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**DISTRICT II**

August 9, 2017

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

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2017AP172-CRNM      State of Wisconsin v. Mary Jo C. McMullen (L.C. #2014CF932)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Mary Jo C. McMullen appeals from a judgment convicting her of two counts of identity theft for financial gain. Her appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). McMullen did not

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

exercise her right to file a response. After reviewing the no-merit report and the record, we conclude there are no issues with arguable merit for appeal and therefore summarily affirm the judgment, as modified consistent with this opinion. *See* WIS. STAT. RULE 809.21.

While working at a Panera Bread location, McMullen found a credit card belonging to a customer who accidentally left it behind. McMullen used the card to make purchases at a Walmart and to buy gas. She admitted to the thefts but blamed her actions to some degree on her mental health issues. After McMullen entered an NGI plea, two psychologists examined her. Both opined that she had a serious mental illness but did not exhibit a loss of cognitive or volitional control and, therefore, there was insufficient evidence to support an NGI plea. One of those psychologists and a psychiatrist then examined McMullen to assess her competence to stand trial. The psychologist opined that she was not competent; the psychiatrist opined that she was. The circuit court found both professionals credible but concluded the psychiatrist's opinion was the more persuasive and thus found her competent to stand trial.

McMullen entered no-contest pleas to both charges. The court sentenced her to two sentences of eighteen months' incarceration followed by three years' extended supervision, concurrent to each other and consecutive to any other sentence. This no-merit appeal followed.

The no-merit report examines four possible appellate issues: whether her pleas were knowing, voluntary, and intelligent; whether the circuit court erroneously exercised its sentencing discretion; whether the court's determination that McMullen was competent to stand trial was clearly erroneous; and whether counsel should have raised any suppression issues. For the most part, the no-merit report sets forth an adequate and accurate discussion of the potential

issues to support the no-merit conclusion. We therefore need not address them further, except in regard to one issue related to McMullen's sentence.

Our point of departure relates to the order that McMullen provide a DNA sample and pay the surcharge. At sentencing, the court said only, "DNA sample and surcharge." The written judgment of conviction reflects, however, that McMullen was assessed a \$500 surcharge. Counsel states that the assessment was proper because McMullen was convicted of two felonies. *See* WIS. STAT. § 973.046(1r)(a). On these facts, this is incorrect.

McMullen committed her crimes in November 2013. Under the law in effect at that time, she would have been subject only to a single discretionary \$250 DNA surcharge regardless of the number of felony convictions. *See* WIS. STAT. § 973.046(1g) (2011-12); *State v. Radaj*, 2015 WI App 50, ¶5, 363 Wis. 2d 633, 866 N.W.2d 758. The law in effect when she was sentenced in February 2016, by contrast, required a mandatory \$250 DNA surcharge for each of her two felony convictions. *See* WIS. STAT. § 973.046(1r)(a) (2015-16); *Radaj*, 363 Wis. 2d 633, ¶9. The date of the crime, not of sentencing, controls. *See Radaj*, 363 Wis. 2d 633, ¶38.

It was within the circuit court's discretion to impose a single DNA surcharge for the two felony convictions. WIS. STAT. § 973.046(1g) (2011-12). We may examine the court's entire sentencing rationale to determine if imposing the DNA surcharge was a proper exercise of discretion. *See State v. Ziller*, 2011 WI App 164, ¶¶11-13, 338 Wis. 2d 151, 807 N.W.2d 241.

We conclude that the circuit court's overall sentencing rationale supports the imposition of a \$250 surcharge. McMullen could not show that it was unreasonable. *See id.*, ¶12. The record establishes her consistent work history, leading to the reasonable finding that she has the financial wherewithal to pay the surcharge, and the State incurs costs associated with collecting

the sample, analyzing it, and putting it into the DNA database. *See State v. Cherry*, 2008 WI App 80, ¶¶9-10, 312 Wis. 2d 203, 752 N.W.2d 393. Further, the \$250 surcharge is well under the \$811.40 in restitution ordered, to which McMullen did not object.

We conclude that the DNA surcharge in the written judgment of conviction is merely a clerical error, which may be corrected at any time. *See State v. Prihoda*, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857. On remand, the circuit court may either correct the error in the judgment itself or direct the clerk's office to make the correction. *Id.*, ¶5.

Our independent review of the record discloses no other potentially meritorious issue for appeal. We accept the no-merit report, order that the judgment of conviction be modified, and as modified, is affirmed. We remand this matter to the circuit court with directions to amend the judgment of conviction to reflect a DNA surcharge of \$250. Therefore,

IT IS ORDERED that the judgment of conviction is modified to reflect a DNA surcharge of \$250; as modified, the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21 and the cause is remanded for entry of a corrected judgment of conviction.

IT IS FURTHER ORDERED that once an amended judgment of conviction is entered, Attorney Patricia A. FitzGerald is relieved of further representing McMullen in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*