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DISTRICT I

September 15, 2017

To:

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

2015AP2268-CRNM State of Wisconsin v. Reymundo L. J. Gonzales
(L.C.# 2013CF002514)

Before Brennan, P.J., Kessler 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).

Attorney Hans P. Koesser has filed a no-merit report seeking to withdraw as appellate counsel for Defendant-Appellant Reymundo L.J. Gonzales. *See* WIS. STAT. RULE 809.32 (2015-16)¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). Gonzales was sent a copy of the report

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

and did not file a response.² Because an arguably meritorious appellate issue exists with regard to the court-imposed DNA surcharges, we reject the no-merit report and dismiss this appeal without prejudice to allow counsel to file a postconviction motion.

A jury found Gonzales guilty of five felonies that were committed in May 2013. At Gonzales's August 2014 sentencing, the trial court said: "I will order that he provide his DNA and pay the surcharge cost and surcharges of this action." Consistent with that pronouncement, the judgment of conviction imposes \$1250 in DNA surcharges on Gonzales for his five crimes (\$250 for each conviction), based on a new DNA surcharge statute that applies to all defendants sentenced on or after January 1, 2014. *See* 2013 Wis. Act 20, §§ 2355, 426(1)(am); WIS. STAT. § 973.046(1r)(a); *State v. Radaj*, 2015 WI App 50, ¶1, 363 Wis. 2d 633, 866 N.W.2d 758. The statute in effect at the time Gonzales committed his crimes allowed only one DNA surcharge for multiple offenses. *See Radaj*, 363 Wis. 2d 633, ¶8. Because the new DNA surcharge statute has a punitive effect as applied to Gonzales, it is an unconstitutional *ex post facto* law. *See id.*, ¶35. Moreover, the decision to impose a DNA surcharge was not mandatory at the time Gonzales committed these crimes, unless the underlying conviction was for certain sex crimes; the decision was committed to the circuit court's discretion. *See id.*, ¶38; *State v. Cherry*, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. The sentencing court did not explain why it imposed the surcharges or otherwise indicate how it exercised discretion in the matter. Therefore, imposition of the DNA surcharges creates an issue of arguable merit.

² Over a ten-month period, Gonzales moved for and was granted ten extensions of time to file a response. He ultimately did not file a response or other correspondence with this court.

The DNA surcharge issue is not currently preserved for appellate review because no postconviction motion was filed raising it. *See State v. Barksdale*, 160 Wis. 2d 284, 291, 466 N.W.2d 198 (Ct. App. 1991). Because we have concluded that there is at least one arguably meritorious issue that must be raised in the circuit court by postconviction motion, we dismiss this appeal without prejudice and direct counsel to file a postconviction motion.

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice. Attorney Koesser or a successor counsel appointed by the State Public Defender shall continue to represent Gonzales.

IT IS FURTHER ORDERED that the deadline for filing a postconviction motion under WIS. STAT. RULE 809.30 is extended until 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