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**DISTRICT I**

August 14, 2018

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

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2016AP650-CRNM	State of Wisconsin v. Donta D. Smith (L.C. # 2013CF5783)
2016AP651-CRNM	State of Wisconsin v. Donta D. Smith (L.C. # 2014CF874)
2016AP652-CRNM	State of Wisconsin v. Donta D. Smith (L.C. # 2014CF899)

Before Kessler, P.J., 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).**

Donta D. Smith appeals the judgments entered after he pled guilty to the following charges in three separate circuit court cases: Milwaukee County Case No. 2013CF5783, one count of armed robbery as a party to a crime; Milwaukee County Case No. 2014CF874 one count of conspiring to intimidate a witness; and Milwaukee County Case No. 2014CF899, one

count of possession of a firearm by a person adjudged delinquent of a felony. *See* WIS. STAT. §§ 943.32(2), 939.05, 940.43(4), 941.29(2)(b) (2013-14).<sup>1</sup> He also appeals the order denying, in part, his postconviction motion.<sup>2</sup> Smith's postconviction and appellate lawyer, Mark A. Schoenfeldt, has filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738, 744 (1967), and WIS. STAT. RULE 809.32. Despite being granted numerous extensions to do so, Smith did not respond. After independently reviewing the record and the no-merit report, we conclude there are no issues of arguable merit that could be raised on appeal and summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

### ***Background***

In Milwaukee County Case No. 2013CF5783, Smith was charged with, and pled guilty to, one count of armed robbery as a party to a crime. According to the complaint, on December 15, 2013, the victim's friend B.M. agreed to help her move but told her that before doing so, they had to pick up Smith, whom the victim had met previously. Shortly after arriving at the victim's apartment, Smith left. B.M. told the victim Smith had taken some of her things. B.M. then asked the victim to give him a ride to a specific location. Upon arriving, the victim observed Smith and another individual, Donte Welch. The victim had met Welch previously. Smith and Welch got into the victim's car, and Welch put a gun to her head and told her not to move. Welch then took the keys from the ignition, and Smith went through the victim's pockets. After

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. These cases were consolidated for this appeal.

<sup>2</sup> The Honorable Jonathan D. Watts presided over the plea proceedings and sentenced Smith. The Honorable Frederick C. Rosa entered the order denying, in part, Smith's postconviction motion.

robbing the victim, Smith and Welch got out of the car and ran away. The victim subsequently identified Smith and Welch in photo arrays as the men who robbed her at gunpoint.

In Milwaukee County Case No. 2014CF874, Smith was charged with, and pled guilty to, one count of conspiracy to commit felony intimidation of a witness. The complaint alleged that in January 2014 the armed robbery victim received threatening calls and text messages as Smith attempted to keep her from coming to court.

In Milwaukee County Case No. 2014CF899, Smith was charged with three counts: (1) possession of a short-barreled shotgun between January and August 2012; (2) possession of a firearm by a person adjudged delinquent (same timeframe as count one); and (3) possession of a firearm in December 2013 by a person adjudged delinquent. The charges followed the execution of a search warrant at Smith's residence in December 2013. He pled guilty to count three.

In exchange for Smith's pleas, the State moved to dismiss and read-in the remaining two counts in Case No. 2014CF899. Additionally, the State agreed that it would recommend imprisonment but would not make a specific recommendation as to the length of Smith's sentence.

The circuit court accepted Smith's pleas and sentenced him as follows: Case No. 2013CF5783, seven years of initial confinement and three years of extended supervision; Case No. 2014CF874, five years of initial confinement and four years of extended supervision; and Case No. 2014CF899, three years of initial confinement and two years of extended supervision. The circuit court ordered the sentences to run consecutively to one another. The circuit court also ordered Smith to pay a DNA surcharge for each of the three charges.

Postconviction, Smith moved the circuit court to vacate the DNA surcharges. He argued that imposition of the new DNA surcharge law as applied to him amounted to an ex post facto violation. The postconviction court concluded that the DNA surcharge in Case No. 2014CF874 was properly imposed under the new DNA surcharge law. *See* WIS. STAT. § 973.046(1r)(a) (2013-14). As to the DNA surcharges in the other two cases, which related to 2013 crimes, the postconviction court concluded that case law required it to vacate one of those charges.

Counsel opines in his fifty-four page no-merit report that there are no issues of arguable merit for Smith to pursue on appeal. We agree. For purposes of this opinion, this court will address only the following issues: (A) the validity of Smith's pleas; (B) the circuit court's exercise of its sentencing discretion; and (C) the imposition of DNA surcharges.

### *Discussion*

#### **(A) Pleas**

Counsel first addresses whether Smith has an arguably meritorious basis for challenging his pleas on appeal. To be valid, a guilty plea must be knowing, intelligent, and voluntary. *See State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Smith completed a separate plea questionnaire and waiver of rights form in each of the three cases. *See State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The relevant jury instructions were attached to the forms. The forms listed, and the court explained, the maximum penalties Smith faced. The forms, along with addendums, further specified the constitutional rights that Smith was waiving with his pleas. *See Bangert*, 131 Wis. 2d at 270-72. Additionally, the circuit court conducted a thorough plea colloquy as required by WIS. STAT. § 971.08, *Bangert*, and *State v.*

*Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. There would be no arguable merit to challenging the validity of Smith's guilty pleas.

**(B) Sentencing**

Counsel also discusses the circuit court's exercise of sentencing discretion. We agree that there would be no arguable basis to assert that the circuit 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 circuit 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 circuit 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 circuit court's discretion. *See Gallion*, 270 Wis. 2d 535, ¶41.

After listening to the attorneys' remarks, the circuit court applied the standard sentencing factors and explained their application in accordance with the framework set forth in *Gallion* and its progeny. In terms of the severity of the sentence, Smith faced a total sentence of thirty-five years of initial confinement and twenty-five years of extended supervision on the charges to

which he pled. *See* WIS. STAT. §§ 943.32(2), 939.05, 940.43(4), 941.29(2)(b), 973.01(2)(b) & (2)(d) (2013-14). The circuit court sentenced Smith to less than half of the maximum time available: fifteen years of initial confinement and nine years of extended supervision. This sentence does not shock the public's sentiment. *See State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. There would be no arguable merit to a challenge to the circuit court's sentencing discretion.

**(C) *Imposition of DNA Surcharges***

Initially the circuit court imposed \$750 in DNA surcharges against Smith: one \$250 surcharge for each of the three felony charges to which he pled guilty. Following a motion, the postconviction court vacated one of the charges for the crimes Smith committed in 2013. The postconviction court concluded that pursuant to *State v. Scruggs*, 2017 WI 15, ¶49, 373 Wis. 2d 312, 891 N.W.2d 786, a surcharge was allowed in Case No. 2013CF5783. And, because the crime in Milwaukee Case No. 2014CF874 was committed in 2014, the postconviction court concluded that the surcharge was mandatory.

In *State v. Williams*, 2018 WI 59, 381 Wis. 2d 661, 912 N.W.2d 373, the Wisconsin Supreme Court recently made clear that there is no arguable merit to challenging the imposition of the remaining DNA surcharges in these cases on ex post facto grounds. *See id.*, ¶55.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Mark A. Schoenfeldt is relieved of further representation of Smith 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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*Sheila T. Reiff*  
*Clerk of Court of Appeals*