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DISTRICT I

September 27, 2017

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

2016AP1615-CRNM State of Wisconsin v. Justin Antonio Moore (L.C. # 2013CF2672)

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).

Justin Antonio Moore appeals from a judgment of conviction, entered upon his guilty plea, on one count of armed robbery with the threat of force as party to a crime. Appellate

counsel, Attorney Russell D. Bohach, 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 Moore has not responded. Upon this court's independent review of the record, we conclude that an arguably meritorious issue remains with respect to the DNA surcharge. We therefore reject the no-merit report, dismiss the appeal without prejudice, and extend the deadline for filing a postconviction motion.

Moore committed his offense in June 2013, but was not convicted and sentenced until June 2014. When Moore committed his crime, 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 Moore was sentenced in June 2014, the circuit court imposed a mandatory \$250 DNA surcharge.

This is the second no-merit appeal of Moore's conviction. In the first appeal,² by order dated February 1, 2016, we asked counsel to file a supplemental no-merit report relating to the DNA surcharge,³ writing:

In some instances, where a defendant committed crimes before January 1, 2014, multiple mandatory surcharges have been deemed to have a punitive effect, thereby creating an *ex post facto* violation. *See, e.g., State v. Radaj*, 2015 WI App 50, ¶1, 363 Wis. 2d 633, 866 N.W.2d 758 (imposition of four mandatory

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

² Moore's prior no-merit appeal was appeal No. 2015AP1739-CRNM.

³ We also asked counsel to discuss a potential issue related to the immigration warning required during a plea colloquy by WIS. STAT. § 971.08(1)(c).

surcharges because of four convictions). In a case where there was only a single mandatory surcharge, we concluded there was no *ex post facto* violation as applied to that defendant. See *State v. Scruggs*, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146. However, implicit in *Scruggs* was the fact that the defendant was providing the sample and paying the surcharge for the first time. See *id.*, ¶13 (small size of surcharge indicates it is intended as administrative charge to pay for sample collection and not punitive).

In response to this order, counsel filed a motion to voluntarily dismiss the appeal and extend the time for filing a postconviction motion or notice of appeal. We dismissed the appeal on March 4, 2016.

The case returned to the circuit court, and Moore moved to vacate the surcharge. The circuit court denied the motion without a hearing, writing, in relevant part:

The defendant asserts that requiring him to pay a DNA surcharge in this case is punitive because he previously paid the surcharge in connection with case 10CF004036. That scenario was not presented in *Scruggs*. The defendant has made no showing that he paid the DNA surcharge in his other case. But even assuming that he has, neither *Radaj* nor *Scruggs* requires the court to vacate the second surcharge. . . . *Scruggs* held that there is no *ex post facto* problem when a court imposes a single DNA surcharge for a felony committed prior to January 1, 2014, and for the reasons set forth, the court is not persuaded that one has been presented because the defendant previously paid the surcharge in connection with his other case.

Upon entry of the circuit court's order denying the motion, counsel again filed a no-merit notice of appeal.

However, on June 28, 2017, this court released *State v. Williams*, 2017 WI App 46, ___ Wis. 2d ___, 900 N.W.2d 310, in which we held that it is an *ex post facto* violation to impose a mandatory 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 Moore's prior case, Milwaukee County Circuit Court case

No. 2010CF4036, indicate that at the November 9, 2010 sentencing hearing, the circuit court ordered in part that Moore must “provide DNA sample if not already given, pay DNA surcharge.” In light of *Williams*, then, Moore appears to have an arguably meritorious challenge to the circuit court’s refusal to vacate the DNA surcharge in this case.

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 Moore to file a new postconviction motion in the circuit court. *See Williams*, 900 N.W.2d 310, ¶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. Moore 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 Moore 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