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February 6, 2017

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

2016AP66-CRNM State v. Charles Dante Higgs
(L.C. #2013CF4224)

Before Brennan, P.J., Kessler and Dugan JJ.

Charles Dante Higgs appeals from a judgment of conviction entered after he pled guilty to second-degree sexual assault of a child and to exposing genitals to a child. Attorney Sara Roemaat has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders***

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

v. California, 386 U.S. 738, 744 (1967). Higgs filed a forty-nine page response, Attorney Roemaat filed a supplemental report, and Higgs filed an additional response to that filing. We reject the no-merit report and dismiss the appeal because counsel fails to demonstrate that potential postconviction claims lack arguable merit. We deny counsel's motion to withdraw and extend the time for Higgs to file a postconviction motion or notice of appeal under WIS. STAT. RULE 809.30 by sixty days.

In September 2013, Higgs was charged with one count of child enticement (sexual contact or intercourse), three counts of second-degree sexual assault of a child, and one count of exposing genitals or pubic area. The charges were filed after M.G. told police officers that while she was at a friend's house, Higgs pulled down her pants and touched her vagina with his finger, licked her vagina, pulled her shirt open and licked her nipple, and showed her his penis. M.G., who is cognitively disabled, was twelve at the time.

At a scheduling conference, Higgs' trial counsel advised the circuit court that Higgs wished to enter a plea of not guilty based on mental disease or defect (NGI). The court-appointed psychologist did not support the special plea; consequently, Higgs' trial counsel asked for time to obtain a second opinion.

At a subsequent hearing, Higgs' trial counsel advised the court that he would not be filing a report and did not have expert support for an NGI plea going forward. At that hearing, Higgs claimed his trial counsel never talked to him about the results of the second evaluation. Trial counsel claimed he verbally shared the results. Without resolving whether Higgs wished to withdraw his NGI plea, the circuit court proceeded to schedule the matter for a pre-trial hearing.

At the pre-trial hearing, after the State recited the terms of the plea agreement that was offered to Higgs, Higgs indicated that he wanted to make a statement:

> [DEFENSE COUNSEL]: My client wants to make a statement. I'm not sure he should do that but that's what he insists on.
>
> THE COURT: Okay. All right. Well, Mr. Higgs, just so that you're aware, everything that you're saying is taken down for the record. What is it that you wanted to say, sir?
>
> [HIGGS]: Well, I just wanted to acknowledge that I did receive a copy of … the DA's offer from my attorney. And my position is still NGI. I think I have a strong NGI case. I'm willing to admit to what I've done but I believe I have a viable excuse for what I've done. Not an excuse in that sense but I have a sickness.
>
> [THE COURT]: All right. Well, that's all been litigated as part of the record here, [defense counsel], correct?
>
> [DEFENSE COUNSEL]: Yeah. This was brought up. There was an examination done. I don't have a factual basis to proceed with that.
>
> THE COURT: Right. Okay. So, Mr. Higgs, sometimes those are factors that the [c]ourt considers if the case resolves for sentencing. Certainly all of the evaluations that have been conducted are in the court file and the [c]ourt would read those. And you can't use that at this point. The [c]ourt's made the determination. Your lawyer's made the determination as a responsible attorney that that defense is not available to you. So we'll proceed then forward and it's up to you how you want to handle it.

Higgs ultimately pled guilty to count two, second-degree sexual assault of a child, and count five, exposing genitals to a child. In exchange, the count one child enticement charge was dismissed outright and counts three and four, two second-degree sexual assault of a child

charges, were dismissed and read-in at sentencing. Additionally, the State agreed to recommend a substantial period of confinement as opposed to a specific length of a time.[2]

The circuit court accepted Higgs' plea and sentenced him to twenty years of initial confinement and ten years of extended supervision on the second-degree sexual assault of a child charge. On the exposing genitals to a child charge, the circuit court sentenced Higgs to one and one-half years of initial confinement and two years of extended supervision, to run consecutively.

We begin our analysis with the applicable case law concerning no-merit appeals:

> "[I]f counsel finds [a defendant's] case to be wholly frivolous, after a conscientious examination of it, [counsel] should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal."

State v. Allen, 2010 WI 89, ¶18, 328 Wis. 2d 1, 786 N.W.2d 124 (quoting ***Anders***, 386 U.S. at 744) (first set of brackets in ***Allen***). Applying those standards here, this court has identified at least two issues of arguable merit that lead us to reject the no-merit report.[3]

[2] We note that in setting forth the terms of the plea agreement, the State relayed that both it and the PSI report writer would recommend a *substantial* period of confinement. Other references in the record suggest that only the State was making that recommendation, and in fact, the PSI made a specific (continued)

Higgs' chief complaint is that his trial counsel was ineffective for not pursuing an NGI plea on his behalf. He cites case law to support his position.

"A favorable expert opinion is not an indispensable prerequisite to a finding of mental disease or defect." ***State v. Leach***, 124 Wis. 2d 648, 666, 370 N.W.2d 240 (1985). We recognize that the circuit court was not obligated to engage Higgs in a personal colloquy before allowing him to abandon his NGI plea, *see* ***State v. Francis***, 2005 WI App 161, ¶22, 285 Wis. 2d 451, 701 N.W.2d 632, and that counsel can withdraw such a plea on the defendant's behalf, *see* ***id.***, ¶23. However, "[i]n deciding whether to withdraw a plea of NGI, counsel has no right to act contrary to the defendant's expressed wishes, as the decision ultimately belongs to the defendant." ***Id.***

During the underlying proceedings in this case, Higgs continually expressed that he wished to pursue an NGI plea. Yet he did not reiterate this point during the plea proceeding. And the circuit court specifically referenced the addendum to the plea questionnaire and asked Higgs to confirm that he "talked to [his] lawyer about certain defenses such as mental disease or defect." Higgs confirmed that he had discussed the defenses that were available to him and said that he did not have any questions for the court.

