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 AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE ALLAN B. TORHORST, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of the court's decision is warranted because the constitutionality of applying the mandatory DNA surcharge to individuals

convicted of felonies committed before the mandatory surcharge's effective date is of statewide importance and is an issue of first impression in Wisconsin.[1]

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Tabitha Scruggs, 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

Scruggs was convicted of one count of burglary (9:1; A-Ap. 101). When she committed the burglary on December 30, 2013 (*id.*), the imposition of a DNA surcharge was discretionary for that offense; the surcharge was mandatory only for certain sex crimes. *See* Wis. Stat. §§ 973.046(1g), (1r) (2011-12); *State v. Cherry*, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. The legislature later amended the DNA surcharge statute, effective January 1, 2014, to make the surcharge mandatory for all felony convictions. *See* Wis. Stat. § 973.046(1r)(a) (2013-14); 2013 Wis. Act 20, §§ 2354, 2355 (amending Wis. Stat. § 973.046(1r) and creating Wis. Stat.

[1]The issue raised in this case is also before the court of appeals in *State v. Gregory Mark Radaj*, case no. 2014AP2496-CR.

§ 973.046(1r)(a)); 2013 Wis. Act 20, § 9426(1)(am) (effective date of first day of the sixth month after July 1, 2013, publication date). As a result, when Scruggs was sentenced on June 9, 2014, a $250 DNA surcharge was imposed (9:1-2; A-Ap. 101-02).

Scruggs argues on appeal, as she did in her postconviction motion (12:1-5), that the mandatory DNA surcharge imposed by Wis. Stat. § 973.046(1r)(a) (2013-14) is unconstitutional as applied to her. She contends that the surcharge violates the ex post facto clauses of the federal and state constitutions because it imposes punishment that was not applicable when she committed this offense.

The parties agree on two points. First, even though the bill creating Wis. Stat. § 973.046(1r)(a) (2013-14) was enacted before Scruggs committed her offense, the relevant date for ex post facto purposes is the January 1, 2014, effective date of the statute. *See Weaver v. Graham*, 450 U.S. 24, 31 (1981) ("The critical question is whether the law changes the legal consequences of acts completed before its effective date."). The circuit court was incorrect, therefore, when it held that "[t]he fact that the particular DNA surcharge section that applies to her became effective two days after she committed the crime is immaterial" because "[t]he law was in effect when Scruggs committed her crime" (13:3; A-Ap. 106).

Second, if the DNA surcharge is punitive, as Scruggs contends, amending the statute to make mandatory what previously was discretionary is an ex post facto violation with respect to defendants who committed their offense before the

effective date of the amendment. *See State ex rel. Singh v. Kemper*, 2014 WI App 43, ¶¶11-13, 353 Wis. 2d 520, 846 N.W.2d 820. The question for this court, then, is whether the DNA surcharge is punitive. For the reasons discussed below, the court should conclude that it is not.

If, as Scruggs maintains, the amended version of the statute may not be applied to her, she would be subject to the prior version of the law, under which the imposition of the DNA surcharge was discretionary. Were this court to hold that Scruggs is not subject to the amended statute, it should remand this case to allow the circuit court to exercise its discretion whether to impose the surcharge. *See Cherry*, 312 Wis. 2d 203, ¶11.

I. STANDARD OF REVIEW.

The constitutionality of a statute presents a question of law that this court reviews de novo. *State v. Cole*, 2003 WI 112, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328.

A statute enjoys a presumption of constitutionality. *State v. Smith*, 2010 WI 16, ¶8, 323 Wis. 2d 377, 780 N.W.2d 90. To overcome that presumption, the party challenging a statute's constitutionality "bears a heavy burden." *Id.* "It is insufficient for the party challenging the statute to merely establish either that the statute's constitutionality is doubtful or that the statute is probably unconstitutional." *Id.* "Instead, the party challenging a statute's constitutionality must 'prove that the statute is unconstitutional beyond

a reasonable doubt.'" *Id*. (quoted source omitted); *see also Singh*, 353 Wis. 2d 520, ¶9 (defendant "bears the burden of establishing a violation of the ex post facto clauses of the United States and Wisconsin Constitutions"). "The burden of proof that challengers face, beyond a reasonable doubt, is the same in both facial and as applied constitutional challenges." *Appling v. Walker*, 2014 WI 96, ¶17 n.21, 358 Wis. 2d 132, 853 N.W.2d 888.

II. THE MANDATORY DNA SURCHARGE STATUTE IS NOT UNCONSTITUTIONAL AS APPLIED TO SCRUGGS.

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). Scruggs argues that the change in the DNA surcharge is an ex post facto violation because it imposes a new criminal penalty. *See* Scruggs's brief at 6.

