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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP2525-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TYDIS TRINARD ODOM,

Defendant-Appellant.

On Certification from the Court of Appeals, District I, Reviewing the Judgment of Conviction and Order Denying Postconviction Relief Entered in the Milwaukee County Circuit Court, the Honorable Timothy G. Dugan, Presiding, and the Order Denying Supplemental Postconviction Relief, the Honorable Ellen R. Brostrom, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. Mr. Odom is Entitled to an Evidentiary Hearing Because He Was Not Advised of the DNA Surcharges.

A. This Court should apply the intent-effects test and hold that DNA surcharges are punishment.

Applying the intent-effects test in this case encourages the consistent and clear development of caselaw, because it has a well-established framework and avoids "punishment" being assessed in disparate ways. In addition, the intent-effects test is seemingly implicitly or explicitly incorporated in the "hodgepodge of analyses" the court of appeals surveyed. (Certification 2 at p.19; App.119). For example, ***"Bollig*** and ***Dugan*** considered both the intent and effects of a law in determining whether the law was a 'potential punishment' for purposes of a plea." (Certification 2 at p.14; App.114).

The state asserts it "does not make sense in *this* context" to apply the intent-effects test, but does not develop its assertion. (Response p.26). It notes no federal court has applied the intent-effects test in a plea-colloquy context; however, other states have used the intent-effects test in plea-colloquy contexts, reflecting its workability. (*See* Certification at p.19-21; App.119-21; Brief-in-chief p.12, 26).

Neither of the state's proposed tests is a good fit for determining whether something constitutes punishment for plea withdrawal purposes. At their core, both the bright-line rule and the fundamental purpose test it suggests are simply the application of the intent portion of the intent-effects test—to the detrimental exclusion of the question of "effects." (Response p.33).

If the baseline question is whether Mr. Odom understood the potential punishments he faced—and thus, whether his plea was knowing, intelligent, and voluntary—then the effects, the practical realities, matter. Intent is relevant, but a dual inquiry is the best way to ascertain whether a ramification of conviction constitutes punishment for plea withdrawal purposes. To focus only on legislative intent would result in an anemic inquiry.

The state argues its bright-line test eliminates confusion "from having to apply an indeterminate test" to various surcharges, "with potential differing outcomes depending on the surcharge or facts of the case." (Response p.22). However, most of those surcharges only apply when a defendant is convicted of a particular offense. *See* Wis. Stat. §§973.042(2) (Child Pornography surcharge), 973.055(1) (Domestic Abuse surcharge), 973.043(1) (Drug Offender Diversion surcharge). The limited application of these surcharges to specific offenses shows a particularized connection between offense and surcharge not existing in the DNA surcharge scheme. In addition, unlike the DNA surcharge statute, some surcharge statutes require courts to make particularized findings before imposing a surcharge, *see* Wis. Stat. §§973.055(1) (Domestic Abuse surcharge), 973.04(2) (Child Pornography surcharge).

The only other surcharges assessed on every count are the Crime Lab and Drug Law Enforcement (CLDLE) surcharge, imposing $13 on each count; the Crime Prevention Funding Board (CPFB) surcharge, imposing $20 on each count if the county involved has created a crime funding board; and the Victim Witness surcharge, imposing $67 for each misdemeanor and $92 for each felony. The CLDLE and the CPFB surcharges are nominal compared to the DNA surcharge. Even the Victim Witness surcharge is still less

than half the DNA surcharge amount. And, unlike the DNA surcharge, all of the revenue from the Victim Witness surcharge goes to the Wisconsin DOJ to fund victim and witness services.[1] (*Compare* Brief-in-chief p.19-20).

It is not confusing or "challenging" for courts to warn defendants of the DNA surcharges they face upon conviction. (Response p.27). The math is simple, and a DNA surcharge warning would fit seamlessly with the other requisite plea-colloquy warnings.

The state nevertheless argues that if this Court declines its bright-line test and adopts the fundamental purpose test or the intent-effects test to define punishment under § 971.08(1)(a), then ***State v. Radaj***, 2015 WI App 50, 363 Wis.2d 633, 866 N.W.2d 758 should be overruled and ***State v. Scruggs***, 2017 WI 15, 373 Wis.2d 312, 891 N.W.2d 786 should control. (Response p.33-4,39). However, when this Court decided ***Scruggs***, this Court did not overrule ***Radaj***. Rather, this Court limited its holding to situations involving retroactive imposition of a single $250 DNA surcharge when the defendant has not previously been assessed a surcharge. ***Scruggs***, 373 Wis.2d 312, ¶50. ***Scruggs*** is significantly different from Mr. Odom, where he was assessed four mandatory DNA surcharges totaling $900. ***Radaj*** should control cases with multiple DNA surcharges and ***Scruggs*** does not require it be overruled, or this Court could have already done so.

Even if this Court stands by its previous conclusion from ***Scruggs*** that the intent of the statute is non-punitive, the DNA surcharge statute, in the context of multiple surcharges, nevertheless "is so punitive in effect as to transform" the

[1] *See* "Surcharge Table," at 17, available at http://wicourts.gov/courts/circuit/docs/fees.pdf.

DNA surcharge into a criminal penalty. ***Scruggs***, 2017 WI 15, ¶39; *see also* ***State v. Williams***, 2016AP883-CR, response filed 1/4/18 p.11-28. The state argues the analysis of the ***Mendoza-Martinez*** factors is not affected by the imposition of multiple surcharges, as in Mr. Odom's case, as opposed to the retroactive imposition of a single surcharge, as in ***Scruggs***. (Response p.36).

In particular, it argues the $900 surcharge is "relatively small [in] size" in contrast to the fine Mr. Odom faced upon conviction. First, the mandatory $900 assessment is a significant burden on an indigent defendant already facing other court costs and fines. Second, this juxtaposition is unpersuasive, as the assessment of fines is within the court's discretion while the DNA surcharges are not. ***State v. Ramel***, 2007 WI App 271, ¶¶14-5, 306 Wis.2d 654, 743 N.W.2d 502. Notably, unlike with DNA surcharges, a sentencing court must determine at sentencing whether a defendant has the ability to pay a fine, if the court intends to impose one. ***Id.***

The state also asserts the per-conviction scheme bears an approximate relation to the costs they are meant to offset, and deems reasonable the legislature's belief that DNA-related costs increase in proportion to the number of convictions. (Response p.37). Perhaps this is true in some cases. But consider the situation where a mother fails to pay child support for a significant period of time. She could face multiple felony convictions, without creating any DNA databank costs. Yet, she would still be responsible for paying thousands of dollars in mandatory DNA surcharges. While there may be some cases where DNA costs are greater because a defendant has created more costs through multiple counts, the DNA surcharge statute as written does not account for differences in DNA cost creation.

The state next argues the CLDLE and DNA surcharge joint fund surplus may be attributable to the CLDLE surcharge, which, it contends, produces more revenue than the DNA surcharge. (Response p.38). However, the LFB memo explains the CLDLE revenue increased by 33% from 2008-09 to 2015-16. (App.159). Compare that to the 444% leap in the DNA surcharge revenue, from just 2012-13 to 2015-16. (App.160). The state argues the total expenditures from the fund "greatly exceed the revenue from the DNA surcharge alone, and the paper does not show what fraction of expenditures is attributable to DNA-related costs." (Response p.38). There are no breakdowns for DNA-related costs because the joint fund has comingled CLDLE revenue with DNA surcharge revenue. (App.158). The state also argues DNA costs are greater than the DNA surcharge revenue. (Response p.38). If so, it is perplexing that DNA surcharge revenue has been comingled with CLDLE revenue and is being appropriated for non-DNA-related costs.

The state does not respond in any meaningful way to Mr. Odom's argument that DNA surcharges are also being used to fund activities *not* tied to DNA analysis and maintenance. It contends that all surcharges collected must be used under § 165.77, which covers DNA-related activities, "so the statute is 'rationally [] connected' to the nonpunitive purpose of 'offset[ting] DNA-related costs." (Response p.36-7).

However, through 2017 Wisconsin Act 59, all monies received from the CLDLE surcharge under § 165.755 and from the DNA surcharge under § 973.046(1r), are being transferred to various appropriation accounts, including $750,000 in each fiscal year in the 2017-19 fiscal biennium towards "criminal investigative operations and law enforcement relating to Internet crimes against children,

prosecution of Internet crimes against children, and activities of state and local Internet crimes against children task forces." Wis. Stat. § 20.455(2)(hd). A $750,000 appropriation each fiscal year is significant, and is not rationally connected to the nonpunitive purpose of offsetting DNA-related costs.

The three "closely-related" ***Mendoza***-factors, which are of "particular importance" here, support the conclusion that the mandatory DNA surcharge scheme is punitive. *See* ***Radaj***, 363 Wis.2d at ¶25; Brief-in-chief p.18-21. Wisconsin's DNA surcharge scheme is both excessive and lacks a reasonable relationship to the costs of collecting, analyzing, and maintaining DNA. *See* ***Mueller v. Raemisch***, 740 F.3d 1128, 1133 (7th Cir. 2014). The structure of the DNA surcharge scheme bears no reasonable relation to the costs the State incurs in collecting, analyzing, and curating DNA. *See* ***id.*** at 1133 (one basis for reclassifying a surcharge as a fine: it bears no relation to the cost for which the fee was intended to compensate).

