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August 21, 2017

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

2016AP1466-CRNM State of Wisconsin v. Alexis Omar West (L.C. # 2013CF4691)

Before Kessler, Brash and Dugan, 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).

Alexis Omar West appeals from a judgment of conviction, entered upon his guilty pleas, on one count of first-degree recklessly endangering safety with a dangerous weapon and one count of possession of a firearm by a felon. Appellate counsel, Attorney Kerri T. Cleghorn, has filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT.

RULE 809.32 (2015-16).¹ West has filed a response. Upon this court's independent review of the record, we conclude that an arguably meritorious issue exists with respect to the DNA surcharge. We therefore reject the no-merit report, dismiss the appeal without prejudice, and extended the deadline for filing a postconviction motion.

West committed his offenses in October 2013. Prior to January 1, 2014, imposition of a \$250 DNA surcharge was discretionary for most felony convictions. *See* WIS. STAT. § 973.046(1g) (2011-12). Beginning January 1, 2014, the \$250 surcharge became mandatory upon each conviction for any felony. *See* 2013 Wis. Act 20, §§ 2353-55, 9423(1)(am); *see also* WIS. STAT. § 973.046(1r)(a) (2015-16). Thus, when West was sentenced in July 2014, the circuit court imposed two mandatory DNA surcharges.

In July 2015, West filed a *pro se* motion to vacate those surcharges. The circuit court responded with a letter, indicating that the surcharges were mandatory, but implying that if West could show he had paid the surcharge previously, both surcharges would be vacated. West responded, explaining he had paid the surcharge in connection with Milwaukee County Circuit Court case No. 2006CF5264. The circuit court then vacated one of the surcharges based on *State v. Radaj*, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, but declined to vacate the second surcharge, noting that “the mandatory DNA surcharge provisions of section 973.046(1r), Stats., do not exempt offenders who paid a DNA surcharge in connection with a prior case.”

On June 28, 2017, this court released *State v. Williams*, 2017 WI App 46, No. 2016AP883-CR, in which we held that it is an *ex post facto* violation to impose a mandatory

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

DNA surcharge for a felony conviction if the surcharge was discretionary when the crime was committed and if the defendant has already given a DNA sample. *See id.*, ¶26. Electronic docket entries from the February 21, 2008 sentencing hearing in West’s prior case state, in relevant part, “Must provide DNA sample and pay surcharge[.]” In light of *Williams*, West appears to have an arguably meritorious challenge to the circuit court’s refusal to vacate the second DNA surcharge.

Because a no-merit report is only appropriate if further proceedings would be wholly frivolous, *see McCoy v. Court of Appeals*, 486 U.S. 429, 437 (1988), we will dismiss this appeal and extend the time for West to file a postconviction motion in the circuit court. *See id.*, ¶27. We note that our conclusion regarding the arguable merit of a challenge to the DNA surcharge does not mean we have reached a conclusion about the merit of any other potential issues in the case. West is not precluded from raising any additional issue in the postconviction proceedings that counsel may now believe has merit.

Upon the foregoing,

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that West shall file a postconviction motion within thirty days of the date on which remittitur occurs. *See* WIS. STAT. RULE 809.82(2)(a).

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

Diane M. Fremgen
Clerk of Court of Appeals