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March 28, 2018

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

2017AP1464-CRNM State of Wisconsin v. Gerald L. Herrington (L.C. # 2013CF152)

Before Reilly, P.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).

Gerald L. Herrington appeals from a judgment convicting him of second-degree sexual assault of a child and child enticement, both as a repeater. Herrington's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386

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

U.S. 738 (1967). Herrington received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, we modify the judgment of conviction and, as modified, summarily affirm it because there are no issues with arguable merit for appeal. WIS. STAT. RULE 809.21.

Herrington was convicted following pleas to second-degree sexual assault of a child and child enticement, both as a repeater. The charges stemmed from allegations that he picked up a 15-year-old girl with his car, provided her with marijuana and alcohol, drove her to an abandoned building, and had oral and vaginal intercourse with her. Several additional charges were dismissed and read-in.[2] The circuit court imposed an aggregate sentence of twenty years of initial confinement and ten years of extended supervision. This no-merit appeal follows.

The no-merit report addresses whether Herrington's pleas were knowingly, voluntarily, and intelligently entered. The record shows that the circuit court engaged in a colloquy with Herrington that satisfied the applicable requirements of WIS. STAT. § 971.08(1) and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. In addition, a signed plea questionnaire and waiver of rights form was entered into the record, along with the relevant jury

[2] The additional charges were second-degree sexual assault of a child, delivering THC to a minor, and violating the sex offender registry, all as a repeater.

instructions detailing the elements of the offenses. We agree with counsel that a challenge to the entry of Herrington's pleas would lack arguable merit.[3]

The no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court's sentencing decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). In making its decision, the court considered the seriousness of the offenses, Herrington's character, and the need to protect the public. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by Herrington's extensive criminal record,[4] the sentence imposed does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to the length of Herrington's sentence would lack arguable merit.

Finally, the no-merit report addresses whether a basis exists for a motion for sentence modification. The no-merit report indicates that Herrington has not been able to point to any fact that might constitute a "new factor" under ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975), warranting sentence modification. We are satisfied that the no-merit report properly analyzes this issue as without merit, and we will not discuss it further.

[3] Over a month before entering his pleas, Herrington asked for a new attorney. The circuit court denied his attorney's motion to withdraw, as Herrington was already on his third attorney and the case was growing old. We are satisfied that the circuit court's decision was proper and does not present an issue of arguable merit. In any event, Herrington expressed satisfaction with his attorney's performance at the subsequent plea hearing. Moreover, the no-merit indicates that Herrington has no desire to seek withdrawal of his pleas.

[4] Herrington had over twenty prior convictions.

The no-merit report does not address one aspect of the sentence that bears discussion: the DNA analysis surcharge. Herrington committed his offenses in November 2012 and was sentenced in February 2015. Those dates and the multiple convictions could set the stage for a possible ex post facto challenge, as the judgment of conviction indicates that Herrington must pay a $500 surcharge. *See* ***State v. Radaj***, 2015 WI App 50, ¶¶3-5, 35, 363 Wis. 2d 633, 866 N.W.2d 758.

Since being amended in 2013, WIS. STAT. § 973.046(1r)(a) requires that a convicted felon pay a mandatory $250 DNA analysis surcharge per felony conviction for sentences imposed on or after January 1, 2014. 2013 Wis. Act 20 §§ 2355, 9426(1)(am). Under the law in effect at the time Herrington committed his crimes, however, he would have been subject to a single $250 DNA analysis surcharge. *See* WIS. STAT. § 973.046(1g), (1r) (2011-12).

Herrington should have been sentenced and had the surcharge statute applied under the law in effect at the time he committed his crimes. That law called for the imposition of a single $250 DNA analysis surcharge, which was mandatory due to Herrington's conviction for second-degree sexual assault of a child. *See* ***id.***

There is no discussion of the DNA analysis surcharge in the sentencing transcript. We conclude that the DNA analysis surcharge in the written judgment of conviction is merely a clerical error, which may be corrected at any time. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857. On remand, the circuit court may either correct the error in the judgment or direct the clerk's office to make the correction. ***Id.***, ¶5.

Our independent review of the record discloses no other potentially meritorious issue for appeal. We therefore accept the no-merit report, order that the judgment of conviction be

modified, and as modified, affirm the judgment. We remand the matter to the circuit court with directions to amend the judgment of conviction to reflect a DNA analysis surcharge of $250.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is modified to reflect a DNA analysis surcharge as $250; as modified, the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21, and the cause is remanded for entry of an amended judgment of conviction.

IT IS FURTHER ORDERED that once an amended judgment of conviction is entered, Attorney Michael J. Backes is relieved of further representation of Herrington in this matter.

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

Sheila T. Reiff
Clerk of Court of Appeals