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DISTRICT I

August 31, 2016

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

2015AP129-CRNM State of Wisconsin v. Shawn W. Tomow
(L.C.#2013CF1963)

Before Kessler, Brennan and Brash, JJ.

Attorney James Rebholz has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). Tomow filed a response. Because an arguably meritorious appellate issue exists with regard to the court-imposed DNA surcharge, we reject the no-merit report. The time for Tomow to file a postconviction motion under WIS. STAT. RULE 809.30 is extended.

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

A jury found Tomow guilty of three felonies: (1) first-degree intentional homicide by use of a dangerous weapon; (2) attempted armed robbery with use of force; and (3) possession of a firearm by a felon. *See* WIS. STAT. §§ 940.01(1)(a), 939.63(1)(b), 943.32(2), 939.32, 941.29(2). On the first-degree intentional homicide charge, the trial court imposed a life sentence without eligibility for extended supervision. On the charges of armed robbery and possession of a firearm by a felon, the trial court imposed two sentences of five years of initial confinement and five years of extended supervision, to run concurrently with each other and with Tomow's life sentence. The trial court also stated: "On each count the Court is going to impose the mandatory DNA sample and surcharge and impose the applicable mandatory penalty assessment, surcharges, and costs, those to be paid including the restitution from 25 percent of any prison funds." Consistent with that pronouncement, the judgment of conviction reflects that Tomow was ordered to pay the DNA surcharge on the three counts, and the summary of obligations listed on the judgment of conviction reflects DNA surcharges totaling \$750.

The crimes were committed on April 21, 2013. Tomow was sentenced on April 4, 2014. Because he was sentenced after January 1, 2014, Tomow 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 Tomow 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 \$750 (three 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 Tomow's crimes and convictions mirrors that found unconstitutional in *Radaj*. Following *Radaj*, there appears to be arguable merit to pursue a postconviction motion based on a potential *ex post facto* violation for imposition of a \$250 DNA surcharge for each of the three felonies.

The no-merit report does not discuss the mandatory DNA surcharges applied in this case. The potential issue with the three DNA surcharges is not currently preserved for appellate review in this case 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) (generally a motion to modify a sentence is a prerequisite to appellate review of a defendant's sentence). We cannot conclude that further postconviction proceedings on Tomow's behalf lack arguable merit. Therefore, the no-merit report is rejected.²

Upon the foregoing reasons,

² Because we conclude there is arguable merit to the DNA surcharge issue, which requires rejection of the no-merit report, we do not consider whether there is arguable merit to the other issues raised by Tomow in his response. Some of the issues raised by Tomow relate to the State's showing of a video purportedly depicting the scene of the shooting and the related testimony during his trial. The video, which was played multiple times for the jury, is not in the appellate record. Additionally, Tomow highlights his trial attorney's failure to explore two witnesses' motivations for testifying against him and he submits that there are potential confrontation clause problems arising from a DNA analyst's testimony about a report that was prepared by another analyst. Were we not rejecting the no-merit report on these grounds, a supplemental no-merit report from counsel would have been required.

We encourage postconviction/appellate counsel to discuss with Tomow the issues he raised in response to counsel's no-merit report.

IT IS ORDERED that the WIS. STAT. RULE 809.32 no-merit report is rejected, appointed counsel's motion to withdraw is denied, and this appeal is dismissed.

IT IS FURTHER ORDERED that the deadline to file a postconviction motion is extended to sixty days from the date of this order.

Diane M. Fremgen
Clerk of Court of Appeals