OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

June 7, 2017

To:

Hon. Chad G. Kerkman
Circuit Court Judge
Br. 8
912 56th Street
Kenosha, WI 53140

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Michael D. Graveley
District Attorney
Molinaro Bldg.
912 56th Street
Kenosha, WI 53140-3747

Becky Nicole Van Dam
Mayer Law Office, LLC
120 N. Main Street, Ste. 360
West Bend, WI 53095

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Kendrick A. Williams 525055
Kenosha Corr. Cntr
6353 14th Avenue
Kenosha, WI 53143

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

2016AP2026-CRNM State of Wisconsin v. Kendrick A. Williams (L.C. # 2012CF1021)
2016AP2027-CRNM State of Wisconsin v. Kendrick A. Williams (L.C. # 2014CF1021)

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

Kendrick A. Williams appeals from judgments of conviction for possession of marijuana with intent to deliver as a repeater and as a second offense, resisting an officer causing a soft tissue injury, and misdemeanor obstructing an officer. 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). Over a nine-week period, Williams filed five documents as his response to the no-merit

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

report. RULE 809.32(1)(e). Upon consideration of these submissions and an independent review of the records, we conclude that the judgments may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Williams was first charged with possession of marijuana with intent to deliver as a repeater and as a second offense after marijuana was found in the car Williams was driving. On September 11, 2012, a police officer conducted a traffic stop because the car had a burnt out headlight. The officer smelled marijuana emanating from the car and searched the vehicle after removing Williams and his passenger. A small digital scale was found between the driver's seat and the center console and a plastic bag with 114 small bags containing approximately .07 grams of marijuana was found in the trunk. Williams' motion to suppress the marijuana was denied. The officer testified that upon finding the marijuana Williams told his passenger he had nothing to worry about and that the marijuana belonged to Williams. The officer also indicated that while booking Williams, the officer found $97 on Williams, he asked Williams where he worked, and Williams stated he did not work. A jury found Williams guilty. Williams was sentenced to two years' initial confinement and two years' extended supervision.

On September 2, 2014, while Williams was on bail on the possession charge, police attempted to locate and contact Williams at the request of Illinois law enforcement. When officers attempted to speak with Williams, he was aggressive and argumentative. Williams turned away and ran. Officers pursued and wrestled Williams to the ground. Williams resisted and demonstrated clenched fists, one of which had a key sticking out between his fingers. The officers were able to cuff Williams and place him in the squad car. Williams had to be forcefully removed from the squad car at the police station. One of the officers injured his back in removing Williams from the squad car. Williams was charged with obstructing an officer,

resisting an officer, resisting an officer causing a soft tissue injury, and three counts of felony bail jumping. Williams entered a guilty plea to resisting an officer causing a soft tissue injury and misdemeanor obstructing an officer. The remaining charges, and charges in another case, were dismissed as read-ins at sentencing. The prosecution agreed to make no recommendation at sentencing and fulfilled that promise. Sentence was withheld on both convictions and Williams was ordered to serve a total of three years' probation consecutive to the sentence on the possession conviction.

With respect to the possession conviction, the no-merit report discusses whether the trial court erred in denying the motion to suppress evidence obtained from the vehicle search, whether Williams' right to due process was violated by the failure of police to preserve the squad video of the stop, whether trial counsel was ineffective for not moving to suppress Williams' statements, whether the evidence was sufficient to support the jury's verdict, and whether the basis for the penalty enhancers was proven. This court is satisfied that the no-merit report properly analyzes these issues as without merit, and this court will not discuss them further. We have also examined other components of the jury trial not discussed in the no-merit report: jury selection, the colloquy with Williams regarding his waiver of the right to testify, use of proper jury instructions, propriety of opening statements and closing arguments, and polling of the jury. We conclude no issues of arguable merit arise from those components.

Williams' response with respect to the possession conviction has five themes: 1) Williams' denial that the marijuana was his and the lack of any physical evidence that it was his, 2) that the officer lied when he testified that Williams told the passenger the marijuana was his, 3) that the prosecutor lied to the jury, 4) the unavailability of the squad car video which Williams believes would show that the police officer planted the marijuana and that a cover-up is

being perpetuated by the police by destroying the video, and 5) that Williams wanted to take the stand on his own behalf but his request was ignored by trial counsel. Our determination that the evidence at trial was sufficient to support the jury's verdict resolves numbers 1, 2 and 3. There is no requirement that any specific type of physical evidence must be produced. It is the function of the jury to decide issues of credibility, to weigh the evidence and resolve conflicts in the testimony. ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). The no-merit report discusses the lack of any suggestion on the record that the squad video was exculpatory or that the police acted in bad faith in not preserving the video.[2] Williams' claim that he wanted to take the stand at trial is belied by the colloquy in which he acknowledged that his decision to not testify was freely and voluntarily made.

