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

August 16, 2017

To:

Hon. Jerome L. Fox
Circuit Court Judge
Manitowoc County Courthouse
1010 S. 8th St.
Manitowoc, WI 54220

Lynn Zigmunt
Clerk of Circuit Court
Manitowoc County Courthouse
1010 S. 8th St.
Manitowoc, WI 54220-5380

Jacalyn C. LaBre
District Attorney
1010 S. Eighth St.
Manitowoc, WI 54220

Mark A. Schoenfeldt
Law Firm of Mark Schoenfeldt
230 W. Wells St., Ste. 610
Milwaukee, WI 53203

Timothy M. Belongie, #564270
Dodge Corr. Inst.
P.O. Box 700
Waupun, WI 53963-0700

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Joseph Ehmann
First State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

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

2015AP2639-CRNM State of Wisconsin v. Timothy M. Belongie (L.C. #2013CF364)
2015AP2641-CRNM State of Wisconsin v. Timothy M. Belongie (L.C. #2013CF497)

Before Neubauer, C.J., Reilly, P.J. and Hagedorn, J.

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).

Timothy M. Belongie appeals from judgments of conviction for possession with intent to deliver methamphetamine and second-degree reckless injury with use of a dangerous weapon as a party to the crime. 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). Belongie received a copy of the report, was advised of his right to file a response, and has elected not to do so. We have considered the issues discussed by the no-merit report and conducted an independent review of the records. As to appeal 2015AP2639-CRNM, we accept the no-merit conclusion on the issues discussed in the report, but are compelled by ***State v. Williams***, 2017 WI App 46, ___ Wis. 2d ___, ___ N.W.2d ___, to reject the no-merit conclusion, dismiss the appeal, and extend the time for Belongie to file a WIS. STAT. RULE 809.30 postconviction motion challenging the $250 DNA surcharge. As to appeal 2015AP2641-CRNM, we also accept the no-merit conclusion on the issues discussed in the report, but reject the no-merit conclusion because the record does not establish that Belongie entered his no contest plea with an understanding of the maximum penalty he faced and because a postconviction motion challenging the DNA surcharge has arguable merit under the holding in ***Williams***. We dismiss appeal 2015AP2641-CRNM and extend the time for Belongie to file a postconviction motion. In the event that subsequent no-merit appeals are filed after a decision on any postconviction motions, the no-merit reviews will be limited to issues raised by the postconviction motions.[2] *Cf.* ***State v. Scaccio***, 2000 WI App 265, ¶8, 240 Wis. 2d 95, 622 N.W.2d 449 (the logic behind the rule that a postrevocation

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

[2] We recognize that in accepting the no-merit conclusion on some potential issues and rejecting on others, we are conducting a partial no-merit review. Although an appellant is not entitled to a partial no-merit review, this court conducts partial no-merit reviews in some cases. ***State ex rel. Ford v. Holm***, 2006 WI App 176, ¶¶6, 8-9, 296 Wis. 2d 119, 722 N.W.2d 609. A partial no-merit review is appropriate in these cases because disposition of the appeals was held because of the potential ex post facto issue arising from the imposition of the mandatory DNA surcharges, which were discretionary at the time Belongie committed the crimes. *See* WIS. STAT. § 973.046(1g) (2011-12). The law with respect to that issue was evolving as the no-merit appeals were pending. To simply dismiss the no-merit appeals because of the DNA surcharge issue would further delay a determination of whether postconviction relief should be pursued on issues related to the pleas and sentences. A partial no-merit in this circumstance promotes judicial economy.

appellant cannot challenge the original conviction is that the appellant already had an opportunity to raise any issues relating to the conviction in a first direct appeal); ***State v. Tobey***, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996) (cannot raise issues not pursued from original conviction and sentence because of dissatisfaction with the sentence imposed after probation revocation).

Although these cases were consolidated on appeal, they were not formally consolidated in the circuit court. The pleas and sentencings were handled together, but the cases remained independent of one another with Belongie represented by different trial counsel in each case. Consequently, we summarize the underlying facts for each case separately.

In appeal 2015AP2639-CRNM, Belongie was arrested for operating a motor vehicle while under the influence of an intoxicant after an August 2013 traffic stop. Belongie was found to have marijuana, methamphetamine, and other pills hidden in his sock. He was charged with possession with intent to deliver methamphetamine and two misdemeanors—possession of an illegally obtained prescription drug and possession of marijuana. Belongie entered a no contest plea to the possession of methamphetamine charge and the other two charges were dismissed as read-ins at sentencing. He was sentenced on December 19, 2014, to two years' initial confinement and three years' extended supervision to be served concurrently with the sentence imposed in the reckless injury case.