In any challenge to law on ex post facto grounds, "the threshold question is whether the [law] is punitive." *City of South Milwaukee v. Kester*, 2013 WI App 50, ¶21, 347 Wis. 2d 334, 830 N.W.2d 710. The court employs a two-part "intent-effects" test to answer whether a law applied retroactively is punitive. *See id.*, ¶22.

First, the court looks at the legislature's intent in creating the law. *See id.* If the court finds that the intent was to impose punishment, the law is considered punitive and the inquiry ends there. *Id.* If the court finds that the intent was to impose a civil and nonpunitive regulatory scheme, it "must next determine whether the effects of the sanctions imposed by the law are 'so punitive . . . as to render them criminal.'" *Id*. (citation omitted). The court considers a number of non-dispositive factors in this part of the test. *See id.* "Only the 'clearest proof' will convince [the court] that what a legislative body has labeled a civil remedy is, in effect, a criminal penalty." *Id*. (citation omitted).

In determining whether Wisconsin's DNA surcharge is punitive, decisions from other jurisdictions provide guidance because "[a]ll 50 states and the federal government have adopted DNA collection and data bank storage statutes that, although not identical, are similar to the one in Wisconsin." *Green v. Berge*, 354 F.3d 675, 676 (7th Cir. 2004). 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 before 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) (retroactive application of $50 increase in DNA analysis fee not an ex post facto violation because the fee is not punishment); *Commonwealth v. Derk*, 895 A.2d 622, 625-30 (Pa. Super. Ct. 2006) (requiring convicted defendant to provide a DNA sample and pay DNA cost is not punitive); *State v. Thompson*,

223 P.3d 1165, 1171 (Wash. Ct. App. 2009) (because DNA fee is not punitive, it is not an ex post facto violation to apply new version of statute that makes imposition of the fee mandatory).

In the Fourth Circuit case, a prisoner challenged on ex post facto grounds a South Carolina law requiring that certain prisoners provide DNA samples for South Carolina's DNA bank and pay a $250 processing fee. *In re DNA Ex Post Facto Issues*, 561 F.3d at 297. The Fourth Circuit first held that the requirement that a prisoner provide a DNA sample was not punitive because its purpose was to allow the State Law Enforcement Division (SLED) to compile the state DNA database by developing DNA profiles on samples for law enforcement and other purposes. *Id*. at 299.

The court then held that "[t]he requirement that those providing the samples pay a $250 processing fee also is not punitive in nature." *Id*. at 299-300. It noted that South Carolina law "expressly provided that the funds generated by the fees will be 'credited to [SLED] to offset the expenses SLED incurs in carrying out the provisions of this article.'" *Id*. at 300. The court further stated that "the relatively small size of the fee also indicates that it was not intended to have significant retributive or deterrent value." *Id*. "Thus," the court concluded, "the 'structure and design' of the statute demonstrate that the fee was intended to be an administrative charge to pay for the substantial expenditures that would be needed to implement, operate, and maintain the DNA database." *Id*.

The Fourth Circuit's reasoning applies with equal force here. As in South Carolina, the funds

collected as a DNA surcharge in Wisconsin are used exclusively to support the operation of the state's DNA data bank. Under Wis. Stat. § 973.046(3), "[a]ll 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." Section 165.77, in turn, is the DNA analysis and data bank statute. Wisconsin's DNA surcharge is thus related to the collection and analysis of DNA samples and the storage of DNA profiles – that is the only use for the surcharge.

Moreover, as in South Carolina, the relatively small size of the fee – $200 for a misdemeanor conviction and $250 for a felony conviction, *see* Wis. Stat. § 973.046(1r) – "also indicates that it was not intended to have significant retributive or deterrent value." *In re DNA Ex Post Facto Issues*, 561 F.3d at 300. In this case, Scruggs faced a possible fine of $25,000 on the burglary charge (2:1). *See* Wis. Stat. § 939.50(3)(f). The fact that the DNA surcharge is just one percent of the potential fine demonstrates that the surcharge is not punitive in intent or in effect.

Scruggs argues that the fact that the DNA surcharge is imposed for each conviction, so that 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," demonstrates the punitive nature of the surcharge. Scruggs's brief at 7. There are two problems with that argument.

First, Scruggs's ex post facto challenge to the statute is an as-applied constitutional challenge. *See* Scruggs's brief at 3 ("The

mandatory $250 DNA surcharge is an unconstitutional ex post facto law as applied to the facts of this case.") (some uppercasing omitted). But "in an as-applied challenge, [the court] assess[es] the merits of the challenge by considering the facts of the particular case in front of us, 'not hypothetical facts in other situations.'" *State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63 (quoting *State v. Hamdan,* 2003 WI 113, ¶43, 264 Wis. 2d 433, 665 N.W.2d 785). Scruggs's argument must be limited, therefore, to the facts of her case, which involve a single $250 surcharge (9:2; A-Ap. 102).

Second, even in a case in which multiple surcharges are imposed, the total amount of the surcharge still would be small in comparison to the fines that may be imposed as punishment. For example, had Scruggs been convicted of five burglaries, she would have faced possible fines of $25,000 on each of her four burglary convictions, for a total potential fine of $125,000. *See* Wis. Stat. § 939.50(3)(f). The DNA surcharge of $1,250 in such a case still would be just one percent of the potential fine.

Scruggs also argues that "[i]mposing a higher surcharge in felony cases" than in misdemeanor cases "also reflects a punitive intent." Scruggs's brief at 7; *see also id.* at 10. The flaw in that argument is that the surcharge in felony cases was $250 before the statute was amended. *See* Wis. Stat. §§ 973.046(1g), (1r) (2011-12); *Cherry*, 312 Wis. 2d 203, ¶5. That the legislature chose to impose a smaller DNA surcharge in misdemeanor cases while maintaining the felony surcharge at $250 does not

demonstrate any punitive intent behind the felony surcharge.[2]

To support her argument that the legislative intent of the DNA surcharge is punitive, Scruggs cites a May 23, 2013, memorandum prepared by the Legislative Fiscal Bureau. *See* Scruggs's brief at 8-9. For the court's convenience, the State has included the LFB memorandum in the appendix to this brief (R-Ap. 101-19).

Scruggs cites the memorandum's description of the expansion of the DNA collection program and its reporting of an estimate that the surcharge change would provide about $3.5 million in revenue during the 2014-15 fiscal year. *See* Scruggs's brief at 8. He notes that the memorandum states that the surcharge is imposed solely in criminal cases and that the proceeds are sent to the State Crime Lab for "identifying, apprehending, arresting, and

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[2]The statutory amendment that made the DNA surcharge mandatory in all felony cases also imposed for the first time a DNA surcharge for misdemeanor convictions. S*ee* 2013 Wis. Act 20, § 9426(1)(am) (creating Wis. Stat. § 973.046(1r)(b)). However, although the effective date for imposing the misdemeanor DNA surcharge is January 1, 2014, the effective date for collecting DNA samples from convicted misdemeanants is April 1, 2015. *See* Wis. Stat. § 165.76(1)(as) (2013-14).

In a case now pending in the court of appeals, the State has conceded that the surcharge is unconstitutional as applied to misdemeanants who committed their offense before the surcharge's January 1, 2014, effective date, and who are convicted before the April 1, 2015, effective date for collecting DNA samples. For that limited class of individuals, the DNA surcharge cannot be justified as a cost-recovery measure. *See* Brief of Plaintiff-Respondent at 2-7, *State v. Garett T. Elward*, no. 2014AP2569-CR.

convicting criminal offenders and exonerating individuals wrongly suspected or accused of a crime." *Id*. at 8-9.[3]

Based on those portions of the LFB memorandum, Scruggs argues that "[t]he DNA surcharge is inextricably intertwined with the criminal justice system and is consequently a criminal cost." *Id*. at 9. But the relevant question is not whether the surcharge is imposed in criminal cases but whether it is punitive in nature. *See Kester*, 347 Wis. 2d 334, ¶21. Scruggs does not identify, nor has the State's examination revealed, any language in the LFB memorandum that suggests a punitive intent behind the surcharge. To the contrary, the memorandum explains that the increased revenue generated by the surcharge amendments would be used to fund the cost of expanding the DNA databank under other provisions of the new law. *See* LFB memorandum at 13 (R-Ap. 113) ("The funding for this proposal would primarily come from an amended and expanded DNA surcharge."). The LFB memorandum supports the conclusion that the intent of the amendment to the surcharge statute is not punitive but to provide funds for an expanded DNA collection and analysis program and the resulting larger DNA databank.

Scruggs argues that the surcharge "is not merely 'intended to compensate the state for the expense of maintaining' the State Crime Laboratory" because "the surcharge is collected in

[3]The quoted language describes nonstatutory legislative findings that were included in the original budget bill draft. *See* LFB Memorandum at 8, 12 (R-Ap. 108, 112). That nonstatutory language was not included in the final version of the bill. *See* 2013 Wis. Act 20, §§ 9101-9151 (nonstatutory provisions of Act 20).

every case, regardless of whether DNA is collected or analyzed" and because "[o]nce a DNA sample has been taken, analyzed, and entered in the DNA databank, there is no DNA cost." Scruggs's brief at 9-10. That argument assumes, without explanation or factual basis, that there is no cost to maintain the DNA data bank once results have been entered. It also incorrectly assumes that the only costs that the DNA surcharge are used to offset are those associated with the initial collection and testing of a DNA sample.

As previously noted, the money collected as DNA surcharges are "utilized under s. 165.77," the state's DNA data bank statute. *See* Wis. Stat. § 973.046(3). The State Crime Lab's DNA-related responsibilities under Wis. Stat. § 165.77 are not limited to the initial DNA analysis of defendants' samples and entry of the results into the data bank. In addition to those duties, Wis. Stat. § 165.77 requires the crime lab to analyze DNA when requested by law enforcement agencies in relation to an investigation, *see* Wis. Stat. § 165.77(2)(a)1.a., upon request by a defense attorney, pursuant to a court order, regarding his or her client's specimen, *see* Wis. Stat. § 165.77(2)(a)1.b., and, subject to Department of Justice rules, at the request of an individual regarding his or her own specimen, *see* Wis. Stat. § 165.77(2)(a)1.c. The crime lab may compare the data obtained from a specimen with data obtained from other specimens and provide those results to prosecutors, defense attorneys, or the subject of the data. *See* Wis. Stat. § 165.77(2)(a)2. The crime lab is required to maintain a data bank based on data obtained from its DNA analyses. *See* Wis. Stat. § 165.77(3). The DNA surcharge funds all of those activities.

In two jurisdictions, California and New York, courts have held that applying a DNA fee to defendants who committed their offense before the enactment of the fee statute was an ex post facto violation. However, those decisions do not support Scruggs's claim that applying Wisconsin's DNA surcharge to her is an ex post facto violation.

California's statute, unlike Wisconsin's, expressly describes the DNA assessment as "an additional penalty." *See People v. Batman*, 71 Cal. Rptr. 3d 591, 593 (Cal. Ct. App. 2008). The statutory language itself, therefore, indicates a punitive intent. And while New York's intermediate appellate court has held that the DNA databank fee could not be applied to crimes committed before the effective date of the legislation imposing that fee, it did so without any analysis and simply accepted the state's concession that the fee should not be applied. *See*, *e.g.*, *People v. Diggs*, 900 N.Y.S.2d 918, 919 (N.Y. App. Div. 2010); *People v. Hill*, 807 N.Y.S.2d 310, 310 (N.Y. App. Div. 2006). New York's intermediate appellate court subsequently questioned the correctness of that concession based on a later decision by New York's highest court in *People v. Guerrero*, 904 N.E.2d 823 (N.Y. 2009), a case involving other criminal surcharges and fees. *See People v. Foster*, 927 N.Y.S.2d 92 (N.Y. App. Div. 2011). The *Foster* court said that *Guerrero* "has now cast doubt upon the determination that the retroactive imposition of the various fees and surcharges mandated by [the statute] represents an unconstitutional ex post facto penalty" because, "[a]s *Guerrero* highlights, the Legislature intended the various surcharges and fees authorized by [the statute] to be revenue-generating measures rather than punishment." *Id.* at 99.

The conclusion that Wisconsin's DNA surcharge is not punitive is further supported by the Seventh Circuit's decision in *Mueller v. Raemisch*, 740 F.3d 1128 (7th Cir. 2014), which rejected an ex post facto challenge to Wisconsin's sex offender registration statute. One of the provisions at issue in *Mueller* 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 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*. However, the court held, the challengers "presented no evidence that it was intended as a fine," nor had they shown that the fee was "grossly disproportionate to the annual

cost of keeping track of a sex offender registrant." *Id.* at 1134. It found that there was no basis to conclude "that $100 is so high that it must be a fine." *Id.*

The Seventh Circuit concluded that the fee "is intended to compensate the state for the expense of maintaining the sex offender registry. The offenders are responsible for the expense, so there is nothing 'punitive' about making them pay for it. . . . The state provides a service to the law-abiding public by maintaining a sex offender registry, but there would be no service and hence no expense were there no sex offenders. As they are responsible for the expense, there is nothing punitive about requiring them to defray it." *Id.* at 1135 (citing, *inter alia*, *In re DNA Ex Post Facto Issues,* 561 F.3d at 299–300).

Raemisch demonstrates that a fee or surcharge is not punitive simply because it is imposed as a consequence of a criminal conviction. Contrary to Scruggs's argument, therefore, *see* Scruggs's brief at 7-8, the fact that the DNA surcharge is included in the sentencing statutes and is imposed when the court imposes a sentence or places a defendant on probation, *see* Wis. Stat. § 973.046(1r), does not make the surcharge punishment.

Scruggs has not carried her burden of proving beyond a reasonable doubt that the DNA surcharge is punitive. The court should conclude, therefore, that requiring her to pay the surcharge under the amended version of the statute is not an ex post facto violation.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 1st day of April, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,690 words.

_____
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Assistant Attorney General

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 1st day of April, 2015.

_____
Jeffrey J. Kassel
Assistant Attorney General

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APPENDIX CERTIFICATION

I hereby certify pursuant to Wis. Stat. § (Rule) 809.19(3)(b) 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.

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix that complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

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