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 II

July 8, 2015

To:

Hon. David M. Reddy
Circuit Court Judge
Walworth County Courthouse
PO Box 1001
Elkhorn, WI 53121

Sheila Reiff
Clerk of Circuit Court
Walworth County Courthouse
P.O. Box 1001
Elkhorn, WI 53121-1001

Daniel A. Necci
District Attorney
P.O. Box 1001
Elkhorn, WI 53121-1001

Adam Schleis
Gamino Law Offices
1746 S. Muskego Ave.
Milwaukee, WI 53204

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

Todd A. Neumann 615800
Supervised Living Facility
220 County Road H, Ste. C.
Elkhorn, WI 53121

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

2014AP2943-CRNM State of Wisconsin v. Todd A. Neumann (L.C. #2014CM81)
2014AP2944-CRNM State of Wisconsin v. Todd A. Neumann (L.C. #2012CF508)

Before Neubauer, P.J., Reilly, and Gundrum, JJ.

Todd A. Neumann appeals from judgments of conviction for fifth offense driving while under the influence of alcohol (OWI), possession of cocaine, possession of marijuana, and possession of drug paraphernalia. Neumann's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Neumann received a copy of the report, was advised of his right to file a response, and has

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

elected not to do so. Upon consideration of the report and an independent review of the records, including the jury trial on the drunken driving charges, we conclude there is no arguable merit to any issue that could be raised on appeal. However, $600 in DNA surcharges were included on the judgment of conviction for the three misdemeanor drug crimes in Walworth county circuit court case No. 2014CM81 (appeal No. 2014AP2943-CRNM). ***State v. Elward***, 2015 WI App 51, ¶7, __ Wis. 2d __, __ N.W.2d __, holds that the mandatory DNA surcharge under WIS. STAT. § 973.046(1r) for misdemeanor crimes committed before January 1, 2014, but sentenced after that date and before April 1, 2015, is an unconstitutional ex post facto punishment. We modify the judgment of conviction in circuit court case No. 2014CM81 to vacate the DNA surcharges, and summarily affirm that judgment as modified and the judgment of conviction for fifth offense OWI. *See* WIS. STAT. RULE 809.21. We remand the cause in No. 2014CM81 with directions for entry of an amended judgment of conviction.

A jury trial was held on the OWI charge and a charge that Neumann operated a motor vehicle with a prohibited blood alcohol content. The jury found Neumann guilty of both. The convictions are Neumann's fifth alcohol-related conviction and he never contested that he had four prior convictions. On the day of sentencing, Neumann entered a guilty plea to the three misdemeanor drug crimes.[2] A joint sentencing recommendation was made that Neumann only be responsible for costs on the misdemeanor convictions and that a sentence of two years', six months' initial confinement and three years' extended supervision be imposed on the OWI

[2] At the time of the guilty plea, Neumann's motion to suppress the drug evidence was pending. The motion was withdrawn during the plea hearing. Having elected to abandon the suppression motion, any potential issues related to the discovery of the evidence was waived. *Cf.* ***State v. McDonald***, 50 Wis. 2d 534, 537, 184 N.W.2d 886 (1971) (holding that deliberate abandonment of suppression motion prior to trial constituted waiver).

conviction. The joint recommendation also included the requirement that for the OWI conviction Neumann submit a DNA sample and pay the DNA surcharge. The court imposed the agreed upon sentence. The judgment of conviction on the misdemeanor crimes recites that Neumann shall "[p]ay court costs including mandatory DNA surcharge in the amount of $200.00 pursuant to [WIS. STAT. §] 973.046(1r)." The DNA surcharge on that judgment totals $600.

The no-merit report addresses the potential issues of whether the evidence was sufficient to support the jury's verdict, whether Neumann's guilty plea was freely, voluntarily and knowingly entered, and whether the sentence was the result of an erroneous exercise of discretion. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further.

The no-merit report is somewhat incomplete. A jury trial has many components which must be examined for the existence of potential appellate issues, e.g., pretrial rulings, jury selection, evidentiary objections during trial, confirmation that the defendant's election to testify is knowingly made or waiver of the right to testify is valid, use of proper jury instructions, propriety of opening statements and closing arguments, the handling of questions from the jury, and polling of the jury. The no-merit report fails to give any indication that appointed counsel considered whether those parts of the process give rise to potential appellate issues. It is important to demonstrate review of the entire trial record to demonstrate that the no-merit procedure has been followed. *See* ***State v. Allen***, 2010 WI 89, ¶82, 328 Wis. 2d 1, 786 N.W.2d 124 ("difficult to know the nature and extent of the court [of appeals'] examination of the record when the court does not enumerate possible issues that it reviewed and rejected in its no-merit opinion"). We examined jury selection, the jury instructions, the opening and closing arguments,

and the polling of the jury. No evidentiary objections were made at trial. No issue of arguable merit exists from these aspects of the jury trial.

Neumann's drug crimes occurred November 19, 2012. Neumann was sentenced April 25, 2014. ***Elward***, 2015 WI App 51, ¶7, explains that for defendants who committed crimes before the January 1, 2014 effective date of the mandatory DNA surcharge for misdemeanor convictions under WIS. STAT. § 973.046(1r), but sentenced before the April 1, 2015 effective date of a mandate to collect a DNA sample for a misdemeanor conviction, the surcharge is a fine and not a fee. Thus, imposition of the DNA surcharge for each of Neumann's misdemeanor convictions was unconstitutional. ***Id.*** This does not present an arguably meritorious issue for appeal because the result is mandated by ***Elward*** and there is no issue to argue.[3] The error regarding the surcharge is corrected by modifying the judgment to vacate the $600 in DNA surcharges.[4]

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report and discharges appellate counsel of the obligation to represent Neumann further in these appeals.

[3] No arguable merit exists regarding the $250 DNA surcharge imposed for Neumann's OWI conviction. Not only did Neumann agree to the surcharge as part of the joint sentencing recommendation, the surcharge is appropriate when a defendant is giving a first DNA sample and the related cost is incurred. *See* ***State v. Long***, 2011 WI App 146, ¶¶8, 9, 337 Wis. 2d 648, 807 N.W.2d 12.

[4] The sentencing court did not mention the DNA surcharge for the misdemeanor convictions. The judgment may be modified for the additional reason of conforming it to the oral pronouncement. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction in Walworth county circuit court case No. 2014CM81 (appeal No. 2014AP2943-CRNM) is modified to vacate the DNA surcharges and, as modified, the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the judgment of conviction in Walworth county circuit court case No. 2012CF508 (appeal No. 2014AP2944-CRNM) is summarily affirmed. *See* WIS. STAT. RULE 809.21. The cause is remanded with directions to enter an amended written judgment of conviction.

IT IS FURTHER ORDERED that Attorney Adam Schleis is relieved from further representing Todd A. Neumann in these appeals. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals