later identified Flores from a photo array as the man who had been kicking the door. On August 24, 2013, M.K. returned home to find her back door open and jewelry missing. A neighbor reported observing two Hispanic males and provided police with the license plate number of a tan vehicle. Five possible DNA samples were collected and two latent fingerprints were found. One of the prints was matched to Flores.

Flores was charged with one count of attempted burglary and one count of burglary. In exchange for his guilty plea to burglary, the State would dismiss and read in the attempted burglary charge. It would also recommend prison time, consecutive to any other sentence, with the length of the sentence left to the circuit court. The circuit court accepted the plea and imposed four years of initial confinement and four years of extended supervision, consecutive to any other sentence. The circuit court also ordered Flores to pay $2000 in restitution and imposed a $250 DNA surcharge.

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

Counsel identifies two potential issues for appeal: whether Flores' plea was knowing, intelligent, and voluntary, and whether the circuit court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

There is no arguable merit for challenging Flores' plea as not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Flores completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses. The jury instructions containing the elements of burglary were attached and signed by Flores. The form correctly acknowledged the maximum penalties Flores faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262. The circuit court also conducted a plea colloquy, in which the circuit court fulfilled its duties as recited in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. *See also* WIS. STAT. § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; and ***Bangert***, 131 Wis. 2d at 260. There is no arguable merit to a challenge to the plea's validity.

The other issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of

the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court considered the community's needs by observing the "unique impact" burglaries have on victims, causing them to no longer feel safe in their homes. The circuit court considered Flores' crime to be aggravated: he had prior periods of supervision, also for burglary convictions, that were revoked, and the circuit court wondered what it was going to take to stop Flores' criminal behavior. It did note that at least Flores typically committed his offenses when no one was home, but concluded that a consecutive sentence was necessary to satisfy the punishment objective.

The maximum possible sentence Flores could have received was twelve and one-half years of imprisonment. The sentence totaling eight years of imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive as to shock the public's sentiment, *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion in setting a term of imprisonment.

We independently discuss three additional aspects of the sentence. First, as noted, the circuit court also imposed $2000 in restitution. Flores stipulated to $500 for victim M.K., and agreed in theory to the $1500 requested on behalf of victim J.B. Of that amount, $250 was J.B.'s out-of-pocket deductible; the remainder would go to J.B.'s insurer. Flores initially questioned only whether the insurance company was an appropriate recipient of a restitution award; it can

be. *See* WIS. STAT. § 973.20(5)(d); ***State v. Fernandez***, 2009 WI 29, ¶62, 316 Wis. 2d 598, 764 N.W.2d 509. Thus, there is no arguable merit to challenging the restitution awards.

Second, with respect to the DNA surcharge, the circuit court stated, "You are to provide a DNA sample and pay the costs of providing that DNA sample." It appears from the lack of any other explanation that the circuit court imposed the surcharge as mandatory, following a change in the law that took effect starting on January 1, 2014, for defendants sentenced on or after that date. *See* WIS. STAT. § 974.046(1r) (eff. Jan. 1, 2014); *see also* 2013 Wis. Act 20 §§ 2353-55. Because this mandatory surcharge is to be imposed regardless of the date of offense, the potential for an *ex post facto* challenge exists in some cases.

However, there is ultimately no such arguably meritorious challenge to be raised here. If Flores has never provided a sample and paid the surcharge before then the case is currently controlled by ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, *review granted* (WI Mar. 7, 2016) (No. 2014AP2981-CR), which held there is no *ex post facto* violation from the imposition of a single mandatory surcharge when the surcharge has not previously been paid.

If Flores has paid the surcharge before, a distinct possibility given his prior convictions, it is an open question whether requiring the surcharge again is an *ex post facto* violation. However, the remedy for such a violation would be to apply the law in effect at the time of Flores' offenses, when imposing the DNA surcharge for most felony convictions was discretionary. *See* WIS. STAT. § 973.046(1g) (2011-12); ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393. Here, the record supports a discretionary imposition of the surcharge, even if Flores paid it previously. *See* ***State v. Pharr***, 115 Wis. 2d 334, 347, 340 N.W.2d 498 (1983)

(this court may search the record for reasons to support a discretionary decision); ***State v. Ziller***, 2011 WI App 164, ¶12, 338 Wis. 2d 151, 807 N.W.2d 241 (imposition of DNA surcharge part of sentencing discretion).

According to the criminal complaint, five possible DNA specimens were collected. There is a cost associated with such collection, even if the samples were not subsequently tested. *See* ***Cherry***, 312 Wis. 2d 203, ¶10; *see also* ***Ziller***, 338 Wis. 2d 151, ¶12 (defendant has burden to show imposition of surcharge unreasonable). Accordingly, there is no arguable merit to a challenge to imposition of the DNA surcharge in this matter.

Finally, there is what appears to be a scrivener's error in the judgment of conviction as it lists a $10 fine. However, the circuit court did not order Flores to pay a fine.[2] Accordingly, upon remittitur, the judgment shall be corrected to remove the $10 fine. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that upon remittitur, the judgment of conviction shall be modified as described herein.

[2] We have considered the possibility that this $10 is merely some mandatory surcharge or court cost, the assessment of which is required by statute, but the record is inadequate for us to so conclude. However, if the $10 is such a charge, the clerk of the circuit court should not be listing it as a fine. Fines are a type of punishment to be expressly imposed by the circuit court, not a cost to be taxed by the clerk. *See* ***State v. Ramel***, 2007 WI App 271, ¶13, 306 Wis. 2d 654, 743 N.W.2d 502 (discussing punitive nature of fine); *see also* ***id.***, ¶15 (a fine "is part of the punishment").

IT IS FURTHER ORDERED that the judgment, as modified, is summarily affirmed.

IT IS FURTHER ORDERED that Attorney Thomas J. Erickson is relieved of further representation of Flores in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals