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DISTRICT IV

May 18, 2018

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

2016AP1195-CRNM State of Wisconsin v. Travis L. Petersen (L.C. # 2013CF38)

Before Lundsten, P.J., Blanchard and Kloppenburg, 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).

Attorney Marcella De Peters, appointed counsel for appellant Travis L. Petersen, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16);¹ *Anders v. California*, 386 U.S. 738, 744 (1967). Petersen was sent a copy of the

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

report and has filed a response arguing, among other things, that he was improperly assessed the DNA surcharge. We conclude that further appellate proceedings to challenge the DNA surcharge imposed against Petersen would not be wholly frivolous within the meaning of *Anders* and RULE 809.32. We therefore reject the no-merit report, dismiss this no-merit appeal, and extend the time to file a postconviction motion.

Petersen was sentenced on January 8, 2015, for a first-degree intentional homicide that occurred on March 5, 2013. The circuit court did not state at the sentencing hearing that it was imposing the DNA surcharge. However, the surcharge was added to the judgment of conviction by the clerk of the circuit court because, at the time of sentencing, the surcharge was mandatory. *See* WIS. STAT. § 973.046(1r)(a).

In *State v. Williams*, 2017 WI App 46, ¶¶20-26, 377 Wis. 2d 247, 900 N.W.2d 310, *review granted*, 2017 WI 94, 378 Wis. 2d 222, 904 N.W.2d 371, we held that the imposition of the mandatory DNA surcharge for a single felony conviction which was discretionary when the crime was committed violates the ex post facto prohibition when applied to a defendant who has already given a DNA sample. Here, at the time the homicide was committed in March 2013, the DNA surcharge for first-degree intentional homicide was discretionary. *See* WIS. STAT. § 973.046(1g) (2011-12). Petersen was sentenced in January 2015, after the DNA surcharge became mandatory. *See* WIS. STAT. § 973.046(1r)(a); 2013 Wis. Act 20. Petersen has attached to his no-merit response a letter from the Wisconsin State Crime Lab verifying that Petersen provided a DNA sample in 2010. Thus, under *Williams*, Petersen 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.² See *id.*, 377 Wis. 2d 247, ¶27; *State v. Barksdale*, 160 Wis. 2d 284, 291, 466 N.W.2d 198 (Ct. App. 1991). Appointed counsel is not precluded from raising any other issue in the postconviction motion that counsel now concludes has arguable merit.

Therefore,

IT IS ORDERED that the no-merit report is rejected and this no-merit appeal is dismissed.

IT IS FURTHER ORDERED that the time to file a postconviction motion is extended to sixty days from the date of this order.

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

Sheila T. Reiff
Clerk of Court of Appeals

² In *State v. Williams*, 2017 WI App 46, ¶27, 377 Wis. 2d 247, 900 N.W.2d 310, review granted, 2017 WI 94, 378 Wis. 2d 222, 904 N.W.2d 371, we recognized that in sentencing a person in Petersen’s situation the 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.