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**DISTRICT I**

October 31, 2017

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

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2016AP2278-CRNM State of Wisconsin v. Leroy Elijah Scott
(L.C. #: 2015CF514)

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).**

Leroy Elijah Scott appeals from a judgment of conviction for two counts of failing to pay child support for 120 days, contrary to WIS. STAT. § 948.22(2) (2013-14).[1] He also appeals from an order partially denying his postconviction motion. Scott's postconviction/appellate counsel, Carly M. Cusack, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Scott has not filed a response. We have independently reviewed the record and the no-merit report as mandated by ***Anders*** and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment and order.

Scott was originally charged with four counts of failure to pay child support for 120 days. According to the criminal complaint, the terms of Scott's divorce required him to pay $200 per month starting January 1, 2005. Child support payment records revealed that Scott made only six monthly payments in the ten years following his divorce.

Scott entered a plea agreement with the State pursuant to which he agreed to plead guilty to Counts 2 and 3, and Counts 1 and 4 would be dismissed and read in.[2] The agreement provided that both parties would be "free to argue at sentencing."

The trial court conducted a plea colloquy, accepted Scott's guilty pleas, and found him guilty. Neither party requested a PSI report, and the trial court did not order one. At sentencing, the State recommended a prison term, while the defense asked for an imposed-and-stayed prison sentence with probation. The trial court imposed and stayed two consecutive sentences of one-

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

[2] Count 2 represented the time period from January 1, 2013, through June 30, 3013. Count 3 represented the time period from July 1, 2013, through February 28, 2014.

and-one-half years of initial confinement and two years of extended supervision. It placed Scott on probation for four years on each count. The trial court imposed ninety days of condition time in jail, with work release privileges.

The trial court ordered Scott to provide a DNA sample and pay a $250 DNA surcharge for Count 2. It said it would waive all other costs so that Scott could focus on paying outstanding child support arrearages. The trial court also ordered Scott to pay over $30,000 in outstanding child support arrearages as restitution.

Postconviction/appellate counsel subsequently filed a postconviction motion. The motion first challenged the restitution, asserting that it should be paid pursuant to WIS. STAT. § 948.22(7), and that Scott should not have to pay restitution surcharges. The State agreed and the trial court subsequently amended the judgment accordingly.

The postconviction motion also challenged the DNA surcharge imposed by the judgment of conviction, noting that although the trial court only imposed the surcharge for Count 2, the judgment of conviction stated that Scott owed $500. Scott asked the court to "waive the single allowable DNA surcharge" or, in the alternative, to amend the judgment to reflect that only $250 was ordered. The trial court's written order said that it would maintain the single $250 DNA surcharge because "the imposition of a single mandatory DNA surcharge does not present an *ex post facto* problem."[3] The judgment of conviction was amended to reflect a single $250 DNA surcharge for Count 2.

[3] The trial court cited the court of appeals' decision in ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, which was later affirmed by the supreme court in ***State v. Scruggs***, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786.

Counsel subsequently filed a no-merit notice of appeal. Counsel's no-merit report addresses two issues: (1) whether Scott's guilty pleas were knowingly, intelligently, and voluntarily entered; and (2) whether the trial court erroneously exercised its sentencing discretion. Counsel concludes there would be no merit to challenging Scott's guilty pleas or sentences. This court agrees with counsel's thorough description and analysis of the potential issues identified in the no-merit report, and we independently conclude that pursuing those issues would lack arguable merit. We will briefly discuss those issues.

We begin with Scott's guilty pleas. There is no arguable basis to allege that they were not knowingly, intelligently, and voluntarily entered. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Scott completed a plea questionnaire and waiver of rights form, as well as an addendum, which the trial court referenced during the plea hearing. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The trial court conducted a thorough plea colloquy that addressed Scott's understanding of the plea agreement and the charges to which he was pleading guilty, the penalties he faced, and the constitutional rights he was waiving by entering his pleas. *See* § 971.08; ***Bangert***, 131 Wis. 2d at 266-72. For instance, the trial court explained that the maximum sentence on each count was eighteen months of initial confinement and two years of extended supervision, plus a fine of up to $10,000. The trial court discussed with Scott the constitutional rights he was waiving, such as his right to a jury trial. It went through the elements of the crime with Scott, and Scott admitted on the record that he twice committed the crime. The trial court also explained to Scott the ramifications of having two read-in charges, including that they would be considered at sentencing but could never be charged again.

The no-merit report acknowledges that the trial court did not explicitly tell Scott that it was not bound by the parties' plea negotiations. *See* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Counsel notes that in this case, there was no specific sentencing recommendation; both sides were free to argue. Counsel states that to the extent it could be argued that there was a ***Bangert*** violation because the trial court did not explain it was not bound by the plea negotiations, counsel concluded, based on her review of the record and her conversations with Scott, "that Mr. Scott would be unable to meet the second requirement necessary to form a prima facie case for plea withdrawal (that Mr. Scott did not understand that the court was not bound by the plea agreement at the time he entered his plea)." We have considered counsel's analysis of these facts. In addition, we note that the guilty plea questionnaire, which Scott told the trial court he reviewed, explicitly states: "I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty." We agree with postconviction/appellate counsel that there would be no arguable merit to seek plea withdrawal.

Based on our review of the record, we conclude that the plea questionnaire, waiver of rights form, Scott's conversations with his trial counsel, and the trial court's colloquy appropriately advised Scott of the elements of the crime and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the pleas were knowing, intelligent, and voluntary. The record does not suggest there would be an arguable basis to challenge Scott's pleas.

The next issue we consider is the sentencing. We conclude there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v.***

***Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentences were excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶41-43.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. Its sentencing comments addressed Scott's character, including his college education, his work history, and his criminal history. The trial court also discussed the offenses, noting that there were years of child support arrearages. It spoke of the need for punishment and the need to deter Scott and others who fail to meet their child support obligations. It concluded that it would give Scott a "chance" on probation, but noted that if he fails on probation, he will serve the maximum sentence for each crime.

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenging the trial court's compliance with ***Gallion***. Further, there would be no merit to assert that the sentences were excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. Scott received what he asked for: imposed and stayed prison sentences, with probation. Further, the maximum

sentences that were imposed and stayed do not shock the conscience, especially where Scott owed over $30,000 and where two additional counts were dismissed and read in.

Finally, we address the imposition of a single DNA surcharge. In ***State v. Scruggs***, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786, the Wisconsin Supreme Court held that a single mandatory DNA surcharge imposed against a defendant who committed her crime prior to January 1, 2014, did not violate the *ex post facto* prohibition. *See* ***id.***, ¶¶2-3. However, the court of appeals subsequently held that where a defendant had previously been "'ordered to provide a DNA sample and pay the surcharge in a prior case,'" there *was* an *ex post facto* violation. *See* ***State v. Williams***, 2017 WI App 46, ¶¶20, 27, 377 Wis. 2d 247, 900 N.W.2d 310 (petitions for review granted Oct. 10, 2017). Applying those cases here, we conclude there would be no arguable merit to challenging the imposition of a single $250 DNA surcharge in this case. Scott's only prior criminal convictions—for possession with intent to manufacture or deliver controlled substances and being a felon in possession of a weapon—occurred in 1992 and 1994, before DNA samples were taken and DNA surcharges were imposed for those crimes. *See* WIS. STAT. §§ 973.045 and 973.046 (1993-94). There is no indication that Scott was previously ordered to provide a sample and pay a DNA surcharge, and the single surcharge is therefore permissible under ***Scruggs***, as the trial court stated in its postconviction order. There would be no arguable merit to challenging that surcharge. *See* ***Scruggs***, 373 Wis. 2d 312, ¶¶2-3.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Carly M. Cusack is relieved of further representation of Scott in this matter. *See* WIS. STAT. RULE 809.32(3).

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

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