STATE OF WISCONSIN

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

DISTRICT III

Case No. 2015AP001004-CR

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD R. WESO,

Defendant-Appellant.

---

On Appeal From a Judgment of Conviction and Order Denying Postconviction Relief Entered in Shawano County, the Honorable James R. Habeck, Presiding

---

# REPLY BRIEF OF DEFENDANT-APPELLANT

---

MARTHA K. ASKINS
Assistant State Public Defender
State Bar No. 1008032

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2879
askinsm@opd.wi.gov

Attorney for Defendant-Appellant

## TABLE OF CONTENTS



## CASES CITED



## STATUTES CITED

## OTHER AUTHORITIES CITED

## ARGUMENT

### This Court Should Vacate the Domestic Abuse Surcharge Because the Record Does Not Establish that Weso and the Complainant Resided Together Within the Meaning of the Domestic Abuse Surcharge Statute.

Weso argues in his brief-in-chief that the domestic abuse surcharge must be vacated because he and R.D. did not reside together within the meaning of the domestic abuse surcharge statute, Wis. Stat. § 973.055. The state responds with three arguments. First, the state argues that Weso's plea to the battery charge constitutes a waiver of any challenge to the domestic abuse surcharge. Second, it argues that the trial court's finding of fact that Weso and R.D. had a domestic relationship was not clearly erroneous. And finally, the state argues Weso's relationship with R.D. is analogous to the roommates discussed in an Attorney General Opinion which opined that the domestic abuse statute and surcharge applies to dormitory residents. Weso discusses each in turn.

The state is correct that, in general, a guilty or no contest plea waives all non-jurisdictional defects and defenses. ***Belcher v. State***, 42 Wis. 2d 299, 308-09, 166 N.W.2d 211, 216 (1969). However, this rule does not deprive an appellate court of the power to rule on an issue. "The guilty-plea-waiver rule, like the general rule that failure to timely raise objections at trial will result in waiver, is a rule of administration and not of power." ***State v. Riekkoff***, 112 Wis. 2d 119, 332 N.W.2d 744 (1983). As in ***Riekkoff***, the issue before the court is a narrow one, and the parties have fully litigated the issue.

In addition, vacating the domestic abuse surcharge in Weso's case would not change the fact of his conviction; it would simply mean vacating the surcharge, much like the vacating of DNA surcharges. *See e.g.* ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393. The conviction is not affected; rather it is the monetary penalty that is changed.

Finally, during the plea colloquy, the court never informed Weso that the penalties would include the surcharge. Regarding the battery and resisting charges, the court said: "those are both a base fine between zero and $10,000. When I say base fine, then there's an amount set, but then court costs are added, so then the total due is higher." (56:13). As such, there is only a vague reference to fines and costs, and no specific reference to a domestic violence surcharge.

The state argues that the court clearly informed Weso that the nature of the charge was domestic abuse. (State's brief at 2). Weso concedes the court did inform Weso the battery was "listed as domestic abuse." (56:3). The court's reference to the crime being a crime of domestic abuse did *not*, however, inform Weso that because the crime was a domestic abuse, the court would impose a special surcharge. At no point during the plea colloquy did the court advise Weso that the crime to which he was pleading guilty would subject him to the domestic violence surcharge. As a result, Weso should not be considered to have forfeited a challenge to the surcharge.

The state next argues that the trial court made a finding of fact that Weso and R.D. resided together within the meaning of Wis. Stat. § 973.055, and that that finding of fact is not clearly erroneous. (State's brief at 3).

The state applies the wrong standard of review, however. Whether or not Weso and R.D. resided together for purposes of the statute is an issue of law, and not an issue of fact. Indeed, the Attorney General Opinion the state relies upon states that whether college dormitory roommates "reside" together "requires an interpretation of the meaning of the term 'resides together' as used in this statute." 79 Wis. Op. Atty Gen. 109 (1990). The interpretation of a statute is a question of law which this court reviews independently. ***Currier v. Wisconsin Dept. of Revenue***, 2006 WI App 12, ¶ 9, 288 Wis. 2d 693, 709 N.W.2d 520. A finding of fact in this case would be that Weso kept two laundry baskets of clothing at Maskewit's home. Whether that fact means that Weso and R.D. "resided" together is an issue of law that this court reviews de novo.

The state next argues that the dating arrangement that Weso and R.D. had was analogous to college dormitory roommates, citing the Wisconsin Attorney General Opinion. The court should reject the analogy.

In the opinion, the Attorney General draws on several sources, including Black's Law Dictionary, a comparison of a "residence" to a "domicile," and the legislative history of Wis. Stat. § 973.055. Finding the definition of "resides" is ambiguous, the court ultimately concludes that the statute "does not turn on whether the parties are living in a permanent legal domicile but rather whether there exists a familial or household relationship with all the attendant stresses." 79 Wis. Op. Atty Gen. 109 at *4.

Weso's relationship with R.D. is not at all similar to dormitory residents. The typical college roommate arrangement would be that each roommate keeps all of his or her relevant possessions in that space, including clothing, but

also books, identification, and personal property. Weso kept only some clothing at Maskewit's home (which is where R.D. was living). The college roommate would only have one "official" place at which to sleep while in college. Even though the roommate may have a home in another city or state, or stay over at another student's home from time to time, that college dormitory room would be considered his or her home for the duration of the college semester. The same cannot be said for Weso. He had a residence elsewhere, and simply spent nights at Maskewit's home with R.D. That she did his laundry does not make the home his residence. The college roommate is assigned to a particular dormitory room; his or her assignment—or residence—would not change simply by staying over at another's home or dormitory room. And Weso's residence did not change simply because he stayed with R.D. frequently while they were dating.

In sum, Weso did not "reside" with R.D. for purposes of the domestic abuse surcharge statute, and the surcharge should be vacated.

## CONCLUSION

For these reasons, and those argued in his brief-in-chief, Donald R. Weso respectfully requests that the court reverse the trial court's order denying his postconviction motion, and vacate the domestic abuse surcharge imposed in his case.

Dated this 14th day of December, 2015.

Respectfully submitted,

MARTHA K. ASKINS
Assistant State Public Defender
State Bar No. 1008032

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2879
askinsm@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 1,072 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 14th day of December, 2015.

Signed:

MARTHA K. ASKINS
Assistant State Public Defender
State Bar No. 1008032

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2879
askinsm@opd.wi.gov

Attorney for Defendant-Appellant