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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP2525-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

TYDIS TRINARD ODOM,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction and an Order Denying a Motion for Postconviction Relief, Both Entered in the Milwaukee County Circuit Court, the Honorable Timothy G. Dugan Presiding, and from an Order Denying a Supplemental Motion for Postconviction Relief, the Honorable Ellen R. Brostrom Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Is Tydis Odom entitled to plea withdrawal because the circuit court misadvised him about his eligibility for the Substance Abuse and Challenge Incarceration Programs right before he decided to plead?

In response to a direct question posed by Odom on the day of trial, the circuit court advised him that it could, in its discretion, find him eligible for the Substance Abuse and Challenge Incarceration Programs if he pled guilty. Odom, however, was statutorily ineligible for both programs. Following sentencing in this case, Odom filed a postconviction motion for plea withdrawal on the grounds that his pleas were not knowingly, intelligently, and voluntarily entered, because the circuit court misadvised him about this collateral consequence of his pleas. The circuit court denied the motion.

2. Is Odom entitled to a hearing pursuant to ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), because the circuit court failed to advise him about the mandatory DNA surcharge, which, according to ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, is a punishment as applied to a defendant with multiple convictions?

The circuit court also denied Odom's supplemental postconviction motion for plea withdrawal under ***Bangert***.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Odom would welcome oral argument if the court would find it helpful. *See* Wis. Stat. § 809.22. Publication is appropriate to clarify whether a defendant's statutory ineligibility for the Substance Abuse and Challenge Incarceration Program is a collateral consequence of a plea, such that misadvice about his eligibility renders his plea unknowing and involuntary. *See* Wis. Stat. § 809.23(a)1.

Publication is also appropriate to clarify a novel issue presented in this case – whether a circuit court is required to inform a defendant about the new mandatory, per-conviction DNA surcharge before accepting his pleas to multiple charges. *See id.* § 809.23(a)1. It is well settled that a circuit court must establish a defendant's understanding of the range of punishments he faces before accepting his plea. ***Bangert***, 131 Wis. 2d at 261-62. Recently, however, this court held that the mandatory DNA surcharge is a punishment for ex post facto purposes as applied to a defendant with multiple convictions. ***Radaj***, 363 Wis. 2d 633, ¶¶ 14, 35. Read together, ***Bangert*** and ***Radaj*** thus appear to require that a circuit court establish a defendant's understanding of the mandatory DNA surcharge in cases with multiple convictions, in addition to his understanding of the maximum potential terms of imprisonment and fines. Whether a circuit court is required to establish this level of understanding is an issue of substantial and continuing public interest, the resolution of which will have statewide impact. Circuit courts are thus in need of clear guidance on this issue in the form of a published opinion. *See* Wis. Stat. § 809.23(a)5.

STATEMENT OF THE CASE AND FACTS

On March 15, 2014, the State filed a criminal complaint charging Odom with multiple offenses arising out

an incident that occurred on March 11, 2014, in which Odom allegedly beat and sexually assaulted his ex-girlfriend. The charges consisted of two counts of second-degree sexual assault, one count of kidnapping, and one count of substantial battery. (2:1-2).

Throughout its pendency, the case proceeded in a trial posture. At the initial appearance on March 15, 2014, Odom demanded a speedy trial, which was subsequently set for June 9, 2014. (33:10; 35:4-5). At the final pretrial conference on May 29, 2014, Odom's attorney informed the circuit court that Odom still intended to take the case to trial. (36:2). The court, the Honorable Timothy G. Dugan presiding, asked the State to put its plea offer on the record, to verify Odom's understanding of the offer. The State explained that its offer was as follows: it would agree to amend one of the second-degree sexual assault counts to third-degree sexual assault, dismiss and read in the other second-degree sexual assault count and the kidnapping count, and keep the substantial battery count as charged. In exchange for Odom's pleas to the remaining charges, the State would agree to recommend four to five years of initial confinement and five years of extended supervision on the third-degree sexual assault count, and one-and-a-half years of initial confinement and three years of extended supervision on the battery count, concurrent with the other count. (36:3).

Odom informed the court, however, that he wanted to reject the State's offer and go trial:

> [THE COURT:] Do you understand that's what they're offering?
>
> THE DEFENDANT: Yes. Yes.
>
> THE COURT: And do you want to go to trial?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right. And you don't want to accept any plea negotiations?

> THE DEFENANT: Not this one.
>
> THE COURT: Okay. That is the only one they're making.
>
> THE DEFENDANT: No.
>
> THE COURT: So if you don't want to accept it, the option is to go to trial, and I just want to make sure you know what they're offering and you're rejecting it, correct?
>
> THE DEFENDANT: Yes.

(36:5).

