STATE OF WISCONSIN

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

DISTRICT II

Case No. 2014AP2569-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARETT T. ELWARD,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE SANDY A. WILLIAMS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JEFFREY A. SISLEY
Assistant District Attorney
State Bar#1000017

Ozaukee District Attorney's Office
1201 S. Spring Street
Port Washington, WI 53074
(262)284-8385
(262)284-8365

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State agrees with the appellant that oral argument is not necessary. The State also agrees that because no published decision has addressed the issue raised in this case, this court may wish to convert the case on its own motion to

a three-judge case to allow for the publication of the court's decision.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Garrett T. Elward, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

THE DNA SURCHARGE VIOLATES THE EX POST FACTO CLAUSE WHEN APPLIED TO DEFENDANTS LIKE ELWARD WHOSE OFFENSE DATE PRECEEDS THE SURCHARGE'S JANUARY 1, 2014, EFFECTIVE DATE AND WHO ARE CONVICTED BEFORE THE APRIL 1, 2015, EFFECTIVE DATE FOR COLLECTING DNA SAMPLES.

Elward argues that the DNA surcharge imposed on convicted misdemeanants by Wis. Stat. § 973.046(1r)(a) is an unconstitutional ex post facto law as applied to him. Although the State does not agree with all of Elward's analysis, it agrees that the ex post facto clause prohibits the imposition of the surcharge on defendants like Elward whose committed their offense before the January 1, 2014, effective date for the surcharge and who do not have to provide a DNA sample because they were convicted before April 1, 2015,

the effective date for collecting DNA samples from individuals convicted of a misdemeanor.

As the party challenging the statute, Elward "bears the burden of establishing a violation of the ex post facto clauses of the United States and Wisconsin Constitutions," *State ex rel. Singh v. Kemper*, 2014 WI App 43, ¶9, 353 Wis. 2d 520, 846 N.W.2d 820, and must prove beyond a reasonable doubt that the statute is unconstitutional, *see Appling v. Walker*, 2014 WI 96, ¶17 n.21, __ Wis. 2d __, 853 N.W.2d 888 ("The burden of proof that challengers face, beyond a reasonable doubt, is the same in both facial and as applied constitutional challenges."). Under the narrow circumstances presented by this case, Elward has met that burden.

An ex post facto law is a 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." *State v. Thiel*, 188 Wis. 2d 695, 703, 524 N.W.2d 641 (1994). Elward argues that applying Wis. Stat. § 973.046(1r) to him violates the ex post facto clauses because it imposes punishment that was not applicable at the time of the charged offense, July 25, 2013 (1:1).

The "threshold question," therefore, "is whether the [statute] is punitive." *City of South Milwaukee v. Kester*, 2013 WI App 50, ¶21, 347 Wis. 2d 334, 830 N.W.2d 710. At least four jurisdictions, including the Fourth Circuit Court of Appeals, have held that a DNA fee or surcharge is not punitive and that imposing the fee on defendants who committed an offense prior to the

fee's effective date is not an ex post facto violation. *See In re DNA Ex Post Facto Issues*, 561 F.3d 294, 299-300 (4th Cir. 2009); *People v. Higgins*, 13 N.E.3d 169, ¶¶16-20 (Ill. App. Ct. June 19, 2014); *Commonwealth v. Derk*, 895 A.2d 622, 625-30 (Pa. Super. Ct. 2006); *State v. Thompson*, 223 P.3d 1165, 1171 (Wash. Ct. App. 2009).

However, this case presents a timing wrinkle not present in those cases. That is because the effective date of the new DNA surcharge on misdemeanants is January 1, 2014, *see* 2013 Wis. Act 20, § 9426(1)(am), but misdemeanants only provide DNA samples if convicted on or after April 1, 2015, *see* Wis. Stat. § 165.76(1)(as) (2013-14) ("A person shall provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis if he or she ... [i]s or was found guilty of any misdemeanor on or after April 1, 2015"). That means that misdemeanor defendants whose offense date was prior to January 1, 2014, but who are convicted before April 1, 2015, have to pay a DNA surcharge even though they do not have to provide a biological sample for DNA analysis.

The State agrees with Elward that the Seventh Circuit's decision in *Mueller v. Raemisch*, 740 F.3d 1128 (7th Cir. 2014), in instructive. In *Mueller*, the court rejected an ex post facto challenge to Wisconsin's sex offender registration statute. One of the provisions at issue was the $100 annual registration fee that the statute imposes on convicted sex offenders. *Id.* at 1130. The district court held that the fee was "a fine, which is a form of punishment and so cannot constitutionally be imposed on persons who committed their sex crimes before the fee provision was enacted." *Id.* at 1130.

The Seventh Circuit reversed. It agreed with the State that the fee was indeed a fee, not a fine. The court observed that "[b]y virtue of their sex offenses the plaintiffs have imposed on the State of Wisconsin the cost of obtaining and recording information about their whereabouts and other circumstances. The $100 annual fee is imposed in virtue of that cost, though like most fees it doubtless bears only an approximate relation to the cost it is meant to offset." *Id*. at 1133. "A fine, in contrast, is a punishment for an unlawful act; it is a substitute deterrent for prison time and, like other punishments, a signal of social disapproval of unlawful behavior." *Id*. The court acknowledged, however, that "[l]abels don't control" and said that "one basis for reclassifying a fee as a fine would be that it bore no relation to the cost for which the fee was ostensibly intended to compensate." *Id*.

The latter statement is an apt characterization of the situation in which misdemeanor defendants such as Elward fall. For those defendants, the DNA surcharge bears no relation to the costs for which the surcharge is intended to compensate because those defendants do not create any DNA-related costs, as their DNA will not be collected or analyzed.

The State does not agree with Elward's argument that the legislature intended that the DNA surcharge be punishment or that the fact that imposing a separate surcharge on each conviction renders the surcharge punitive. However, for those misdemeanor defendants who challenge the surcharge on ex post facto grounds and who will not be providing DNA samples because they are convicted before April 1, 2015, the surcharge cannot be justified as a cost-recovery measure.

To summarize, the State's concession is limited to misdemeanor defendants who meet all of the following conditions: 1) they committed their offense prior to January 1, 2014; 2) they had a DNA surcharge imposed because they were sentenced after January 1, 2014; and 3) they do not have to provide a DNA sample because they were convicted prior to April 1, 2015. The State's concession does not apply to defendants who commit a misdemeanor offense after January 1, 2014, because the surcharge is not subject to an ex post facto challenge by person who commits an offense after the surcharge's effective date. The State's concession also does not apply to misdemeanor defendants who are convicted on or after April 1, 2015, because those individuals will be required to provide a DNA sample and the surcharge compensates the State for the costs of collecting and analyzing the sample and maintaining the DNA database.

CONCLUSION

For the reasons stated above, the court should reverse the order denying the motion to vacate the DNA surcharge in this case.

Dated this _____ day of February, 2015.

Respectfully submitted,

_____

Jeffrey A. Sisley
Assistant District Attorney
State Bar No. 1000017
Attorneys for Plaintiff-Respondent

Ozaukee District Attorney's Office
1201 S. Spring Street
Port Washington, WI 53074
(262)284-8380
(262) 284-8365
jeff.sisley@da.wi.gov

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. State § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,381 words.

Dated this ____ day of February, 2015.

_____

Jeffrey A. Sisley
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (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 ____ day of February, 2015.

_____

Jeffrey A. Sisley
Assistant District Attorney

APPENDIX

The State will not be submitting an appendix.

Index to Appendix.

The State has not submitted an appendix.