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August 11, 2016

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

2015AP1240-CRNM	State of Wisconsin v. Matthew J. Koldos (L.C. # 2014CF266)
2015AP1241-CRNM	State of Wisconsin v. Matthew J. Koldos (L.C. # 2014CF321)
2015AP1242-CRNM	State of Wisconsin v. Matthew J. Koldos (L.C. # 2014CF343)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

In these consolidated appeals, Matthew Koldos appeals from judgments convicting him of multiple felonies: making misleading statements in connection with the sale of securities, misappropriating identification, eight counts of theft by false representation, nine counts of capturing nude images, and three counts of possessing child pornography. Koldos's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14) and *Anders v. California*, 386 U.S. 738 (1967). Koldos received a copy of the report and was advised of his right to file a response. He has not done so. Upon consideration of the report and an

independent review of the record as mandated by *Anders* and RULE 809.32, we have located multiple issues with arguable merit relating to the no contest pleas and sentences. Therefore, we reject the no-merit report, dismiss these appeals and reinstate the time to file a RULE 809.30 postconviction motion.

The plea colloquy presents issues with arguable merit for appeal. It is arguable that during the plea colloquy, the circuit court did not discharge its duties under *State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794, to assess the defendant's personal characteristics, determine the defendant's understanding of the nature of the crimes (the elements), determine a factual basis for the pleas, and confirm that no promises, agreements or threats were made. The circuit court did not mention the elements of any of the crimes other than to note that jury instructions were attached to the plea questionnaires.¹ The court declared that there was a factual basis without identifying the source of the factual basis or confirming that the parties understood or stipulated to the source of the factual basis. "A circuit court may not ... rely entirely on the Plea Questionnaire/Waiver of Rights Form as a substitute for a substantive in-court plea colloquy," and "the plea hearing transcript must demonstrate that the circuit court used a substantive colloquy to satisfy each of the duties listed." *Id.*, ¶31.

During the plea colloquy, the circuit court did not discuss the consequences of the dismissed and read in counts. In *State v. Straszkowski*, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835, the court stated that the circuit court should advise the defendant that it may

¹ The jury instructions in 2014CF266 do not include instructions for misappropriating identification contrary to WIS. STAT. § 943.201(2)(a) and may not include proper instructions relating to the misleading statements count. The latter instructions (from 2004) refer to statutes that were the subject of 2007 Wis. Act 196.

consider read-in charges when imposing sentence, may require a defendant to pay restitution on a read-in charge, and that the State cannot prosecute a read-in charge in the future. In *State v. Sull*, 2016 WI 46, par. 35, 369 Wis. 2d 225, 880 N.W.2d 659, the court reiterated the *Straszkowski* advisements. Restitution was imposed on two of the dismissed and read in counts. This issue has arguable merit for appeal.

The circuit court imposed a \$250 DNA surcharge for each of the 22 crimes. The imposition of the DNA surcharges has arguable merit for appeal. The crimes were committed prior to January 1, 2014. Sentencing occurred in December 2014. Under the law in effect at the time Koldos committed the crimes, imposition of the WIS. STAT. § 973.046 DNA surcharge would have been discretionary with the circuit court. WIS. STAT. § 973.046(1g); *State v. Radaj*, 2015 WI App 50, ¶5, 363 Wis. 2d 633, 866 N.W.2d 758. Koldos's crimes occurred before the law changed to require a mandatory DNA surcharge for all felony convictions, *id.*, ¶¶1-5, 8-9 (change in DNA surcharge law discussed), and before the statute required the court to impose a DNA surcharge for each felony, *id.*, ¶¶8-9. *Radaj* suggests that the multiple DNA surcharges imposed in this case are ex post facto violations. *Id.*, ¶¶35-36. In addition, the circuit court did not show an exercise of discretion in imposing the DNA surcharges, which was required under prior law. *Id.*, ¶38.

Upon the foregoing reasons,

IT IS ORDERED that the WIS. STAT. RULE 809.32 no-merit report is rejected.

IT IS FURTHER ORDERED that these appeals are dismissed in favor of WIS. STAT. RULE 809.30 proceedings in the circuit court.

IT IS FURTHER ORDERED that a WIS. STAT. RULE 809.30 postconviction motion shall be filed in the circuit court within sixty days of the date of this order.

Diane M. Fremgen
Clerk of Court of Appeals