STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2014AP2496 CR

GREGORY MARK RADAJ,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POST-CONVICTION MOTION ORDERED AND ENTERED IN LAFAYETTE COUNTY CIRCUIT COURT, CIRCUIT JUDGE JAMES R. BEER PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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DEFENDANT-APPELLANT'S BRIEF

ISSUE PRESENTED

WERE THE DNA SURCHARGES IMPOSED IN THIS CASE AN *EX POST FACTO* LAW BECAUSE THEY WERE BASED UPON A CHANGE IN THE LAW AFTER THE DATE OF THE OFFENSE?

The trial court answered this question in the negative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested as the defendant-appellant (Radaj) believes the briefs of the parties will sufficiently discuss the issues on appeal . Publication

is appropriate as this case involves an issue of importance to the administration of justice: whether the DNA surcharges imposed by the legislature in 2013 Act 20 that were effective for all sentencings on or after January 1, 2014 constituted an *ex post facto* law as applied to offenses that occurred before that date. A decision in this case can distinguish it from prior cases that held that retroactive application of the sex offender registry and retroactive application of a ban on possession of firearms by convicted felons were not *ex post facto* laws. Those cases are discussed below.

STATEMENT OF THE CASE

This matter was commenced by the filing of a criminal complaint on February 13, 2013 charging Radaj and two others with six counts of party to the crime of burglary to a trailer home; one count of possession of burglarious tools; eight counts of misdemeanor theft and six counts of criminal damage to property that occurred on January 28, 2013 contrary to Sec. 939.05, 943.10(1m)(3), 943.12, 943.10(2)(a) and 943.01(1) respectively (1). An initial appearance was held on February 13 and 19, 2013 (46 and 47). On February 19, 2014, Attorney Philip Brehm was appointed to represent Radaj (6). On February 25, 2013, Radaj filed a request for substitution against Judge William Johnson (8). On March 1, 2013, Radaj waived his right to a preliminary examination (48) and pleaded not guilty to

an information (11) containing the same offenses as those alleged in the complaint.

Judge James A. Beer was assigned to the case (16). Several status conferences and motion hearings were subsequently held (49, 51-54).

On March 26, 2014 (55), Radaj pleaded guilty to four counts of burglary in return for dismissal of the remaining counts. Judge Beer sentenced Radaj to concurrent terms of seven and one-half years of initial confinement followed by five years of extended supervision on each count (42; App. 101-103). Radaj subsequently filed a Notice of Intent to Pursue Post-Conviction Relief (43) and the undersigned attorney was appointed to represent Radaj (68).

Radaj filed a post-conviction motion seeking to vacate the DNA surcharge on July 25, 2014 (50; App. 105-110). A hearing was held on the motion on August 27, 2014 (71: 1-3) at which the motion was initially denied but then set for further proceedings. Another hearing was held on the motion on September 24, 2014 (71:4-7) at which the motion was again denied. A written order denying the motion was entered on September 30, 2014 (65; App. 104). On October 20, 2014, Radaj filed a Notice of Appeal (66) directed at both the Judgment of Conviction and the Order Denying Post-Conviction Motion[1].

[1] Radaj's notice of appeal was timely because the 20th day after the entry of the order denying Radaj's post-conviction motion was a Sunday. Sec. 809.30(2)(j) and Wis. Stats.

STATEMENT OF FACTS

The criminal complaint (1) indicated that on January 28, 2013, Radaj and two co-defendants entered or attempted to enter approximately seventeen trailers at Mound View RV in the Village of Belmont in Lafayette County and stole televisions and other electronic items. A few hours later, they were arrested in a vehicle in Dane County, Wisconsin with the stolen items. Radaj was convicted and sentenced on March 26, 2014 for four of the completed burglaries and the remaining offenses were read-in. At sentencing, Judge Beer imposed "costs" for each conviction (55: 28). The judgment of conviction (42; App. 101-103) assessed a $250 DNA surcharge for each count upon which Radaj was convicted. Judge Beer denied Radaj's motion to set aside the DNA surcharge (71:5-6 ; App. 111-112) on the grounds that it was a fee to reimburse the State for the cost of taking samples and not a fine.

ARGUMENT

THE TRIAL COURT ERRED BY IMPOSING A DNA SURCHARGE FOR EACH BURGLARY CONVICTION IN THIS CASE AS THE MANDATORY REQUIREMENT FOR SUCH A SURCHARGE AT EACH SENTENCING THAT OCCURRED ON OR AFTER JANUARY 1, 2014 CONSTITUTED AN *EX POST FACTO* LAW AS APPLIED TO THIS CASE.

A. Standard of Review.

A finding of constitutional fact consists of the circuit court's findings of historical fact, which appellate courts review under the "clearly erroneous

standard, " and the application of these historical facts to constitutional principles, are reviewed *de novo*." *State v. Popke***,** 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. The application of constitutional principles to historical facts is a question of law reviewed without deference to the trial court. *State v. Eason*, 2001 WI 98, ¶ 9, 245 Wis.2d 206, 629 N.W.2d 625. There is no dispute about the relevant facts in this case so there should not be any deference to the ruling of the trial court.

B. The Mandatory DNA Surcharge for Each Felony Conviction in This Case was an *Ex Post Facto* Law.

The statute regarding the DNA surcharge at the time of the offenses on January 28, 2013 read as follows:

973.046 Deoxyribonucleic acid analysis surcharge.

> (1g) Except as provided in sub. (1r), if a court imposes a sentence or places a person on probation for a felony conviction, the court may impose a deoxyribonucleic acid analysis surcharge of $250.
>
> (1r) If a court imposes a sentence or places a person on probation for a violation of s. 940.225, 948.02 (1) or (2), 948.025, 948.085, the court shall impose a deoxyribonucleic acid analysis surcharge of $250.
>
> (2) After the clerk of court determines the amount due, the clerk shall collect and transmit the amount to the county treasurer under s. 59.40 (2) (m). The county treasurer shall then make payment to the secretary of administration under s. 59.25 (3) (f) 2.
>
> (3) All moneys collected from deoxyribonucleic acid analysis surcharges shall be deposited by the secretary of administration as specified in s. 20.455 (2) (Lm) and utilized under s. 165.77.

> (4) If an inmate in a state prison or a person sentenced to a state prison has not paid the deoxyribonucleic acid analysis surcharge under this section, the department shall assess and collect the amount owed from the inmate's wages or other moneys. Any amount collected shall be transmitted to the secretary of administration.

2013 Act 20 required the DNA surcharge be imposed for all criminal offenses and convictions. Section 2355-2356 . It was effective the first day after the 6th month following publication. Section 9426. Since Act 20 was published on July 1, 2013, that day was January 1, 2014. The offense for which Radaj was sentenced occurred on January 28, 2013. Imposition of the DNA surcharge was discretionary for the offenses for which the court found Radaj guilty at the time the offenses were committed. The plain language of 2013 Act 20 applied the DNA surcharge to all sentencings that occurred after the effective date rather than to offenses that were committed on or after the effective date.

To the extent that that the legislature applied or modified penalties retroactively, it is Radaj's position that applying Sections 2355-2356 of 2013 Wisconsin Act 20 to this case was an *ex post facto* law contrary to Article One, Sections 9 and 10 of the United States Constitution and Article 1, Section 12 of the Wisconsin Constitution.

State v. Thiel, 188 Wis. 2d 695, 524 N.W.2d 641 (1994) set forth the factors which render a statute *ex post facto*. In *Thiel*, the Wisconsin Supreme Court held that application of Sec. 971.29, Wis. Stats., which prohibits possession

of firearms by convicted felons, was not an *ex post facto* law. *Thiel,* 188 Wis. 2d at 703. An *ex post facto* law is

> any law: " 'which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed....' " (citing *Collins v. Youngblood*, 497 U.S. 37, 42, 110 S.Ct. 2715, 2719, 111 L.Ed.2d 30 (1990)

Thiel, 524 N.W.2d at 643.

In this case, Radaj contends that changing the DNA surcharge from being discretionary to being mandatory and requiring it for each conviction made more burdensome the punishment to which Radaj was subject as a result of his conduct on January 28, 2013. The *Thiel* court recognized that

> ... any law which was passed after the commission of the offense for which the party is being tried is an ex post facto law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed.... or which alters the situation of the accused to his disadvantage ....' (Emphasis added). *Mueller*, 64 Wis.2d at 646, 221 N.W.2d 692, citing *Medley*, 134 U.S. at 171, 10 S.Ct. at 387.
>
> The court stated that a more difficult situation would be where a legislative act did not increase the sentence but in some manner "alters the punishment of the offender to his detriment...." after he had committed the crime or after he was sentenced. *Id*.

Thiel , 188 Wis.2d at 702.

