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

DISTRICT I/II

December 12, 2017

To:

Hon. Rebecca F. Dallet
Circuit Court Judge, Branch 40
Safety Building
821 W. State Street
Milwaukee, WI 53233

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

James B. Duquette
Seymour Kremer Koch & Lochowicz LLP
P.O. Box 470
Elkhorn, WI 53121-0470

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

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

Henry Anthony Preston 122609
New Lisbon Corr. Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

Andrea Cornwall
State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

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

2015AP1373-CRNM State of Wisconsin v. Henry Anthony Preston (L.C. # 2013CF4877)

Before Neubauer, C.J., Gundrum and Hagedorn, 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).

Henry Preston appeals from a judgment convicting him of being a felon in possession of a firearm contrary to WIS. STAT. § 941.29(2) (2013-14),[1] felony bail jumping contrary to WIS. STAT. § 946.49(1)(b), possession of tetrahydrocannabinols as a second or subsequent offense contrary to WIS. STAT. § 961.41(3g)(e), and disorderly conduct contrary to WIS. STAT. § 947.01(1). Preston's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16) and ***Anders v. California***, 386 U.S. 738 (1967). Preston received a copy of the report and was advised of his right to file a response. He has not done so. We have considered the plea and sentencing issues discussed in the no-merit report and conducted an independent review of the record. Although we accept the no-merit conclusion on the issues discussed in the report, we are compelled by ***State v. Williams***, 2017 WI App 46, 377 Wis. 2d 247, 900 N.W.2d 310, *review granted*, 2017 WI 94, ___ Wis. 2d ___, ___ N.W.2d ___, to reject the no-merit conclusion. We dismiss the appeal and extend the time for Preston to file a RULE 809.30 postconviction motion challenging the $250 DNA surcharge.[2] In the event that a second no-merit appeal is filed after a decision on the postconviction motion, the no-merit review will be limited to issues raised by the postconviction motion.[3] *Cf.* ***State v. Scaccio***, 2000 WI App 265,

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

[2] Postconviction, the circuit court vacated three other $250 DNA surcharges and one $200 DNA surcharge for the misdemeanor conviction.

[3] We recognize that in accepting the no-merit conclusion on the plea and sentencing issues, we are conducting a partial no-merit review. Although an appellant is not entitled to a partial no-merit review, this court conducts partial no-merit reviews in some cases. ***State ex rel. Ford v. Holm***, 2006 WI App 176, ¶¶6, 9-12, 296 Wis. 2d 119, 722 N.W.2d 609. A partial no-merit review is appropriate in this case to avoid further delay because of a potential ex post facto issue arising from the imposition of the mandatory DNA surcharge for the felon in possession of a firearm conviction when the surcharge was still discretionary in relation to Preston's October 2013 crime. *See* WIS. STAT. § 973.046(1g) (2011-12). To simply dismiss the no-merit appeal would further delay determination of whether postconviction relief should be pursued on issues related to the plea and sentence. A partial no-merit in this circumstance promotes judicial economy.

¶8, 240 Wis. 2d 95, 622 N.W.2d 449 (the logic behind the rule that a postrevocation appellant cannot challenge the original conviction is that the appellant already had an opportunity to raise any issues relating to the conviction in a first direct appeal); ***State v. Tobey***, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996) (cannot raise issues not pursued from original conviction and sentence because of dissatisfaction with the sentence imposed after probation revocation).

The no-merit report addresses the following possible appellate issues: (1) whether Preston's guilty pleas were knowingly, voluntarily, and intelligently entered and had a factual basis and (2) whether the circuit court misused its sentencing discretion. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of his guilty pleas, Preston answered questions about the pleas and his understanding of his constitutional rights during a thorough colloquy with the circuit court that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The record discloses that Preston's guilty pleas were knowingly, voluntarily, and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that they had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the plea questionnaire and waiver of rights form Preston signed is competent evidence of a knowing and voluntary plea. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32. The circuit court gave Preston the advisements discussed in ***State v. Straszkowski***, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d

835, relating to the counts being dismissed and read in. We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Preston's guilty pleas.

With regard to the sentences, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. The court adequately discussed the facts and factors relevant to sentencing Preston to consecutive terms as follows: four years for felon in possession of a firearm, two years for felony bail jumping, two years for possession of tetrahydrocannabinols, and ninety days for disorderly conduct. In fashioning the sentences, the court considered the serious and aggravated nature of the offenses, Preston's character, drug-dealing and history of other offenses, the domestic violence context in which the offenses occurred, the need to protect the public, and the need to punish Preston because multiple prior sentences had not induced the necessary behavior change. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The weight of the sentencing factors was within the circuit court's discretion. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. The record supports the circuit court's decision to declare Preston ineligible for the Challenge Incarceration Program and the Substance Abuse Program. The felony sentences complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. The circuit court properly considered the dismissed and read-in offenses. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentences.

An issue with arguable merit arises with regard to the $250 DNA surcharge imposed by the circuit court for the felon in possession of a firearm conviction. At sentencing, the circuit court erroneously stated that the surcharge was mandatory, which it was not under the law in effect at the time Preston committed his October 2013 offenses. WIS. STAT. § 973.046(1g)

(2011-12); ***Williams***, 377 Wis. 2d 247, ¶¶22, 24-25. This case appears to fall under ***Williams*** because the record indicates that Preston gave a DNA sample in connection with a prior conviction. ***Williams***, 377 Wis. 2d 247, ¶26, holds that imposition of the mandatory DNA surcharge for a single felony conviction when the surcharge was discretionary at the time the crime was committed and the defendant gave a DNA sample in a prior case is an ex post facto violation. Under ***Williams***, Preston has an arguably meritorious challenge to the imposition of the $250 DNA surcharge which may be raised in the circuit court by a postconviction motion.[4] *See* ***id.***, ¶27.

Our review of the record discloses no other potential issues for appeal. Because we conclude that there is an arguably meritorious issue that may be raised in a circuit court postconviction motion, we accept the no-merit report in part, reject it in part, dismiss this appeal, deny counsel's motion to withdraw, and extend the time to file a postconviction motion. Although we will not conduct a second and subsequent no-merit review of the plea and sentencing issues discussed in the no-merit report, appointed counsel is not precluded from raising any other issue in the postconviction motion that counsel now concludes has arguable merit.

Upon the foregoing reasons,

[4] ***State v. Williams***, 2017 WI App 46, ¶27, 377 Wis. 2d 247, 900 N.W.2d 310, *review granted*, 2017 WI 94, ___ Wis. 2d ___, ___ N.W.2d ___, recognizes that for a person situated like Preston, the sentencing court may, in its discretion, impose the DNA surcharge. Where the circuit court has not exercised its discretion in the first instance, this court should not review the record in search of reasons to sustain a discretionary decision not made. "The function of an appellate court is not to exercise discretion in the first place, but to review the circuit court's exercise of discretion." ***Vlies v. Brookman***, 2005 WI App 158, ¶33, 285 Wis. 2d 411, 701 N.W.2d 642.

IT IS ORDERED that the WIS. STAT. RULE 809.32 (2015-16) no-merit report is accepted in part and rejected in part, appointed counsel's motion to withdraw is denied, and this appeal is dismissed.

IT IS FURTHER ORDERED that the WIS. STAT. RULE 809.30 (2015-16) deadline for filing a postconviction motion is reinstated and extended to sixty days after remittitur.

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

Diane M. Fremgen
Clerk of Court of Appeals