STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP2535-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ARTHUR ALLEN FREIBOTH,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE LINDSEY GRADY AND THE HONORABLE JEFFREY A. KREMERS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar #1009170
Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

TABLE OF CONTENTS

Page

CASES

Page

Page

Page

STATUTES

Page

ADDITIONAL AUTHORITY

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of the court's decision is warranted because the issue raised in this appeal – whether a circuit court conducting a plea colloquy is required to advise a defendant of mandatory DNA surcharges – is a recurring issue that has not been addressed in a published Wisconsin decision.[1]

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Arthur Allen Freiboth, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

Freiboth was charged with two counts of suffocation and strangulation as acts of domestic abuse and three counts of bail jumping, two of which also were charged as acts of domestic abuse. (2:1-2; 6:1-2.) He reached a plea agreement with the State pursuant to which he entered guilty pleas to one count of strangulation and suffocation and three counts of bail jumping.

---

[1] This issue is also before the court of appeals in *State v. Tydis Trinard Odom*, no. 2015AP2525-CR (Dist. I).

(33:4, 9-10, A-App. 124, 126.) The remaining charge in this case was dismissed and read in, as were charges in two other pending cases. (33:4, 18, A-App. 124, 128.)

Freiboth filed a postconviction motion in which, as relevant to this appeal, he asserted that he was entitled to withdraw his pleas because the court failed to inform him at the plea hearing that he faced mandatory DNA surcharges totaling $1,000 and he did not know that the surcharge would be imposed. (23:5-9, A-App. 116-20.) He argued that the court was required to inform him of the surcharge because the court of appeals held in *State v. Radaj*, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, that "the DNA surcharge is a punishment when assessed against a defendant with multiple convictions." (23:6, A-App. 117.) The circuit court denied the motion, holding that the mandatory DNA surcharges were not punishment and that the court was not required to inform Freiboth of them when taking his plea. (24:7, A-App. 110.)

The sole issue that Freiboth raises on appeal is whether he is entitled to an evidentiary hearing on his claim that he should be allowed to withdraw his pleas because the court failed to advise him of the mandatory DNA surcharges. The State agrees with the postconviction court that the plea-taking court was not required to inform Freiboth of the surcharges. Before addressing that issue, though, the State will discuss an

alternate ground for affirming the order denying Freiboth's postconviction motion, that the court's decision in *Radaj* does not undermine the validity of Freiboth's pleas because it was decided after he entered those pleas. *See State v. Darcy N.K.*, 218 Wis. 2d 640, 651, 581 N.W.2d 567 (Ct. App. 1998) ("a respondent may advance for the first time on appeal any argument that will sustain the trial court's ruling").

I. *RADAJ* DOES NOT UNDERMINE THE VALIDITY OF FREIBOTH'S GUILTY PLEAS BECAUSE IT WAS DECIDED AFTER HE ENTERED THE PLEAS.

There is a timing issue in this case that neither the parties nor the court addressed below and that Freiboth has not addressed on appeal. Freiboth entered his guilty pleas on September 16, 2014. (33:1, 9-10, A-App. 124, 126.) The court of appeals decided *Radaj* on May 21, 2015, and that decision was ordered published on June 24, 2015.[2] *Radaj* was not decided until eight months after Freiboth entered his pleas and did not become binding authority until nine months after the pleas. *See* Wis. Stat. § (Rule) 809.23(3).

The United States Supreme Court has held that "a voluntary plea of guilty intelligently made in the light of the

[2] *See* https://wscca.wicourts.gov/appealHistory.xsl;jsessionid=DBE960909C542144E409297E378D047F?caseNo=2014AP002496&cacheId=AA6501922247A3B988E04C3F29C04B87&recordCount=2&offset=1&linkOnlyToForm=false&sortDirection=DESC.

then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Brady v. United States*, 397 U.S. 742, 757 (1970). At the plea hearing, the court asked Freiboth's counsel if he had advised Freiboth "of the maximum possible penalties including felony warnings"; counsel responded that he had. (33:12-13, A-App. 126-27.) Freiboth does not explain how, at the time of the plea hearing, the circuit court or his lawyer could have anticipated the *Radaj* decision. *Cf. State v. Maloney*, 2005 WI 74, ¶ 23, 281 Wis. 2d 595, 698 N.W.2d 58 ("[B]ecause the law is not an exact science and may shift over time, the rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized.").

Freiboth voluntarily entered his guilty pleas under then applicable law, which did not characterize multiple DNA surcharges as having a punitive effect for ex post facto purposes. Even if *Radaj*'s holding that multiple DNA surcharges have a punitive effect for ex post facto purposes were relevant to the plea-taking process, it does not undermine the validity of pleas entered before the decision was published.

II. FREIBOTH IS NOT ENTITLED TO WITHDRAW HIS GUILTY PLEAS BECAUSE THE TRIAL COURT WAS NOT REQUIRED TO INFORM HIM ABOUT THE DNA SURCHARGES AT THE PLEA HEARING.

A. Standard of review.

When a defendant seeks to withdraw a guilty plea after sentencing, he must prove by clear and convincing evidence that a refusal to allow withdrawal of the plea would result in manifest injustice. *State v. Brown*, 2006 WI 100, ¶ 18, 293 Wis. 2d 594, 716 N.W.2d 906. One way for a defendant to meet this burden is to show that he did not knowingly, intelligently, and voluntarily enter the plea. *Id*.

Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. *Id*. ¶ 19. An appellate court accepts the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but determines independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary. *Id.* A defendant's claim that his plea was not knowing, intelligent, and voluntary based on alleged deficiencies in the plea colloquy that establish a violation of Wis. Stat. § 971.08 or other mandatory duties at a plea hearing presents a question of law that this court reviews de novo. *Id*. ¶ 21.

B. The trial court was not required to inform Freiboth about the DNA surcharges at the plea hearing.

"Due process requires that 'a defendant's guilty plea must be affirmatively shown' to be knowing, intelligent, and voluntary." *State v. Taylor*, 2013 WI 34, ¶ 30, 347 Wis. 2d 30, 829 N.W.2d 482 (quoted sources omitted). "'The duties established in Wis. Stat. § 971.08, in *Bangert*,[3] and in subsequent cases are designed to ensure that a defendant's plea is knowing, intelligent, and voluntary.'" *Id*. (quoting *Brown,* 293 Wis. 2d 594, ¶ 23). "Before the court accepts a plea of guilty or no contest, it must '[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.'" *Id*. (quoting Wis. Stat. § 971.08(1)(a)).

Making a defendant aware of the potential punishment generally means that a defendant must be aware of the direct consequences of his or her plea. *State v. Byrge,* 2000 WI 101, ¶ 60, 237 Wis. 2d 197, 614 N.W.2d 477. A direct consequence of a plea has "a definite, immediate, and largely automatic effect on the range of a defendant's punishment." *Id.* However, the circuit court need not inform a defendant of collateral

[3] *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

consequences of a plea. *Id.* ¶ 61. "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." *Id.*

Freiboth bases his contention that the circuit court was required to inform him about the mandatory DNA surcharges on the court of appeals' decision in *Radaj*. The issue in *Radaj* was whether applying the new mandatory surcharge to a defendant who committed four crimes before the effective date of the new surcharge statute but was sentenced after that date was an ex post facto violation. *See Radaj*, 363 Wis. 2d 633, ¶ 1.

To answer that question, the court applied the two-part "intent-effects" test used in ex post facto cases to determine whether a statute is punitive. *See id*. ¶ 13. Under that test, the court first asks whether the legislature's "intent" was to punish or rather was to impose a non-punitive regulatory scheme. *See id.* This intent inquiry is "primarily a matter of statutory construction that asks whether the legislative body . . . 'indicated either expressly or impliedly a preference for one label or the other.'" *Id.* (quoted source omitted).

The "effects" prong "asks whether, despite the fact that the legislature intended a non-punitive regulatory scheme, 'the effects of the sanctions imposed by the law are 'so punitive . . .

as to render them criminal.'" *Id.* ¶ 14 (quoted source omitted). When determining whether a scheme is punitive in effect, the court considers the following non-exhaustive list of factors:

> (1) whether [the law in question] involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which [the law] applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Id. (quoted source omitted).

The *Radaj* court assumed without deciding that the legislature's intent was nonpunitive. *Id*. ¶ 22. But, the court held, the effect of assessing a $250 DNA surcharge for each felony conviction was punitive because the $1,000 surcharge "is not rationally connected and is excessive in relation to the surcharge's intended purpose" and "its effect is to serve traditionally punitive aims." *Id*. ¶ 35

The unstated premise of Freiboth's argument is that because multiple DNA surcharges have a punitive effect for ex post facto purposes, they necessarily constitute punishment for purposes of a valid plea colloquy. But he cites no authority for that proposition. It is hardly a self-evident proposition, as the tests for determining what is punishment for ex post facto

purposes is different than the test for when a consequence is punishment for purposes of a valid plea colloquy. *Compare Byrge,* 237 Wis. 2d 197, ¶¶ 60-61, with *Radaj*, 363 Wis. 2d 633, ¶¶ 13-14.

Restitution provides a good illustration of that difference. Many federal and state courts have held that restitution is punishment under an ex post facto analysis and that the ex post facto clause prohibits the retroactive application of statutes imposing new or expanded restitution obligations.[4] But this court held in *State v. Dugan*, 193 Wis. 2d 610, 534 N.W.2d 897 (Ct. App. 1995), that a trial court need not address restitution during a plea colloquy even though restitution has a punitive effect.

---

[4] *See, e.g., United States v. Schulte*, 264 F.3d 656, 661-62 (6th Cir. 2001); *United States v. Richards,* 204 F.3d 177, 213 (5th Cir. 2000), *overruled on other grounds by United States v. Cotton*, 535 U.S. 625 (2002); *United States v. Siegel,* 153 F.3d 1256, 1260 (11th Cir. 1998); *United States v. Edwards,* 162 F.3d 87, 89-91 (3d Cir. 1998); *United States v. Rezaq,* 134 F.3d 1121, 1141, n.13 (D.C. Cir. 1998); *United States v. Baggett,* 125 F.3d 1319, 1322 (9th Cir. 1997); *United States v. Thompson,* 113 F.3d 13, 15 n.1 (2d Cir. 1997); *United States v. Williams,* 128 F.3d 1239, 1241 (8th Cir. 1997); *Eichelberger v. State*, 916 S.W.2d 109, 112 (Ark. 1996); *In the Matter of Appeal in Maricopa Cnty. Juvenile Action No. J-92130*, 677 P.2d 943, 946-47 (Ariz. Ct. App. 1984); *People v. Zito*, 10 Cal. Rptr. 2d 491, 494 (Cal Ct. App. 1992); *State v. Corwin*, 616 N.W.2d 600, 602 (Iowa 2000); *Spielman v. State*, 471 A.2d 730, 734-35 (Md. 1984); *People v. Slocum*, 539 N.W.2d 572, 574 (Mich. Ct. App. 1995); *State v. McMann*, 541 N.W.2d 418, 422 (Neb. Ct. App. 1995); *State v. Short*, 350 S.E.2d 1, 2 (W. Va. 1986); *but see United States v. Nichols,* 169 F.3d 1255, 1279-80 (10th Cir. 1999); *United States v. Newman,* 144 F.3d 531, 542 (7th Cir. 1998).

The court "beg[a]n by rejecting Dugan's unspoken notion that the consequences of a sentencing proceeding (whether they be incarceration, a fine, restitution, probation, or conditions of probation) can or should be exclusively catalogued as either punishment or rehabilitation." *Id*. at 619. "Instead," the court said, "such consequences represent a blend of both concepts." *Id*.

Restitution, the court concluded, is no different. *Id*. at 620. Restitution "is commonly considered as a rehabilitative tool to the offender and as a compensatory tool to the victim." *Id*. "However, by appropriating the offender's money or property to pay the victim, restitution can also be said to work a punitive effect." *Id*. "Thus," the court held, "*simply saying a sentencing provision works a punitive or rehabilitative effect begs the question before us as to what warnings must be included in a valid plea colloquy.*" *Id*. (emphasis added). "Rather, recognizing that both concepts are at work, we must decide the fundamental purpose of the sentencing provision at issue." *Id*.

The court did not find it significant that that the legislature stated in the restitution statute that a sentencing court should order restitution "in addition to any other penalty." *Id.* (quoting Wis. Stat. § 973.20(1). "This language simply recognizes . . . that restitution can work a punitive effect. It does not mean, however, that restitution does not also

work a rehabilitative effect and that such may be the basic and fundamental purpose of restitution." *Id*.

The court held "that the primary and fundamental goal of restitution is the rehabilitation of the offender" rather than punishment. *Id*. at 620-21. It observed that the potential Class C penalties for Dugan's crime of aggravated battery were "a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both." *Id*. at 621 (quoting Wis. Stat. § 939.50(1), (3)(c)). The court noted that "[t]hese potential punishments were set out in the ch. 939, Stats., 1991-92, subchapter entitled 'Penalties'" and that "[n]owhere in this subchapter is restitution enumerated as a potential penalty or punishment for any classification of crime or forfeiture." *Id*. The court said that "[i]f the legislature had truly intended restitution to constitute 'potential punishment' for purposes of the plea colloquy statute, § 971.08, Stats., it would have formally included such among the 'Penalties' in the sections of the criminal code devoted to that specific topic." *Id*.

The court noted that "the plain meaning of the word 'restitution' support[ed its] conclusion." *Id*. at 621. "Restitution is defined as an 'equitable remedy under which a person is restored to his or her original position prior to loss or injury, or placed in the position he or she would have been, had the breach not occurred.'" *Id*. (quoted source omitted). "This

definition," the court observed, "does not have a punitive ring." *Id*. The court said that the restitution statute "reflects a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution." *Id*. at 622.[5]

Dugan's rationale and conclusion apply to Freiboth's claim that the trial court was required to inform him of the DNA surcharge. Like the restitution statute at issue in *Dugan*, Wis. Stat. § 973.20, the DNA surcharge statute, Wis. Stat. § 973.046(1r), is not included in the "penalties" subchapter of chapter 939. *See Dugan*, 193 Wis. 2d at 621. "If the legislature had truly intended [the DNA surcharge] to constitute 'potential punishment' for purposes of the plea colloquy statute, § 971.08, Stats., it would have formally included such among the

[5] This court noted in *Dugan* that Wisconsin's restitution statute is patterned on the federal Victim and Witness Protection Act (VWPA), 18 U.S.C. § 3663. *See Dugan*, 193 Wis. 2d at 623. It also noted that "the Ninth Circuit, in examining the purpose of restitution under 18 U.S.C. § 3663, concluded: "The primary purpose of the Victim and Witness Protection Act, unlike a forfeiture statute, is not to punish the defendant but to compensate the victim." *Id*. at 623-24 (quoting *United States v. Salcedo-Lopez*, 907 F.2d 97, 99 (9th Cir. 1990) (italics omitted). Yet the Ninth Circuit later held that "to avoid running afoul of the *Ex Post Facto* Clause," the district court should apply the version of the VWPA in effect when the defendants committed the crime rather than a subsequently enact amended version of the VWPA that "had the potential to increase the amount of restitution they would have to pay." *United States v. Baggett*, 125 F.3d 1319, 1322 (9th Cir. 1997). These Ninth Circuit cases demonstrate that punishment for ex post facto purposes is broadly defined.

'Penalties' in the sections of the criminal code devoted to that specific topic." *Id*.

And, as with restitution, the purpose of the DNA surcharge statute is not punitive. The *Radaj* court assumed without deciding that the legislature's intent was nonpunitive. *See Radaj*, 363 Wis. 2d 633, ¶ 22. But in *State v. Scruggs*, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146 (review granted), this court held that the legislature's intent with respect to the mandatory DNA surcharge was not punitive. Rather, based on "the statute and its history," the court held that "the legislature was motivated by a desire to expand the State's DNA data bank and to offset the cost of that expansion, rather than a punitive intent." *Id*. ¶ 10. The court noted that the 2014 amendment to the DNA surcharge statute "was part of a larger initiative by the State to expand the collection of DNA samples." *Id*. The court said that "to offset the increased burden on the Department of Justice (DOJ) in collecting, analyzing, and maintaining the additional DNA samples, the legislature imposed the $250 surcharge on felony convictions to be deposited with the DOJ to pay for operating its DNA data bank." *Id*. "That the DNA surcharge is specifically dedicated to fund the collection and analysis of DNA samples and the storage of DNA profiles—all regulatory activities—evidences a nonpunitive cost-recovery intent." *Id*. ¶ 12.

The supreme court's decision in *State v. Bollig*, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199, also recognized that the fact that a statute has a punitive effect does not mean that the trial court is required to inform a defendant of that consequence during a plea colloquy. Bollig argued that his no contest plea to attempted sexual assault was unknowingly made because the circuit court failed to inform him of the registration requirement for sex offenders. *Id*. ¶ 1. The court acknowledged that sex offenders suffer a variety of adverse consequences as a result of registration, but held that "the punitive or deterrent effects resulting from registration and the subsequent dissemination of information do not obviate the remedial and protective intent underlying those requirements." *Id*. ¶ 26."Simply because registration can work a punitive effect," the court said, "we are not convinced that such an effect overrides the primary and remedial goal underlying Wis. Stat. § 301.45 to protect the public." *Id*. The court concluded that "[b]ecause the duty to register is not punishment, it does not represent a direct consequence of Bollig's no contest plea. Rather, it is a collateral consequence, and Bollig does not have a due process right to be informed of collateral consequences prior to entering his plea." *Id*. at ¶ 27.

In its decision denying Freiboth's postconviction motion, the circuit court noted that an analogous surcharge, the

victim/witness surcharge under Wis. Stat. § 973.045(1), also is imposed in criminal cases. (24:6, A-App. 109.) That surcharge of $67 for each misdemeanor conviction and $92 for each felony conviction, the court observed, "applies regardless of whether there is an actual victim and may not be waived, reduced or forgiven for any reason." (*Id*.) But, the court stated, that surcharge "is not included within the range of punishment a court may impose under sections 939.50 and 939.51, Stats., and the court knows of no authority in this State or any other which requires a court to inform a defendant about a mandatory victim/witness surcharge during a plea colloquy." (24:6-7, A-App. 109-10.)

There is relevant authority from other states. Courts in at least two states have rejected arguments that a trial court is required to inform a defendant entering a guilty plea about mandatory surcharges or fees. In *Hermann v. State*, 548 S.E.2d 666 (Ga. Ct. App. 2001), the defendant argued that he was entitled to withdraw his guilty plea because the court did not advise him of the surcharges and fees that would be imposed on him as a condition of probation. *Id*. at 667. The Georgia Court of Appeals rejected that argument. It noted that the trial court "did not have the discretion to add or suspend the mandatory charges of which Hermann complains." *Id*. "More importantly," the court held, "the unanticipated costs

associated with Hermann's sentence did not result in a plea that was involuntarily given." *Id*. "Because the statutorily mandated fees and the cost of Hermann's probation and drug treatment did not lengthen or alter the pronounced sentence, they merely had a collateral effect." *Id*. "'Adverse unanticipated collateral consequences are not valid reasons for reversing the trial court's refusal to withdraw a plea.'" *Id*. (quoted source omitted).

New York's appellate court has reached the same conclusion. In *People v. Grace*, 873 N.Y.S.2d 67 (N.Y. App. Div. 2009), the court held that the defendant was not entitled to withdraw his plea "on the ground that the court did not inform him of the mandatory fees and surcharges." *Id*. at 69. "Information about fees and surcharges is not the type of information that is essential for a pleading defendant to have 'in order to knowingly, voluntarily intelligently choose among alternative courses of action.'" *Id*. (quoted source omitted); *see also People v. Salmans*, 853 N.Y.S.2d 675, 677 (N.Y. App. Div. 2008) ("we do not require that a defendant be advised, prior to his or her plea, that the statutory surcharge is a part of the sentence").