The DNA surcharge is punishment and altered Radaj's situation to his detriment. It is part of Chapter 973 which is entitled “Sentencing.” It imposes a burden upon Radaj which can be enforced by criminal sanctions. In *Thiel,* the

court upheld the application of Sec. 971.29 to persons convicted of felonies as avoiding the status of an *ex post facto* law because it "accomplish[ed] some other legitimate governmental purpose" citing *Wis. Bingo Sup. & Equip. Co. v. Bingo Control Bd*., 88 Wis.2d 293, 305, 276 N.W.2d 716 (1979). That purpose in *Thiel* was public safety. In *Wis. Bingo*, it was licensing standards for bingo games.

The DNA surcharge, when collected, is paid to the Department of Administration for use in DNA database expenditures. Sec. 973.046(3). It is requires payments only from persons convicted of crimes. The DNA surcharge is a financial penalty that the legislature anticipated might have to be collected from prison wages. Sec. 973.046(4). A claimed objective of shifting the cost for the DNA database from taxpayers to convicted persons does not save the statute from having a punitive intent.

Certainly, Radaj has a heavy burden of proving the DNA statute is unconstitutional as applied to him. *Thiel*, 524 N.W.2d at 645. However, no other reasonable conclusion can be drawn except that the DNA surcharge is a criminal penalty and that the amendment to make it mandatory for all sentencings that occurred after January 1, 2014 was an unlawful *ex post facto* law for persons like Radaj who committed an offense prior to the effective date or even the enactment of Sections 2355-2356 of 2013 Act 20. As an *ex post facto* statute, it cannot be lawfully imposed upon him.

In proceedings below, the State (58) and the trial court (71: 5-6; App. 111-112) characterized the DNA surcharge as a user fee and not as a criminal penalty. The authority supporting the State's argument was not persuasive.

In its reply to Radaj's motion, the State cited *State ex rel Singh v. Kemper*, 2014 WI App 43, 353 Wis.2d 520, 846 N.W. 2d 820 in support of its position that Radaj did not meet his burden of proof to establish that applying Act 20's changes to the DNA surcharge to him was an *ex post facto* law. The opinion, authored by Judge Gundrum, found that 2011 Wisconsin Act 38, which curtailed the opportunities for early release established by 2009 Wisconsin Act 28, *was* an unconstitutional *ex post facto* law as applied to Singh, who was sentenced and committed some offenses while 2009 Wisconsin Act 28 was still in effect. *Singh*, ¶19. The *Singh* court determined that the change in the law increased a penalty in terms of increased risk of longer confinement as a result of the new law. *Singh* ¶18. Similarly, the new universal requirement of the DNA surcharge to all offenses and each conviction as a result of Act 20 to offenses that occurred before its effective date imposed a punitive sanction even though it is monetary rather than confinement.

In proceedings below the State distinguished *State v. Nickel*, 2010 WI App 11, 330 Wis.2d 750, 794 N.W.2d 765 (a case not cited by Radaj) from the present situation because the issue in *Nickel* was a procedural one that did not squarely address whether the DNA surcharge was punitive. Although the State set up a straw man and shot it down, it did not address the context of Sec. 973.046 in the

statutory chapter devoted to sentencing or the discussion of the DNA surcharge as an element of a court's sentencing discretion in *State v. Cherry*, *2*008 WI App 80, 312 Wis.2d 203, 752 N.W.2d 393. If a financial penalty of $250 was significant enough to require a court to exercise the same kind of discretion it uses in imposing other portions of a criminal sentence, it was punitive. It is also significant, of course, that the DNA surcharge is now assessed for each conviction (instead of each case with a felony conviction), regardless of the role of DNA in a defendant's apprehension and regardless of how many times the surcharge may have been paid before or whether an offender's DNA sample was taken and added to the data bank.

In its brief below, the State cited several cases from other jurisdictions that also impose a surcharge upon criminal fines to finance a DNA data base. One was *People v. Higgins*, ___ N.E. 3rd ___, 2014 IL App.2d 120888 (June 19, 2014)[2] , an unpublished case which held that a DNA surcharge was not punitive. A published Illinois appellate case a few days earlier explained that State's scheme in greater detail. In *People v. Warren*, 2014 IL App (4th) 120721 (Ill. App., 2014), the Illinois Court of Appeals explained the difference between a "fee" and a "fine":

> ¶ 86 The supreme court has recognized, despite their label as fees, certain assessments imposed pursuant to a conviction are fines.

[2] Radaj is not citing it as authority. The State's citation of it is simply an historical fact in this case. Therefore, Radaj's position is that he is not required to comply with Sec. 809.23(3) as to that case. The State did not comply with Sec. 809.23(3) in the proceedings below.

