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 REPLY BRIEF

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STATE OF WISCONSIN COURT OF APPEALS DISTRICT 4

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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.

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.

The parties agree that *de novo* review applies in this case.

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

The State agrees with Radaj that test of whether a retroactive statute is *ex post facto* depends upon whether the law involved is punitive (p. 4 of State's brief). While *City of South Milwaukee v. Kester*, 2013 WI App 50, ¶ 25, 347 Wis.2d 334, 830 N.W.2d 710 states the correct legal test for an *ex post facto* law, the facts of that case and type of statute involved are easily distinguishable from the situation in this case. South Milwaukee's ordinance prohibited persons convicted of certain child sex offenses from residing within 1000 feet of certain facilities and declared them a public nuisance. Radaj agrees that such a city ordinance is rather similar in scope and effect to the sex offender registry with its administrative fees that was upheld in *Mueller v. Raemisch*, 740 F.3rd 1128 (7th Cir 2014). See discussion on pages 11-12 in Radaj's brief-in-chief and State's discussion on pages 8-10 in its brief.

Nevertheless, it is clear that the purpose of the DNA surcharge is to punish offenders and not simply to offset costs of DNA collection. The cost of DNA collection is the same whether it is obtained from one convicted of a felony or a misdemeanor. Yet the DNA surcharge per misdemeanor conviction is only $200

rather than $250, perhaps reflecting the less serious nature of the offense but certainly not related to costs of the DNA database program.

Certainly, Radaj has a heavy burden of proving the DNA statute is unconstitutional as applied to him. *State v.Thiel*, 188 Wis. 2d 695, 524 N.W.2d 641, 645 (1994). 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 addition to cases from other states cited by Radaj in his brief-in-chief (pages 10-12) and the State in its brief (p. 6-8), other jurisdictions have also considered changes in financial penalties imposed upon offenders and found them to be punitive and not permissibly imposed retroactively. See *United States v. Jones*, 489 F.3d 243, 254 n.5 (6th Cir. 2007); (*ex post facto* clause prevented increased "special assessment" on convictions after commission of crime) security; *Eichelberger v. State*, 916 S.W.2d 109, 112 (Ark. 1996); (same result for restitution); *Matter of Appeal in Maricopa Cnty. Juvenile Action No. J-92130*, 677 P.2d 943, 947 (Ariz. Ct. App. 1984) (restitution and "monetary assessment"); *People v. Batman*, 71 Cal. Rptr. 3d 591, 593-94 (2008) (DNA assessment); *People v. Stead*, 845 P.2d 1156, 1159 (Colo. 1993) ("drug offender

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The State did not comment upon Radaj's request for a remand for a discretionary determination regarding the imposition of a single DNA surcharge as required by prior law for a burglary offense. Radaj believes this amounts to a concession that such a remand would be appropriate if this court agrees with Radaj that the mandatory four DNA surcharges imposed in this case was an *ex post facto* law.

[1] Credit for locating these cases belongs to Assistant State Public Defender Dustin Haskel who cited them on pages 10-11 of his brief involving a similar issue in *State v. Garett T. Elward*, Case No 2014AP2569-CR, a one judge appeal in District Two. That case is still pending a decision as of February 23, 2015. The State cited proceedings in that case on page 10 of its brief.

CONCLUSION

For the reasons stated above and in his brief-in-chief, the undersigned attorney requests that this court reverse the imposition of the 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 24th day of February 2015

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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 1091 words, including certifications.

Dated this 24th day of February 2015.

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 24th day of February 2015

LEN KACHINSKY