This Court should apply the intent-effects test in this case, conclude the mandatory DNA surcharges are punitive, and remand for a hearing.

B. This Court should not adopt an unnecessary harmless error analysis.

The state argues this Court should hold that "traditional harmless-error analysis applies" to all plea-colloquy errors, in an attempt to broaden the scope of ***State v. Reyes Fuertes***, 2017 WI 104, 378 Wis.2d 504, 904 N.W.2d 773. (Response p.28). This Court should reject the state's proposition as unnecessary because the ***Bangert*** framework is sound, and its application renders moot the state's concerns. Specifically, ***Bangert*** already employs a limited harmlessness analysis:

> The harmless error analysis is essentially built into the ***Bangert*** analysis. It applies at the prima facie case stage if the parent does not allege a failure to understand the information that should have been, but was not, provided….
>
> Additionally, harmless error might be found at the second stage of the ***Bangert*** analysis if the court finds the parent understood the information despite the inadequate colloquy. But, this is simply another way of saying the County met its burden to prove the plea was knowingly and intelligently entered.

Oneida Cnty. DSS v. Therese S., 2008 WI App 159, ¶¶18-19, 314 Wis.2d 493, 762 N.W.2d 122 (citations omitted).[2] Thus, in the ***Bangert*** context, a "harmless error" is a misstatement or omission by the plea-taking court that does not lead to a misunderstanding. ***Id.***; ***State v. Lagundoye***, 2004 WI 4, ¶¶40-44, 268 Wis.2d 77, 674 N.W.2d 526; ***State v. Brown***, 2006 WI 100, ¶63, 293 Wis.2d 594, 716 N.W.2d 906.

And, while the state attempts to expand the ***Reyes Fuerte*** decision to all plea-colloquy defects, this Court specifically limited its holding in that case by noting, "under the circumstances of this case, the circuit court's errors in giving the plea advisement required by Wis. Stat. § 971.08(1)(c) are harmless." 378 Wis.2d 504, ¶41. ***Reyes Fuerte*** did not overrule ***Taylor*** as the state suggests (Response p.11); ***Taylor*** concerned Wis. Stat. § 971.08(1)(a) and whether the plea was knowing, intelligent, and voluntary despite the misstated maximum penalty. ***State v. Taylor***, 2013 WI 34, 347 Wis.2d 30, 829 N.W.2d 482.

The record support that allowed a harmlessness finding in ***Reyes Fuerte***—and, for that matter, the finding in ***Taylor***

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[2] ***Bangert*** principles apply in TPRs. ***Brown Cnty. DHS v. Brenda B.***, 2011 WI 6, ¶35, 331 Wis.2d 310, 795 N.W.2d 730.

that the record reflected the plea was knowing, intelligent, and voluntary—does not exist in Mr. Odom's case. This Court identified three reasons supporting its harmlessness determination: (1) Reyes Fuerte knew the potential immigration consequences because his counsel went over the substantially-similar advisement in the plea waiver form with him in Spanish; (2) the absence of an IAC claim indicates counsel informed Reyes Fuerte of his potential immigration consequences; and (3) the relevant immigration consequences were raised by the circuit court "such that he had knowledge of those potential consequences." 378 Wis.2d 504, ¶41.

This harmlessness determination is exactly the kind of limited harmlessness employed in ***Bangert***: if the defendant already knew the misstated or missing information from the plea colloquy, then it does not matter that he was not told or was told wrong. Indeed, the harm ***Bangert*** seeks to avoid is the *unknowing* relinquishment of constitutional trial rights, and the *unknowing* acceptance of misunderstood legal consequences. Mr. Odom's assertion he did not know or understand he faced four mandatory DNA surcharges upon conviction is not conclusively disproved by the record, unlike in ***Reyes Fuerte*** and ***Taylor***. It is for this reason he deserves an evidentiary hearing where the state can attempt to prove his plea was nevertheless knowingly, intelligently, and voluntarily entered. If the state cannot meet that burden, he should be allowed to withdraw his plea.

