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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  
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**DISTRICT II**

May 11, 2016

To:

Hon. Jeffrey S. Froehlich  
Circuit Court Judge  
Calumet County Courthouse  
206 Court St.  
Chilton, WI 53014

Connie Daun  
Clerk of Circuit Court  
Calumet County Courthouse  
206 Court St.  
Chilton, WI 53014

Nicholas W. Bolz  
District Attorney  
206 Court St.  
Chilton, WI 53014

Daniel Goggin II  
Goggin & Goggin  
P.O. Box 646  
Neenah, WI 54957-0646

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

Jessica J. Wells, #585004  
Robert Ellsworth Corr. Center  
21425-A Spring St.  
Union Grove, WI 53182-9408

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

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2015AP287-CRNM      State of Wisconsin v. Jessica J. Wells (L.C. #2013CF192)

Before Gundrum, J.<sup>1</sup>

Jessica J. Wells appeals from a judgment of conviction for obstruction of an officer and conspiracy to commit criminal damage to property. Her appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Wells 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

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

conclude there is no arguable merit to any issue that could be raised on appeal. However, a \$200 DNA surcharge was included on the judgment of conviction. *State v. Elward*, 2015 WI App 51, ¶¶2, 7, 363 Wis. 2d 628, 866 N.W.2d 756, 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 to vacate the DNA surcharge and summarily affirm that judgment as modified. *See* WIS. STAT. RULE 809.21. We remand the cause with directions for entry of an amended judgment of conviction.

Wells was originally charged with a felony—conspiracy to commit robbery with use of force—for her role in setting up a robbery at the home she shared with the victim. With information supplied by Wells that the victim kept cash in a safe in his home, three men entered the home, beat and tied up the victim, and stole cash from the safe. Under a plea agreement, the charge was amended to the two misdemeanor crimes to which Wells entered a no contest plea. A joint sentencing recommendation was made for a withheld sentence in favor of two years of probation to be served concurrent with a prison sentence Wells was already serving. The court imposed two nine-month consecutive sentences but stayed them in favor of two years’ probation to be served consecutive to the sentence Wells was already serving. The judgment of conviction assesses a \$200 DNA surcharge.

The no-merit report addresses the potential issues of whether Wells’ no contest plea was freely, voluntarily, and knowingly entered; whether Wells could demonstrate a manifest injustice to support plea withdrawal; whether Wells received the effective assistance of trial counsel; 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.

Wells' crimes occurred October 10, 2012. Wells was sentenced September 30, 2014. *Elward*, 363 Wis. 2d 628, ¶¶2, 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 Wells' misdemeanor convictions was unconstitutional. *Elward*, 363 Wis. 2d 628, ¶7. This does not present an arguably meritorious issue for appeal because the result is mandated by *Elward* and there is no issue to argue. The error regarding the surcharge is corrected by modifying the judgment to vacate the \$200 DNA surcharge.<sup>2</sup>

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 Wells further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is modified to vacate the \$200 DNA surcharge and, as modified, the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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<sup>2</sup> 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.

IT IS FURTHER ORDERED that the cause is remanded with directions to enter an amended written judgment of conviction.

IT IS FURTHER ORDERED that Attorney Daniel Goggin II is relieved from further representing Jessica J. Wells in this appeal. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*