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August 16, 2017

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

2015AP188-CRNM State of Wisconsin v. Sherman M. Threats (L.C. #2014CF144)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, 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).

Sherman M. Threats appeals from a judgment of conviction and an order denying his motion for postconviction relief. Threats' appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)¹ and *Anders v. California*, 386 U.S. 738 (1967). Threats

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

received a copy of the report, was advised of his right to file a response, and has elected not to do so.

After reviewing the record and no-merit report, we accept counsel's conclusions that (1) Threets' no contest plea was knowingly, voluntarily, and intelligently entered and (2) the circuit court properly exercised its discretion at sentencing. However, we cannot say that there would be no arguable merit to any issue that could be raised on appeal. In particular, we conclude that Threets can challenge his \$250 DNA surcharge pursuant to our recent decision in *State v. Williams*, 2017 WI App 46, __ Wis. 2d __, __ N.W.2d __. Accordingly, we accept the no-merit report in part, reject it in part, deny counsel's motion to withdraw, and dismiss the appeal.² We also extend the time for Threets to file a new WIS. STAT. RULE 809.30 postconviction motion.

Threets was convicted following a no contest plea to one count of manufacture/delivery of cocaine, more than one gram but less than five grams. He committed the felony during an undercover drug buy in 2010 and was convicted in 2014. The circuit court imposed a sentence

² 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 due to a potential ex post facto issue arising from the imposition of the mandatory DNA surcharge, which was discretionary at the time Threets committed his 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.

of nine months in jail. Although the court did not expressly order the \$250 DNA surcharge, it appeared on the judgment of conviction pursuant to a change in the law.³

Threets sought to remove the DNA surcharge in a postconviction motion. He argued that the surcharge violated his constitutional rights against ex post facto laws because his offense was committed before the change in the law. He also noted that he had previously provided a DNA sample in an unrelated case. The circuit court denied Threets' motion. This no-merit appeal follows.

The no-merit report addresses whether Threets' no contest plea was knowingly, voluntarily, and intelligently entered. The record shows that the circuit court engaged in a colloquy with Threets that satisfied the applicable requirements of WIS. STAT. § 971.08(1) and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.⁴ In addition, a signed plea questionnaire and waiver of rights form was entered into the record. We agree with counsel that a challenge to the entry of Threets' no contest plea would lack arguable merit.

The no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court's sentencing decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197

³ On January 1, 2014, an amendment to the DNA surcharge statute took effect that made the previously discretionary DNA surcharge mandatory. See *State v. Scruggs*, 2017 WI 15, ¶¶7-8, 373 Wis. 2d 312, 891 N.W.2d 786.

⁴ There is one exception to this. The circuit court failed to delineate all of the constitutional rights Threets was giving up by entering his plea. This failure does not present a potentially meritorious issue for appeal, however, as (1) the information was included in the signed plea questionnaire and (2) the no-merit report indicates that, "Threets cannot assert that he did not understand all the constitutional rights he was giving up."

(citation omitted). In making its decision, the court considered the seriousness of the offense, Threats' character, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by Threats' criminal record, the sentence imposed does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to the court's sentencing decision would lack arguable merit.

As noted, the \$250 DNA surcharge appeared on Threats' judgment of conviction pursuant to a change in the law. Although Threats challenged this surcharge in a postconviction motion, he did so at a time when there was no state case law to directly support his claim. Now there is. In *Williams*, 2017 WI App 46, we considered whether the imposition of a single mandatory DNA surcharge for a felony offense committed before 2014 (and sentenced after January 1, 2014) violated constitutional prohibitions against ex post facto laws when the defendant had already given a DNA sample and been ordered to pay a surcharge due to a prior conviction. We concluded that it did, likening the mandatory surcharge to a fine under such circumstances. *See id.*, ¶26. Because Threats appears to be similarly situated to the defendant in *Williams*, we will allow him to file a new WIS. STAT. RULE 809.30 postconviction motion challenging his DNA surcharge.

Our review of the record discloses no other potential issues for appeal. Because we have concluded that an arguably meritorious issue exists as to the DNA surcharge, we accept the no-merit report in part, reject it in part, deny counsel's motion to withdraw, and dismiss the appeal. We also extend the time for Threats to file a new WIS. STAT. RULE 809.30 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, 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.

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.

Diane M. Fremgen
Clerk of Court of Appeals