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September 16, 2016

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

2016AP1148-CRNM State of Wisconsin v. Austin J. Alexander (L.C. # 2014CF302, 2014CF471)

Before Lundsten, Sherman and Blanchard, JJ.

Attorney Ralph Sczygelski, appointed counsel for Austin Alexander, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to Alexander's plea or sentencing. Alexander was sent a

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

copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, we conclude that further proceedings as to the DNA surcharges imposed would not be wholly frivolous within the meaning of ***Anders*** and RULE 809.32. Accordingly, we reject the no-merit report.

A criminal complaint charged Alexander with committing one count of using a computer to facilitate a child sex crime on or about June 25, 2014. In a separate case, a criminal complaint charged Alexander with committing one count of felony bail jumping on or about October 2, 2014. Pursuant to a plea agreement, the State amended the charges to four counts of exposing a child to harmful material and one count of misdemeanor bail jumping, and Alexander pled no contest to the amended charges. In September 2015, the court withheld sentence on the exposing a child to harmful material counts and placed Alexander on probation for three years, and sentenced Alexander to nine months in jail on the misdemeanor bail jumping count.

At the sentencing hearing, the court stated that it was imposing the DNA surcharge on the first felony count, but waiving all other surcharges. Thus, according to the court's oral pronouncement, the court imposed one $250 surcharge. *See* WIS. STAT. § 973.046(1r)(a) (the court shall impose a $250 DNA surcharge for each felony conviction). However, the felony judgment of conviction imposes $1,000 in DNA surcharges.[2] Thus, it appears that, contrary to the court's oral pronouncement, the clerk of the circuit court imposed four $250 felony DNA surcharges—one for each felony conviction.

[2] The judgment of conviction as to the single misdemeanor conviction does not reflect imposition of a DNA surcharge.

Because the felony judgment of conviction does not conform to the court's oral pronouncement at sentencing, further proceedings to challenge the DNA surcharges would not be wholly frivolous. When there is a discrepancy between the sentencing court's oral pronouncement and the written judgment of conviction, the oral pronouncement controls. ***State v. Perry***, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987); ***State v. Schordie***, 214 Wis. 2d 229, 231 n.1, 570 N.W.2d 881 (Ct. App. 1997). In such a case, the error in the judgment is a mere defect in the form of the certificate of conviction, which may be corrected in accordance with the actual determination by the sentencing court. *See* ***State v. Prihoda***, 2000 WI 123, ¶17 & n.9, 239 Wis. 2d 244, 618 N.W.2d 857. Here, however, WIS. STAT. § 973.046(1r), on its face, appears to require the sentencing court to impose a DNA surcharge for each judgment of conviction. We note that, in any further proceedings on this issue in the circuit court, the State may take a position as to whether the court was required to impose a surcharge as to each conviction.

Depending on the resolution of the DNA surcharge issue, there may also be arguable merit to a plea withdrawal motion. During the plea colloquy, the circuit court did not assess whether Alexander understood that DNA surcharges would be imposed for each conviction. In ***State v. Odom***, No. 2015AP2525-CR, an appeal currently pending in this court, the appellant argues that he has grounds for plea withdrawal because he was not advised at the time of his plea that he faced multiple mandatory DNA surcharges. Accordingly, we cannot conclude, at this time, that further proceedings in this case would be wholly frivolous.

Therefore,

IT IS ORDERED that the no-merit report is rejected and this no-merit appeal is dismissed without prejudice.

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

Diane M. Fremgen
Clerk of Court of Appeals