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DISTRICT I

August 21, 2017

To:

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

2015AP2492-CRNM	State of Wisconsin v. Brian Keith Mitchell (L.C. # 2012CF5378)
2015AP2493-CRNM	State of Wisconsin v. Brian Keith Mitchell (L.C. # 2012CF5556)

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).

Brian K. Mitchell appeals two judgments, each convicting him of one count of burglary, as a party to a crime.¹ He also appeals the circuit court's order denying his motion to vacate the DNA surcharge imposed in one of the cases. Appointed appellate counsel, James A. Rebholz, has filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2015-16).² Mitchell responded. After reviewing the no-merit report and the response, and after conducting an independent review of the record as mandated by *Anders*, we conclude that there is an issue of arguable merit that could be pursued on appeal. Therefore, we reject the no-merit report.

Specifically, we conclude that our recent decision in *State v. Williams*, 2017 WI App 46, ___ Wis. 2d ___, ___ N.W.2d ___, *petitions for review pending*, compels us to reject the no-merit report, dismiss the appeal, and extend the time for Mitchell to file a WIS. STAT. RULE 809.30 postconviction motion challenging the \$250 DNA surcharge. *Williams* holds that the imposition of the mandatory DNA surcharge for a single felony conviction that was discretionary when the crime was committed violates the *ex post facto* prohibition when applied to a defendant who has already given a DNA sample. *See id.*, 2017 WI App 46, ¶26. Under *Williams*, Mitchell—who, according to circuit court on-line docket entries, previously provided a DNA sample—has an arguably meritorious challenge to the imposition of the DNA surcharge that may be raised in the circuit court by a postconviction motion. *See id.*, ¶27.

Therefore,

¹ These appeals are consolidated.

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

IT IS ORDERED that the no-merit report is rejected and these appeals are dismissed without prejudice. Attorney Rebholz or a successor counsel appointed by the State Public Defender shall continue to represent Mitchell.

IT IS FURTHER ORDERED that the time for Mitchell to file a postconviction motion is extended to sixty days from the date of this order.

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

Diane M. Fremgen
Clerk of Court of Appeals