With respect to the resisting an officer causing a soft tissue injury and misdemeanor obstructing an officer convictions, the no-merit report addresses the potential issues of whether the guilty plea was freely, voluntarily, and knowingly entered. We agree with the report's assessment that the plea hearing fully conformed to the strictures of ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and the record demonstrates that the plea was freely, voluntarily, and knowingly entered. Williams claims in his response that he never resisted, he did not run, he knew of no reason the police were making contact with him, that the police officer hurt himself, and that Williams did not cause the injury. Williams forfeited

[2] Before jury selection began, Williams' trial counsel explained on the record that when Williams' third attorney sought to obtain the squad video, the attorney was informed that the time to preserve the video had expired. Trial counsel gave his analysis that the nonpreservation of the squad video did not rise to the level of a constitutional violation and noted that Williams was not satisfied with counsel's analysis.

possible defenses when he entered his guilty plea. ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886.

As to both cases, the no-merit report also discusses whether the sentence was illegal or otherwise an erroneous exercise of discretion. The report explains why there is no arguable merit to challenge the sentence. Although the sentencing court mentioned the COMPAS[3] evaluation as indicating that Williams has a "high history of violence" and "high current violence," the court did not utilize the evaluation in a determinative fashion. Thus, the court properly utilized the COMPAS evaluation consistent with our supreme court's decision in ***State v. Loomis***, 2016 WI 68, ¶99, 371 Wis. 2d 235, 881 N.W.2d 749. There is no arguable merit to challenge the sentence as an erroneous exercise of discretion or as excessive.

At the November 4, 2015 sentencing, the sentencing court ordered Williams to "submit a DNA sample unless previously provided and pay a DNA surcharge." Each judgment of conviction includes a $250 DNA surcharge. Due to litigation over DNA surcharges imposed on crimes committed before the January 1, 2014 effective date of the change in the law making DNA surcharges mandatory for each count of conviction, we address the issue here. Under the law in effect at the time Williams committed the possession crime in September 2012, a circuit court sentencing a defendant for a felony conviction could impose a $250 DNA surcharge as an

[3] "'COMPAS' stands for 'Correctional Offender Management Profiling for Alternative Sanctions.'" ***State v. Loomis***, 2016 WI 68, ¶4 n.10, 371 Wis. 2d 235, 881 N.W.2d 749.

exercise of discretion unless the crime was one for which the surcharge was mandatory.[4] *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. Here the circuit court did not give a discretionary reason for imposing the DNA surcharge for the possession conviction. Thus, we consider whether the surcharge is a proper mandatory assessment. The judgment of conviction recites that Williams is to "Pay DNA surcharge (unless previously paid[])]."[5] Williams will not be required to pay the DNA surcharge for the possession conviction if he has already done so and he cannot claim that imposing the mandatory DNA surcharge is unconstitutional *ex post facto* punishment. If Williams has not previously paid the DNA surcharge, the imposition of a single mandatory DNA surcharge to cover, for the first time, the cost of taking the DNA sample is not an unconstitutional *ex post facto* punishment. ***State v. Scruggs***, 2017 WI 15, ¶¶21, 38, 373 Wis. 2d 312, 891 N.W.2d 786.

There is no arguable basis to challenge the $250 DNA surcharge for the conviction of resisting an officer causing a soft tissue injury. The crime occurred September 2, 2014, after the effective date of the mandatory DNA surcharge. There is no *ex post facto* claim to be made.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the convictions and discharges appellate counsel of the obligation to represent Williams further in these appeals.

[4] In July 2013, the legislature repealed the discretionary surcharge under WIS. STAT. § 973.046(1g) (2011-12) and revised § 973.046(1r) to require the circuit court to impose a $250 surcharge for each felony conviction. *See* 2013 Wis. Act 20, §§ 2353-55. The mandatory surcharge was first applicable to defendants sentenced after January 1, 2014, irrespective of when they committed their crimes of conviction. *See* ***id.***, § 9426(1)(am), § 973.046(1r).

[5] Although Williams has a 2008 felony conviction, it is not known if Williams previously gave a DNA sample or paid the surcharge.

Upon the foregoing reasons,

IT IS ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Becky Van Dam is relieved from further representing Kendrick A. Williams in these appeals. *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 except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals