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**DISTRICT II**

August 9, 2017

To:

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

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2015AP1584-CRNM      State of Wisconsin v. Elsander Maine Phillips (L.C. #2012CF838)

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

**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).**

Counsel for Elsander Maine Phillips 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), concluding there is no

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

arguable basis for Phillips to withdraw his no-contest plea or challenge the sentence imposed for burglary. Phillips received a copy of the report, was advised of his right to file a response, and has elected not to do so. We have considered the plea and sentencing issues discussed in the no-merit report and conducted an independent review of the record. Although we accept the no-merit conclusion on the issues discussed in the report, we are compelled by *State v. Williams*, 2017 WI App 46, \_\_\_ Wis. 2d \_\_\_, \_\_\_ N.W.2d \_\_\_, to reject the no-merit conclusion, dismiss the appeal, and extend the time for Phillips to file a WIS. STAT. RULE 809.30 postconviction motion challenging the \$250 DNA surcharge. In the event that a second no-merit appeal is filed after a decision on the postconviction motion, the no-merit review will be limited to issues raised by the postconviction motion.<sup>2</sup> Cf. *State v. Scaccio*, 2000 WI App 265, ¶8, 240 Wis. 2d 95, 622 N.W.2d 449 (the logic behind the rule that a postrevocation appellant cannot challenge the original conviction is that the appellant already had an opportunity to raise any issues relating to the conviction in a first direct appeal); *State v. Tobey*, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996) (cannot raise issues not pursued from original conviction and sentence because of dissatisfaction with the sentence imposed after probation revocation).

On July 26, 2012, police were called to a closed grocery store on a report of a burglary in progress. After apprehending one man outside the back of the store, police searched the

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<sup>2</sup> We recognize that in accepting the no-merit conclusion on the plea and sentencing issues, we are conducting a partial no-merit review. Although an appellant is not entitled to a partial no-merit review, this court conducts partial no-merit reviews in some cases. *State ex rel. Ford v. Holm*, 2006 WI App 176, ¶¶6, 9-12, 296 Wis. 2d 119, 722 N.W.2d 609. A partial no-merit review is appropriate in this case because disposition of this appeal was held because of a potential ex post facto issue arising from the imposition of the mandatory DNA surcharge, which was discretionary at the time Phillips committed the crime. See WIS. STAT. § 973.046(1g) (2011-12). To simply dismiss the no-merit appeal would further delay determination of whether postconviction relief should be pursued on issues related to the plea and sentence. A partial no-merit in this circumstance promotes judicial economy.

building. Phillips was discovered in the basement of the store. Phillips was placed in handcuffs in an officer's squad car but managed to flee from the vehicle. He was apprehended a few houses away. Phillips was charged with burglary and escape. Phillips was found not competent to proceed. He was committed with an order for the involuntary administration of medication and his competency was restored. Phillips entered a no contest plea to the burglary charge and the escape charge was dismissed as a read in at sentencing. The prosecution agreed to recommend a two-year sentence consecutive to time Phillips was already serving and adhered to that agreement at sentencing. On October 2, 2014, Phillips was sentenced to four years' initial confinement and three years' extended supervision, but the sentence was stayed in favor of probation for four years with one year of conditional jail time.

The no-merit report addresses the potential issues of whether Phillips' plea was freely, voluntarily, and knowingly entered and whether the sentence was the result of an erroneous exercise of discretion.<sup>3</sup> This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further.

At sentencing, the circuit court ordered Phillips to pay the mandatory \$250 DNA surcharge even though the court knew Phillips had already given a DNA sample as a result of a prior conviction. *Williams*, 2017 WI App 46, ¶26, holds that the imposition of the mandatory DNA surcharge for a single felony conviction which was discretionary when the crime was committed violates the ex post facto prohibition when applied to a defendant who has already

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<sup>3</sup> The no-merit report recognizes that the circuit court failed to give Phillips the deportation warning required by WIS. STAT. § 971.08(1)(c). It concludes that the omission does not present an issue of arguable merit because Phillips is a citizen and not subject to deportation. See *State v. Douangmala*, 2002 WI 62, ¶4, 253 Wis. 2d 173, 646 N.W.2d 1. Phillips does not contest the representation that he is a citizen.

given a DNA sample. Under *Williams*, Phillips has an arguably meritorious challenge to the imposition of the \$250 DNA surcharge which may be raised in the circuit court by a postconviction motion.<sup>4</sup> See *id.*, ¶27; *State v. Barksdale*, 160 Wis. 2d 284, 291, 466 N.W.2d 198 (Ct. App. 1991).

Our review of the record discloses no other potential issues for appeal.<sup>5</sup> Because we have concluded that there is an arguably meritorious issue that may be raised in the circuit court by a postconviction motion, we accept the no-merit report in part, reject it in part, dismiss this appeal, deny counsel's motion to withdraw, and extend the time to file a postconviction motion. Although we will not conduct a second and subsequent no-merit review of the plea and sentencing issues discussed in the no-merit report, appointed counsel is not precluded from raising any other issue in the postconviction motion that counsel now concludes has arguable merit.

Upon the foregoing reasons,

IT IS ORDERED that the WIS. STAT. RULE 809.32 no-merit report is accepted in part and rejected in part, appointed counsel's motion to withdraw is denied, and this appeal is dismissed.

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<sup>4</sup> *State v. Williams*, 2017 WI App 46, ¶27, \_\_\_ Wis. 2d \_\_\_, \_\_\_ N.W.2d \_\_\_, recognizes that for a person situated like Phillips, the sentencing court may, in its discretion, impose the DNA surcharge. Where the circuit court has not exercised its discretion in the first instance, this court should not review the record in search of reasons to sustain a discretionary decision not made. "The function of an appellate court is not to exercise discretion in the first place, but to review the circuit court's exercise of discretion." *Vlies v. Brookman*, 2005 WI App 158, ¶33, 285 Wis. 2d 411, 701 N.W.2d 642.

<sup>5</sup> Any other possible appellate issues are forfeited because Phillips's no contest plea waived the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. See *State v. Kelly*, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886.

IT IS FURTHER ORDERED that the WIS. STAT. RULE 809.30 deadline for filing a postconviction motion is reinstated and extended to sixty days after remittitur.

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*