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March 15, 2018

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

2017AP1633-CRNM State v. Matthew F. Moore (L. C. Nos. 2015CF382, 2015CF1727)
2017AP1634-CRNM

Before Stark, P.J., Hruz and Seidl, JJ.

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).

Matthew F. Moore appeals from judgments of conviction for conspiracy to commit perjury and being a party to the crimes of first-degree reckless homicide and first-degree reckless homicide by delivery of a controlled substance. His appellate counsel has filed a no-merit report

pursuant to WIS. STAT. RULE 809.32 (2015-16),¹ and *Anders v. California*, 386 U.S. 738 (1967). Moore received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the records, we conclude there is no arguable merit to any issue that could be raised on appeal. See WIS. STAT. RULE 809.21. We modify the judgments of conviction to remove two DNA surcharges, summarily affirm the judgments as modified, and remand for entry of amended judgments of conviction.

On February 25, 2012, Thomas Wick was shot to death in his home. After testimony at a John Doe proceeding conducted in 2015, Moore and his girlfriend, Katie Heller, were charged with having killed Wick. Moore and Heller were both in Wick's home when he was shot, they sprayed graffiti all over the home to make it look like a gang occurrence, and they attended Wick's funeral making it appear they had no knowledge of the crime. Heller told police that Moore tried to get her to lie in her John Doe testimony. Moore was charged with being party to the crime of first-degree intentional homicide, being a party to the crime of obstruction of an officer, two counts of perjury, and conspiracy to commit perjury. While Moore was in custody on the Wick murder, he was charged as a party to the crime of first-degree reckless homicide by delivery of a controlled substance in the May 4, 2013 death of Spencer Patz.

On the same day and as part of a global plea agreement, Moore entered no-contest pleas to the amended homicide charge related to Wick's death (reduced to reckless homicide), the conspiracy to commit perjury charge, and the reckless homicide charge related to Patz's death.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

The other charges were dismissed and read in at sentencing. The plea agreement called for the prosecution to cap its sentencing recommendation on the homicide convictions, which it did at sentencing. Moore was sentenced to consecutive maximum terms for Wick's death and the conspiracy to commit perjury count, totaling forty-three years' initial confinement and twenty-three years' extended supervision. Regarding Patz's death, Moore was sentenced to a consecutive term of ten years' initial confinement and five years' extended supervision. Moore stipulated to restitution to Wick's estate and to one of Wick's sisters for a total of \$87,085.80, joint and several with Heller.

The no-merit report addresses whether any issues arise from the proceedings leading up to the entry of Moore's plea,² whether Moore's pleas were freely, voluntarily and knowingly entered, and whether the sentences were the result of an erroneous exercise of discretion or unduly harsh or excessive. 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 does not consider whether the imposition of the three DNA surcharges is problematic. The homicides occurred in 2012 and 2013. Under the law in effect at that time, Moore would have been subject to a single discretionary \$250 DNA surcharge. *See* WIS. STAT. § 973.046(1g) (2011-12). Under the law in effect when Moore was sentenced in 2015, a \$250 DNA surcharge for each of his two felony convictions was mandatory. *See* WIS. STAT. § 973.046(1r)(a). In *State v. Radaj*, 2015 WI App 50, ¶35, 363 Wis. 2d 633, 866 N.W.2d

² Generally, possible appellate issues from the proceedings before entry of the plea are forfeited because the defendant's no-contest plea forfeits the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

758, we held that the new mandatory, per-count DNA surcharge was an unconstitutional ex post facto law as applied to a defendant convicted in one case of multiple felonies after January 1, 2014, when the underlying crimes were committed before January 1, 2014.

The statute in effect at the time of Moore’s offenses allowed only one DNA surcharge for multiple offenses, and its imposition was discretionary. *Id.*, ¶8. At sentencing, the circuit court did not make any mention of DNA surcharges and did not exercise its discretion to impose a surcharge for the 2012 and 2013 crimes. By including the DNA surcharges when the court did not order Moore to pay them, the judgments do not match the pronouncement at sentencing. “[T]he circuit court’s unambiguous oral pronouncement of sentence trumps the written judgment of conviction.” *State v. Prihoda*, 2000 WI 123, ¶15, 239 Wis. 2d 244, 618 N.W.2d 857; *see also State v. Perry*, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987). A defect in the form of the judgment of conviction may be corrected in accordance with the sentencing court’s actual determination. *See Prihoda*, 239 Wis. 2d 244, ¶17.

We therefore modify the judgments of conviction to remove the DNA surcharges on the homicide convictions.³ Upon remand, the circuit court may either correct the clerical error in the sentence portion of the written judgments of conviction or may direct the clerk’s office to make such a correction. *Id.*, ¶5. Having concluded that no issues of arguable merit exist for appeal, this court accepts the no-merit report, affirms the modified judgments of conviction, and discharges appellate counsel of the obligation to represent Moore further in these appeals.

Upon the foregoing reasons,

IT IS ORDERED that the judgments of conviction are modified to remove the DNA surcharges on the homicide convictions; as modified, the judgments are summarily affirmed, and the causes remanded with directions. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Erica L. Bauer is relieved from further representing Matthew F. Moore in these matters. *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

³ The conspiracy to commit perjury occurred in 2015 and the law in effect at that time required a mandatory \$250 DNA surcharge for a felony conviction. *See* WIS. STAT. § 973.046(1r)(a).