

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Appeal No. 2009AP1540-CR

No. 2009AP1541-CR

No. 2009AP1542-CR

No. 2009AP1543-CR

Plaintiff-Respondent,

v.

SCOTTIE BALDWIN

Defendant-Appellant

APPEAL FROM THE JUDGMENTS OF
CONVICTION AND SENTENCES
ENTERED IN THE CIRCUIT COURT FOR
MILWAUKEE COUNTY, THE HON.
CLARE L. FIORENZA PRESIDING

REPLY BRIEF OF
DEFENDANT-APPELLANT
SCOTTIE BALDWIN

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The Defendant/Appellant replies to State regarding the three issues raised, as set forth below.

THE COURT IMPROPERLY IMPOSED THE DNA SURCHARGE.

Regarding the imposition of the DNA surcharge, the State's position, however interesting, is based on a misreading/misunderstanding/misrepresentation of the Defendant/Appellant's statements contained in his brief.

According to the State, with regard to the defendant/appellant's argument that the court erred in imposing the DNA surcharge, the defendant/appellant "claims the court imposed the surcharge without explaining its reasons for doing so, in violation of this court's decision in *State v. Cherry*...." State's Brief, p. 4. That statement is partially correct, the defendant/appellant stated that "the court offered no reasoning to support its exercise of discretion in ordering the payment of the DNA surcharge, *other than to say that the surcharge funds the DNA testing.*" Brief at p. 17(emphasis added). This is *the one basis* that this court found to be insufficient to justify the imposition of the DNA surcharge. (Brief at 18 (*citing Cherry*)).

The State's arguments regarding jurisdiction are innovative, creative, and entertaining, but unfortunately have no basis in fact, law, or logic.

The State contends that there is no jurisdiction to decide the issue because the defendant/appellant did not include an appeal of the pro se postconviction motion filed in this matter. State's Brief, pp. 4-5. Of course, the State is correct that the defendant/appellant's motion is not being appealed - motions are not appealed - decisions are appealed. The State correctly points out that the court did not decide the issue because it was filed *pro se* (State's Brief at pp. 6-7), which means that there was no order of the court made which could be appealed.

The State also attacks this court's jurisdiction based on the objection raised, and ruled on, at the time of sentencing. State's Brief, p. 4. The correct standard, however, for raising

and reviewing an issue at the trial court level, as articulated by this court, is that at the time of sentencing a person “must raise an issue with sufficient prominence such that the trial court understands that it is being called upon to make a ruling.” *Bishop v. City of Burlington*, 246 Wis.2d 879,889, 631 N.W.2d 656, 660(Ct. App. 2001) (citing *State v. Salter*, 118 Wis.2d 67, 79, 346 N.W.2d 318 (Ct.App.1984) The State concedes that the defendant/appellant objected to the imposition of the DNA surcharge at the time of sentencing (State’s Brief, p. 4), and never disagrees with the facts presented by the defendant/appellant regarding the exchange between the parties at the time of sentencing. Brief, pp. 15-16.

The exchange between the parties at sentencing makes clear that the defendant/appellant was objecting to the imposition of the DNA surcharge, and that the court understood that it was being called upon to make a ruling to that objection, which it did by justifying the imposition on the one basis this court has stated that it could not use to justify the imposition of the DNA surcharge. Brief, pp. 15-16.

The State then agrees with the Defendant/Appellant that, based on the facts presented, and the law controlling the merits of the argument, remand to the trial court is appropriate for a fact-finding hearing similar to the one ordered in *Cherry*. Brief pp. 18-19; State’s Brief p. 8.

UNAVAILABILITY OF THE VICTIM/WITNESS AND THE FORFEITURE BY WRONG-DOING.

The State concedes that the trial court, in ruling on the doctrine of forfeiture, relied on a case whose fundamental principal was overruled by the United States Supreme court. State Brief, p. 15.

What the State does not address is the fact that all of the evidence presented to the trial court concerned prior acts of intimidation, either with the misdemeanor case that had previously been dismissed or the preliminary hearing that was held prior to the many adjournments of the trial. Brief, pp. 3-16. There was no showing to the trial court that the defendant/appellant was responsible for the victim/witness’s

non-appearance at the trial, other than an argument that, because the defendant/appellant had engaged in improper conduct regarding the witness in the past, he forfeited forever his ability *to ever* have a right to confront her in court.¹ Of course, no legal authority is set forth for this amazing proposition, which in fact is contrary to §904.04(2) with regard to proving bad conduct by proving prior bad conduct, and unsupported by any law with the regard to a permanent lose of the right to confrontation.

Based on the record it was presented, the trial court erred in its application of the forfeiture doctrine.

THE AUTHENTICITY OF THE TELEPHONE CALLS.

The State concedes that at trial the State did not comply with the authentication requirements of §909.015(6)(a) with regard to the telephone calls. State's Brief, p. 18. The State concedes that the telephone number in question was assigned to a person other than the victim/witness, but states the police thought this to be an alias. State's Brief, p.18. The State never presented any evidence, however, other than the police officer's unsupported opinion, that CA was an alias for the victim/witness. Nor does the State present any legal argument to counter the argument presented by the defendant/appellant based on five cited cases, one treatise, one law review article, and a statute. Breif, pp. 22-23.

CONCLUSION

The judgments of conviction should be vacated, and the matter remanded for a new trial consistent with the proper

¹ Indeed, the State's position, apparently adopted by the court was that the defendant /appellant lost the right of confrontation, "even if this witness is here in court, [because] the damage he has done to the prosecution's case makes her, per se, unavailable as our criminal justice system was designed. ...In many respects, the defendant is no longer going to have -- whether this victim is here or not -- a person that he needs to confront." Brief, p. 9.

legal principles regarding the question of forfeiture by wrongdoing and admission of the recorded telephone calls into evidence.

Independent and regardless of those issues, however, the Defendant/Appellant is entitled to have the matter remanded for a proper determination of whether it is appropriate for the court to impose the payment of the DNA surcharge as a condition of the judgment of conviction in case 07CF3514.

Dated this ____ day of _____, 20 .

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FORM AND LENGTH CERTIFICATION

Robert E. Haney, counsel for the defendant/appellant, certifies to the Court as follows:

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1283 words.

Dated this _____ day of _____, 2010.

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.62(4)(b).

I further certify that: This electronic petition is identical in content and format to the printed form of the petition filed as of this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this _____ day of _____, 2010.

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