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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP002187-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,

v.

KYLE LEE MONAHAN,

Defendant-Appellant-Cross-Respondent.

On Notice of Appeal from a Judgment and Notice of
Cross-Appeal from an Order Entered in the
Circuit Court for Lafayette County,
the Honorable William D. Johnston, Presiding

COMBINED BRIEF OF APPELLANT AND CROSS-RESPONDENT

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ARGUMENT

The Circuit Court's Exclusion of Evidence that R.C. Drove her Vehicle at High Speeds in the Hours and Minutes Before the Crash, which the State Concedes Was Erroneous, Was not Harmless.

The state now agrees with Mr. Monahan that the trial court should have admitted the evidence proffered to show that R.C., the alleged victim in this case, was actually the driver, but argues that excluding it was harmless. Respondent's Brief at 2-3.

This represents a reversal of the state's position in more ways than one: not only did it fight to exclude the evidence, but did so in part by asserting that its introduction would be unfairly prejudicial (78:4; 73:35), a notion endorsed by the circuit court. (78:39, 45). Having obtained a favorable ruling as to the prejudicial nature of the evidence, it is curious that the state should now seek to convince this court that the evidence was of such little import that it could not have contributed to the verdict. But that is the sole basis on which the state now seeks to sustain Mr. Monahan's conviction.

The state's harmlessness argument overstates the strength of its case and fails to seriously contend with the impact of the exclusion of the evidence that R.C. was driving the car recklessly minutes before the crash.

The heart of the prosecution's case consisted of two categories of evidence: Mr. Monahan's statements and the accident reconstruction offered by Trooper Parrot. As to the statements, the state presents Mr. Monahan's words while ignoring the circumstances in which they were uttered: Mr. Monahan, having been knocked unconscious by the

crash, initially asked "what happened" and made statements that he did not know where he was, how many people were in the car, or if he was driving. (160:33-36; 152:71; 153:12). After being asked several times, he responded (apparently without knowing whether anyone else was in the vehicle) "I was driving, I guess." (153:12). Later, on the side of the road, he again said he could not remember whether he was the driver, and asked if a female had been in the car. (152:71). Only on being told that there had been a female did he respond that "I probably was driving, then." (152:71).

When initially asked by Deputy Gorham who was driving, Mr. Monahan again responded uncertainly: "I might have been, I guess." (152:91). It was at this point that Deputy Gorham told Mr. Monahan that a fireman (who, the state does not contest, was never found and did not testify) "saw your driving the car out of Shullsburg—so you were the driver?" (92:Exh. 12). He responded "yeah." Asked whether he was "BSing," he responded "I don't think so." (92:Exh. 12).

It was only during and after Deputy Gorham's suggestive questioning of the newly-conscious Monahan that he began to recall any details about the accident. Some were accurate: tires going off the road, going too fast on a hill. (92:Exh. 12; 160:9). Some were not: that he had been wearing his seatbelt and that he had been coming from the Wheel Inn (where in fact they had been earlier that day). (155:60-61,34). Taken as a whole, Mr. Monahan's statements about his "memory" of the crash carry real doubts about reliability. Perhaps this explains why the state, despite being in possession of all of these statements, did not charge Mr. Monahan with any crime for over a year after the crash. (2:1).

As for Trooper Parrot's accident reconstruction (which, by Trooper Parrot's own admission, depended on the statements discussed above, (154:84-85)), it was contradicted by Mr. Monahan's own expert, Paul Erdtmann. The state seeks to diminish Mr. Erdtmann's testimony by claiming that he "could say only that he could not tell who the driver was" though, as it earlier acknowledges, he in fact opined that it was *impossible* to determine who was driving. Respondent's Brief at 12, 15; (190:95,135). The state also declares that Trooper Parrott "refuted" Mr. Erdtmann's view that the presence of a second person's DNA on the airbag suggested that R.C. had been in the car when the airbags deployed; it is not clear how the state reaches this conclusion, since each expert merely expressed an opinion as to when the airbags would have deployed (and, it should be noted, Mr. Erdtmann has designed airbags and their control systems). Respondent's Brief at 13. (160:54-55,121-22; 155:88-90).

In sum, the state's brief inflates the strength of its case in an effort to show that Mr. Monahan's proffered evidence would not have made a difference. To the same end, it seeks to minimize the significance of that evidence by puffing up minor inconsistencies in the eyewitness accounts that placed R.C. behind the wheel. It asserts that one eyewitness was "undermined considerably" by the fact that she you could not, at trial, accurately describe a vehicle she had apparently seen one time nearly two and a half years prior. Respondent's Brief at 16. It faults another for failing to consistently estimate the distance from which he had seen Mr. Monahan and R.C. get into the car, again two and a half years earlier. Respondent's Brief at 16.

More importantly, the state fails to confront the degree to which the prosecution sought to profit from the absence of the evidence it had excluded. Twice during closing, the

prosecutor argued that R.C. would never drive over unfamiliar roads at such speeds as led to the crash, when she herself had successfully excluded the evidence tending to show that she *had* driven at such speeds, moments before the crash. (156:32, 44). It is no answer to say, as the state now does, that this was not the *only* argument the prosecutor made. Respondent's Brief at 18. In emphasizing the absence of evidence it had prevented Mr. Monahan from offering, the state, back then, plainly recognized its importance.

Further, contrary to the state's implication, it is irrelevant that the prosecutor only spoke of a switch in drivers during her rebuttal. Respondent's Brief at 17-18. That is the logical time for a prosecutor to try to discredit a defendant's theory—after defense counsel has presented it in closing. And the excluded evidence was crucial to Mr. Monahan's theory. Accused of being the driver in a reckless high-speed crash, Mr. Monahan had evidence that the other person in the car, R.C., was driving the same vehicle at recklessly high speeds minutes before the crash occurred.

The state now admits this evidence was relevant and admissible, but seeks to uphold Mr. Monahan's conviction by reciting the facts supporting its version of events—its story of the crash. The problem is that while the jury heard the state's story, it was prevented, by the state's efforts, from hearing Mr. Monahan's. It is the jury, and not this court, that should decide which story is true. Mr. Monahan is entitled to a new trial.

CONCLUSION

For the foregoing reasons, Mr. Monahan respectfully requests that this court reverse his conviction and sentence and remand the case to the circuit court for a new trial.

Dated this 8th day of July, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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C O U R T O F A P P E A L S

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CROSS-RESPONDENT'S BRIEF

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ARGUMENT

The Mandatory DNA Surcharge is Punitive in Nature and Cannot Be Imposed Retroactively

As it did below, the state here agrees with Mr. Monahan that if the DNA surcharge is punitive, the legislation making it mandatory is a retroactive increase in punishment and thus violates the ex post facto clauses of the federal and state constitutions. Cross-Appellant's Brief at 4. The only question is thus whether the surcharge constitutes punishment.

As an initial matter, after the state filed its brief this court decided ***State v. Radaj***, 2015 WI App 50, __ Wis. 2d __, __ N.W.2d __, and ordered the opinion published. In ***Radaj***, the defendant was convicted of four felonies, meaning that the total mandatory surcharge was $1000, rather than the $250 that the parties and court presumed to be the prior maximum per-case surcharge. ***Id.***, ¶¶2 n.3, 3, 5. This court held that the new statute violates the ex post facto clauses in cases where multiple surcharges are levied, while expressly not deciding whether this is so for a single surcharge.[1] ***Id.***, ¶¶7, 36.

While the ***Radaj*** court expressly refrained from deciding the precise question here presented, the decision strongly supports Mr. Monahan's view that the mandatory surcharge is punitive. For one thing, the United States

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[1] In another recently decided (and published) case, this court also held the $200 misdemeanor DNA surcharge in violation for those sentenced after the statute's effective date but before DNA began to be collected in misdemeanor cases. ***State v. Elward***, 2015 WI App 51, __ Wis. 2d __, __ N.W.2d __.

Supreme Court has stated that ex post facto challenges are decided by reference to the statute on its face, and not "as applied"—"by reference to the effect that Act has on a single individual." ***Seling v. Young***, 531 U.S. 250, 262 (2001). Rather, "courts must evaluate the question by reference to a variety of factors considered in relation to the statute on its face." ***Id.***; *see also* Nicholas Quinn Rosenkranz, The Objects of the Constitution, 63 Stan. L. Rev. 1005, 1026 n. 126 (2011) ("The Ex Post Facto Clause is not violated when a law is applied to a particular set of facts. The Ex Post Facto Clause forbids passing certain laws. If a legislature violates this provision, then it violates the provision by passing such a law, at the moment of passage. Thus, a challenge is inherently 'facial,' and cannot turn on any subsequent facts.") Retroactive application of the mandatory surcharge is therefore either punitive or it is not—if it was punitive in ***Radaj***, it must be so here.

Moreover, the analysis of punitive effect in ***Radaj*** largely applies to this case. Of the seven factors analyzed by the ***Radaj*** court, only the seventh—whether the surcharge "appears excessive in relation to" the non-punitive purpose assigned by the legislature—admits of any distinction between the two cases. ***Radaj***, 2015 WI App 50, ¶24. And while the ***Radaj*** court held the law punitive because the "per-conviction basis" of the surcharge lacked a rational connection to the "cost of the DNA-analysis-related activities that the surcharge is meant to cover," ***id.***, ¶29, this is not the only feature of the law lacking such a rational connection. For one, the surcharge is required whether or not the defendant has already given a sample, meaning that even those who impose *no* additional cost on the state must pay the $250. The new law also sets the surcharge at $200 for misdemeanors and $250 for felonies. Obviously it is no more costly to obtain and analyze a felon's DNA sample than that of a

misdemeanant, so there is no difference between the two in the "cost of DNA-analysis related activities." Rather, the surcharge amount is higher for more serious crimes, and lower for lesser ones.

The state's reliance on ***Mueller v. Raemisch***, 740 F.3d 1128 (7th Cir. 2014), is thus misplaced. Cross-Appellant's Brief at 10-11. Unlike the sex-offender registry surcharge at issue there, the DNA surcharge is *not* charged on a per-capita basis in "approximate relation" to the defendant's "share" of the cost of the database. ***Id.*** at 1132. It is assessed, instead, in rough proportion to *culpability*, suggesting a punitive effect.

For much the same reason, ***In re DNA Ex Post Facto Issues***, 561 F.3d 297 (4th Cir. 2009), is also inapposite. There, South Carolina imposed only one surcharge *when the defendant provided a sample*. ***Id.*** at 297.[2] Thus, the cost to the defendant was directly tied to the cost to the state. Moreover, this court in ***Radaj*** rejected the state's argument, also based on ***In re DNA***, that the small amount of the surcharge relative to the potential criminal fine renders it non-punitive. Cross-Appellant's Brief at 8; ***Radaj***, 2015 WI App 50, ¶33.

Wisconsin's DNA surcharge is instead much like the DNA "assessment" at issue in ***People v. Batman***, 1 Cal. Rptr. 3d 591, 593-94 (2008), which the California court held punitive. The state attempts to distinguish ***Batman*** on the ground that the California statute expressly described the assessment as "an additional penalty" thereby betraying a "punitive intent." Respondent's Brief at 9. But "[l]abels don't control." ***Mueller***, 740 F.3d at 1133. The California statute "applies to every criminal fine, penalty, and forfeiture" and is

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[2] The same is true of ***People v. Higgins***, 13 N.E.3d 169 (Ill. App. Ct. 2014), also relied on by the state. Respondent's Brief at 6; ***People v. Marshall***, 950 N.E.2d 668, 679 (Ill. 2011).

"assessed in proportion to the defendant's criminal culpability." ***Id.*** at 593. Moreover, revenues from the assessment were to be "used to process DNA samples and specimens collected in the future for inclusion in data banks operated by and for the benefit of law enforcement." ***Id.*** For these reasons, among others, the court concluded that the assessment was punitive. ***Id.*** at 594.

Each of these observations holds for Wisconsin's law as well. The surcharge is a monetary sum collected from criminal defendants, and only criminal defendants, as opposed to other users of the court system. It is used to support the DNA database, which has a primarily law-enforcement purpose. Most importantly, as discussed above, it is assessed in proportion not to cost imposed on the state, but to the defendant's culpability. In ***Radaj***, this court declared that the per-conviction nature of Wisconsin's surcharge made it similar to the law struck down in ***Batman***, 2015 WI App 50, ¶¶28-29, and these additional similarities compel the same result in the case of a single surcharge.

CONCLUSION

For the foregoing reasons, Mr. Monahan respectfully requests that, if his underlying conviction should be affirmed, this court also affirm the circuit court's removal of the DNA surcharge from his judgment of conviction.

Dated this 8th day of July, 2015.

Respectfully submitted,

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