> *People v. Graves*, *235 Ill. 2d 244, 250, 919 N.E.2d 906, 909-10 (2009); People v. Jones*, 223 Ill. 2d 569, 599-600, 861 N.E.2d 967, 985-86 (2006). The *Graves* court explained the distinction between fines and fees as follows:
>
> A fee is defined as a charge that seeks to recoup expenses incurred by the state, or to compensate the state for some expenditure incurred in prosecuting the defendant. [Citation omitted.] A fine, however, is punitive in nature and is a pecuniary punishment imposed as part of a sentence on a person convicted of a criminal offense. [Citation.]" (Internal quotation marks omitted.) *Graves*, 235 Ill. 2d at 250, 919 N.E.2d at 909.

Warren, ¶ 86

The Illinois court further explained how the DNA surcharge in that State was a cost recovery mechanism because it was assessed only if not previously paid when an offender's DNA profile was added to the State data base. *Warren*, ¶ 144. That, of course, contrasts with the DNA surcharge as amended by Act 20 which now applies to all convictions, regardless of DNA data collection costs.

Similarly, the South Carolina statutory scheme in *In re DNA Ex Post Facto Issues*,561 F.3d 294 (4th Cir. 2009) was different from the Wisconsin one. It was a processing fee directly tied to the collection of the DNA sample. *Id*. 561 F.3d at 298-300. Wisconsin's DNA surcharge, at least since the passage of 2013 Act 20, is not directly connected to the collection and storage of DNA profiles.

The 7th Circuit case regarding Wisconsin's sex offender annual registration fee is inopposite. The scheme in *Mueller v. Raemisch*, 740 F.3rd 1128 (7th Cir 2014) was not imposed at the time of sentencing, as the DNA surcharges

in this case were. The annual sex offender registration fee was administrative in nature clearly designed to offset governmental expenses. It was not dependent upon the number or even date of qualifying sex offenses (since the sex offender registry statute was retroactive). Here, the DNA surcharge was judicially imposed for each conviction and had no relationship to the burdens placed upon the DNA database collection and maintenance by a criminal conviction.

Under the law prior to 2013 Act 20, the trial court could have imposed one DNA surcharge as a matter of discretion. In *State v. Cherry*, 2008 WI App 80, ¶8-9, 312 Wis.2d 203, 752 N.W.2d 393, the Court of Appeals held that the sentencing court must show an exercise of discretion when imposing the DNA surcharge for offenses when it is not mandatory. It stated that not just any reason will do:

> Thus, in exercising discretion, the trial court must do something more than stating it is imposing the DNA surcharge simply because it can. We also do not find the trial court's explanation that the surcharge was imposed to support the DNA database costs sufficient to conclude that the trial court properly exercised its discretion. To reach such a conclusion would eliminate the discretionary function of the statute as a DNA surcharge could be imposed in every single felony case using such reasoning. We are not going to attempt to provide a definite list of factors for the trial courts to consider in assessing whether to impose the DNA surcharge. We do not want to limit the factors to be considered, nor could we possibly contemplate all the relevant factors for every possible case. In an effort to provide some guidance to the trial courts, however, we conclude that some factors to be considered could include: (1) whether the defendant has provided a DNA sample in connection with the case so as to have caused DNA cost; (2) whether the case involved any evidence that needed DNA analysis so as to have caused DNA cost; (3) financial resources of the defendant; and (4) any other factors the trial court finds pertinent.

Cherry, ¶10.

In the event of a remand, Radaj will ask that the surcharge not be imposed. However, the record is clear that Judge Beer believed that the mandatory DNA surcharge was not an *ex post facto* law and did not consider exercise of discretion, In his post conviction motion Radaj requested that if the court chose to exercise its discretion that the court vacate the DNA surcharges (50: 6: App. 109) . A remand would be needed for a hearing on that issue.

CONCLUSION

For the reasons stated above, the undersigned attorney requests that this court reverse the imposition of four DNA surcharges in the trial court's Judgment of Conviction and reverse the Order Denying Post-Conviction Motion and remand with instructions to conduct a hearing on whether a DNA surcharge should be imposed in this case.

Dated this 16th day of December 2014

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CERTIFICATION AS TO LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with a serif proportional font. This brief has 3363 words, including certifications.

Dated this 16th day of December 2014

LEN KACHINSKY

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies the requirements of Rule 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 16th day of December 2014

LEN KACHINSKY