Notwithstanding the lack of objection, Higgs submits that his plea was defective. Specifically, he claims that his trial counsel advised him that a favorable doctor's report and/or

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sentencing recommendation. This is another issue that counsel may, after conferring with Higgs, wish to explore during any subsequent postconviction proceedings.

[3] We have not attempted to make a final determination as to the arguable merit of all the issues discussed in the no-merit report, the supplemental no-merit report, and Higgs' responses. Postconviction/appellate counsel may ultimately conclude that additional issues have arguable merit.

opinion was an indispensable prerequisite to an NGI plea. Higgs' appendix to his response includes multiple letters he received from trial counsel. In one such letter, counsel states: "You indicated that you did not want to give up on the NGI plea. However, you have had two evaluations, neither one of which comes close to supporting an NGI defense. So I have no basis to pursue that any further." In another letter, Higgs' trial counsel repeats that because the report from the second evaluation would not support an NGI claim, counsel would not be filing the report and states that "[w]e are … going to have to abandon the NGI defense."

Higgs also submits documentation revealing that shortly before he entered his guilty pleas, he continued to press his trial counsel to secure records that might provide some basis for an NGI plea. His trial counsel repeatedly told him it was not a viable option without an expert witness.

Higgs further contends that the circuit court "applied the wrong substantive law by requiring that [he] produce a favorable doctor's report and/or expert opinion/testimony to carry his burden in the responsibility phase of his bifurcated trial."

Counsel does not adequately address the case law cited by Higgs. Indeed, counsel does not cite any cases in her supplemental no-merit response. Additionally, counsel submits that "[n]owhere in any of the correspondence from the trial attorney to Higgs does it say" that expert testimony was a prerequisite. Yet, in our review of the correspondence Higgs submitted, to the extent it was not explicit, this is the clear inference.

Our supreme court recently held that while expert testimony is typically offered to prove the elements of an NGI defense, it is not the only means to do so: "[A defendant] may also offer testimony by lay witnesses as well as his own testimony." *See* ***State v. Magett***, 2014 WI 67, ¶7,

355 Wis. 2d 617, 850 N.W.2d 42. For those cases "where the issue is within the common understanding of a jury, as opposed to technical or esoteric, and when lay testimony speaks to the mental illness, expert testimony, though probative may not be required." ***Id.***, ¶43. The circuit court is to make the discretionary decision as to whether expert testimony is required in a given case, and in doing so, it "must examine the facts, apply the correct legal standard, and reach a rational conclusion." *See* ***id.***, ¶44. When a circuit court requires expert testimony, it "should … discuss its reasoning." ***Id.***

Based on the record and information before us, we do not know what, if any, evidence Higgs would have presented if he had been afforded the opportunity to pursue an NGI defense. "[A] court should normally permit a defendant to offer his evidence in the responsibility phase of a trial before the court rules on his NGI defense." ***Id.***, ¶70. Consequently, we are not convinced that it would be wholly frivolous to assert either that trial counsel's performance was ineffective with respect to his pursuit of an NGI plea on Higgs' behalf or that the circuit court erred in its resolution of that issue so as to provide a basis for plea withdrawal.

Next, in sentencing Higgs, the circuit court stated: "You're going to have to pay for a DNA sample in this case for both counts, … Count[] 2 and Count 5 and you're to pay all the costs and fees and surcharges associated with this action along with those DNA surcharges." Consistent with that pronouncement, the judgment of conviction reflects that Higgs was ordered to pay the DNA surcharge on the two counts, and the summary of obligations listed on the judgment of conviction reflects DNA surcharges totaling $500.

The crimes were committed on September 7, 2013. Higgs was sentenced on July 10, 2014. Because he was sentenced after January 1, 2014, Higgs 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.

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 Higgs' crimes and convictions mirrors that found unconstitutional in ***Radaj***.

Higgs' circumstances do, however, differ from those presented in ***Radaj*** because even under the prior DNA surcharge statute, the surcharge for a conviction under WIS. STAT. § 948.02(2) would have been mandatory; yet, the surcharge for a conviction under WIS. STAT. § 948.10(1)(a) would not have been. *See, e.g.*, WIS. STAT. § 973.046(1r) (2011-12) (mandating that the DNA surcharge be imposed upon a defendant convicted of certain sex offenses, which include offenses under § 948.02(2)). Thus, it appears that an additional surcharge was imposed under the revised DNA surcharge statute. The no-merit report does not discuss the application of the mandatory DNA surcharges in this case.

We are not convinced that it would be wholly frivolous to challenge the imposition of the additional DNA surcharge. *See* ***Radaj***, 363 Wis. 2d 633, ¶35; *see also* ***State v. Scruggs***, 2015 WI App 88, ¶19, 365 Wis. 2d 568, 872 N.W.2d 146, *review granted* (WI Mar. 7, 2016) (No. 2014AP2981-CR) (holding that there is no *ex post facto* violation from the imposition of a single

mandatory surcharge when the surcharge has not previously been paid).[4] The potential issue regarding the DNA surcharge 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 Higgs' behalf lack arguable merit. Therefore, the no-merit report is rejected.

Upon the foregoing reasons,

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

[4] It is unclear whether Higgs previously paid a DNA surcharge.