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 IV

September 28, 2018

To:

Hon. John R. Storck
Circuit Court Judge
Justice Facility
210 West Center St.
Juneau, WI 53039

Lynn M. Hron
Clerk of Circuit Court
Dodge County Justice Facility
210 W. Center St.
Juneau, WI 53039

Robert G. Barrington
Dodge Co. District Attorney's Office
210 W. Center Street
Juneau, WI 53039-1086

Frances Philomene Colbert
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Ned Guerra
154 1/2 W. Division St.
Fond du Lac, WI 54935

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

2016AP442-CRNM State of Wisconsin v. Ned Guerra (L.C. # 2014CF410)

Before Sherman, J.[1]

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).

Ned Guerra appeals a judgment of conviction entered after he pled no contest to one count of battery and one count of resisting or obstructing an officer. Attorney Frances Reynolds

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Colbert has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). The no-merit report discusses the validity of the plea and sentence. Guerra was sent a copy of the report and he filed a response questioning the imposition of $400 in mandatory DNA surcharges. Upon reviewing the entire record, as well as the no-merit report, I conclude that there are no arguably meritorious appellate issues.

I first address the issue raised in Guerra's response to the no-merit report. Guerra argues that he should not have been assessed $400 in DNA surcharges when he already had provided a DNA sample in relation to a prior criminal case. For the reasons discussed below, this issue is without arguable merit. Guerra committed the crimes at issue in this case on December 21, 2014. In June 2013, the legislature made DNA surcharges mandatory at sentencing for all felony and misdemeanor convictions, and the change was effective for all sentences imposed after January 1, 2014, including cases where the court places a person on probation. *See* 2013 Wis. Act 20, §§ 2353-2355, 9426(1)(am). The surcharge is $200 for each misdemeanor conviction. WIS. STAT. § 973.046(1r)(b). Section 973.046(1r)(b) does not include an exception for persons who previously have provided DNA samples to the State. On February 12, 2015, Guerra was convicted of two misdemeanor counts. The circuit court therefore imposed a mandatory $200 DNA surcharge on each count, resulting in a total of $400 in surcharges.

Ex post facto challenges were made to the mandatory DNA surcharge where, as here, the offense occurred before January 1, 2014, but the sentencing occurred after that date. While those cases were pending, the question remained unanswered as to whether there would be arguable merit to a claim like Guerra's, where the defendant previously gave a DNA sample and was later assessed multiple mandatory DNA surcharges in accordance with the new law, but was not advised during the plea colloquy of the surcharges. Therfore, this case was placed on hold

pending the Wisconsin Supreme Court's decision in one of the ex post facto challenges, ***State v. Odom***, No. 2015AP2525-CR, which was expected to address whether a defendant could withdraw a plea because the defendant was not advised at the time of his plea that multiple mandatory DNA surcharges would be assessed. The ***Odom*** appeal was voluntarily dismissed before oral argument. However, the Wisconsin Supreme Court recently issued a decision in ***State v. Freiboth***, 2018 WI App 46, ¶12, __ Wis. 2d __, 916 N.W.2d 643, holding that a plea hearing court does not have a duty to inform the defendant about the mandatory DNA surcharge because the surcharge is not punishment and is not a direct consequence of the plea. Consequently, any claim that Guerra is entitled to plea withdrawal based on the assessment of the DNA surcharges is without arguable merit.

There is also no other arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective in a manner that resulted in the defendant actually entering an unknowing plea, or demonstrate some other manifest injustice such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. ***State v. Bangert***, 131 Wis. 2d 246, 273-78, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 and n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

In exchange for Guerra's pleas of no contest, the State agreed to a joint recommendation to withhold Guerra's sentence and place him on twenty-four months of probation. The circuit court conducted a standard plea colloquy, inquiring into Guerra's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring his understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, and the constitutional rights being waived. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41,

¶18, 317 Wis. 2d 161, 765 N.W.2d 794; and ***Bangert***, 131 Wis. 2d at 266-72. The court made sure Guerra understood that it would not be bound by any sentencing recommendations. In addition, Guerra provided the court with a signed plea questionnaire. Guerra indicated to the court that he understood the information explained on that form, and is not now claiming otherwise. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Guerra stipulated that the facts in the criminal complaint provided a sufficient factual basis for the pleas. There is nothing in the record to suggest that defense counsel's performance was in any way deficient, and Gueura has not alleged any other facts that would give rise to a manifest injustice. Therefore, his pleas were valid and operated to waive all nonjurisdictional defects and defenses, aside from any suppression ruling. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

The no-merit report also addresses whether the court erroneously exercised its sentencing discretion. The circuit court withheld sentence and placed Guerra on probation for twenty-four months, as jointly recommended by the parties. The standards for the circuit court and this court on sentencing issues are well-established and need not be repeated here. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result. Under WIS. STAT. § 939.51(3)(a), Guerra faced a maximum imprisonment term of nine months on each of the two misdemeanor counts to which he pled. *See* WIS. STAT. §§ 940.19(1) and 946.41 (classifying battery and resisting an officer as Class A misdemeanors). Under the circumstances, I agree with counsel that there would be no arguable merit to challenging Guerra's sentence on appeal.

This court's review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Colbert is relieved of further representation of Guerra in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals