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April 26, 2017

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

2016AP931-CRNM State of Wisconsin v. Dustin A. Mills (L.C. # 2014CF261)

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

Dustin A. Mills appeals from a judgment of conviction for exposing genitals to a child and failure to maintain a sex offender registry, as a repeater. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)¹ and *Anders v. California*, 386 U.S. 738 (1967). Mills filed a response to the no-merit report suggesting that the inclusion of \$500 in DNA surcharges on the judgment of conviction is improper. Counsel's supplemental

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

no-merit report does not respond to the DNA surcharge issue Mills asserts. Upon consideration of these submissions and an independent review of the record, we modify the judgment of conviction to remove the DNA surcharges and summarily affirm the judgment as modified because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

In June 2014, Mills was charged as a repeat offender of child enticement, fourth-degree sexual assault, and failure to maintain sex offender registry for conduct occurring in 2010 and 2013. Mills entered a guilty plea to the amended charge of exposing genitals to a child and a no contest plea to the repeater sex offender registry charge.² Mills was sentenced to concurrent terms of incarceration totaling three and one-half years to be served concurrently with a longer sentence Mills was serving. The sentencing court acknowledged that Mills had already given a DNA sample and that it was not necessary to order the giving of a sample. The court said nothing about DNA surcharges and the judgment of conviction includes DNA surcharges totaling \$500.

The no-merit report addresses the potential issues of whether Mills' pleas were intelligently, voluntarily, and knowingly entered, whether the sentence was the result of an erroneous exercise

² On the day of the plea taking Mills was going to enter a no contest plea to the misdemeanor fourth-degree sexual assault charge. During the plea hearing, further discussion with the prosecutor outside of court resulted in the dismissal of the sexual assault charge as a read-in at sentencing. The parties also agreed that an uncharged count of second-degree sexual assault of a child would be a read-in at sentencing as the factual basis for that uncharged count was recited in the probable cause portion of the complaint.

of discretion, and whether Mills was denied the effective assistance of counsel with respect to the entry of the plea and sentencing.

The record shows that the circuit court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and *State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Additionally, the circuit court properly relied upon Mills' signed plea questionnaire to ascertain Mills' understanding and knowledge at the time the plea was taken. *State v. Hoppe*, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. Mills acknowledged that he had gone over the questionnaire with his attorney and understood the information it contained.

The sentence was based on appropriate facts of record and considerations and cannot be deemed excessive. We also agree with counsel's assessment that as to the plea and sentencing, Mills was not denied the effective assistance of counsel. We have also reviewed the related search warrant and conclude no issue of arguable merit exists with respect to the issuance of the search warrant.

Mills correctly identifies that the inclusion of \$500 in DNA surcharges on the judgment of conviction is problematic. Under the law when Mills committed his crimes in 2010 and 2013, he would have been subject to a discretionary \$250 DNA surcharge. *See* WIS. STAT. § 973.046(1g) (2011-12). Under the law in effect when Mills was sentenced in 2015, a \$250 DNA surcharge for each of his two felony convictions was mandatory. *See* WIS. STAT. § 973.046(1r)(a) (2015-16). In *State v. Radaj*, 2015 WI App 50, ¶35, 363 Wis. 2d 633, 866 N.W.2d 758, we held that the new mandatory, per-count, DNA surcharge was an

unconstitutional *ex post facto* law as applied to a defendant convicted in one case of multiple felonies after January 1, 2014, when the underlying crimes were committed before January 1, 2014.

The statute in effect at the time of Mills' offenses allowed only one DNA surcharge for multiple offenses, and its imposition was discretionary. *Id.*, ¶8. Here the circuit court did not mention the DNA surcharge and did not exercise its discretion to impose the surcharge. By including the DNA surcharges when the court did not order Mills to pay them, the form of the judgment does not match the pronouncement at sentencing. "[T]he circuit court's unambiguous oral pronouncement of sentence trumps the written judgment of conviction." *State v. Prihoda*, 2000 WI 123, ¶15, 239 Wis. 2d 244, 618 N.W.2d 857; *see also State v. Perry*, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987). A defect in the form of the judgment of conviction may be corrected in accordance with the actual determination by the sentencing court. *See Prihoda*, 239 Wis. 2d 244, ¶17.

We modify the judgment to remove the DNA surcharges. The circuit court may either correct the clerical error in the sentence portion of the written judgment of conviction or may direct the clerk's office to make such a correction. *Id.*, ¶5. Having concluded that no issues of arguable merit exist for appeal, this court accepts the no-merit report, affirms the modified judgment of conviction, and discharges appellate counsel of the obligation to represent Mills further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is modified to remove the DNA surcharges; as modified, the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Mark A. Schoenfeldt is relieved from further representing Dustin A. Mills in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited under WIS. STAT. RULE 809.23(3)(b).

Diane M. Fremgen
Clerk of Court of Appeals