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DISTRICT II

February 16, 2015

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

2014AP1631-CRNM State of Wisconsin v. Aimee E. Dean (L.C. # 2013CM1457)

Before Reilly, J.

Aimee Dean appeals from a judgment convicting her of resisting/obstructing contrary to WIS. STAT. § 946.41(1) (2013-14). Dean's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Dean received a copy of the report, was advised of her 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 reject the no-merit report because an issue with arguable merit is presented by the record and not discussed in the no-merit report. The time for Dean to file a postconviction motion under WIS. STAT. RULE 809.30 is extended.

Dean pled guilty to a misdemeanor. At sentencing the court ordered Dean to pay a \$200 DNA surcharge under WIS. STAT. § 973.046(1r). The crime of conviction, which Dean committed in July 2013, was not subject to a DNA surcharge under the law at the time Dean committed the crime. Dean was sentenced in February 2014.

WISCONSIN STAT. § 973.046(1r) (through January 1, 2015)¹ was amended by 2013 WI Act 20, § 2355, to make mandatory the DNA surcharge for a misdemeanor conviction. The mandatory DNA surcharge was made applicable to sentences imposed on or after January 1, 2014. 2013 WI Act 20, § 9426(1)(am).

An issue of arguable merit exists as to whether the DNA surcharge imposed on Dean for a crime committed before the effective date of the statutory change violates the ex post facto clause of the Wisconsin and United States constitutions. An ex post facto law is one that ““makes more burdensome the punishment of the crime, after its commission.”” *State v. Thiel*, 188 Wis. 2d 695, 703, 524 N.W.2d 56 (1994) (citation omitted). This court is aware that the issue of whether the mandatory surcharge can be applied to crimes committed before January 1,

¹ WISCONSIN. STAT. § 973.046(1r) (through January 1, 2015) provides:

If a court imposes a sentence or places a person on probation, the court shall impose a deoxyribonucleic acid analysis surcharge, calculated as follows:

- (a) For each conviction for a felony, \$250.
- (b) For each conviction for a misdemeanor, \$200.

2014, is being litigated in some circuit courts within the state and that it may be presented by three appeals recently docketed in this court.²

The no-merit report does not discuss the imposition of the DNA surcharge. The potential issue is not currently preserved for appellate review in this case because no postconviction motion was filed raising it. *See State v. Barksdale*, 160 Wis. 2d 284, 291, 466 N.W.2d 198 (Ct. App. 1991) (generally a motion to modify a sentence is a prerequisite to appellate review of a defendant's sentence). We cannot conclude that further postconviction proceedings on Dean's behalf lack arguable merit. Therefore, the no-merit report is rejected.

Upon the foregoing reasons,

IT IS ORDERED that the WIS. STAT. RULE 809.32 no-merit report is rejected, appointed counsel's motion to withdraw is denied, and this appeal is dismissed.

IT IS FURTHER ORDERED that the WIS. STAT. RULE 809.30 deadline for filing a postconviction motion is reinstated and extended to thirty days after remittitur.

Diane M. Fremgen
Clerk of Court of Appeals

² The three known appeals that may present the issue are: *State v. Elward*, 2014AP2569-CR, *State v. Radaj*, 2014AP2496-CR, and *State v. Monahan*, 2014AP2187-CR.