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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP002535-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ARTHUR ALLEN FREIBOTH,

Defendant-Appellant.

On Appeal from a Judgment of Conviction, Entered in the Milwaukee County Circuit Court, the Honorable Lindsey Grady Presiding, and an Order Denying Post-Conviction Relief, Entered in the Milwaukee County Circuit Court, the Honorable Jeffrey A. Kremers, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> Is Mr. Freiboth entitled to an evidentiary hearing under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), because the circuit court failed to advise him of the $1,000 mandatory DNA surcharges he faced by entering his pleas—surcharges which, pursuant to ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, were punitive?

The circuit court did not as part of its plea colloquy advise Mr. Freiboth that he would have to pay $1,000 in DNA surcharges. The court denied Mr. Freiboth's motion for plea withdrawal without an evidentiary hearing.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Mr. Freiboth welcomes oral argument. Publication is warranted to address whether, pursuant to the requirements of Wisconsin Statute § 971.08 and ***State v. Brown***, 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543, a circuit court must advise a defendant who is entering a plea to multiple felony offenses about the mandatory DNA surcharges.

STATEMENT OF THE FACTS AND CASE

The State charged Mr. Freiboth with five counts related to alleged violence towards D.B., on July 27, 2014. (2).[1]

Mr. Freiboth ultimately entered a plea. (33:1-19;App.124-128). In exchange for his plea to four of the five counts in this case, the State agreed to move to dismiss and read-in the fifth count, as well as additional counts of bail jumping from two other cases (33:2-3;App.124).[2]

The circuit court conducted a colloquy with Mr. Freiboth at the plea hearing. (33:4-17;App.124-128). As part of this colloquy, the court explained that it was not bound by any of the recommendations and could impose up to the maximum penalties on each of the four counts. (33:5;App.l25). It noted that each count to which he pled was a Class H Felony, which carried a maximum penalty of six years of imprisonment and/or a $10,000 fine. (33:6-7;App.125). It explained that three of the four counts to which he pled were charged as domestic abuse, which meant that "a

[1] The State charged the following five counts: (1) Felony Bail Jumping, in violation of Wis. Stat. § 946.49(1)(b); (2) Strangulation and Suffocation, Domestic Abuse Assessment, in violation of Wis. Stats. §§ 940.235(1), 968.075(1)(a), and 973.055(1); (3) Felony Bail Jumping, Domestic Abuse Assessment, in violation of Wis. Stats. §§ 946.49(1)(b), 968.075(1)(a), and 973.055(1); (4) Felony Bail Jumping, Domestic Abuse Assessment, in violation of Wis. Stats. §§ 946.49(1)(b), 968.075(1)(a), and 973.055(1); and (5) Strangulation and Suffocation, Domestic Abuse Assessment, in violation of Wis. Stats. §§ 940.235(1), 968.075(1)(a), and 973.055(1).

[2] Six additional counts of felony bail jumping, charged in Milwaukee County Cases 14-CF-3467 and 14-CF-3562, were ordered dismissed and read-in as part of the plea agreement in this case. (33:2-3;App.124).

domestic abuse assessment will be added as part of the costs." (33:6-7;App.125).

The court stated: "And you have to provide a DNA sample if you have not already done so. You have to pay for it no matter what." (33:9;App. 126). The court accepted his pleas and entered the judgments. (33:17-18;App.128). After doing so, the court stated: "You must give a DNA sample and pay for it." (33:18;App.128). It did not otherwise advise Mr. Freiboth that, upon entering his pleas, he would be required to pay a $250 DNA surcharge for all four of the felony counts to which he pled. (*See generally* 33;App.124-136).

The court proceeded immediately to sentencing. (33:18-49;App.128-136). It imposed a total length of sentence of five years of initial confinement followed by seven years of extended supervision. (33:45-49;App.135-136). It also ordered Mr. Freiboth to pay the costs, fees, and surcharges, and noted: "[t]hat does include four DNA, three domestic abuse." (33:48;App.135).

The judgment of conviction reflects that Mr. Freiboth must pay $1,000 in DNA surcharges. (17:2;App.102).

Mr. Freiboth filed a post-conviction motion seeking plea withdrawal on grounds that the circuit court failed to ensure that he understood one of the punishments he faced by entering his pleas—the imposition of $1,000 in DNA surcharges. (23;App.112-123).

The circuit court denied his motion for plea withdrawal via written order, without an evidentiary hearing. (24;App.104-111). The court acknowledged that it "did not discuss the defendant's obligation to pay the mandatory DNA surcharges" during the plea colloquy. (24:2;App.105). The court further recognized that "[i]f the DNA surcharge is a

punishment, then a defendant has a due process right to be notified about the surcharge as a direct consequence of his or her plea." (24:5;App.108).

The court, however, concluded that the DNA surcharge "is not a punishment." (24:6;App.109). Therefore, it determined that it had no obligation to advise Mr. Freiboth about this consequence of his plea. (24:7;App.110).[3]

Mr. Freiboth now appeals the circuit court's order denying his motion for plea withdrawal.

[3] Mr. Freiboth further moved the circuit court to set aside the previously-ordered bond forfeiture, and to vacate the domestic abuse surcharges and corresponding modifiers. (23;App.112-123). The court denied his motion to set aside the bond forfeiture, and entered an order holding his motion to vacate the domestic abuse surcharges and modifiers in abeyance, pending a decision in another case from this Court. (24;App.104-111). Mr. Freiboth subsequently withdrew his request to vacate the domestic abuse surcharges and modifiers so that he could proceed immediately with an appeal of the circuit court's order denying his motion for plea withdrawal. (25). Mr. Freiboth does not renew either his motion to vacate the domestic abuse surcharges and modifiers or to set aside the bond forfeiture on appeal.

ARGUMENT

I. The Circuit Court Had a Duty to Advise Mr. Freiboth During the Plea Colloquy of the $1,000 in DNA Surcharges He Would Be Required to Pay. The Circuit Court Erred in Denying Mr. Freiboth's Motion for Plea Withdrawal Without an Evidentiary Hearing.

A. Relevant principles of law and standards of review.

In order to withdraw a plea after sentencing, the defendant must show that the withdrawal is necessary to correct a "manifest injustice." ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). A defendant meets this showing if the plea was not constitutionally valid. ***Hatcher v. State***, 82 Wis. 2d 559, 565, 266 N.W.2d 320 (1978). To establish that a plea was not constitutionally valid, the defendant must show that it was not knowingly, voluntarily, and intelligently entered. ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

To show that a plea was not knowingly, voluntarily, and intelligently entered, the defendant must make a *prima facie* showing that (1) a deficiency in the plea colloquy exists and (2) the defendant did not "know or understand the information that should have been provided at the plea hearing." ***State v. Hoppe***, 2009 WI 41, ¶ 4, n.5, 317 Wis. 2d 161, 754 N.W.2d 794 (discussing the requirements of ***Bangert***).

If a defendant "alleges sufficient material facts that, if true, would entitle [him] to relief," then he is entitled to an evidentiary hearing on the post-conviction motion. ***State v. Love***, 2005 WI 116, ¶ 42, 284 Wis. 2d 111, 700 N.W.2d 62. "Once the defendant files a ***Bangert*** motion entitling him to

an evidentiary hearing, the burden shifts to the State to prove by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified defects in the plea colloquy." ***Hoppe***, 2009 WI 41, ¶ 44.

In deciding whether a guilty plea was voluntarily and knowingly entered, this Court accepts the circuit court's findings of evidentiary and historical fact unless they are clearly erroneous. ***State v. Rodriguez***, 221 Wis. 2d 487, 492, 585 N.W.2d 701 (Ct. App. 1989). On the other hand, whether a plea was knowingly and voluntarily entered is a question of constitutional fact that this court reviews *de novo*. ***State v. Brown***, 2004 WI App 179, 276 Wis. 2d 559, ¶ 5, 687 N.W.2d 543.

B. A circuit court must inform the defendant of the punishments he faces by entering guilty pleas.

In ***Brown***, the Wisconsin Supreme Court held that a circuit court has a duty at a plea hearing to establish that the defendant understands, among other things, the "range of *punishments* to which he is subjecting himself by entering a 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 circuit court here acknowledged that if the DNA surcharges were part of Mr. Freiboth's punishment, then it had an obligation to inform him of that punishment prior to accepting his pleas. (24:5;App.108). The court further acknowledged that it made no such advisement. (24:2;App.105). Thus, the central question in this case is whether $1,000 of mandatory DNA surcharges were a part of the *punishment* Mr. Freiboth faced by entering his pleas.

C. The now-mandatory DNA surcharges are part of the punishment a defendant faces when he enters pleas to multiple felony offenses.

Before January 1, 2014, if a court imposed a sentence or placed a person on probation for a felony offense other than certain sex offenses, the court could—in its discretion—choose to impose a single $250 DNA surcharge. *See* Wis. Stat. § 973.046(1g), (1r) (2011-12). A single $250 DNA surcharge was mandatory for convictions for certain sex offenses.[4] *See* Wis. Stat. § 973.046(1g), (1r) (2011-12). Regardless of the number of the convictions, if a court imposed the surcharge, it could only impose one, $250 surcharge. *Id*.; *see also* ***Radaj***, 2015 WI App 50, ¶ 8, n.3, 363 Wis. 2d 633.