On the day of trial on June 9, 2014, the alleged victim did not appear. (37:2-3; App. 102-03). Odom's attorney informed the court that, as a result, the parties had been engaging in further negotiations all morning, and the State had now made a new plea offer. (37:2-3; App. 102-03). Pursuant to that offer, the State would agree to amend the two counts of second-degree sexual assault to two misdemeanor counts of fourth-degree sexual assault, contrary to Wis. Stat. § 940.225(3m), and amend the kidnapping count to false imprisonment, contrary to Wis. Stat. § 940.30. The substantial battery count, a violation of Wis. Stat. § 940.19(2), would remain as charged. In exchange for Odom's pleas, the State would then agree to recommend a sentence with the length at the court's discretion. In addition, the State would further agree not to file any new witness intimidation charges, which the State indicated it was prepared to do absent a plea deal in this case. (37:3-5; App. 103-05).

After the new offer was put on the record, Odom expressed significant hesitation about accepting the offer. First, he spoke repeatedly with his attorney off the record:

> THE COURT: And do you want to accept the plea negotiations, or do you want to go to trial?

> THE DEFENDANT: Can I talk to [my attorney]?
>
> THE COURT: Briefly. You can turn off the microphone.
>
> (There was a discussion off the record between the defendant and [his attorney].)
>
> [DEFENSE COUNSEL]: I think I've answered all his questions, Judge.
>
> THE COURT: All right, Mr. Odom, what do you want to do?
>
> (There was a discussion off the record between the defendant and [his attorney].)

(37:5; App. 105).

After speaking with his attorney off the record for a second time, Odom asked the court a number of questions about the new offer. Specifically, Odom asked what the maximum potential penalties would be under the new plea deal as compared to the original charges; whether his convictions could be expunged in the future; and whether he would be eligible for the Challenge Incarceration Program or the Substance Abuse Program. (37:5-9; App. 105-09). The circuit court, in turn, answered all of these questions for Odom. (37:5-9; App. 105-09).

With respect to his eligibility for the Challenge Incarceration and Substance Abuse Programs, the court advised Odom that it could, in its discretion, find him eligible for these programs. In doing so, however, the court failed to realize that Odom was statutorily ineligible for both programs, as all his offenses were crimes specified in Chapter 940. *See* Wis. Stat. § 973.01(3g), (3m). In this respect, the following exchange took place:

> THE DEFENDANT: Do people in sexual assault cases, are they eligible for boot camp or anything like that?

> THE COURT: You could be eligible for boot camp and I believe for substance abuse. That again, would determine – Court would have to look at all the factors. And I also have to have a substance abuse issue need to be addressed for both of those programs.

(37:9; App. 109).

The court then stated, "[i]t's your choice, No one's here pressuring you. Do one or the other." (37:11; App. 111). After another discussion off the record between Odom and his attorney, Odom's attorney informed the court that he had decided to accept the plea offer. (37:11-12; App. 111-12). The court then conducted a plea colloquy, after which Odom pled no contest to the two counts of fourth-degree sexual assault, and guilty to the false imprisonment and substantial battery counts. (37:20-21; App. 120-21). During the colloquy, the court established that Odom understood the maximum potential terms of imprisonment and the maximum potential fines for these offenses, (37:13-15; App. 113-15); however, the court did not inform Odom, nor did it otherwise establish that he understood, that he faced a mandatory, per-conviction DNA surcharge of $900 (two misdemeanors x $200 plus two felonies x $250). *See* Wis. Stat. § 973.046(1r).

The next day, on June 10, 2014, the circuit court conducted Odom's sentencing hearing. Pursuant to the plea agreement, the State recommended a sentence with a length at the court's discretion. (38:9). Defense counsel asked for a probationary sentence. (38:12). After hearing the parties' recommendations, the court made its remarks and then imposed two concurrent sentences of nine months each on the misdemeanor sexual assault counts,[1] a consecutive sentence

[1] As pointed out in Odom's original postconviction motion, the circuit court's oral pronouncement regarding whether the sentences for the sexual assault counts were to be concurrent with or consecutive to each other was somewhat unclear; however, the court's intent was to make these sentences concurrent with each other. (28:12-13). The

of three years of initial confinement and three years of extended supervision on the false imprisonment count, and another consecutive sentence of one-and-a-half years of initial confinement and two years of extended supervision on the battery count. (38:38-39). The court then found Odom ineligible for the Substance Abuse Program and the Challenge Incarceration Program, without providing an explanation for why. (38:39). It also imposed the mandatory DNA surcharge of $900. (38:36-37; *see also* 18-19; App. 30-33).

Following the entry of the judgment of conviction, Odom filed a timely notice of intent to pursue postconviction relief. (20). He then filed a postconviction motion seeking plea withdrawal on the grounds that his pleas were not knowingly, intelligently, and voluntarily entered, because the circuit court incorrectly advised him that it could find him eligible for the Substance Abuse and Challenge Incarceration Programs if he pled guilty. (28:7-12).

On April 20, 2015, the circuit court denied the motion in a written order. (29; App. 136-38). The court reasoned that it had simply told Odom that there was a possibility he could be found eligible for prison programming, and that Odom's "claimed reliance on a *possibility* is not sufficient to warrant plea withdrawal." (29:2; App. 137) (emphasis in original).

In so ruling, the court distinguished a number of cases involving alleged misadvice about certain other collateral consequences of a plea. Those other collateral consequences included the requirement to register as a sex offender, ***State v. Brown***, 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543; the possibility of being subject to Chapter 980 proceedings and commitment, ***id.***; the possibility of being deported, ***State v. Rodriguez***, 221 Wis. 2d 487, 585 N.W.2d

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circuit court agreed that this was its intent and ordered that the judgment of conviction be amended accordingly. (29:3; App. 138).

701 (Ct. App. 1989); the waiver of the right to appellate review, ***State v. Riekkoff***, 112 Wis. 2d 119, 332 N.W.2d 744 (1983); and the fact that the defendant would lose his right to possess a firearm if he pled guilty. ***State v. Kohlhoff***, 2013 WI App 41, 346 Wis. 2d 733, 828 N.W.2d 593 (unpublished opinion). (29:2-3; App. 137-38; App. 148-52).

The court stated that these cases were all "concerned with negative legal repercussions for the defendant, or unfortunately legal consequences that flowed from the conviction." (29:2-3; App. 137-38). According to the court, "[a] misunderstanding about an early release program does not constitute a similar negative legal collateral consequence occurring beyond the service of the sentence." (29:3; App. 138). On that basis, the circuit court denied Odom's postconviction motion for plea withdrawal. (29:2-3; App. 137-38).

Thereafter, on May 21, 2015, this court issued its decision in ***Radaj***, 363 Wis. 2d 633, holding that the new mandatory DNA surcharge is a punishment that violates ex post fact law as applied to a defendant who committed multiple felonies prior to the effective date of the amended statute mandating the surcharge. ***Id.*** ¶¶ 14, 35. Following the issuance of this decision, Odom requested leave to file a supplemental postconviction motion for plea withdrawal on new grounds, which this court granted on June 15, 2015. (41).

Odom then filed a supplemental postconviction motion for an evidentiary hearing and plea withdrawal on the grounds that his pleas were not knowingly and voluntarily entered, because the circuit court failed to establish that he understood he faced a mandatory $900 DNA surcharge as a result of his pleas. (44). Odom asserted that the surcharge was part of the range of punishments he faced pursuant to ***Radaj***, and therefore the circuit court was required to establish his understanding of the surcharge pursuant to ***Bangert***. (44:3-7).

On November 17, 2015, the circuit court, the Honorable Ellen R. Brostrom now presiding, denied Odom's supplemental motion in a written order. (54; App. 141-47). The court concluded that Odom was not entitled to a hearing under ***Bangert***, stating that Odom's reading of ***Radaj*** was "overbroad." (54:3; App. 143). The court reasoned that although the surcharge may have a punitive effect in some cases, the surcharge "is not a direct consequence of a guilty or no contest plea." (54:6; App. 146). In reaching this conclusion, the court relied on this court's recent post-***Radaj*** decision in ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872, N.W.2d 146, which held "that the DNA surcharge is not a punishment" as applied to a defendant with a single conviction. (54:5-6; App. 145-46). The circuit court held that because the DNA surcharge is not a punishment as applied to a defendant with a single conviction, the surcharge was merely a collateral consequence of a plea with punitive effect in some cases, not a direct punishment. (54:6-7; App. 146-47). The court therefore denied Odom's supplemental postconviction motion without holding a ***Bangert*** hearing. (54:6-7; App. 146-47).

Odom now appeals the circuit court's orders denying both his original and supplement postconviction motions for plea withdrawal. (52).

ARGUMENT

I. Odom Is Entitled To Plea Withdrawal Because the Circuit Court Misadvised Him About His Eligibility For the Substance Abuse and Challenge Incarceration Programs.

In this case, the circuit court informed Odom that it could, in its discretion, find him eligible for the Substance Abuse and Challenge Incarceration Programs if he pled guilty. That information was incorrect. All of Odom's convictions are for Chapter 940 offenses, making him

statutorily ineligible for both programs. Wis. Stat. § 973.01(3g), (3m). Odom's statutory ineligibility for prison programming that provides an inmate with early release was thus a negative collateral consequence of his pleas. As a result of the court's misadvice, Odom pled guilty with a mistaken belief about this collateral consequence. He believed, through no fault of his own, that the possibility of early release through prison programming would be potentially open to him if he pled guilty; however, that possibility was barred by statute. Odom's pleas were therefore unknowing and involuntary.

A. General legal principles and standard of review.

A defendant who seeks to withdraw a guilty or no contest plea after sentencing must establish by clear and convincing evidence that withdrawal is necessary to avoid a manifest injustice. ***State v. White***, 2001 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836. The Constitution requires that a plea be knowingly, voluntarily, and intelligently entered, and a manifest injustice occurs when it is not. ***Boykin v. Alabama***, 395 U.S. 238, 242 (1969); ***Rodriguez***, 221 Wis. 2d at 492. A defendant who is denied a constitutional right may withdraw a guilty or no contest plea as a matter of right. ***Bangert***, 131 Wis. 2d at 283.

In deciding whether a guilty or no contest plea was voluntarily and knowingly entered, this court accepts the circuit court's findings of evidentiary and historical fact unless they are clearly erroneous. ***Rodriguez***, 221 Wis. 2d at 492. However, whether a plea was knowingly and voluntarily entered is a question of constitutional fact that this court reviews *de novo*. ***Brown***, 276 Wis. 2d 558, ¶ 5.

B. Odom's statutory ineligibility for prison programming was a collateral consequence of his pleas; the circuit court's misadvice therefore rendered his pleas unknowing and involuntary.

Inaccurate legal information provided by lawyers or a judge can render a plea unknowing and involuntary. ***State v. Woods***, 173 Wis. 2d 129, 140, 469 N.W.2d 144 (Ct. App. 1992). This is true with respect to both direct and collateral consequences of a plea. A direct consequence of a plea is one that has a definite, immediate, and largely automatic effect on the range of a defendant's punishment. ***Brown***, 276 Wis. 2d 559, ¶ 7. A collateral consequence, on the other hand, is indirect, does not necessarily flow automatically from a conviction, and may depend on the subsequent conduct of a defendant. ***Id.*** "The distinction between direct and collateral consequences essentially recognizes that it would be unreasonable and impractical to require a circuit court to be cognizant of every conceivable consequence before the court accepts a plea." ***State v. Byrge***, 2000 WI 101, ¶ 61, 237 Wis. 2d 197, 614 N.W.2d 477.

If a circuit court fails to disclose a direct consequence of a plea, the plea is not knowing and voluntary, and a defendant may withdraw the plea as a matter of right. ***Brown***, 276 Wis. 2d 559, ¶ 7 (citing ***State v. Merten***, 2003 WI App 171, ¶ 7, 266 Wis. 2d 588, 668 N.W.2d 750). However, if the court does not disclose a collateral consequence of a plea, a defendant may not withdraw his plea on the basis of that lack of information. ***Id.***

Nevertheless, even when a consequence of a plea is collateral, Wisconsin courts have permitted plea withdrawal based on a misunderstanding of the collateral consequence if a defendant was affirmatively misinformed about the consequence. ***Id.*** ¶ 8. In other words, although a court is not required to disclose a collateral consequence during a plea colloquy, a manifest injustice may occur when a court misinforms a defendant about a collateral consequence or

acquiesces to a defendant's misunderstanding of that consequence. ***Kohlhoff***, 346 Wis. 2d 733, ¶ 6 (federal firearm prohibition for conviction of crime involving domestic violence is a collateral consequence) (App. 149); *see also* ***Riekkoff***, 112 Wis. 2d at 128 (same for waiver of right to appellate review).

For example, in ***Brown***, the defendant sought plea withdrawal because his lawyer told him that his pleas would not require him to register as a sex offender, and were not sexual predator offenses under Chapter 980, which could subject him to post-incarceration commitment. 276 Wis. 2d 559, ¶ 2. At the plea hearing, defense counsel explained that the purpose of the plea agreement was to avoid these consequences. ***Id.*** In fact, however, the defendant unknowingly pled guilty to two felonies that required sex offender registration and another that subjected him to potential Chapter 980 commitment. ***Id.*** ¶ 3. The court of appeals identified both of these consequences as collateral consequences of the defendant's pleas. ***Id.*** ¶ 13. The court noted that the defendant's misunderstanding was "not the product of 'his own inaccurate interpretation,' but was based on affirmative, incorrect statements on the record by [his attorney] and the prosecutor. The court did not correct the statements." ***Id.*** The court of appeals held that under these circumstances, the defendant's pleas were not knowingly and voluntarily entered as matter of law. ***Id.*** ¶ 14.

The court in ***Brown*** explained its holding by distinguishing ***Rodriguez***, 221 Wis. 2d 487. In ***Rodriguez***, the defendant alone misunderstood a collateral consequence of his plea – that a conviction could result in deportation. ***Brown***, 276 Wis. 2d 559, ¶ 12. Without any contribution by other parties to the defendant's misunderstanding, the trial court's denial of plea withdrawal was thus affirmed. ***Id.*** By contrast, in both ***Brown*** and ***Riekkoff***, others individuals (the defense attorney, prosecutor, and/or the judge) contributed to the defendants' misunderstanding. Accordingly, the

underlying principle of these cases is that a misunderstanding regarding a collateral consequence is grounds for plea withdrawal if the misunderstanding is based on "affirmative incorrect statements" by the court or lawyers, and not the product of the defendant's "own inaccurate interpretation." ***Id.*** ¶ 12-13; ***Riekkoff***, 112 Wis. 2d at 128; ***Kohlhoff***, 346 Wis. 2d 733, ¶¶ 6, 9 (App. 149).[2]

Like the defendants in ***Brown*** and ***Riekkoff***, Odom pled guilty/no contest in this case based on affirmative misinformation provided to him about a collateral consequence of his plea – his eligibility for the Substance Abuse and Challenge Incarceration Programs. Pursuant to statute, when imposing a bifurcated sentence, a circuit court is generally required to determine, in the exercise of its discretion, whether a defendant is eligible or ineligible for the Substance Abuse Program and Challenge Incarceration Program. *See* Wis. Stat. § 973.01(3g), (3m).[3] The exception to this general rule is that a defendant convicted of a crime specified in Chapter 940 or certain crimes specified in Chapter 948 is statutorily ineligible for either program. *Id.*

An inmate who completes either the Substance Abuse or Challenge Incarceration Program is entitled to a reduction in the length of his term of initial confinement. *See* Wis. Stat. §§ 302.045(3m), 302.05(3). The inmate's term of extended supervision is then increased so that the total length of the bifurcated sentence originally imposed does not change. *Id.* Eligibility for these programs, and the corresponding benefits of completing one, are therefore not direct consequences of a

[2] In ***Kohlhoff***, the court of appeals found the federal firearm prohibition was a collateral consequence of a plea; however, the court held that the circuit court did not actually misinform the defendant about this consequence. 346 Wis. 2d 733, ¶ 10 (App. 149).

[3] If the court finds a defendant eligible for either or both of these programs, it is then up to the Department of Corrections to determine, in its discretion, if and when the defendant is suitable for participation in one of the programs. *See* Wis. Stat. §§ 302.045, 302.05.

plea. They do not automatically flow from a conviction; instead, they depend on subsequent future events. Eligibility for these programs (or the lack thereof) is thus a collateral consequence of a plea. *See* ***State v. Sutton***, 2006 WI App 118, ¶¶ 13-15, 294 Wis. 2d 330, 718 N.W.2d 146 (adopting the State's argument that the term of initial confinement is not a direct result of a plea, but rather a collateral consequence contingent on future events). Accordingly, Odom's statutory ineligibility for these programs was a collateral consequence of his pleas to offenses specified in Chapter 940.

The circuit court affirmatively misinformed Odom about this collateral consequence. It advised Odom that it was within its discretion to find him eligible for these programs:

> You could be eligible for boot camp and I believe for substance abuse. That again, would determine – Court would have to look at all the factors.

(37:9; App. 109).

Furthermore, in denying Odom's original postconviction motion for plea withdrawal, the circuit court misconstrued the law regarding collateral consequences in several respects. First, the court indicated that eligibility for the Substance Abuse and Challenge Incarceration Programs was not a collateral consequence because it was simply a "possibility." It is true that a circuit court generally has the discretion to determine a defendant's eligibility for these programs, such that a finding of eligibility is only a possibility at the time of a plea. However, a collateral consequence, by its very nature, does not have to be a matter of certainty. It is a consequence that is indirect, which usually does not flow automatically from a conviction. It may also depend on subsequent events, even subsequent events that rest with an agency other than the sentencing court. *See* ***Byrge***, 237 Wis. 2d 197, ¶ 61. A collateral consequence can therefore be mere a possibility. For

example, the following possible consequences of pleas have been found to be collateral consequences: the possibility of Chapter 980 commitment, ***Brown***, 276 Wis. 2d 559; the possibility of deportation, ***Rodriguez***, 221 Wis. 2d 487; and the possibility of having a restitution order imposed. ***State v. Dugan***, 193 Wis. 2d 610, 618, n.4, 624, 534 N.W.2d 987 (Ct. App. 1995).[4]

Moreover, the collateral consequence in this case – Odom's ineligibility for prison programming – was not actually a consequence that was merely a *possibility*, as the circuit court suggested. It was a consequence that was required by statute, given the nature of Odom's convictions in this case. The circuit court's determination that Odom's ineligibility for the prison programming was not a collateral consequence because it was a mere possibility was therefore erroneous.

The circuit court also incorrectly determined that a collateral consequence must be a "negative" consequence of a plea. The circuit court cited no authority to support that conclusion, and the case law suggests the opposite. *See* ***Byrge***, 237 Wis. 2d 197, ¶ 66 (parole eligibility determined by an agency other than the court is a collateral consequence); ***Sutton***, 294 Wis. 2d 330, ¶¶ 13-15, (term of initial confinement is a collateral consequence). Moreover, even if the circuit court were correct in this regard, Odom's statutory ineligibility for the Substance Abuse and Challenge Incarceration Programs *was* a negative collateral consequence of his pleas. By virtue of his pleas to offenses specified in Chapter 940, he was statutorily barred from participation in these early release programs. That is certainly not a positive consequence of a plea. *See* ***State v. Plank***, 2005 WI App 109, ¶ 17, 282 Wis. 2d 522, 699 N.W.2d 235 (indicating that lack

[4] Certain collateral consequences are also automatic, such as the requirement to register as a sex offender and the federal firearm prohibition. *See* ***Brown***, 276 Wis. 2d 559, ¶ 13; ***State v. Kosina***, 226 Wis. 2d 482, 486-89, 595 N.W.2d 464 (Ct. App. 1999).

of parole and good-time credit under truth-in-sentencing is collateral consequence).

Because of the circuit court's misadvice about the Substance Abuse and Challenge Incarceration Programs, Odom mistakenly believed that he was statutorily eligible for these programs, and that the court could, in the exercise of its discretion, find him eligible for the programs if he pled guilty/no contest. His misunderstanding was not due to his own inaccurate interpretation; rather, it was based on affirmative, inaccurate information provided by the court. Under these circumstances, Odom's pleas were unknowing and involuntary as a matter of law. *See* ***Brown***, 276 Wis. 2d 559, ¶ 14. He should therefore be entitled to plea withdrawal.

In the alternate, Odom asserts that even if he is not entitled to plea withdrawal as a matter of law, at a minimum, he is entitled to a hearing on whether his pleas were, in fact, unknowing and involuntary. In his original postconviction motion, Odom alleged that he did not know whether he was eligible for the Challenge Incarceration or Substance Abuse Programs before asking the court at the plea hearing. He also alleged that when court informed him it could find him eligible after considering all the factors, he believed this to be the case.[5] (28:10). He therefore alleged a *prima facie* case for plea withdrawal on the grounds that his pleas were unknowing and involuntary. *See* ***Bangert***, 131 Wis. 2d at 274. As such, Odom requests that if this court determines that he is not entitled to plea withdrawal as a matter of law, that the court remand the matter to the circuit court with

[5] Odom's attorney explained at sentencing that Odom had a substance abuse need. As his attorney explained, Odom, who was eighteen at the time, had been exposed to a significant amount of drug abuse by his family while growing up. His attorney also stated that Odom used marijuana a lot as a teenager. (38:15-16).

instructions to hold an evidentiary hearing pursuant to ***Bangert***.[6]

II. Odom's Supplemental Postconviction Motion Alleged a *Prima Facie* Case For Plea Withdrawal Under ***Bangert***; the circuit court therefore erred in denying his motion without a hearing.

Odom further argues that he is entitled to plea withdrawal because the circuit court failed to inform him at the plea hearing that he faced a mandatory $900 DNA surcharge, and he was otherwise unaware of this fact. Pursuant to ***Radaj***, 363 Wis. 2d 633, the surcharge is a punishment when assessed against a defendant with multiple convictions. In such a case, it is therefore part of the range of punishments that a circuit court must ensure a defendant understands. *See* ***Bangert***, 131 Wis. 2d at 274.

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[6] Odom also asserts that no showing of prejudice is required because his misunderstanding was due to inaccurate information provided by the court, which rendered his pleas unknowing and involuntary. In both ***Brown*** and ***Riekkoff***, the courts did not consider whether the misinformation prejudiced the defendants (i.e., whether they would not have pled guilty and would have insisted on going to trial absent the misinformation). Instead, those cases held that the misinformation, and the defendants' resulting misunderstandings, undermined the knowing and voluntary nature of the pleas as a matter of law, thereby entitling the defendants to plea withdrawal. ***Brown***, 276 Wis. 2d 559, ¶¶ 13-14; ***Riekkoff***, 112 Wis. 2d at 128. Nevertheless, Odom maintains that he was, in fact, prejudiced by the inaccurate information provided by the circuit court. As alleged in his original postconviction motion, he would not have pled guilty/no contest had he known that he was statutorily ineligible for the Challenge Incarceration and Substance Abuse Programs. Eligibility for these programs was crucial to Odom, because he wanted the chance to be able to earn early release in light of the fact that he still faced a substantial maximum potential sentence under the new plea deal. That is precisely why he asked the circuit court about his eligibility at the plea hearing. (28:10-12). Thus, even if a showing of prejudice were required (which it is not), Odom would still be entitled to an evidentiary hearing.

In ***Bangert***, the Wisconsin Supreme Court established a two-step process to determine whether a defendant voluntarily, knowingly, and intelligently entered a guilty or no contest plea. To make a *prima facie* case for plea withdrawal, the defendant must show that his pleas were accepted without the trial court's conformance with the requirements of Wis. Stat. § 971.08 or other mandatory duties. ***Bangert***, 131 Wis. 2d at 274. The defendant must also allege that he "in fact did not know or understand the information which should have been provided at the plea hearing." ***Id.***. Once the defendant makes a *prima facie* case, the burden then shifts to the State to prove by clear and convincing evidence that the defendant's pleas were knowingly, voluntarily, and intelligently entered despite the inadequacy of the record at the plea hearing. ***Id.***

In ***Brown***, the supreme court listed the trial court's mandatory duties when taking a defendant's guilty or no contest plea. Among those duties is to establish that the defendant understands the range of punishments to which he is subjecting himself by entering his plea. ***Brown***, 293 Wis. 2d 594, ¶ 35. The general practice in this regard is to advise the defendant of the minimum and maximum penalties associated with a plea. ***State v. Chamblis***, 2015 WI 53, ¶ 24, 362 Wis. 2d 380, 864 N.W.2d 806.

The new mandatory DNA surcharge is part of the punishment that a criminal defendant faces when he pleads to multiple offenses. Under the prior law, if a court imposed a sentence or placed a person on probation for a felony, the court could, in its discretion, impose a DNA surcharge in the amount of $250, unless an underlying conviction was for a specified sex crime, in which case the surcharge was mandatory.[7] *See* Wis. Stat. § 973.046(1g), (1r) (2011-12). The surcharge amount, if imposed, was $250, regardless of

[7] Violations of Wis. Stat. §§ 940.225, 948.02(1) or (2), 948.025, and 948.085 required courts to impose the DNA surcharge. Wis. Stat § 973.046(1r) (2011-12).

the number or nature of the convictions. *Id*.; *see also* ***Radaj***, 363 Wis. 2d 633, ¶ 8, n.3.

Effective January 1, 2014, the legislature amended Wis. Stat. § 973.046(1r) to require a mandatory DNA surcharge in the amount of $250 for each felony conviction and $200 for each misdemeanor conviction. 2013 Wis. Act 20, §§ 2355, 9326, 9426. Under the new law, the amount of the surcharge is thus tied to the number of convictions, which makes it more akin to a criminal fine than a civil fee or surcharge. *See* ***Radaj***, 363 Wis. 2d 633, ¶¶ 5, 29-30, 35.

In ***Radaj***, this court held that the mandatory DNA surcharge was a punishment that violated the Ex Post Facto Clause as applied to a defendant who committed multiple felonies prior to the effective date of the amended statute, but who was not sentenced until after the effective date. 363 Wis. 2d 633, ¶¶ 1, 14, 35. There, the defendant had committed four felonies and was thus assessed a DNA surcharge of $1,000 (four felonies x $250). ***Id.*** ¶ 5. The ***Radaj*** court stated that the "ex post facto question turns on whether the DNA surcharge statute, as applied to Radaj, was a punitive criminal statute or a non-punitive civil statute." ***Id.*** The court found that there was no non-punitive reason why the costs of DNA-analysis-related activities would increase with the number of convictions. ***Id.*** ¶ 29-30. Thus, the court concluded that the surcharge was excessive and not rationally connected to its intended purpose. ***Id.*** ¶ 35. Instead, it served "as an additional criminal fine." ***Id.*** ¶ 25. The court therefore held that the per-conviction approach to setting the DNA surcharge made the $1,000 surcharge in that case a punishment and, thus, an ex post facto violation. ***Id.*** ¶¶ 14, 35.

Here, Odom's offenses occurred after the effective date of the amended DNA statute, so there was not a retroactive application of the statute. Accordingly, there is no ex post facto violation. Nevertheless, ***Radaj***'s conclusion that the surcharge is a punishment still applies. Like the

defendant in ***Radaj***, Odom pled guilty/no contest to multiple crimes and was assessed a DNA surcharge based on the number of convictions. Also as in ***Radaj***, there was no non-punitive reason why the amount of Odom's DNA surcharge should increase with the number of convictions. Thus, rather than serving as a non-punitive civil fee or surcharge, Odom's $900 DNA surcharge served as a punishment. It was in effect "an additional criminal fine." *See* ***id.*** ¶ 25.

Because the DNA surcharge was a punishment, pursuant to ***Radaj***, and because the court was required to establish at the plea hearing that Odom understood the punishments he faced, pursuant to ***Bangert***, the circuit court was required to establish that Odom understood that he faced a mandatory, per-conviction DNA surcharge of $900, in addition to the maximum potential terms of imprisonment and fines he faced. The DNA surcharge cannot logically be a punishment for one purpose, such as an ex post facto claim, and not a punishment for another purpose, such as a ***Bangert*** claim.

The record of the plea hearing in this case reflects that the circuit court did not establish that Odom understood he would be assessed a mandatory DNA surcharge in the amount of $900, or any DNA surcharge for that matter. Moreover, as alleged in his supplemental postconviction motion, Odom did not know at the time of the plea hearing that the court was required to impose a $900 DNA surcharge. In fact, he did not know that the court was required to, or that it even could, impose any DNA surcharge at all. (44:6). Odom therefore alleged a *prima facie* case for plea withdrawal. He was therefore entitled to a hearing pursuant to ***Bangert***.

In rejecting this claim, the circuit court erroneously determined that the DNA surcharge was a collateral, not direct, consequence of Odom's pleas. The court's reasoning ignores the plain meaning of the term direct consequence. A direct consequence is one that has "a definite, immediate, and largely automatic effect on the range of the defendant's

punishment." ***State v. James***, 176 Wis. 2d 230, 238, 500 N.W.2d 345 (Ct. App. 1993). The DNA surcharge imposed in this case is the definition of a direct consequence. By statute, the surcharge is mandatory upon a conviction for any crime, and its amount is predetermined based on the number and type of convictions. *See* Wis. Stat. § 973.046(1r). The surcharge is thus definite, immediate, and automatic in every way.

In addition, the circuit court's reliance on ***Scruggs*** was misplaced. ***Scruggs*** held that the mandatory DNA surcharge for a single felony conviction was not punitive. 365 Wis. 2d 568, ¶¶ 9, 19. This case, however, involves multiple convictions. It is therefore like ***Radaj***.

The circuit court concluded that ***Radaj*** merely stands for the proposition that the DNA surcharge may have some "punitive effect" in certain cases, but is still a collateral consequence. However, the DNA surcharge statute is more than a civil statute with some secondary punitive effect, as the circuit court determined. According to ***Radaj***, there is no non-punitive reason why the amount of the surcharge should increase with the number of convictions. 363 Wis. 2d 633, ¶ 30-32. Thus, in cases involving multiple convictions, the DNA surcharge statute is a "punitive criminal statute." ***Id.*** ¶ 5, 29, 35. Its *primary* effect is punishment.

This case is therefore distinguishable from ***Dugan***, 193 Wis. 2d 610, and ***State v. Bollig***, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199, which involved collateral consequences. In ***Dugan***, the court of appeals held that restitution, even if it is "definitive, immediate, and largely automatic," is not a punishment for purposes of Wis. Stat. § 971.08. 193 Wis. 2d at 618, n.4, 624. The court reasoned that although restitution has some "punitive effects," its primary purpose is to rehabilitate offenders and make victims whole. ***Id.*** at 620-22. Similarly, in ***Bollig***, the Wisconsin Supreme Court held that sex offender registration was not primarily a punishment: "Simply because registration can

work a punitive effect, we are not convinced that such an effect overrides the primary and remedial goal . . . to protect the public." 232 Wis. 2d 561, ¶ 26.

Because the specific consequences at issue in ***Dugan*** and ***Bollig*** had primary goals that were non-punitive, they were collateral consequences. By contrast, in cases with multiple convictions, the primary effect of the per-conviction DNA surcharge is punishment. Again, there is *no non-punitive* reason why the amount of the surcharge should increase with the number of convictions. *See* ***Radaj***, 262 Wis. 2d 633, ¶ 30-32. The DNA surcharge is thus a direct consequence of a plea in cases involving multiple convictions. As a result, the circuit court in this case was required to establish that Odom understood he faced a mandatory $900 DNA surcharge before accepting his pleas. Because it failed to do so, Odom is entitled to a hearing under ***Bangert***.

CONCLUSION

For the foregoing reasons, Tydis Odom respectfully requests that this court reverse the judgment and orders of circuit court, order that his pleas be deemed withdrawn as a matter of law, and remand the case to the circuit court for further proceedings consistent with this court's opinion. Should this court determine that Odom is not entitled to plea withdrawal as a matter of law, then Odom requests that the court remand the case to the circuit court with instructions to hold a hearing on both of his claims for plea withdrawal under ***Bangert***.

Dated this 7th day of March 2016.

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 6,638 words.

CERTIFICATE OF COMPLIANCE WITH RULES 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 7th day of March 2016.

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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; and (3) 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.

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