STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP000374-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GAVIN S. HILL,

Defendant-Appellant.

On Appeal From the Judgment of Conviction Entered
in the Vilas County Circuit Court, the
Honorable Neal A. Nielsen, III, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

SARA KELTON BRELIE
Assistant State Public Defender
State Bar No. 1079775

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1770
brelies@opd.wi.gov

Attorney for Defendant-Appellant

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ISSUES PRESENTED

1. Mr. Hill pleaded no contest to an enhanced disorderly conduct charge. The complaint stated Mr. Hill met the statutory standard for a domestic abuse repeater but did not specify any prior offenses that the State believed satisfied the standard. Instead, CCAP reports of several cases, some of which may have been related to the domestic abuse repeater enhancer, were attached to the complaint. Under the circumstances, was the domestic abuse repeater penalty enhancer properly applied?

   The circuit court sentenced Mr. Hill based on the penalty enhancer and denied Mr. Hill's postconviction motion to commute the sentence to the maximum allowed without the enhancer.

2. Mr. Hill was convicted of felony disorderly conduct as a domestic abuse repeater on April 9, 2014, for conduct that occurred on July 18, 2013. On January 1, 2014, 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. Mr. Hill was sentenced on June 9, 2014, and the court imposed the surcharge. Does applying the surcharge in Mr. Hill's case violate the prohibitions against *ex post facto* laws in the state and federal constitutions because the surcharge did not exist at the time of the offense?

   The circuit court imposed the surcharge and denied Mr. Hill's postconviction motion to vacate the surcharge.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Hill believes that the briefs will adequately address the issues in this case, but welcomes the opportunity for oral argument should this Court find that counsel's arguments require further discussion. Publication is not requested.

STATEMENT OF THE CASE AND FACTS

The state charged Mr. Hill with disorderly conduct and criminal damage to property and alleged that two different penalty enhancers applied to the first count – the ordinary repeater statute (Wis. Stat. § 939.62) and the domestic abuse repeater statute (Wis. Stat. § 939.621). (1; App. 114-28).[1] Regarding the ordinary repeater, the complaint noted that Mr. Hill had been convicted of three misdemeanors within five years: Shawano County Case No. 11-CM-454, Shawano County Case No. 09-CM-1195, and Brown County Case No. 08-CT-1859. (*Id.*). Regarding the domestic abuse repeater, the complaint stated that Mr. Hill met the statutory standard but did not specify any prior offenses that the State believed satisfied this standard. (*See id.*). Attached to the complaint were CCAP reports from five cases – the three mentioned in the complaint and two others. (*See id.*). The information, filed on August 22, 2013, mirrored the complaint, without attachments. (2; App. 129-30).

[1] The complaint also alleged that Mr. Hill would need to pay a domestic abuse surcharge in this case, but the surcharge is not relevant to this appeal.

On April 9, 2014, Mr. Hill pleaded no contest to count one – disorderly conduct – as "contained in the information." (17:3). There was no negotiated plea agreement; Mr. Hill agreed to plead to count one as charged and both sides were free to argue sentencing. (*Id.*). At the time of his plea, Mr. Hill intended to go to trial on the criminal-damage-to-property count but those charges were ultimately dismissed and read in. (17:3-4, 14).

Regarding the repeater allegations, the court engaged in the following colloquy with Mr. Hill:

> THE COURT: Now, ordinarily, disorderly conduct is a Class B misdemeanor which is punishable by a fine of up to $1,000, or by imprisonment in the county jail for up to 90 days, or both. In this case we have a different penalty structure because there are two separate – well, three actually, penalty enhancers. One is that this is an act of domestic abuse that is that the disorderly conduct happened between you and a domestic partner. When the court makes that finding, then the Court can impose a 100 [dollar] domestic abuse assessment, essentially a surcharge, to raise money to combat domestic violence, generally; do you understand that?
>
> MR. HILL: Yes, your Honor.
>
> THE COURT: You're also charged with a repeater enhancer, and that repeater is based on three misdemeanor convictions which are of record, and un-reversed, so once we have those three prior convictions then you can have a repeater enhancer which can increase the penalty by up to, excuse me, by not more than two years; do you understand that?
>
> MR. HILL: Yes, your Honor.

> THE COURT: And if there has been a – there is another repeater enhancer in this case, because there is an allegation that you are [a] domestic abuse repeater, which means that you have been convicted on two separate occasions of either a felony or a misdemeanor in which the Court did impose, or could have imposed a domestic abuse surcharge. In other words, two prior domestic abuse incidents during the ten years immediately prior to the commission of this offense, do you understand that?
>
> MR. HILL: Yes, your Honor.
>
> THE COURT: And when that's the case, then the maximum term of imprisonment may be increased by not more than two years, and which would mean ultimately two years and three months, or two years and ninety days as a maximum penalty. And the penalty itself, the repeater enhancer changes the status of the conviction here from a misdemeanor to a felony; do you understand that?
>
> MR. HILL: Yes, your Honor.

(*Id*. at 7-8). Later in the plea hearing, the court asked whether defense counsel "acknowledge[d] for purposes of the repeater, and domestic abuse repeater enhancers, that the prior convictions that are noted in the complaint and information are valid convictions of record that remain un-reversed." (*Id*. at 9). Defense counsel answered affirmatively. (*Id*.).

Ultimately, the court sentenced Mr. Hill to a bifurcated sentence of two years of initial confinement and one year, three months of extended supervision on the count of conviction. (18:26; App. 101-02). As for the DNA surcharge, the court stated: "The Court will impose court costs here which will include $250 DNA assessment, and because of the

felony conviction you will be required to provide a sample of your DNA for purposes of maintaining a State data base." (*Id.* at 28; *see also* App. 101-02).

On December 1, 2014, Mr. Hill filed a postconviction motion asking the court to vacate the domestic abuse sentence enhancer and commute his sentence to the maximum allowed by law without the enhancer. He also asked that the court vacate the DNA surcharge imposed. (8).

Regarding the domestic abuse penalty enhancer, Mr. Hill argued that that the state had failed to prove the qualifying prior convictions and the defendant had not personally admitted to them. (8:4-6). Specifically, Mr. Hill argued that the CCAP reports attached to the complaint were insufficient based on ***State v. Bonds***, 2006 WI 83, ¶49, 292 Wis. 2d 589, 649 N.W.2d 133. Regarding the DNA surcharge, Mr. Hill argued that because the DNA surcharge would have been discretionary at the time he committed his offense, its application without a determination that it was appropriate as a matter of discretion was improper.

After holding a hearing on January 26, 2015, the court denied the motion, stating that the record as a whole supported a finding that Mr. Hill understood his plea to the charges and to the domestic abuse penalty enhancer:

> What is important, is that the defendant fully understands the nature of the repeater charge, and this is found from the totality of the record. The record in this case amply supports a finding that Mr. Hill fully understood and appreciated the charges and penalties, including the domestic abuse repeater enhancer.

> Second, although CCAP reports attached to the complaint may not be enough to satisfy a burden beyond a reasonable doubt as to the prior qualifying convictions under ***State v. Bonds***, 2006 [WI 83, 292 Wis. 2d 344, 717 N.W.2d 133], it is clear from ***Bonds*** and from ***State v. Caldwell***, 154 [Wis. 2d 683, 454 N.W.2d 13 (Ct. App. 1990)], that a PSI prepared by the Wisconsin Department of Corrections is an official report of a governmental agency, which constitutes prima facie evidence of the prior convictions, and therefore satisfies the requirements of [Wis. Stat. §] 973.12(1).

(20:9; App. 109).

The court also declined to vacate the DNA surcharge, noting that statutes are presumed constitutional and that the court of appeals has yet to decide the *ex post facto* DNA surcharge issue. (20:11-13; App. 111-13).

This appeal follows.

ARGUMENT

I. The Record in This Case Does Not Support the Wis. Stat. § 939.621 Domestic Abuse Penalty Enhancer.

The domestic abuse penalty enhancer issue revolves around three statutes and case law interpreting them—Wis. Stat. §§ 939.621, 973.12(1), and 973.13.

First, Wis. Stat. § 939.621 outlines when a defendant may be subject to penalty enhancement based on prior convictions:

> (1) In this section, "domestic abuse repeater" means either of the following:

. . . .

> (b) A person who was convicted, on 2 separate occasions, of a felony or misdemeanor for which a court imposed a domestic abuse surcharge…or waived a domestic abuse surcharge…during the 10-year period immediately prior to the commission of the crime for which the person presently is being sentenced….
>
> (2) If a person commits an act of domestic abuse…and the act constitutes the commission of a crime, the maximum term of imprisonment for that crime may be increased by not more than 2 years if the person is a domestic abuse repeater…. The penalty increase under this section changes the status of a misdemeanor to a felony.[2]

Thus, it is not enough to prove a certain type of prior conviction to show that someone is a domestic abuse repeater. There must also be a showing that the court either imposed or waived a domestic abuse surcharge in the prior case, which requires proof of facts other than the fact of conviction.[3]

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[2] Therefore, if Mr. Hill's sentence is reduced based on the state's failure to prove he was a domestic abuse repeater, he will be convicted of an enhanced misdemeanor rather than a felony.

[3] Wisconsin Statute § 973.055 governs domestic abuse surcharges. The court "shall" impose the surcharge if a person is convicted of certain listed offenses *and* "[t]he court finds that the conduct constituting the violation…involved an act by the adult person against his or her spouse, against an adult with whom the adult person resides or formerly resided or against an adult with whom the adult person has created a child." Wis. Stat. § 973.055. Subsection (4) provides for waiver of the surcharge in cases where the court finds imposing it would have a negative impact on the offender's family.

Next, Wis. Stat. § 973.12(1) outlines proof or admission requirements for establishing that a defendant is subject to the penalty enhancement based on prior convictions:

> Whenever a person charged with a crime will be a repeater or a persistent repeater under [Wis. Stat. §] 939.62[4] if convicted, any applicable prior convictions may be alleged in the complaint, indictment or information or amendments so alleging at any time before or at arraignment, and before acceptance of any plea…. If the prior convictions are admitted by the defendant or proved by the State, he or she shall be subject to sentence under [§] 939.62…. An official report of the F.B.I. or any other governmental agency of the United States or of this or any other state shall be prima facie evidence of any conviction or sentence therein reported.

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[4] Although Wis. Stat. § 973.12(1) does not explicitly refer to the Wis. Stat. § 939.621 penalty enhancer at issue in this case, its requirements apply. *See* ***State v. Coolidge***, 173 Wis. 2d 783, 792-93, 496 N.W.2d 701 (Ct. App. 1993), *abrogated on other grounds by* ***State v. Tiepelman***, 2006 WI 66, ¶31, 291 Wis.2d 179, 717 N.W.2d 1 (applying the requirements of Wis. Stat. § 973.12(1) to the enhanced penalty provisions of the Uniform Controlled Substance Act based in part on "due process concerns."); *see also* ***State v. Wideman***, 206 Wis. 2d 91, 556 N.W.2d 737 (1996) (reasoning that § 939.62's exclusion of OWI offenses from the definition of repeater was a clear expression of legislative intent not to apply § 973.12(1) requirements to penalty enhancers under those same statutes); ***State v. Spaeth***, 206 Wis. 2d 135, 556 N.W.2d 728 (1996) (same reasoning as in ***Wideman*** regarding § 973.12(1) applied to OAR convictions). Based on ***Coolidge***, ***Wideman***, and ***Spaeth***, the § 973.12(1) requirements apply to proof of prior convictions for the domestic abuse repeater enhancer because it is a penalty enhancement involving offenses that are not explicitly excluded from the ordinary repeater statute.

Finally, Wis. Stat. § 973.13 outlines the remedy when a sentence is imposed in excess of the maximum:

> In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.

Whether the state satisfied the proof or admission requirement of § 973.12(1) is a question of law reviewed *de novo*. ***State v. Watson***, 2002 WI App 247, ¶3, 257 Wis. 2d 679, 653 N.W.2d 520.

A. Under Wis. Stat. § 973.12(1), a sentence enhanced based on Wis. Stat. § 939.621 cannot stand unless the defendant's status as a repeater is established either by the defendant's admission or by proof of facts necessary to make the defendant a domestic abuse repeater.

There is a substantial body of case law interpreting the requirements laid out in Wis. Stat. § 973.12(1). Relevant to this case, the sentencing court may apply the enhancer only if the state proves the existence of qualifying prior convictions beyond a reasonable doubt or the defendant "personally admits to qualifying prior convictions." ***State v. Saunders***, 2002 WI 107, ¶19, ¶57, 255 Wis. 2d 589, 649 N.W.2d 263. If the court relies on the state's proof, the state can only meet its burden with an "official document." ***Id.*** at ¶19. An uncertified copy of a judgment of conviction or, in some cases, a PSI may suffice, ***Saunders***, 255 Wis. 2d at ¶¶23-25, but a CCAP report can not, ***State v. Bonds***, 2006 WI 83, ¶49, 292 Wis. 2d 344, 717 N.W.2d 133.

If the court relies on an admission by the defendant, such admission "may not 'be inferred nor made by defendant's attorney, but rather, must be a direct and specific admission by the defendant.'" ***Saunders***, 255 Wis. 2d 589, ¶22 (quoting ***State v. Farr***, 119 Wis. 2d 651, 659, 350 N.W.2d 640, 645 (1984)). It "must contain specific reference to the date of the conviction and any period of incarceration if relevant to applying § 939.62." ***Id.*** Appellate courts have found that a plea of guilty or no contest can effect a personal admission where the complaint described the basis for the repeater charge, the plea colloquy references that complaint, and the defendant "fully understood the nature of the repeater charge." ***State v. Liebnitz***, 231 Wis. 2d 272, 275-76, 603 N.W.2d 208 (1999)).

B. The state did not prove the convictions underlying the domestic abuse repeater penalty enhancement and the record does not establish that they exist.

In this case, the state did not prove the convictions relevant to the domestic abuse repeater allegation; indeed it never explained what convictions it believed justified that allegation. The complaint and information listed three misdemeanor cases that the state alleged satisfied the requirement of § 939.62 – the ordinary repeater allegation – but they did not tie *any* cases to the domestic abuse repeater allegation. (1:1; App. 114). Attached to the complaint were CCAP reports of five cases, some of which the state presumably intended to relate to the domestic abuse repeater allegation, but the complaint did not refer to them in its discussion of that allegation. (*See* 1; App. 114-128).

As noted, the state supreme court has specifically held that a CCAP report does not constitute prima facie proof of a

prior conviction for purposes of a repeater allegation. ***Bonds***, 292 Wis. 2d 344, ¶ 49. In ***Bonds,*** the state submitted a printout from CCAP as proof of a felony conviction not alleged in the complaint. ***Id.***, ¶4. The court noted that "[w]ith a CCAP report, the question is whether the report is an accurate narration of the judgment of conviction of a particular defendant, for a particular crime, on a particular date." ***Id.***, ¶45. It then reasoned that "CCAP reports do not purport to be identical to the court records…. The agreement to which all CCAP users are asked to adhere specifically warns that CCAP provides no warranty of accuracy for the data in its reports.." ***Id.*** ¶49. Based on that, the court concluded that "[w]e cannot, under those circumstances, consider the contents of a CCAP report to rise to the level of reliability sufficient to establish prima facie proof that a defendant has a prior conviction." ***Id.***

Here, as in ***Bonds***, the state tried to use CCAP reports to prove convictions that were not listed in the complaint. Worse, the state did not specify which CCAP reports it intended to use to prove the prior convictions related to the domestic abuse repeater allegation. Moreover, although some of the CCAP reports show that some of the convictions involved charges including the Wis. Stat. § 968.075(1)(a) "domestic abuse" modifier, there is no indication that a surcharge under Wis. Stat. § 973.055 was either imposed or waived as required for the Wis. Stat. § 939.621 sentence enhancement. (1). Additionally, the CCAP reports do not necessarily even indicate that the domestic modifier was applied; it could have been dismissed. Thus, even if the CCAP reports were sufficient to prove the fact of prior conviction, they did not contain enough information to prove the convictions fit the domestic abuse repeater requirements.

In some cases, a PSI may provide proof of the fact of conviction. *See* ***State v. Caldwell***, 154 Wis. 2d 683, 694, 454 N.W.2d 13 (Ct. App. 1990), the court of appeals held that the PSI in that case was sufficient because "[t]he repeater allegation was expressly contemplated by the investigating probation and parole agent," "[t]he date of the relevant prior conviction [was] included in the report," and "the report contain[ed] numerous indications that the agent independently verified the prior conviction from sources other than the complaint."

C. Mr. Hill did not admit to the convictions underlying the Wis. Stat. § 939.621 domestic abuse repeater penalty enhancement.

Mr. Hill also did not admit to any qualifying prior convictions for the domestic abuse penalty enhancement. He entered a plea to "count one as it is contained in the information." (17:3). The information did not refer to prior offenses underlying the domestic abuse repeater allegation. (2; App. 129-30). Mr. Hill told the court that he understood that "there [was] an allegation that [he was a] domestic abuse repeater," but no one informed him of any prior convictions that allegedly served as the basis for that allegation and Mr. Hill did not acknowledge any prior convictions. (17:8).

Appellate courts have held that a plea to a charge as described in the complaint can effect an admission to prior offenses described in the complaint. *See* ***Liebnitz***, 231 Wis. 2d at 276-86; ***State v. Watson***, 2002 WI App 247, ¶6, 257 Wis. 2d 679, 653 N.W.2d 520. For example, in ***Liebnitz***, the Wisconsin supreme court addressed the admission requirements in the context of a no contest plea. The ***Liebnitz*** court noted that the no contest plea was "an admission to all the material facts alleged in the complaint."

Liebnitz, 231 Wis. 2d at 287-88. The complaint and information in that case "set forth in detail" the nature of Liebnitz's previous convictions and the dates of conviction. ***Id.*** at 285-86.

As noted by the court of appeals in ***Watson***:

> An admission from a defendant stating, "I am a repeater," without more, is insufficient to constitute an admission of a prior conviction under Wis. Stat. § 973.12(1)…. "[R]epeater" and "habitual offender" are legal, not factual terms, and a defendant may not be aware of what he or she is admitting.

Watson, 257 Wis. 2d 679, ¶ 5. In ***Watson***, as in ***Liebnitz***, the court relied on the complaint adequately stating the basis of the repeater allegation. ***Watson***, 257 Wis. 2d 679, ¶6.

Here, unlike in ***Liebnitz*** and ***Watson***, neither the complaint nor the information – which was the basis for the plea – specified which convictions the state belied met the domestic abuse repeater allegation. Thus, Mr. Hill had no notice of the substance of the allegation that he might be admitting to.[5] (*See* 1 & 2; App 114-30).

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[5] The case numbers that were actually mentioned in the information are irrelevant to this analysis; although they presumably effected an admission of the offenses underlying the ordinary repeater allegation, they had no impact on the domestic abuse repeater allegation. Neither the complaint nor the information suggested that any of those cases involved qualifying domestic offenses. In addition, where two different sentence enhancers are imposed, they must be based on distinct underlying crimes. *See* ***State v. Delaney***, 2003 WI 9, ¶¶31-32, 259 Wis.2d 77, 658 N.W.2d 416; ***State v. Maxey***, 2003 WI App 94, ¶¶19-21, 264 Wis. 2d 878, 663 N.W.2d 811. Thus, here, the State could not use the same prior convictions to justify two different enhancers. *See* ***id.***

Finally, defense counsel's statement that the prior convictions noted in the complaint and information were valid, had no effect. As noted, the appellate courts have held that a defendant's admission to prior offenses must be made personally, not by his attorney. ***Saunders***, 255 Wis. 2d 589, ¶22. More importantly, neither the complaint nor the information alleged that any particular offenses served as the basis for the domestic abuse repeater allegation. (*See* 1 & 2; App. 114-30).

It is well established that a repeater charge must be proven by the time of sentencing; it cannot be established at the postconviction stage. ***State v. Koeppen***, 195 Wis. 2d 117, 128-31, 536 N.W.2d 386 (Ct. App. 1995). That simply did not happen here. Notably, even now it is not possible to ascertain from the record that Mr. Hill meets the criteria for conviction as a domestic abuse repeater; there is no indication that a domestic abuse surcharge was ordered or waived in any of his prior convictions, much less two convictions separate from those that are the basis of the ordinary repeater enhancement. *See* Wis. Stat. § 939.621(1)(b).

If, as Mr. Hill contends, he was improperly sentenced as a domestic abuse repeater, the sentence should be commuted under § 973.13 to the maximum without the repeater enhancement. *See* ***State v. Goldstein***, 182 Wis. 2d 251, 262, 513 N.W.2d 631 (Ct. App. 1994) (because repeater status not established, court of appeals commutes sentences to the maximums without the penalty enhancement); *see also*, ***State v. Zimmerman***, 185 Wis. 2d 549, 559, 518 N.W.2d 303 (Ct. App. 1994). Specifically, the two-year term of confinement followed by one year and three months of supervision should be commuted to a two-year total sentence with 18 months initial confinement. *See* Wis. Stat. § 939.62(1)(a); ***State v. Lasanske***, 2014 WI App 26, ¶12,

353 Wis. 2d 280, 844 N.W.2d 417. Two PSIs were prepared in this case: one court-ordered and one alternative PSI submitted by the defense.[6] Both contain what appears to be an identical table of prior offenses. A few prior offenses are labeled "domestic abuse," without clarifying what was meant by that. (21:3-4 in both PSIs). There is no mention that any of those offenses or any other offenses involved the imposition or waiver of a domestic abuse surcharge under § 973.055(1) or § 973.055(4). Thus, even if one or both of the PSIs in this case is sufficient to prove the listed prior convictions pursuant to ***Caldwell***, neither PSI can serve as proof of a domestic abuse repeater allegation under § 939.621 because, again, there is no mention of the necessary domestic abuse surcharge.

II. 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).

[6] Only the court-ordered PSI would constitute an official report of a governmental agency under Wis. Stat. § 973.12(1), but since they contain the same information, Mr. Hill discusses them together.

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

At the time Mr. Hill committed the offense, in 2013, the DNA surcharge statute required the sentencing court to impose the surcharge for a short list of felonies.[7] Wis. Stat. § 973.046(1r) (2011-12). An enhanced disorderly conduct offense was not on that list.[8] *Id.* Thus, the court was permitted

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

"(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."

[8] Notably, it is the Wis. Stat. § 939.621 penalty enhancer that makes the disorderly conduct a felony. Thus, if that enhancer is removed, the current version of the statute would only impose a $200 surcharge. That would also be a violation of *ex post facto* because when Mr. Hill committed his offense there was no surcharge for misdemeanors.

to impose the DNA surcharge only if it first determined (on the record) that the surcharge was appropriate as a matter of discretion. § 973.046(g); *see also* ***State v. Cherry***, 2008 WI App 80, ¶¶ 9-11, 312 Wis.2d 203, 752 N.W.2d 393.

In 2013, the legislature amended § 973.046(1r) to require the DNA surcharge for every conviction. 2013 Wis. Act 20, § 2355. The new statute mandates a $200 surcharge for each misdemeanor and a $250 surcharge for each felony.[9] *Id.* The act specifies that the change applies to any sentencing held on or after January 1, 2014. *Id.* at § 9326. Therefore, the act appears to apply to Mr. Hill, who was sentenced after the effective date, although the offense occurred prior to the effective date. Nonetheless, the application of the new § 973.046(1r) to Mr. Hill acts as an *ex post facto* law violating the federal and state constitutions.

The United States Supreme Court has long held that a law that makes mandatory what was previously discretionary constitutes an increase in punishment. *See*, *e.g.*, ***Lindsey v. Washington***, 301 U.S. 397, 400-02 (1937) (statute changing penalty from 15-year maximum to mandatory 15-year sentence violated *ex post facto* clause); ***Weaver v. Graham***, 450 U.S. 24, 32 n.17 (1981) ("a law may be retrospective not only if it alters the length of the sentence, but also if it changes the maximum sentence from discretionary to mandatory"); *see also* ***State ex rel. Singh v. Kemper***, 2014 WI App 43, ¶ 13, 353 Wis. 2d 520, 846 N.W.2d 820 (statute eliminating the possibility of early release based on positive adjustment time violated *ex post facto* clause).

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[9] "(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."

Courts in other jurisdictions have also held that financial liability may be punishment for purposes of the *ex post facto* clause. *See*, *e.g.*, ***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); ***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, 1085-866 (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).

Here, the statute in question is undoubtedly retrospective and makes mandatory a surcharge that was previously discretionary for Mr. Hill's offense. The DNA surcharge became mandatory (and applicable for every conviction) after the conduct underlying Mr. Hill's conviction was completed. At the time of the offense, the surcharge could only be applied after an appropriate exercise of discretion.

Thus, the only question is whether the statute is punitive for purposes of the *ex post facto* analysis. 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.

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.

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 and in fact appears to mandate it be imposed for every count of conviction.

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 reflects 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 further 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 Wis. Stat. § 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).[10]

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.[11] 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 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.

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

[11] 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.

Because the text of the statute and its legislative history reflect a punitive intent, this Court should find that the mandatory DNA surcharge in Mr. Hill's 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 it 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 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.

Here, the amended statute imposing a mandatory DNA surcharge, which functions like an automatic $250 fine, retroactively increases the burden on Mr. Hill and is thus unconstitutional as applied to him. 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 set forth above, Mr. Hill respectfully requests that the court reverse his conviction as a domestic abuse repeater and the order denying postconviction relief, and remand with directions that the sentence be commuted to the maximum without the repeater enhancer, meaning that the sentence would be reduced to a two year prison sentence with eighteen months initial confinement followed by six months extended supervision. Mr. Hill further requests that the court vacate the DNA surcharge applied to his case.

Dated this 18th day of May, 2015.

Respectfully submitted,

SARA KELTON BRELIE
Assistant State Public Defender
State Bar No. 1079775

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1770
brelies@opd.wi.gov

Attorney for Defendant-Appellant

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 6,630 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 this 18th day of May, 2015.

Signed:

SARA KELTON BRELIE
Assistant State Public Defender
State Bar No. 1079775

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1770
brelies@opd.wi.gov

Attorney for Defendant-Appellant

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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 s. 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 this 18th day of May, 2015.

Signed:

SARA KELTON BRELIE
Assistant State Public Defender
State Bar No. 1079775

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1770
brelies@opd.wi.gov

Attorney for Defendant-Appellant