Effective January 1, 2014, the Legislature amended Wisconsin Statute § 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.

In ***Radaj***, this Court held that the mandatory DNA surcharge was a punishment violating constitutional protections against *ex post facto* punishments as applied to a defendant sentenced after January 1, 2014, for multiple felonies committed prior to the effective date of the amended statute. ***Id.***, ¶¶ 1, 14, 35. There, the defendant plead guilty to four felony counts, and was thus assessed a DNA surcharge of $1,000 (four felonies x $250). ***Id.*** ¶ 5.

[4] 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).

This Court noted that "[i]f there is no rational connection and the fee is excessive in relation to the activities it is intended to fund, then the fee in effect serves *as an additional criminal fine*, that is, the fee is punitive." ***Id.***, ¶ 25. For purposes of the *ex post facto* analysis, the Court assumed, without deciding, that the intent of the legislature in enacting the DNA surcharge statute was non-punitive. ***Id.***, ¶ 22. This Court found no non-punitive reason to explain why the total amount a defendant must pay towards the DNA surcharge imposed would correspond "not to costs, but to the number of convictions." ***Id.***, ¶ 30.

This Court acknowledged that—to survive an *ex post facto* constitutional challenge—the "connection between a surcharge and the costs it is intended to cover need not be perfect to be rational"; nevertheless, this Court held that "there must be some reason why the cost of the DNA-analysis-related activities under Wis. Stat. §§ 973.046 and 165.77 increases with the number of convictions." ***Id.*** Importantly, the Court "perceive[d] no reason why this might be true." ***Id.***

This Court further elaborated as to why the lack of connection between the increasing costs of the surcharge per count and the statute's intended purpose rendered the DNA surcharge statute akin to other criminal penalties:

> Taking Radaj as an example, suppose that, during plea negotiations, Radaj had somewhat more leverage and his plea agreement involved him entering pleas to two felonies, rather than four. If so, his DNA surcharge would have been $500, rather than $1,000. Or, suppose he had less leverage and entered pleas to eight felonies and four misdemeanors, making his DNA surcharge $2,800. In either case, there is no reason to think that the costs associated with analyzing Radaj's DNA sample and undertaking the other DNA-analysis-realted

> activities under § 165.77 would be affected. *Rather, the smaller or larger surcharge, like the decrease or increase in Radaj's exposure to other criminal penalties, relates only to the number of convictions.*

Id. (emphasis added). This Court therefore held that the per-conviction approach to setting the DNA surcharge made the $1,000 surcharge a punishment and, thus—in that case—an ex post facto violation. ***Id.*** ¶¶ 14, 35.

Here, the offenses to which Mr. Freiboth pled guilty occurred after the effective date of the amended DNA statute, *see* (2)(explaining that the offenses were alleged to have occurred on July 27, 2014), so there is no *ex post facto* challenge or violation in this matter.

Nevertheless, this Court's analysis and conclusion in ***Radaj*** that the DNA surcharge statute in effect functions as a punishment also applies here. Like the defendant in ***Radaj***, Mr. Freiboth pled guilty to four felonies and was assessed a total of $1,000 for the DNA surcharge based on the number of convictions. *See* (17:2;App.102). Just as in ***Radaj***, here too there was no non-punitive reason why the amount Mr. Freiboth had to pay towards the DNA surcharge should increase with the number of convictions. Thus, rather than serving as a non-punitive civil fee or surcharge, the $1,000 in DNA surcharges served as a punishment—it served, in effect, as "an additional criminal fine." *See* ***id.*** ¶ 25.

The circuit court pointed to ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146 (petition for review granted March 7, 2016), and to other cases discussing collateral consequences of plea agreements, as support for its conclusion that it had no obligation to inform Mr. Freiboth of the DNA surcharges he faced. (24:5-7;App.108-110). While this Court reviews independently the legal question of

whether the DNA surcharges constituted a punishment thus requiring the circuit court to verify that Mr. Freiboth understood the DNA surcharge punishments he faced, *see* ***Brown***, 2004 WI App 179, it is worth noting why this case is distinguishable from those cited by the circuit court.

