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

SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

CASES CITED

Page

STATUTES CITED

STATE OF WISCONSIN

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

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ARGUMENT

In an order entered on July 7, 2015, the court of appeals "question[ed] how the State's position seeking imposition of a single mandatory surcharge comports with the State's concession regarding the remedy for an ex post facto violation in *State v. Radaj*, 2015 WI App 50, __ Wis. 2d __, __ N.W.2d __." *See State v. Tabitha A. Scruggs*, case no. 2014AP2981-CR, order at 1 (Ct. App. July 7, 2015). The court noted that the State had

conceded in *Radaj* and in *State v. Booker*, no. 2015AP573-CR, cases that involved the imposition of multiple DNA surcharges, that the remedy for the ex post facto violation was a remand for the circuit court to apply the discretionary DNA surcharge statute that was in effect when the crimes were committed. Order at 1-2.

The court ordered the State to file a supplemental brief addressing several questions relating to the effect of the State's concession in those cases regarding the appropriate remedy with its position in this case that a single mandatory surcharge is not an ex post facto violation. *Id*. at 2-3. The State submits this brief to answer those questions.

I. THE STATE'S CONCESSION REGARDING THE REMEDY IN *RADAJ* DOES NOT CONFLICT WITH ITS POSITION IN THIS CASE.

The first question posed by the court is "whether the State's concession that upon an ex post facto violation only one discretionary DNA surcharge could be imposed conflicts with its position in this case that a single mandatory DNA surcharge is permissible." Order at 2. There is no conflict because the question of the appropriate remedy for a constitutional violation is distinct from the question whether there has been a violation.

The court of appeals held in *Radaj* that the mandatory DNA statute is an unconstitutional ex post facto law as applied to defendants sentenced on multiple convictions for offenses occurring

before the mandatory surcharge's effective date who were required by the statute to pay a separate surcharge for each conviction. *See Radaj*, 2015 WI App 50, ¶¶35-36. Assuming without deciding that the legislature's intent was non-punitive, the court held that the statute, as applied to Radaj, had a punitive effect. *See id.* at ¶¶24-36. The dispositive factor, according to the *Radaj* court, was the lack of a rational connection between the amount of the surcharge – in *Radaj*, four surcharges totaling $1,000 – and the non-punitive DNA-related activities that the surcharge is intended to fund. *See id*.

The court then addressed the remedy Radaj should receive. *See id.,* ¶37. It noted that Radaj argued that the proper remedy was a remand with directions that the circuit court apply the surcharge statute that was in effect when Radaj committed his crimes, *id*., and that "[t]he State fail[ed] to respond to Radaj's remedy argument, even though it is not apparent that the remedy Radaj requests is the only or best option," *id*., ¶38. The court said that it would treat the State's failure to respond to Radaj's remedy argument as a concession and, "without deciding whether a different remedy could be appropriate," would "remand with directions that the circuit court apply the [discretionary] surcharge statute that was in effect when Radaj committed his crimes." *Id*.

The reason that the State did not challenge the remedy that Radaj suggested is that the State believed (and continues to believe) that applying the version of the statute in effect when Radaj committed his offenses is the appropriate remedy for an ex post facto violation. "The proper relief upon a conclusion that a state prisoner is being

treated under an *ex post facto* law is to remand to permit the state court to apply, if possible, the law in place when his crime occurred." *Weaver v. Graham*, 450 U.S. 24, 36 n. 22 (1981); *see also Murtishaw v. Woodford*, 255 F.3d 926, 967 (9th Cir. 2001) (holding that sentencing the defendant under a law passed after the date of his offense that removed sentencing discretion was an ex post facto violation and that the remedy was resentencing under the sentencing statute in effect at the time of the offense).

The *Radaj* court said that it was granting the remedy Radaj requested even though "it is not apparent that the remedy Radaj requests is the only or best option." *Radaj*, 2015 WI App 50, ¶38. However, the court did not identify any other potential remedies.

A potential remedy other than resentencing under the old statute would be for the court to have remanded with instructions to apply a single mandatory surcharge under the new statute. But the reason the State did not suggest that as a remedy was not because it believed that imposing a single surcharge would present an ex post facto violation. If that had been the State's reason, there would be a conflict between the State's remedy concession in *Radaj* and its position in this case that imposition of a single mandatory surcharge does not constitute an ex post facto violation.

The State's reason for not suggesting that the *Radaj* court remand for imposition of a single, mandatory surcharge is twofold. First, as previously discussed, the proper relief under *Weaver v. Graham* was to apply, if possible, the law in place when Radaj committed his offense.

The State perceived no reason why applying the prior discretionary version of the DNA surcharge was not possible.

Second, imposing a single surcharge when the defendant has been convicted of multiple felonies is not authorized by the new DNA surcharge statute. That statute requires the circuit court to impose a surcharge for "each conviction for a felony." Wis. Stat. § 973.046(1r)(a) (2013-14). Imposing a single mandatory surcharge would require ignoring or rewriting that statutory language, which a court may not do. *See State v. Steffes*, 2013 WI 53, ¶21, 347 Wis. 2d 683, 832 N.W.2d 101 ("To reach the result desired by Steffes, we would have to either rewrite or ignore the plain language of the statute. This we may not do.").

The State's concession in *Radaj* that upon an ex post facto violation only one discretionary DNA surcharge could be imposed was based on its understanding of the appropriate remedy for an ex post facto violation, not on its belief that imposing a single mandatory surcharge would create an ex post facto violation. For that reason, the State's concession in *Radaj* does not conflict with its position in this case that a single mandatory DNA surcharge is permissible.

II. THIS DIFFERENT TREATMENT CAN BE "EXPLAINED AND SANCTIONED."

The second question posed by the court is "whether and how this potential different treatment can be explained and sanctioned." Order at 2-3. The State's answer to the previous

question informs its answer to this question as well.

The potential (and, in the State's view, proper) difference in treatment between the defendant in *Radaj* and the defendant in this case follows from the *Radaj* court's explanation of why multiple surcharges are punitive. The court said that the "critical inquiry is whether there is a rational connection between the amount of the fee and the non-punitive activities that the fee is intended to fund, or if instead the amount of the fee is excessive in relation to that purpose." *Radaj*, 2015 WI App 50, ¶25. "For this surcharge scheme to be non-punitive, there must be some reason why the cost of the DNA-analysis-related activities under Wis. Stat. §§ 973.046 and 165.77 increases with the number of convictions." *Id.*, ¶30. The court concluded that the multiple surcharge scheme was punitive because it could "conceive of no reason why [DNA-related] costs would generally increase in proportion to the number of convictions, let alone in direct proportion to the number of convictions." *Id.*, ¶32.

That reasoning does not apply to the imposition of a single DNA surcharge. Unlike the situation with multiple surcharges, where the court could conceive of no rational connection between multiple surcharges and the non-punitive activities that the fee funds, it is rational to apply a single $250 DNA surcharge in a case to offset the costs of DNA analysis and the various DNA data bank activities the surcharge funds. *See* State's respondent's brief at 12.

Scruggs bears the burden "to show by the 'clearest proof' that there is no rational connection between the method of calculating the surcharge

and the costs the surcharge is intended to fund." *Radaj*, 2015 WI App 50, ¶34. Yet Scruggs has made no attempt to present affirmative evidence that the cost of a single DNA surcharge has little or no relation to the purposes for which the surcharge is imposed. *See id*. The *Radaj* court was willing to disregard the defendant's failure in that respect because the multiple surcharge issue could be "resolved by applying the statutory language and common sense." *Id*. But because Scruggs has not presented any evidence that a single DNA surcharge is not rationally related to its purposes, and because the punitive effect of a single surcharge cannot be demonstrated merely "by applying the statutory language and common sense," *id*., this court should conclude that Scruggs has failed to carry her burden.

III. THE CONCESSION IN CASES INVOLVING MULTIPLE CONVICTIONS DOES NOT RENDER THE MANDATORY SURCHARGE IN A SINGLE CONVICTION CASE A PENALTY.

The final question posed by the court is "whether the concession in cases involving multiple convictions renders the mandatory surcharge in a single conviction case a penalty." Order at 3. It does not.

The State's concession in *Radaj* concerned the remedy for a defendant to whom the new mandatory surcharge statute was unconstitutionally applied. The issue in this case, in contrast, is whether a single surcharge is punitive and therefore an ex post facto violation.

The answer to that question is not affected by the *remedy* that should be applied in cases where multiple surcharges were applied. As discussed above, the reason that the State did not argue in *Radaj* that the remedy should be the imposition of a single mandatory surcharge was not because the State believes that a single mandatory surcharge is punitive, but because the appropriate remedy for an ex post facto violation is to apply the statute in effect at the time of the offense and because a single surcharge is not authorized by the statute when there are multiple convictions.

CONCLUSION

For the reasons stated above and in the State's respondent's brief, the court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 27th day of July, 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 the court's order that this brief not exceed 3,000 words if produced with a proportional font. The length of this brief is 1,730 words.

_____
Jeffrey J. Kassel
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 27th day of July, 2015.

_____
Jeffrey J. Kassel
Assistant Attorney General