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 a Judgment and an Order Entered
in the Vilas County Circuit Court, the
Honorable Neal A. Nielsen, III, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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

The state does not dispute that the complaint and attached CCAP reports are insufficient to prove the prior convictions that form the basis of the domestic abuse repeater allegation. Instead, the state relies on Hill's statements and the table of prior convictions in both PSIs to support the trial court's ruling that the domestic abuse repeater allegation was valid.

Even after Hill's conviction, postconviction motion litigation and appellate briefing, the state has never specified which prior convictions satisfy the requirements of its domestic abuse repeater allegation. A domestic abuse repeater is defined as "[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 for which the person presently is being sentenced." Wis. Stat. § 939.621(1)(b).

No document—not the complaint, the information, or either PSI—mentions the imposition or waiver of the domestic abuse surcharge, which is required to support the domestic abuse repeater allegation. The state does not argue otherwise or explain how the record supports the domestic abuse repeater enhancer. This court should not allow the enhancer to stand when the state has not proven its validity and there is no clear admission of specific prior convictions from Hill.

A. Hill never personally admitted to prior domestic abuse convictions underlying the penalty enhancer.

The state argues that Hill's acknowledgment that he understood "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" constitutes an admission. (State's Brief at 7). As Hill argued in his brief-in-chief, that is insufficient under Wis. Stat. § 973.12(1) and the case law interpreting it. (Hill's Brief at 12-14).

On this record, Hill has acknowledged no more than a cursory understanding of the definition of a domestic abuse repeater. There is no evidence that he understood what he was admitting to or the specific convictions underlying the domestic abuse repeater enhancer. *See* ***State v. Watson***, 2002 WI App 247, ¶5, 257 Wis. 2d 679, 653 N.W.2d 520. Notably, two enhancers were applied to Hill's disorderly conduct charge, which means that different prior convictions needed to be used to support each penalty enhancer. *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. Under the circumstances, even the broadest reading of Hill's acknowledgment is insufficient to show he knew whether he fit the criteria for the enhancer.

The state also argues that Hill admitted to the prior convictions through the submission of his own PSI. That cannot constitute the personal admission required by Wis. Stat. § 973.12(1). If an attorney's admission on behalf of

a client is insufficient, *see* ***State v. Saunders***, 2002 WI 107, ¶22, 255 Wis. 2d 589, 649 N.W.2d 263, a defense PSI is insufficient, as well. Furthermore, both PSIs contained the same chart of prior convictions. Neither contained enough information to support the domestic abuse repeater enhancer because nothing indicates that the domestic abuse surcharge was imposed or waived in any prior conviction. (21:3-4 in both PSI's); *see also* Wis. Stat. § 939.621(1)(b).

Finally, in its statement of facts, the state quotes defense counsel agreeing with the repeater allegation and stating that it would be unnecessary for the court to receive certified copies of prior convictions "or anything like that." (State's Brief at 4). Although the state does not use that language to support a personal admission by Hill, that portion of the state's statement of facts misrepresents the record and requires correction.

When the plea hearing began, Hill's intention was to plead to the disorderly-conduct count and then go to trial on the criminal-damage-to-property count. (17:3-4). The court accepted Hill's plea to "count one of the information" and then moved on to discuss the trial, which was set for that morning. (17:10). The language quoted by the state is part of a pre-trial discussion of the ordinary repeater enhancer attached to the criminal-damage-to-property charge. (17:11). Importantly, there was no domestic abuse repeater enhancer attached to that charge. (1:1-2).

At the plea hearing, defense counsel merely acknowledged "that the prior convictions that are noted in the complaint and information are valid convictions of record that remain un-reversed." (17:9). That acknowledgment is insignificant for two reasons. First, Wis. Stat. § 973.12(1)

requires a personal admission by the defendant. ***Saunders***, 255 Wis. 2d 589, ¶22. Second, since the complaint and attached CCAP printouts were insufficient to prove the prior convictions underlying the enhancer, an admission that those convictions were valid and un-reversed is insignificant.

B. The state did not prove the prior convictions beyond a reasonable doubt.

The state argues that the PSI constitutes proof of the prior convictions. It does not. Both PSIs contain the same list of prior convictions. As explained in Hill's postconviction motion and brief, neither list is sufficient to prove the domestic abuse repeater allegation.[1] (8:5, Hill Brief at 15). The domestic abuse repeater statute requires more than the fact of prior conviction to support the enhancer; the prior convictions must involve the imposition or waiver of the domestic abuse surcharge. Wis. Stat. § 939.621(1)(b). Thus, because there is no mention of the necessary domestic abuse surcharge, the PSI is insufficient to prove the prior convictions for purposes of penalty enhancement. And since the PSI is not prima facie proof supporting the domestic abuse repeater allegation, Hill's lack of objection prior to sentencing does not waive his claim postconviction. ***State v. Bonds***, 2006 WI 83, ¶44, 292 Wis. 2d 344, 717 N.W.2d 133.

[1] Both Hill's postconviction motion and brief acknowledge that a PSI may in some cases constitute proof of prior convictions, and argue that the PSI's in this case were insufficient to do so. (8:5, Hill Brief at 15). Unfortunately, because of a cutting and pasting error, the paragraph in Hill's brief-in-chief explaining why the PSIs are insufficient to prove the prior convictions appears at the end of section II.-C. (beginning at the top of page 15) instead of the end of section II.-B. Nonetheless, Hill's argument remains the same and is consistent with his postconviction motion.

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.

Since Hill filed his brief-in-chief, the court of appeals has twice held that the new, mandatory DNA surcharge is unconstitutional as applied to defendants who committed crimes before the revised statute's effective date. First, in ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, the court of appeals held that assessing a mandatory DNA surcharge for multiple felonies committed before January 1, 2014, violates *ex post facto*. Next, in ***State v. Elward***, 2015 WI App 51, 363 Wis. 2d 628, 866 N.W.2d 756, the court of appeals held that the imposition of a $200 DNA surcharge violates *ex post facto* when applied to misdemeanors committed before the law applied the surcharge.

As noted in his brief-in-chief, if the court grants Hill's request to vacate his conviction as a domestic abuse repeater, his crime of conviction, disorderly conduct, becomes a misdemeanor rather than a felony. Wis. Stat. § 939.621(2); *see also* (1:1; App. 114; Hill Brief at 7 n.2, 16 n.8). If that is the case, then ***Elward*** applies and the surcharge should be vacated since at the time of Hill's crime, there was no DNA surcharge imposed for misdemeanors. ***Elward***, 363 Wis. 2d 628, ¶7.

If this court does not grant relief on Hill's first issue, Hill will remain convicted of a single felony where the court imposed a mandatory $250 surcharge. As of the filing of this brief, that specific fact scenario has not been addressed by the court of appeals. Therefore, the remainder of this brief addresses the DNA surcharge assuming that Hill remains convicted of a felony rather than a misdemeanor.

Although the ***Radaj*** court expressly refrained from deciding the single felony issue, ***Radaj***, 363 Wis. 2d 633, ¶7, the decision strongly supports Mr. Hill's position that the mandatory surcharge is punitive. First, the only distinction between the defendant in ***Radaj*** and Hill is that the mandatory surcharge was imposed for multiple felonies in ***Radaj*** and only for one here. As noted by the state and the court in ***Radaj***, the statute in effect when Hill committed his crime was also would have allowed the court to exercise its discretion to impose a $250 surcharge on Hill. ***Id.***, ¶ 8; (State's Brief at 17). However, laws that make mandatory what was previously discretionary may also violate *ex post facto*. ***Weaver v. Graham***, 450 U.S. 24, 32 n.17 (1981). It is undisputed that the court did not exercise its discretion in imposing the surcharge in this case.

In ***Radaj***, the court began by noting that the date Radaj committed his crimes, the date he was sentenced, and (in Radaj's case) the number of convictions "set the scene for Radaj's ex post facto challenge." ***Radaj***, 363 Wis. 2d 633, ¶3. Hill, like Radaj, committed his crime before the statute making the $250 surcharge mandatory went into effect. He was sentenced after the effective date and required to pay—under the same statutory scheme as Radaj—a mandatory $250 surcharge that would have been discretionary under the statute in effect when he committed his crime. The only plausible distinction is the number of convictions.

Based on that, the state argues that defendants like Hill, with a single felony conviction for a crime committed before the effective date of the updated statute, should continue to be subject to the mandatory $250 surcharge. (State's Brief at 16-19). But the state offers no explanation as to why the statute should be interpreted to subject defendants convicted of a single felony to a mandatory surcharge while

defendants who have committed multiple felonies in the same time frame may not have to pay a surcharge at all.

When applying the intent-effect test, the ***Radaj*** court assumed without deciding that the legislature's intent was to impose a non-punitive regulatory scheme rather than to punish. ***Id.***, ¶16. In so doing, the court noted that "the legislative decision to tie the amount of the surcharge to the number of convictions, something seemingly unrelated to the cost of the DNA-analysis-related activities that the surcharge funds, casts doubt on legislative intent." ***Id.***, ¶21. The court also noted that "[d]ifferentiating misdemeanors and felonies seemingly has implications for both the 'intent' and 'effect' parts of the *ex post facto* test." ***Id.***, ¶21 n.6. Thus, as acknowledged by the court in ***Radaj***, the structure of the statute supports a finding of punitive intent.

Regarding punitive effect, of the seven factors analyzed by the ***Radaj*** court, only the seventh—whether the surcharge "appears excessive in relation to" the non-punitive purpose assigned by the legislature—is arguably different between the two fact situations. In analyzing this factor, the ***Radaj*** court focused on the $1000 surcharge imposed in ***Radaj***, which it held lacked a rational connection to the cost the surcharge was meant to cover. ***Id.***, ¶¶29, 35. But that is not the only feature of the law lacking a rational connection to costs incurred by the state. The surcharge is required regardless of whether the defendant has already given a sample, meaning that even those who impose *no* additional cost on the state must pay the surcharge. The new law also sets the surcharge at $200 for misdemeanors and $250 for felonies. Obviously it is no more costly to obtain and analyze a felon's DNA sample than that of a misdemeanant, so there is no difference between the two in terms of the "costs of DNA-analysis-related activities." ***Id.***, ¶18. Instead, the statute

imposes a higher amount for more serious crimes and a lower amount for lesser ones. Both of those factors support punitive intent and effect.

The state argues that the distinction between the $200 imposed for a misdemeanor and the $250 imposed for a felony is insignificant because the surcharge for felonies was $250 (on a discretionary basis) in the prior version of the statute. (State's Brief at 17). That argument misses the mark. First, as previously noted, laws that make mandatory what was previously discretionary can violate *ex post facto*. ***Weaver v. Graham***, 450 U.S. 24, 32 n.17 (1981). Second, the fact that the legislature previously imposed a discretionary $250 surcharge does not change the significance of later choosing to impose a lesser mandatory surcharge for misdemeanors than for felonies.

The state also argues that Hill has not introduced evidence "showing that a $250 surcharge has little or no relation to the state's costs under Wis. Stat. § 165.77" and argues that "[n]either the statutory language nor common sense demonstrates that there is no rational connection between a single surcharge and DNA-related costs." (State's Brief at 18). The ***Radaj*** court acknowledged that the defendant in that case did not present "affirmative evidence…verifying that costs under [§] 165.77 have little or no relation to the number of convictions at a given sentencing." ***Radaj***, 363 Wis. 2d 633, ¶34. Even so, the court was "satisfied that this is a matter that can be resolved by applying the statutory language and common sense." ***Id.*** It held that there was no relationship between the number of convictions and the DNA-related costs incurred by the state. ***Id.***, ¶35. Likewise, common sense dictates that there can be no relationship between a $250 surcharge and DNA-related costs when, for example, the defendant has already given a

DNA sample in a prior case. Common sense is also sufficient to conclude that there can be no increased cost to collect, test, and store DNA in felony versus misdemeanor cases.

The flaw in all of the state's arguments is that based on the statutory language of the updated Wis. Stat. § 973.046(1r), the only basis for calculating the mandatory DNA surcharge is the number of convictions and their classification as a felony or a misdemeanor. That demonstrates both the intent and the effect of the statute are punitive.

The remedy granted by the ***Radaj*** court was to reverse the portion of the circuit court's judgment imposing the DNA surcharge and the order denying postconviction relief and remand "for the circuit court to apply the DNA surcharge statute that was in effect when [the defendant] committed his crimes." ***Radaj***, ¶39. The court's remedy in that case was based on Radaj's request for that remedy and the state's failure to respond to that request. ***Id.***, ¶38.

In his brief-in-chief, Hill simply asked the court to vacate the portion of his judgment of conviction imposing the $250 DNA surcharge, which would also necessitate reversal of the portion of the order denying postconviction relief on that issue. (Hill Brief at 25-26). As in ***Radaj***, the state did not argue against Hill's proposed remedy. Accordingly, Hill asks the court to consider the state's failure to argue for a different remedy as a concession that the one requested by Hill is appropriate in this case. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

CONCLUSION

For the reasons set forth above and in his brief-in-chief, 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 and reverse the portion of the postconviction motion denying that request.

Dated this 31st day of August, 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 2,672 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 31st day of August, 2015.

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