In appeal 2015AP2641-CRNM, Belongie was charged, as a party to the crime and a repeater, of attempted first-degree intentional homicide by use of a dangerous weapon for attacking a man who was stabbed twice by Belongie's female companion during the altercation. The victim suffered a punctured and collapsed lung as a result of the stabbing. Because the

stabbing occurred while Belongie was out on a personal recognizance bond for the drug case, he was also charged with felony bail jumping as a repeater. The offense occurred December 10, 2013. Belongie entered a no contest plea to the amended charge of party to the crime of second-degree reckless injury by use of a dangerous weapon, and the bail jumping charge was dismissed as a read-in at sentencing. On December 19, 2014, he was sentenced to three years' initial confinement and three years' extended supervision.

The no-merit report first addresses the potential issues of whether Belongie's pleas were freely, voluntarily and knowingly entered. Although the report states the proper standard of review of the plea taking, it fails to acknowledge certain inadequacies in the plea taking. The circuit court did not give the deportation warning required by WIS. STAT. § 971.08(1)(c). However, no issue of arguable merit exists because the private presentence investigation report lists Belongie's birthplace as Wisconsin and Belongie could not show that his plea is likely to result in deportation. *See* ***State v. Douangmala***, 2002 WI 62, ¶4, 253 Wis. 2d 173, 646 N.W.2d 1.

During the plea colloquy the circuit court also failed to advise Belongie as required by ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14, "that the terms of a plea agreement, including a prosecutor's recommendations, are not binding on the court." ***Hampton*** requires that when a circuit court discovers that "the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, *the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court*." ***Id.***, ¶32. In ***Hampton***, the defendant and the State agreed to a particular sentence. ***Id.***, ¶16. Here the plea agreement required the dismissal of charges as read-ins and an amended charge and there were no sentencing recommendation promises. The court accepted the

agreement as to the dismissal and amendment of the charges. As to sentencing recommendations, there was no agreement for the circuit court to approve or reject. Belongie was not affected by the defect in the plea colloquy. Any argument that Belongie should be permitted to seek plea withdrawal under ***Hampton*** lacks arguable merit.[3] *See* ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441 (no manifest injustice justifying plea withdrawal exists where the court failed to advise defendant but followed the plea agreement).

With the exceptions noted above, the record in appeal 2015AP2639-CRNM shows that the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1) and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). A factual basis for the plea to the possession charge exists. Thus, we are able to conclude that no issue of merit exists from the plea taking in appeal 2015AP2639-CRNM.

A potentially serious defect in the plea taking exists in appeal 2015AP2641-CRNM because the circuit court failed to ascertain Belongie's understanding of the maximum penalty he faced on the charge of second-degree reckless injury by use of a dangerous weapon. The maximum penalty for that charge was never recited on the record. By confirming that Belongie had read the plea questionnaire and gone over it with counsel, the circuit court utilized the plea questionnaire to ascertain Belongie's understanding of the range of punishment Belongie faced.

[3] The no-merit report discusses the ruling in ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14, at length but does not link the ruling to any defect in the plea colloquy. The no-merit report observes that the record establishes that Belongie understood that the court was not bound by the plea agreement or recommendations of the parties. During the plea hearing one of Belongie's attorneys specifically informed the court that he advised Belongie that the maximum sentence could be imposed. Because we conclude there is no issue of merit, we need not address whether defense counsel's advisement fulfills the duty the court had under ***Hampton***.

The maximum penalty was stated in an attachment to the plea questionnaire as 12.5 years, and no information was included about the additional years the sentence could be increased by virtue of the use of a dangerous weapon enhancer. The maximum penalty for second-degree reckless injury, a class F felony, is 12.5 years and the addition of the dangerous weapon enhancer adds five years, for a total of 17.5 years. *See* WIS. STAT. §§ 939.50(3)(f), 939.63(1)(b). The mistake in the maximum penalty was never corrected and Belongie was sentenced with the prosecutor, defense counsel, presentence investigation author, and sentencing court believing the maximum to be 12.5 years.

There exists a possibility that Belongie entered his plea not knowing the true maximum he faced. In ***State v. Taylor***, 2013 WI 34, ¶34, 347 Wis. 2d 30, 829 N.W.2d 482, the court concluded that, where the defendant was not correctly informed at the plea hearing of the additional years under the dangerous weapon penalty enhancer, only an insubstantial defect in the plea colloquy occurred. The circumstances in ***Taylor***, ¶54—that Taylor received the actual sentence that he was informed of and "the record is abundantly clear that Taylor was nonetheless aware of the two-year penalty enhancer from the alleged repeater"—are not readily apparent here. Although the court imposed a concurrent sentence that did not exceed the erroneously understated penalty provided to Belongie, we cannot conclude from the record that Belongie was aware, despite the misinformation provided during the plea proceeding, that he faced a maximum 17.5 year sentence for the subject crime.[4] Where there is no clear indication in the record that

[4] The only place the additional five-year increase in the sentence was mentioned was the recitation in the criminal complaint, information, and amended information. During the plea colloquy and in the context of discussing the factual basis for the plea, Belongie acknowledged that he had read the criminal complaint.

the defendant is actually aware of the correct maximum, plea withdrawal is a viable remedy. *See* ***State v. Finley***, 2016 WI 63, ¶¶93-94, 370 Wis. 2d 402, 882 N.W.2d 761 (defendant entitled to withdraw his plea when he lacks an understanding of the potential punishment), *aff'g*, 2015 WI App 79, 365 Wis. 2d 275, 872 N.W.2d 344.

