



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](http://www.wicourts.gov)

**DISTRICT I**

April 2, 2018

To:

Hon. Daniel L. Konkol  
Milwaukee County Courthouse  
821 W. State Street  
Milwaukee, WI 53233-1427

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

Hon. Janet C. Protasiewicz  
Milwaukee County Courthouse  
901 N. 9th Street  
Milwaukee, WI 53233-1425

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

John Barrett, Clerk  
Milwaukee County Courthouse  
821 W. State Street  
Milwaukee, WI 53233

Michael Leshawn Gray  
4620 North 53rd Street  
Milwaukee, WI 53218

Peter O. Bockhorst  
Bockhorst Law Offices  
510 N. 27th Street  
Milwaukee, WI 53208

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

---

2017AP806-CRNM      State of Wisconsin v. Michael Leshawn Gray  
(L.C. # 2013CF2444)

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).**

Michael LeShawn Gray pled guilty to possessing with intent to deliver more than three grams of heroin but not more than ten grams of heroin. *See* WIS. STAT. § 961.41(1m)(d)2.

(2013-14).<sup>1</sup> He also pled guilty to possessing with intent to deliver five grams of cocaine but not more than fifteen grams of cocaine. *See* WIS. STAT. § 961.41(1m)(cm)2. The matter proceeded to sentencing, but the circuit court subsequently vacated the sentences and a successor circuit court held a resentencing hearing. At that hearing, the circuit court imposed a five-year term of imprisonment for the heroin offense and bifurcated the term as two years of initial confinement and three years of extended supervision. For the cocaine offense, the circuit court imposed a concurrent three-and-a-half-year term of imprisonment bifurcated as eighteen months of initial confinement and twenty-four months of extended supervision. The circuit court also imposed two \$250 DNA surcharges. In postconviction proceedings, Gray challenged those surcharges. The circuit court vacated one surcharge but required Gray to pay the other.<sup>2</sup> Gray appeals.

Appellate counsel, Attorney Peter O. Bockhorst, filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2015-16). In the no-merit report, Attorney Bockhorst addressed whether Gray could pursue an arguably meritorious challenge to the remaining DNA surcharge. At this court's request, Attorney Bockhorst filed a supplemental no-merit report addressing why the plea and resentencing proceedings did not give rise to any issues of arguable merit. Gray did not respond to the no-merit reports. Upon our review of the no-merit reports and the record, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21 (2015-16).

---

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

<sup>2</sup> The Honorable Daniel L. Konkol accepted Gray's guilty pleas and entered the judgment of conviction. The Honorable Timothy Witkowiak presided over Gray's resentencing. The Honorable Janet C. Protasiewicz presided over the postconviction motion challenging the DNA surcharges.

According to the criminal complaint, police stopped Gray on May 2, 2013, upon observing that he was operating a motor vehicle without wearing a seatbelt. During the stop, police noted that Gray appeared nervous. Gray subsequently consented to a search of his vehicle. During the search, police found a quantity of heroin, cocaine, and methylenedioxymethamphetamine (MDMA). The State charged Gray with three counts of possessing with intent to deliver a controlled substance. Gray decided to resolve the charges with a plea bargain. In December 2013, he pled guilty to one count of possessing with intent to deliver heroin in violation of WIS. STAT. § 961.41(1m)(d)2., and one count of possessing with intent to deliver cocaine in violation of § 961.41(1m)(cm)2. The State moved to dismiss and read in a charge of possessing with intent to deliver MDMA. The matter proceeded to sentencing on April 2, 2014.

Following sentencing, Gray moved for an order vacating his sentences and granting resentencing before a different judge. As grounds, he alleged that his trial counsel was ineffective for failing to object when the State breached the plea bargain by not making the promised sentencing recommendation. The circuit court granted the relief that Gray requested.

On November 30, 2015, a successor circuit court conducted a resentencing hearing. The State made the promised recommendation and asked the circuit court to impose an aggregate of two years of initial confinement and three years of extended supervision. Gray asked the circuit court to impose an aggregate of twenty months of initial confinement followed by three years of extended supervision. The circuit court followed the State's recommendation. The circuit court also imposed two \$250 DNA surcharges, one of which it subsequently vacated.

In this proceeding, appellate counsel addresses the issue of whether Gray could pursue an arguably meritorious challenge to his guilty pleas. Upon our independent review, we conclude he could not mount such a challenge. Gray executed a plea questionnaire and waiver of rights form in which he acknowledged the elements of the offenses, the penalties that could be imposed, and the constitutional rights he waived by entering guilty pleas. Gray also executed an addendum to the form acknowledging that by pleading guilty he would give up his rights to raise defenses, to challenge the validity of his arrest, and to seek suppression of evidence. At the plea hearing, the circuit court established that Gray understood, *inter alia*, the maximum penalties, the circuit court's freedom to impose any penalties within the statutory maximums regardless of the plea bargain, the elements of the offenses, and his constitutional rights.

The record shows that the circuit court conducted an impeccable plea colloquy and fully complied with the obligations imposed by statute and case law. *See* WIS. STAT. § 971.08 and *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. We conclude that Gray entered his guilty pleas knowingly, intelligently, and voluntarily. There is no arguably meritorious basis on which to challenge the guilty pleas.

Appellate counsel also addresses whether Gray could pursue an arguably meritorious challenge to the sentences he received at the resentencing hearing. We agree that he could not mount such a challenge. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. “[D]iscretion contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by

inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.” *Id.*, ¶19 (citation omitted). Here, the circuit court considered the mandatory sentencing factors of “the gravity of the offense[s], the character of the defendant, and the need to protect the public.” *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court also considered a variety of mitigating factors, including Gray’s efforts at rehabilitation and his lack of a prior felony record. The factors that the circuit court considered were relevant and proper. Additionally, the sentences that the circuit court imposed were far below the statutory maximums—fifteen years of imprisonment and a \$50,000 fine—that Gray faced on each count. *See* WIS. STAT. §§ 961.41(1m)(d)2., 961.41(1m)(cm)2., 939.50(3)(e). Accordingly, we cannot conclude that the sentences were unduly harsh or unconscionable. *See State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. A challenge to the sentences would be frivolous within the meaning of *Anders*.

Appellate counsel does not discuss whether Gray could pursue an arguably meritorious claim that resentencing was the wrong remedy for trial counsel’s ineffectiveness at the original sentencing. We conclude that Gray could not pursue such a claim. Gray received the remedy he requested. A challenge to that remedy is therefore barred by principles of judicial estoppel. *See State v. English-Lancaster*, 2002 WI App 74, ¶22, 252 Wis. 2d 388, 642 N.W.2d 627. Moreover, Gray claimed that trial counsel was ineffective because trial counsel failed to object to the State’s breach of a plea bargain, and resentencing by a different judge is the preferred remedy when a plea bargain is breached. *See State v. Howard*, 2001 WI App 137, ¶¶34-37, 246 Wis. 2d 475, 630 N.W.2d 244.

We agree with appellate counsel's conclusion that no basis exists to challenge the postconviction order vacating only one of the two \$250 DNA surcharges imposed at the resentencing hearing. The law in effect in 2013 when Gray committed his crimes allowed a circuit court to impose a DNA surcharge as a discretionary matter when imposing a sentence for most felonies, including those at issue here. *See* WIS. STAT. § 973.046(1g) (2011-12); *see also State v. Cherry*, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393.<sup>3</sup> Effective January 1, 2014, the legislature amended the law to require a DNA surcharge of \$250 per felony conviction. *See* 2013 Wis. Act 20, §§ 2353-55, 9426(1)(am); *see also* WIS. STAT. § 973.046(1r). Gray's resentencing took place after the effective date of the amendment, and the circuit court therefore imposed two mandatory DNA surcharges under § 973.046(1r) (2015-16).

Gray moved for postconviction relief in reliance on *State v. Radaj*, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, which holds that multiple mandatory DNA surcharges constitute an unconstitutional *ex post facto* punishment when imposed on a defendant sentenced after January 1, 2014, for crimes committed before that date. *See id.*, ¶¶1, 4-5, 35. In response to Gray's motion, the circuit court vacated one of the two DNA surcharges imposed on Gray. The circuit court concluded, however, that Gray must pay one mandatory DNA surcharge. No basis exists to challenge that conclusion. In *State v. Scruggs*, 2017 WI 15, ¶¶49-50, 373 Wis. 2d 312,

---

<sup>3</sup> When we decided *State v. Cherry*, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, the governing version of WIS. STAT. § 973.046(1g) was identical to the version in effect when Gray committed the crimes underlying this appeal.

891 N.W.2d 786, the supreme court upheld a single mandatory DNA surcharge imposed at sentencing after January 1, 2014, for a felony committed before that date.<sup>4</sup> *Id.*, ¶¶3, 19.

We address one additional matter that appellate counsel did not discuss in the no-merit reports. At the resentencing hearing, the circuit court ordered that Gray receive 622 days of credit against each of his concurrent sentences. The record shows that the purpose of the award was to credit Gray for two periods of time that he spent in custody: (1) five days he spent in jail before his conviction and original sentencing; and (2) the period from April 2, 2014, when he was first sentenced in these matters, through November 30, 2015, when he was resentenced. In response to an inquiry from the Department of Corrections, the circuit court subsequently determined that Gray was entitled to a total of 613 days of credit for these periods and modified the judgment of conviction accordingly. Pursuant to WIS. STAT. § 902.01, we take judicial notice of the interval between two dates, and we conclude that the circuit court accurately recalculated the award of sentence credit.<sup>5</sup> Further pursuit of this issue would lack arguable merit.

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32 (2015-16).

---

<sup>4</sup> We add that, to the extent the discussion in *State v. Scruggs*, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786, assumes the defendant did not previously pay a DNA surcharge in connection with a prior conviction, the record here is clear that Gray's only prior conviction was for a misdemeanor he committed in 1992. At that time, the law did not authorize a DNA surcharge for misdemeanants. *Cf. State v. Elward*, 2015 WI App 51, ¶2, 363 Wis. 2d 628, 866 N.W.2d 756 (describing the 2013 legislation authorizing a DNA surcharge upon conviction for a misdemeanor).

<sup>5</sup> We have relied on the date-to-date calculator available at [www.timeanddate.com](http://www.timeanddate.com) to determine the number of days that Gray spent in custody from April 2, 2014 through November 30, 2015.

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2015-16).

IT IS FURTHER ORDERED that Attorney Peter O. Bockhorst is relieved of any further representation of Michael LeShawn Gray on appeal. *See* WIS. STAT. RULE 809.32(3) (2015-16).

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

---

*Sheila T. Reiff*  
*Clerk of Court of Appeals*