Nevertheless, the state fixates on the terms of Mr. Odom's plea, which reduced his imprisonment and fine exposure. (Response p.40). This is irrelevant to the fundamental question whether, at the time of his plea, Mr. Odom possessed a "full understanding of what the plea connotes and of its consequence." ***Boykin v. Alabama***, 395

U.S. 238, 244 (1969); ***State v. Bangert***, 131 Wis.2d 246, 269, 389 N.W.2d 12 (1986). [3]

In ***Dominguez Benitez***, the United States Supreme Court noted, "when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed"—with no separate showing of prejudice required. 542 U.S. 74, 84 n.10 (2004). "In other words, where a guilty plea was unknowing or involuntary, it '[cannot] be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless.'" ***Tellado v. United States***, 799 F.Supp.2d 156, 175 (D.Conn.2011)(citing ***Dominguez Benitez*** at 84 n.10), *aff'd*, 745 F.3d 48 (2d Cir.2014).

The state's request to move to harmless error underestimates the ways the ***Bangert*** analysis promotes finality interests. Appellate courts only see the instances where something has gone wrong, but generally, most defendants have a proper understanding of the consequences of their pleas, and do not attempt to withdraw, despite the existence of a plea-colloquy defect. In addition, as this Court previously observed:

> [I]f the ***Bangert***-type case requires something less to support the defendant's allegation of his understanding at the time of plea, it must be remembered that the court can head off the problem with a sufficient plea colloquy…. In sum, the court has the means to virtually eliminate this ground for plea withdrawal.

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[3] Unlike an IAC claim under ***Nelson/Bentley***, a ***Bangert*** claim does not require a defendant to allege (or prove) prejudice, or that he would not have pled guilty had he been informed of the DNA surcharge. *See* ***State v. Cross***, 2010 WI 70, ¶40, 326 Wis.2d 492, 786 N.W.2d 64.

State v. Hampton, 2004 WI 107, ¶65, 274 Wis.2d 379, 683 N.W.2d 14.

II. The Circuit Court Misadvised Mr. Odom About His Eligibility for Earned-Release Programs.

The state argues, "[t]he circuit court's general statement that Mr. Odom 'could' be eligible for these programs did not misinform Mr. Odom, even if it did not give him full context." (Response p.43). The state's suggestion that "nothing the court said was incorrect" is disingenuous. (Response p.44). It quotes the postconviction court's reasoning: "the word 'could' denotes a possibility, not an automatic given.'" (Response p.43; R.29:2; App.156).

Mr. Odom agrees the word "could" merely denotes a possibility. (29:2; App.156). However, Mr. Odom has never argued he was *promised* eligibility for earned-release programming. Instead, he explained he pled believing he could argue for earned-release programming at sentencing. He did not know earned-release programming was entirely foreclosed to him pursuant to statute—because the court's answer to Mr. Odom's direct question regarding his programming eligibility was wrong.

Nor does the fact that the judge said Mr. Odom's eligibility was a possibility, as opposed to a promise, mitigate the error. Indeed, people plead every day in hopes of possibilities, and without automatic givens—they do so every time the state agrees to "leave the sentence up to the court;" every time the parties jointly recommend a probation sentence; every time the defense argues for a sentence significantly lower than the state's recommendation. Here, the problem is that the court specifically told Mr. Odom earned-release programming was a possibility, when it was not.

The state argues Mr. Odom did not claim to have a substance abuse issue. (Response p.45). This is belied by the record: defense counsel's sentencing argument that 18-year-old Mr. Odom used marijuana "a lot as a teenager" was a current representation of his drug usage; counsel also discussed his exposure to drug usage in his home. (38:15-6; App.185). The state's minimization of "teenage marijuana use" is unpersuasive: it is not for the state or the court to assess the extent of a defendant's substance abuse needs. The DOC is tasked with determining "during assessment and evaluation, that the inmate has a substance abuse problem" for purposes of earned-release programming. Wis. Stat. § 302.045(2)(d).

The state also argues there is no reasonable probability that Mr. Odom would have forgone a plea had he known he was ineligible for the earned-release programs. Again, the state wants to circumvent the process in place, which simply asks: did the circuit court affirmatively misadvise Odom about a collateral consequence? *See, e.g.*, ***State v. Riekkoff***, 112 Wis.2d 119, 128, 332 N.W.2d 744 (1983); ***State v. Kohlkoff***, No.2012AP1144-CR, unpublished slip op. (WI App Feb.14, 2013) (federal firearm prohibition for conviction of crime involving domestic violence is a collateral consequence) (App. 166). It did, and therefore, this Court should remand to determine whether his plea was entered knowingly, intelligently, and voluntarily despite this affirmative misadvice.

CONCLUSION

For the above-stated reasons and those argued in Mr. Odom's brief-in-chief, this Court should reverse and remand for an evidentiary hearing.

Dated this 2nd day of January, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,956 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 2nd day of January, 2018.

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