The no-merit report does not recognize or discuss that the maximum sentence for the charge of second-degree reckless injury by use of a dangerous weapon was understated. We are unable to conclude from the record in appeal 2015AP2641-CRNM that there is no arguable merit to a motion for plea withdrawal.[5] We recognize that a motion to withdraw a plea is only meritorious if the defendant can allege that he did not know or understand that aspect of his plea that is related to a deficiency in the plea colloquy. ***State v. Brown***, 2006 WI 100, ¶62, 293 Wis. 2d 594, 716 N.W.2d 906. Because we must reject the no-merit conclusion for another reason, we need not resolve at this point whether Belongie can make that allegation with respect to the maximum sentence he faced.[6] If Belongie can make the allegation and wants to pursue a

[5] The potential lack of awareness of the actual maximum penalty is the only potential defect in the plea we see in the record. For the reasons stated above, the plea was not affected by the failure to give the deportation or ***Hampton*** warning. With the exceptions noted above, the record shows that the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1) and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986).

We further observe that there is a factual basis for the no contest plea to the second-degree reckless injury by use of a dangerous weapon charge. In discussing the factual basis regarding the reckless injury charge, the no-merit report inaccurately discusses the need for conduct demonstrating utter disregard for human life. Acting in utter disregard for human life is an element of the crime of first-degree reckless injury and is not applicable here.

[6] By an order dated March 24, 2017, appointed counsel was required to file a supplemental no-merit report addressing whether the plea was entered with knowledge of the maximum penalty. A motion for a third extension of the time for filing the supplemental report is pending as counsel continues to wait for a response from Belongie regarding his knowledge of the maximum penalty or whether he desires to seek plea withdrawal. Because we must reject the no-merit report on the DNA surcharge issue, we no longer require the supplemental no-merit report. The March 24, 2017 order is vacated and the motion for an extension of time to file the supplemental no-merit report is denied as moot.

motion for plea withdrawal,[7] he may do so in the postconviction motion allowed by our rejection of the no-merit conclusion.

The no-merit report also discusses whether the sentences were the result of an erroneous exercise of discretion and whether there is any suggestion that Belongie was denied the effective assistance of counsel. This court is satisfied that the no-merit report properly analyzes those two potential issues as without merit in both appeals, and this court will not discuss them further.

Each judgment of conviction includes a $250 DNA surcharge, a mandatory assessment at the time of sentencing. Belongie was not ordered to provide a DNA sample as the sentencing court recognized he had already furnished his DNA. ***Williams***, 2017 WI App 46, ¶26, holds that the imposition of the mandatory DNA surcharge for a single felony conviction which was discretionary when the crime was committed violates the ex post fact prohibition when applied to a defendant who has already given a DNA sample. Under ***Williams***, Belongie has an arguably meritorious challenge to the imposition of the $250 DNA surcharges which may be raised in the circuit court by a postconviction motion.[8] *See* ***id.***, ¶27; ***State v. Barksdale***, 160 Wis. 2d 284, 291, 466 N.W.2d 198 (Ct. App. 1991).

[7] We recognize that a defendant may not wish to pursue a motion to withdraw a plea. For example, plea withdrawal after a plea agreement has been reached may expose a defendant to a greater sentence upon reinstatement of the original charges.

[8] ***State v. Williams***, 2017 WI App 46, ¶27, ___ Wis. 2d ___, ___ N.W.2d ___, recognizes that for a person situated like Belongie, the sentencing court may, in its discretion, impose the DNA surcharge. Where the circuit court has not exercised its discretion in the first instance, this court should not review the record in search of reasons to sustain a discretionary decision not made. "The function of an appellate court is not to exercise discretion in the first place, but to review the circuit court's exercise of discretion." ***Vlies v. Brookman***, 2005 WI App 158, ¶33, 285 Wis. 2d 411, 701 N.W.2d 642.

Because we have concluded that there are arguably meritorious issues that may be raised in the circuit court by postconviction motions, we accept the no-merit report in part, reject it in part, dismiss the appeals, deny counsel's motion to withdraw, and extend the time to file postconviction motions. Although we will not conduct a second and subsequent no-merit review of the issues discussed in the no-merit report, appointed counsel is not precluded from raising any other issue in the postconviction motions that counsel now concludes has arguable merit.

Upon the foregoing reasons,

IT IS ORDERED that the WIS. STAT. RULE 809.32 no-merit report is accepted in part and rejected in part, appointed counsel's motion to withdraw is denied, and these appeals are dismissed.

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

IT IS FURTHER ORDERED that the March 24, 2017 order requiring a supplemental no-merit report is vacated and the motion for an extension of time to file the supplement no-merit report is denied as moot.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals