STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP2981-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TABITHA A. SCRUGGS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Postconviction Relief Entered in the Racine County Circuit Court, the Honorable Allan B. Torhorst, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Tabitha Scruggs committed felony burglary on December 30, 2013. Two days later, a new law went into effect, requiring circuit courts to impose a $250 DNA surcharge for every felony conviction at sentencing, regardless of whether any DNA was taken or analyzed in the case. Ms. Scruggs was sentenced on June 9, 2014. Does applying the mandatory DNA surcharge in Ms. Scruggs' case violate the prohibitions against *ex post facto* laws in the state and federal constitutions because the surcharge was discretionary at the time of the offense?

The circuit court imposed the surcharge and denied Ms. Scruggs' postconviction motion to vacate the surcharge.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Ms. Scruggs believes that the briefs will adequately address the issue in this case.

Ms. Scruggs believes that publication is necessary to address whether the mandatory DNA surcharge under Wis. Stat. § 973.046(1r) violates the *ex post facto* law clauses of the state and federal constitutions when applied to defendants who committed their offenses before January 1, 2014. This issue arises in nearly every case where the defendant committed the charged offense before January 1, 2014, but is sentenced after that date. No published case has addressed this issue.

STATEMENT OF FACTS

On December 30, 2013, the State filed a complaint charging Tabitha Scruggs with one count of burglary as a

party to a crime, contrary to Wis. Stat. §§ 943.10(1m)(a), 939.05. (1). The complaint alleged that on December 30, 2013, Ms. Scruggs drove an accomplice to a residence in Racine where he broke two front windows and stole a TV, a PlayStation, and a video game. (1). A witness watched the burglary from across the street. (1:1). Police responded to the area and found a car matching the description of the car used in the burglary. (1:2). Police saw Ms. Scruggs and the accomplice remove the TV from the car and begin moving it to a residence. (1:2). The officer then stopped them and saw the remaining stolen items in the car. (1:2).

On April 1, 2014, Ms. Scruggs pled no contest to one county of burglary as a party to a crime. (18:7). On June 9, 2014, the court sentenced Ms. Scruggs to 18 months in confinement, followed by 18 months of extended supervision. (19:13). The court stayed that sentence and placed Ms. Scruggs on probation for three years. (19:13). The court also stayed six months of condition time. (19:15).

Concerning costs and surcharges, the sentencing court stated: "You'll be obligated to pay the court costs and supervision fees. You will be obligated to provide a DNA sample for genetic testing." (19:14). The court did not specifically order the DNA surcharge under Wis. Stat. § 973.046. Nevertheless, a $250 DNA surcharge appears on the judgment of conviction. (9:2; App. 102).

On November 20, 2014, Ms. Scruggs filed a postconviction motion asking that the court vacate the DNA surcharge. (12). The motion argued that imposing the mandatory surcharge in this case violated the *ex post facto* law clauses of the United States and Wisconsin constitutions. (12). The motion also argued that the surcharge should be vacated even if the court applied the version of the DNA surcharge statute in place at the time of the offense because

the court offered no reason for imposing the discretionary surcharge. (12).

On December 11, 2014, the circuit court entered an order denying postconviction relief. (13; App. 104-06). The court ruled that there was no *ex post facto* violation because 2013 Wisconsin Act 20, which created the mandatory DNA surcharge, was published prior to Ms. Scruggs' offense. (13:3; App. 106). The court ruled that it was "immaterial" that the law did not actually go into effect until two days after the underlying offense. (13:3; App. 106).

ARGUMENT

I. The Mandatory $250 DNA Surcharge Is an Unconstitutional Ex Post Facto Law as Applied to the Facts of This Case and Should Be Vacated.

Any statute "which makes more burdensome the punishment for a crime, after its commission . . . is prohibited as *ex post facto*." ***Collins v. Youngblood***, 497 U.S. 37, 42 (1990) (quoting ***Beazell v. Ohio***, 269 U.S. 167 (1925)); ***State v. Thiel***, 188 Wis. 2d 695, 703, 524 N.W.2d 641 (1994); U.S. Const. art. I, § 10; Wis. Const. art. I, § 12. Laws that make mandatory what was previously discretionary also violate *ex post facto*. ***Weaver v. Graham***, 450 U.S. 24, 32 n.17 (1981).

Here, Ms. Scruggs was convicted of burglary under Wis. Stat. § 943.10(1m)(a). On December 30, 2013, when she committed the burglary, the mandatory DNA surcharge did not exist. At the time, circuit courts were required to impose a $250 DNA surcharge for certain felony sex offenses, and had discretion to impose the surcharge in any other felony case. ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393; Wis. Stat. § 973.046.[1]

[1] At the time the offense was committed, the relevant portion of section 973.046 read as follows:

Between the time Ms. Scruggs committed the burglary and when she plead guilty, the law changed. On January 1, 2014, a new version of section 973.046 went into effect. 2013 Wis. Act 20, §§ 2355, 9326, 9426. The new version required the circuit court to impose a $250 DNA surcharge for every felony conviction, and a $200 DNA surcharge for every misdemeanor conviction. Wis. Stat. § 973.046(1r).[2] The act specified that the new surcharge would apply to any sentences imposed on or after January 1, 2014. 2013 Wis. Act 20, §§ 9326, 9426. Ms. Scruggs was ordered to pay the surcharge. (9). This Court should vacate the surcharge under the state and federal prohibitions against *ex post facto* laws because the surcharge was altered from discretionary to mandatory after the date of the offense in this case.

Whether an amended statute violates *ex post facto* is a question of law that this Court reviews de novo. ***State v. Haines***, 2003 WI 39, ¶ 7, 261 Wis. 2d 139, 661 N.W.2d 72. The defendant bears the burden of overcoming this Court's presumption that laws are constitutional. ***State ex rel. Singh v. Kemper***, 2014 WI App 43, ¶ 9, 353 Wis. 2d 520, 846 N.W.2d 820. Wisconsin courts generally construe the *ex post facto* clause of the Wisconsin Constitution consistently with the *ex post facto* clause of the United States Constitution. ***State v. Thiel***, 188 Wis. 2d 695, 699, 524 N.W.2d 641 (1994).

"(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] "(1r) If a court imposes a sentence or places a person on probation, the court shall impose a deoxyribonucleic acid analysis surcharge, calculated as follows: (a) For each conviction for a felony, $250. (b) For each conviction for a misdemeanor, $200."

A law violates *ex post facto* when it is: (1) retrospective; and (2) disadvantageous to the defendant. ***Weaver***, 450 U.S. at 29.

Here, the statute in question is undoubtedly retrospective. "The critical question is whether the law changes the legal consequences of acts completed before its effective date." ***Weaver***, 450 U.S. at 31. If the punishment changes after the offense is completed, the statute violates *ex post facto*. ***Id.*** at 36. That is precisely what happened here. The DNA surcharge became mandatory (and applicable for every conviction) after Ms. Scruggs' was completed. At the time of the offense, the surcharge could only be applied after an appropriate exercise of discretion. Thus, the statute is retrospective.

Deciding whether a law disadvantages the defendant is a two-step test designed to determine whether the statute is a criminal or civil action. ***State v. Rachel***, 2002 WI 81, ¶¶ 32-33, 38, 254 Wis. 2d 215, 647 N.W.2d 762. First the court must "decide whether the legislature either expressly or impliedly indicated a preference that the statute in question be considered civil or criminal." ***Id.*** at ¶ 32. If the legislature intended the new punishment to be a criminal penalty, retrospective application of the penalty violates *ex post facto*. *See* ***id.*** at ¶¶ 32, 41.

Even if the legislature did not intend to create a new criminal penalty, the statute may still be unconstitutional if it is "so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." ***Id.*** at ¶ 33.

Here, retroactive application of the mandatory DNA surcharge has both a punitive intent and effect. Therefore, this Court should vacate the DNA surcharge in this case and hold that the surcharge violates *ex post facto* when applied to offenses committed before January 1, 2014.

A. The mandatory DNA surcharge is intended to impose a new criminal penalty.

The text of the statute as well as its legislative history demonstrates that the legislature intended the mandatory DNA surcharge as a criminal penalty. Therefore, retroactive imposition of the surcharge violates *ex post facto*. Determining legislative intent "is primarily a matter of statutory construction, and we must ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." ***Id.*** at ¶ 40 (internal quotations omitted). "[S]tatutory interpretation begins with the language of the statute." ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. If the language is plain, the inquiry ends. ***Id.***

The plain text of the amended DNA surcharge statute reflects a punitive intent because the surcharge bears no relation to actual DNA expense incurred by the State. The surcharge imposes a flat fine: $200 for every misdemeanor conviction and $250 for every felony conviction. The surcharge is required regardless of whether the offender provided a DNA sample in the past or whether any DNA testing was done in connection with the case. Thus, the surcharge is not being used simply to recover costs incurred in collecting or testing the defendant's DNA. Even if revenue generated from the DNA surcharge goes to the State Crime Laboratory, there is no connection between imposition of the surcharge and whether the defendant created any DNA cost.

The fact that this penalty is called a "DNA surcharge" does not control the outcome in this case. "A fine is a fine even if called a fee, and 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." ***Mueller v. Raemisch***, 740 F.3d 1128, 1133 (7th Cir. 2014). That is

precisely the case here: although labeled a "DNA surcharge," the assessment in this case bears no relation to the costs associated with collecting and testing the defendant's particular DNA sample. Thus, it would more appropriately be labeled a fine.

Imposing the surcharge for *each conviction* demonstrates the punitive nature of the DNA surcharge. An offender does not provide a DNA sample for every conviction, so why must he or she pay a surcharge for each conviction? A person simultaneously convicted of five felonies would be required to pay $1250, even if he or she provided a DNA sample and paid the surcharge in the past. The statute contemplates no limit to the number of surcharges that could be imposed.

Imposing a higher surcharge in felony cases also reflects a punitive intent. If the surcharge were actually intended to offset the costs of DNA testing, there would be no reason to impose a higher surcharge in felony cases than misdemeanor cases. Surely it does not cost the State more to test a felon's DNA than a misdemeanant's. Instead, the different treatment seems to reflect statutory intent to impose a harsher penalty for a felony conviction simply because it is the more serious offense.

Placement of the DNA surcharge statute within the criminal sentencing statutes also reflects a legislative intent to impose a penalty. According to the Wisconsin Supreme Court: "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Kalal***, 271 Wis. 2d 633, ¶ 46. Here, the surcharge is situated squarely within the criminal sentencing statutes which discuss criminal penalties and their imposition. In contrast, court costs are collected under section 814.60, a

chapter devoted to Court Costs, Fees, and Surcharges. Wis. Stat. ch. 814. This placement suggests that the legislature intended to impose a criminal penalty.

Even if this Court finds that the statutory text does not unambiguously reflect a punitive intent, the limited legislative history of the statute reflects that intent. Counsel has been able to identify only one item in the legislative record concerning amendments to the DNA surcharge: a memo from the Legislative Fiscal Bureau to the Joint Committee on Finance. (LFB, Memo, DNA Collection at Arrest and the DNA Analysis Surcharge, May 23, 2013).[3]

The memo outlines a legislative plan to vastly expand DNA collection in Wisconsin. Instead of taking DNA samples only after a felony conviction, the memo proposes (and the legislature adopted) taking DNA samples at arrest from all adults and juveniles arrested for a felony or specified misdemeanor offenses, and taking DNA samples after any felony or misdemeanor conviction. (Memo, 2, 3-4); Wis. Stat. §§ 165.76; 973.047.[4] The memo estimated that the surcharge change would provide over $3.5 million in revenue for the 2014-15 fiscal year. (Memo, 2).

Although the DNA surcharge revenue will be used predominantly to fund the new DNA collection procedures, the surcharge remains a criminal penalty. The surcharge is imposed solely in criminal cases after criminal convictions. (Memo, 2). The proceeds are then sent to the State Crime

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[3] Available at http://legis.wisconsin.gov/lfb/publications/budget/2013-15%20budget/documents/budget%20papers/410.pdf (last visited Feb. 24, 2015).

[4] The requirement to submit a DNA sample upon arrest was subsequently scaled back by 2013 Wis. Act 214 to cases where the person is arrested for a "violent crime." Wis. Stat. § 165.76(gm). Notably, the DNA surcharge was not correspondingly scaled back. Thus, the State is collecting just as much money, but collecting fewer DNA samples.

Laboratory for "identifying, apprehending, arresting, and convicting criminal offenders and exonerating individuals wrongly suspected or accused of crime." (Memo at 8). The DNA surcharge is inextricably intertwined with the criminal justice system and is consequently a criminal cost.

Because the text of the statute and its legislative history reflect a punitive intent, this Court should find that the mandatory DNA surcharge in Ms. Scruggs' case violates *ex post facto*.

B. The DNA surcharge is so punitive that even if it was intended to be a civil assessment it is a criminal penalty.

Even if this Court finds that the legislature did not intend the new DNA surcharge to be a criminal penalty, it still violates *ex post facto* if it is "so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." ***Rachel***, 254 Wis. 2d 215, ¶ 33. Here, the effect of a $200 or $250 DNA surcharge for every conviction, regardless of DNA cost, is so punitive that is has become a criminal penalty.

The effect of the DNA surcharge is to impose a financial penalty; it is not merely "intended to compensate the state to compensate for the expense of maintaining" the State Crime Laboratory. As discussed above, the DNA surcharge is completely unrelated to the costs of DNA analysis. First, the surcharge is collected in every case, regardless of whether DNA is collected or analyzed. Section 973.046(1r) simply imposes a blanket rule to take the surcharge for every conviction. A defendant convicted of three felonies and two misdemeanors would be required to pay $1150 under the "DNA surcharge," no matter how much or how little DNA analysis was done in the case.

Second, if the surcharge were actually intended to compensate the State for the costs of DNA testing, there would be no reason for distinguishing between felonies and misdemeanors. There is no rational basis to conclude that it costs more to process or analyze the DNA of a felon than that of a misdemeanant.

Third, the DNA surcharge cannot compensate for DNA cost in any misdemeanor case because the State is not yet collecting DNA samples from convicted misdemeanants. The State will not begin collecting DNA samples from convicted misdemeanants until April 1, 2015. 2013 Wis. Act 20, §§ 2356, 9426(1)(bm).

Fourth, there is no reason for a surcharge for each *conviction* if the surcharge is merely intended to recoup the costs of DNA analysis. Once a DNA sample has been taken, analyzed, and entered in the DNA databank, there is no DNA cost.

A constitutional civil penalty would be a one-time fee to cover the cost of DNA collection and analysis after conviction. That was precisely the circumstance in South Carolina, where the Fourth Circuit upheld a DNA surcharge that was imposed *upon defendants who supplied a DNA sample*. ***In re DNA Ex Post Facto Issues***, 561 F.3d 294 (4th Cir. 2009). There, the statute at issue read: "A person who is required to provide a sample pursuant to this article must pay a two hundred and fifty dollar processing fee which may not be waived by the court." ***Id.*** at 297. Thus, only persons who submitted a DNA sample had to pay a $250 DNA surcharge. The defendants argued that the statute violated *ex post facto* because it went into effect after the conduct that resulted their convictions. ***Id.*** at 298. The appellate court upheld the surcharge, holding that the statute was clearly compensatory in nature because the DNA surcharge was directly related to actual DNA costs. ***Id.*** at 299. In contrast the surcharge in

Wisconsin bears no relation to whether a DNA sample was taken from the defendant. Although it is called a "DNA surcharge," it is actually a per-conviction fine of $200-$250.

A series of other jurisdictions have concluded that similar financial penalties violate *ex post facto* and cannot be applied retroactively. ***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 surcharge"); ***Cutwright v. State***, 934 So. 2d 667, 668 (Fla. Dist. Ct. App. 2006) (court costs); ***People v. Rayburn***, 630 N.E.2d 533, 538 (Ill. Ct. App. 1994) (fine for "Family Abuse Fund"); ***State v. Corwin***, 616 N.W.2d 600, 602 (Iowa 2000) (restitution); ***State v. Theriot***, 782 So. 2d 1078, 1085-87 (La. Ct. App. 2001) (change of fine from discretionary to mandatory violated ex post facto clause); ***Spielman v. State***, 471 A.2d 730, 735 (Md. 1984) (restitution); ***People v. Slocum***, 539 N.W.2d 572, 574 (Mich Ct. App. 1995) (restitution); ***State v. McMann***, 541 N.W.2d 418, 422 (Neb. Ct. App. 1995) (restitution); ***People v. Stephen M.***, 824 N.Y.S.2d 757 (N.Y. Crim. Ct. 2006) (DNA fee); ***Commonwealth v. Wall***, 867 A.2d 578, 580-81 (Pa. Super. Ct. 2005) (OWI assessment); ***State v. Short***, 350 S.E.2d 1, 2-3 (W.Va. 1986) (restitution); ***Loomer v. State***, 768 P.2d 1042, 1049 (Wyo. 1989) (costs).

Here, Ms. Scruggs is being required to pay a mandatory $250 DNA surcharge despite the fact that the mandatory surcharge did not exist at the time she committed the offense. As applied to her, this surcharge is strictly

punitive. Therefore, this Court should vacate the DNA surcharge and hold that imposing it in this case violates the *ex post facto* law clauses of the United States and Wisconsin constitutions.

CONCLUSION

For the reasons stated above, Ms. Scruggs asks that this Court issue an opinion reversing the decision of the circuit court and vacating the DNA surcharge in this case.

Dated February 26, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,383 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 February 26, 2015.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated February 26, 2015.

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