First, ***Scruggs*** does not apply because it deals with the imposition of a *single* DNA surcharge. 2005 WI App 88. In ***Scruggs***, the defendant committed an offense before January 1, 2014, but was sentenced for a single felony offense after that date. ***Id.***, ¶ 2. This Court held that the mandatory single DNA surcharge of $250 did not constitute an *ex post facto* punishment as applied to Scruggs. ***Id.***, ¶¶ 13-18. Unlike in ***Radaj***, in ***Scruggs*** this Court found that the "relatively small size" of the single $250 charge "indicates that the fee applied here was not intended to be a punishment, but rather an administrative charge to pay for the collection of the sample from Scruggs, along with expenditures needed to administer the DNA data bank." ***Id.***, ¶ 13.

Here, however, unlike ***Scruggs***, but like ***Radaj***, Mr. Freiboth faced not a mere single surcharge of $250, but $1,000 in DNA surcharges, without any apparent connection between the increased surcharge costs and the number of convictions to which he pled. *See* 365 Wis. 2d 568, ¶¶ 9, 19; ***Radaj***, 2015 WI App 50, ¶ 5.

This case is further distinguishable from ***Dugan***, 193 Wis. 2d 610, 534 N.W.2d 897 (Ct.App.1995), and ***State v. Bollig***, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199, both of which involved collateral consequences of a plea agreement. In ***Dugan***, this Court held that restitution, even if it is "definitive, immediate, and largely automatic," is not a *punishment* for purposes of Wisconsin Statute § 971.08. 193 Wis. 2d at 618, n.4, 624. This Court explained that while a

circuit court must inform a defendant of the direct consequences of his plea, a court is not required to do the same with regard to collateral consequences of a plea. ***Id.*** at 618. It clarified that "[t]he distinction between direct and collateral consequences of a plea turns on whether the result represents a definite, immediate, and largely automatic effect *on the range of the defendant's punishment*." ***Id.*** (internal citations omitted)(emphasis added). It reasoned that although restitution has some "punitive effects," the primary goal of restitution 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." 2000 WI 6, ¶ 26.

Thus, because the primary goals and effects of the restitution and sex offender registration statutes, respectively, are non-punitive, those ramifications constitute collateral consequences of a plea.

Here, on the other hand, this Court has held that when a defendant is convicted of multiple felonies, the primary effect of the mandatory DNA surcharges *is* punitive, as there is "no reason to think that the costs associated with analyzing" a defendant's DNA sample and "undertaking the other DNA-analysis-realted activities" increases with each additional conviction. *See* ***Radaj***, 2015 WI App 50, ¶ 30. Indeed, there is *no non-punitive* reason why the amount of the surcharge should increase with the number of convictions. *See id.*, ¶ 30-32. In cases in which a defendant is convicted of multiple felony counts, the DNA surcharge statute thus

functions as punishment, and is in turn a direct consequence of a plea.

D. As Mr. Freiboth met his *prima facie* burden for plea withdrawal, the circuit court erred in denying his motion without an evidentiary hearing.

Because the DNA surcharge was a punishment and because the court was required to establish at the plea hearing that Mr. Freiboth understood the punishments he faced, the circuit court was required to explain to Mr. Freiboth, and verify that he understood, that he faced mandatory DNA surcharges totaling $1,000, in addition to the maximum potential terms of imprisonment and fines he faced.

As Mr. Freiboth alleged and explained in his post-conviction motion, the circuit court failed to ensure that Mr. Freiboth understood the DNA surcharge punishment he faced. (23:6-8;App.117-119); *see generally* (33;App.124-136). The circuit court itself acknowledged that it did not do so. (24:2;App.105). Thus, Mr. Freiboth met his burden to establish a deficiency in the plea colloquy. *See* ***Hoppe***, 2009 WI 4, ¶4, n.5.

Mr. Freiboth also met his burden to allege that he did not know or understand the information that should have been explained. *See* ***id.*** As provided in his post-conviction motion: "Mr. Freiboth asserts, and at a hearing would testify, that prior to entering his plea, he did not know that he would be required to pay a $250 DNA surcharge for each count to which he pled." (23:8-9;App.119-120).

As he demonstrated both a deficiency in the plea colloquy and a lack of understanding of that which the court failed to explain, Mr. Freiboth's post-conviction motion

established his *prima facie* burden for plea withdrawal; he is entitled to an evidentiary hearing. *See* ***Love***, 2005 WI 116, ¶ 42; ***Hoppe***, 2009 WI 41, ¶ 44. The circuit court erred in denying his post-conviction motion without an evidentiary hearing.

CONCLUSION

For these reasons, Mr. Freiboth respectfully requests that this Court enter an order reversing the circuit court's decision denying his motion for plea withdrawal, and remanding this matter for an evidentiary hearing.

Dated this 16th 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 3,079 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 16th day of March, 2016.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 16th day of March, 2016

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*D.B.'s name has been redacted to initials in this Appendix document to comport with Wis. Stat. (Rule) § 809.86.