

California, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. French filed a response.² Upon consideration of the report, response, and an independent review of the record, we reject the no-merit report because an issue of arguable merit is presented by the record and not sufficiently discussed in the no-merit report. The time for French to file a new or amended postconviction motion under WIS. STAT. RULE 809.30 is extended.

We previously concluded that a supplemental report was necessary to address whether there is any arguable merit to a challenge to the use of the domestic abuse modifier, *see* WIS. STAT. § 968.075(1)(a), and to the imposition of the domestic abuse surcharge, *see* WIS. STAT. § 973.055(1), on both offenses. As set forth in our order requesting the supplemental report, “domestic abuse” is not a standalone crime but, rather, a modifier that can be attached to other offenses. This modifier does not necessarily have immediate consequences as a matter of law. However, it may lead to the imposition, as it did in this case, of a \$100 domestic abuse surcharge for each conviction. *See id.* Further, a person convicted on two separate occasions of a felony or misdemeanor for which the domestic abuse surcharge is imposed may, under certain circumstances, later be deemed a domestic abuse repeater, which subjects that person to an additional possible two years’ imprisonment for the subsequent offenses. *See* WIS. STAT. § 939.621.

Here, the plea questionnaire does not expressly reference the domestic abuse modifier. In the section of the form that lists the charges to which French was pleading, it

² While this opinion was circulating, we received an additional unsigned submission from French.

states “CDTP – Repeater” and “Strangulation – Repeater.”³ No other statutory references are included.

During French’s plea hearing, the prosecutor set forth the plea agreement and made no mention of the domestic abuse modifier or surcharge. Additionally, when it stated the charges against French at the beginning of its plea colloquy, the circuit court did not mention the domestic abuse modifier.

The parties stipulated to the complaint as a factual basis. However, it is not clear that the complaint contains sufficient facts to establish domestic abuse as that term is defined in WIS. STAT. § 968.075(1)(a).

In its sentencing remarks, the circuit court stated that French is “clearly a domestically violent male.” Later, the circuit court also discussed the cycle of domestic violence. The court then ordered the domestic violence surcharge at the State’s request. However, WIS. STAT. § 973.055(1)(a)2. requires the circuit court to make a particular finding regarding the conduct in question before it imposes the domestic violence surcharge.⁴ The language of the statute suggests that an explicit finding is required, but we are unable to locate any express finding by the circuit court in this record, so we therefore question whether imposition of the surcharge was appropriate.

³ CDTP is the abbreviation for criminal damage to property.

⁴ WISCONSIN STAT. § 973.055(1)(a)2. requires the court imposing a domestic abuse surcharge to “find[] that the conduct constituting the violation under subd. 1. involved an act by the adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided or against an adult with whom the adult person has created a child....”

In his supplemental report, counsel does not discuss the merits of the issue let alone establish that it is without arguable merit. Instead, counsel concludes that because French previously filed a WIS. STAT. RULE § 809.30 motion challenging the circuit court's finding that he must register as a sex offender, French is procedurally barred from also pursuing this issue. We are not convinced. *See generally State v. Sutton*, 2012 WI 23, ¶20 & n.14, 339 Wis. 2d 27, 810 N.W.2d 210 (discussing the liberal amendments of motions that have been allowed pursuant to WIS. STAT. § 802.09).

We cannot conclude that further postconviction proceedings on French'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 deadline to file a new or an amended motion for postconviction relief is extended to sixty days from the date of this order.

Diane M. Fremgen
Clerk of Court of Appeals