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DISTRICT III

December 20, 2016

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

2015AP1943-CRNM	State of Wisconsin v. Matthew Lee Spencer (L.C. # 2013CM214)
2015AP1944-CRNM	State of Wisconsin v. Matthew Lee Spencer (L.C. # 2013CF176)
2015AP1945-CRNM	State of Wisconsin v. Matthew Lee Spencer (L.C. # 2014CF36)
2015AP1946-CRNM	State of Wisconsin v. Matthew Lee Spencer (L.C. # 2014CF38)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Matthew Spencer has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),[1] concluding no grounds exist to challenge Spencer's convictions arising from four Marinette County Circuit Court cases. Spencer was informed of his right to file a response to the report and has not responded. Upon our independent review of the records as

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

mandated by ***Anders v. California***, 386 U.S. 738 (1967), we have identified a potential issue of arguable merit.

The State charged Spencer with fourteen crimes. Under a global plea agreement, Spencer pleaded no contest to armed robbery; felony bail jumping; two counts of burglary of a building or dwelling, both counts as party to a crime; and two counts of issuing a worthless check, one count as party to a crime. In exchange for his no contest pleas, the State agreed to dismiss and read in the remaining charges and join in defense counsel's recommendation for concurrent and consecutive sentences totaling ten and one-half years' initial confinement followed by twelve years' extended supervision.

With respect to the bail jumping offense, the parties agreed to recommend one year of initial confinement and one year of extended supervision, consecutive to all other sentences. During the sentencing hearing, however, the State recommended a consecutive sentence of one year of initial confinement and two years of extended supervision on the bail jumping conviction. The circuit court departed from the jointly recommended total sentence and imposed concurrent and consecutive terms resulting in a sentence consisting of fifteen and one-half years' initial confinement and seventeen years' extended supervision. On the bail jumping conviction, the court stated it was imposing "[e]xactly what was suggested there … one year of initial confinement, two years of extended supervision." [Emphasis added.]

In deciding a no-merit appeal, the question is whether a potential issue would be "wholly frivolous." ***State v. Parent***, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915. Here, the State's sentence recommendation on the bail jumping conviction exceeded that which the parties

had jointly agreed to under the plea agreement, and the circuit court appears to have followed the State's recommendation on that count. Because this creates a potential issue of arguable merit, counsel must pursue a postconviction motion based on the discrepancy. We will, therefore, reject the no-merit report, dismiss these appeals and extend the time for filing a postconviction motion.

We also note that the judgment of conviction in case No. 2014CF38 includes the $250 DNA analysis surcharge. Under the law in effect at the time Spencer committed his crimes, a circuit court sentencing a defendant for a felony conviction could impose a $250 DNA surcharge as an exercise of discretion unless the crime was one for which the surcharge was mandatory. *See* WIS. STAT. § 973.046(1g) (2011-12); ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. At sentencing, the circuit court, in the exercise of its discretion, indicated Spencer would give a DNA sample and pay the surcharge unless he had already done so. The court emphasized Spencer would not have to give a DNA sample "a second time" and would not have to "pay a second time." Defense counsel interjected "He has," thus suggesting that Spencer had previously given the sample and paid the surcharge. Therefore, if appellate counsel can confirm Spencer has previously given a DNA sample and paid the surcharge, Spencer may be entitled to have that surcharge removed from the judgment of conviction.[2]

Upon the foregoing,

IT IS ORDERED that the no-merit report is rejected and the appeals are dismissed.

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

Diane M. Fremgen
Clerk of Court of Appeals

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[2] Our discussion does not address all issues contained in appellate counsel's no-merit report. Our limited analysis is not intended to suggest that we have determined that the issues addressed herein are the only potentially nonfrivolous issues arising from Spencer's cases. Rather, we provide the discussion to explain our conclusion that the no-merit report has not demonstrated there are no issues of arguable merit.