



OFFICE OF THE CLERK  
**WISCONSIN COURT OF APPEALS**

110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT I**

August 25, 2017

To:

Hon. M. Joseph Donald  
Circuit Court Judge  
Felony Division  
821 W. State St., Rm. 506  
Milwaukee, WI 53233

John Barrett  
Clerk of Circuit Court  
Room 114  
821 W. State Street  
Milwaukee, WI 53233

Brian C. Hagner  
Magner, Hueneke, Smith & Borda, LLP  
4377 W. Loomis Rd.  
Greenfield, WI 53220

Karen A. Loebel  
Asst. District Attorney  
821 W. State St.  
Milwaukee, WI 53233

Criminal Appeals Unit  
Department of Justice  
P.O. Box 7857  
Madison, WI 53707-7857

Andrea Taylor Cornwall  
Asst. State Public Defender  
735 N. Water St., Ste. 912  
Milwaukee, WI 53202

Angus A. Stewart Jr.  
3062 N. 38th. St.  
Milwaukee, WI 53210

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

---

2016AP1791-CRNM      State of Wisconsin v. Angus A. Stewart, Jr. (L.C. # 2013CF526)

Before Brennan, P.J., Kessler and Brash, 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).**

Angus A. Stewart, Jr., appeals from judgments of conviction. Attorney Brian C. Hagner filed a no-merit report and a supplemental no-merit report concluding that further postconviction or appellate proceedings would lack arguable merit. Upon review, we conclude that a challenge to the DNA surcharge would not lack arguable merit. Accordingly, we reject the no-merit reports, dismiss this appeal without prejudice, and extend the deadline for filing a postconviction motion.

The State alleged in a criminal complaint that Stewart committed felony failure to support a child on three occasions during periods in 2010, 2011, and 2012. Pursuant to a plea bargain, Stewart pled guilty to two felony counts and one misdemeanor count of failure to support a child. The matter proceeded to sentencing in October 2014.

Prior to January 1, 2014, the circuit court had discretion to impose a \$250 DNA surcharge for felony convictions such as those at issue here, and no statutory provision authorized a DNA surcharge for a misdemeanor. *See* WIS. STAT. § 973.046(1g) (2011-12); *State v. Elward*, 2015 WI App 51, ¶¶2, 7, 363 Wis. 2d 628, 866 N.W.2d 756. Effective January 1, 2014, a \$250 DNA surcharge is mandatory upon each conviction for any felony and a \$200 DNA surcharge is mandatory upon each conviction for any misdemeanor. *See* 2013 Wis. Act 20, §§ 2353-55, 9426; *see also* WIS. STAT. § 973.046(1r) (2015-16). Thus, following Stewart's 2014 sentencing, the circuit court entered judgments of conviction reflecting \$500 in DNA surcharges for the two felony convictions and a \$200 DNA surcharge for the misdemeanor conviction. Stewart subsequently moved for sentence modification, alleging that mandatory DNA surcharges constituted *ex post facto* violations. The circuit court vacated the DNA surcharges for the misdemeanor and for one of the felony convictions but concluded that Stewart was required to pay a single mandatory \$250 DNA surcharge. This appeal followed.

On June 28, 2017, this court released *State v. Williams*, 2017 WI App 46, \_\_\_ Wis. 2d \_\_\_, \_\_\_ N.W.2d \_\_\_. In *Williams*, we held that a single mandatory DNA surcharge imposed after January 1, 2014, for a felony committed before that date constitutes a prohibited *ex post facto* violation if the surcharge was discretionary when the defendant committed the crime and the defendant previously provided a DNA sample. *See id.*, ¶¶25-26. In the instant case, the record shows that Stewart previously was convicted of a felony in Milwaukee County case

No. 2003CF5632 and in Milwaukee County case No. 2003CF7414. Electronic docket entries reflect that in case No. 2003CF5632, the circuit court ordered Stewart to provide a DNA sample and pay a DNA surcharge unless he had previously done so. The circuit court subsequently denied Stewart's motion to quash the DNA surcharge in case No. 2003CF5632.

In light of the foregoing, we cannot conclude that a challenge grounded on *Williams* in regard to the mandatory DNA surcharge that remains in place in the instant case would lack arguable merit. We therefore will dismiss this appeal and extend the deadline for filing a postconviction motion in circuit court. *See id.*, 2017 WI App 46, ¶27; *see also State v. Walker*, 2006 WI 82, ¶7, 292 Wis. 2d 326, 716 N.W.2d 498 (requiring a new postconviction motion when defendant seeks modification of a sentence imposed at resentencing). We add that our conclusion regarding the arguable merit of a challenge to the DNA surcharge does not mean we have reached a conclusion about the merits of any other potential issues in the case. Stewart is not precluded from raising any issue in the postconviction proceedings that counsel may now believe has merit.

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

IT IS FURTHER ORDERED that the deadline for Stewart to file a postconviction motion is extended through October 9, 2017. *See* WIS. STAT. RULE 809.82(2)(a) (2015-16).

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

---

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