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DISTRICT I

June 23, 2016

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

2015AP1947-CRNM State of Wisconsin v. Todd E. Whiting (L.C. # 2013CF5778)

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

Todd E. Whiting appeals a judgment convicting him of two counts of second-degree sexual assault of a child and one count of child enticement. His appointed appellate counsel, Attorney Mark S. Rosen, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)¹ and *Anders v. California*, 386 U.S. 738 (1967). Whiting received a copy of the report and responded to it. After reviewing the record, we conclude that there is an issue of arguable merit

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

regarding the DNA surcharges imposed on Whiting. Therefore, we reject the no-merit report and dismiss this appeal without prejudice to allow counsel to file a postconviction motion.

The judgment of conviction imposes a \$250 DNA surcharge on each felony on Whiting based on a new DNA surcharge statute that applies to all defendants sentenced on or after January 1, 2014. *See* 2013 Wis. Act 20, §§ 2355, 9426(1)(am); WIS. STAT. § 973.046(1r)(a); *State v. Radaj*, 2015 WI App 50, ¶1, 363 Wis. 2d 633, 866 N.W.2d 758. Whiting committed the crimes in 2013. The statute in effect at the time these crimes were committed allowed only one DNA surcharge for multiple offenses. *Radaj*, 363 Wis. 2d, ¶8. Because the new DNA surcharge statute has a punitive effect as applied to Whiting, it is an unconstitutional *ex post facto* law. *See id.*, ¶35. Therefore, imposition of the DNA surcharges creates an issue of arguable merit.

The DNA surcharge issue is not currently preserved for appellate review because no postconviction motion was filed raising it. *See State v. Barksdale*, 160 Wis. 2d 284, 291, 466 N.W.2d 198 (Ct. App. 1991). Because we have concluded that there is *at least one arguably meritorious issue* that must be raised in the circuit court by postconviction motion, we dismiss this appeal without prejudice and direct counsel to file a postconviction motion.

IT IS ORDERED that the no-merit report is rejected.

IT IS FURTHER ORDERED that this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the deadline for filing a postconviction motion under WIS. STAT. RULE 809.30 is extended until sixty days from the date of this order.

Diane M. Fremgen
Clerk of Court of Appeals