That the mandatory DNA surcharge may have a punitive effect for ex post facto purposes does not mean that the surcharge is punishment that the court must discuss at a plea

colloquy. Because the circuit court had no duty to inform Freiboth of the mandatory DNA surcharges before accepting his guilty pleas, it properly denied his motion to withdraw those pleas.

C. Freiboth's argument, if accepted by this court, would require substantial changes to Wisconsin plea colloquy procedures.

The victim/witness surcharge noted by the circuit court in this case is one of many surcharges imposed under Wisconsin law in criminal cases. In addition to the DNA surcharge under Wis. Stat. § 973.046(1r) and the victim/witness surcharge under Wis. Stat. § 973.045(1), state law imposes the following surcharges on persons convicted of criminal offenses, many of which are assessed on a per-count basis:

- *Child pornography surcharge*: $500 for each image associated with a conviction under Wis. Stat. §§ 948.05 or 948.12. *See* Wis. Stat. § 973.042(2).
- *Crime laboratories and drug law enforcement surcharge*: $13 for each count. *See* Wis. Stat. § 165.755 (1)(a), (2).
- *Crime prevention funding board surcharge*: $20 for each count in a county that has established a crime prevention funding board. *See* Wis. Stat. § 973.0455(1).
- *Domestic abuse surcharge*: $100 for each count on qualifying domestic abuse offenses. *See* Wis. Stat. § 973.055(1).

- *Drug abuse program improvement surcharge*: Seventy five percent of the fine imposed for a controlled substances violation. *See* Wis. Stat. § 961.41(5)(a).

- *Drug offender diversion surcharge*: $10 per count for a crime under ch. 943. *See* Wis. Stat. § 973.043(1).

- *Global positioning system tracking surcharge*: $200 for each offense under Wis. Stat. §§ 813.12 or 813.125. *See* Wis. Stat. § 973.057(1).

- *Jail surcharge*: One percent of the fine imposed or $10, whichever is greater, for each fine imposed. *See* Wis. Stat. § 302.46(1)(a).

- *Penalty surcharge*: Twenty-six percent of the total fine imposed for all offenses. *See* Wis. Stat. § 757.05(1)

- *Restitution surcharge*: When restitution is ordered, "5% of the total amount of any restitution, costs, attorney fees, court fees, fines, and surcharges ordered under s. 973.05(1)." Wis. Stat. § 973.20(11)(a).

- *Weapons surcharge*: Seventy-five percent of the fine imposed for a violation of Wis. Stat. § 167.31. *See* Wis. Stat. § 167.31(5).

See generally Wis. Stat. § 814.76.

Under *Radaj*'s reasoning, any of those surcharges, especially those imposed on a per-count basis, might be deemed punitive in effect for ex post facto purposes were they imposed on a defendant who committed an offense before the surcharge's effective date. Under Freiboth's reasoning, the circuit court must inform a defendant of all of those surcharges

that are applicable to his or her crimes when accepting a guilty plea.

Freiboth's judgment of conviction indicates that he is obligated to pay over $2,300 in fees and surcharges: "Court costs" of $652, "other" costs of $352, a victim/witness surcharge of $368, and a $1,000 DNA surcharge. (17:2, A-App. 102.) During the plea colloquy, the court informed Freiboth that he would have to pay three domestic abuse assessments, but did not inform him of the amount of those assessments. (33:6-7, A-App. 125.) The court also told Freiboth that he would have to provide a DNA sample if he had not already done so and that had "to pay for it no matter what," but did not inform him of the amount of the surcharge. (33:9, A-App. 126.)

Just as the State would not argue that a court would satisfy the its duties under Wis. Stat. § 971.08 or *Bangert* by informing a defendant that he faced possible imprisonment or a fine without stating the maximum prison term or fine, it does not contend that, if the DNA surcharge is a punishment, the court satisfied its duties by telling Freiboth that he had to pay a DNA surcharge without stating the amount. However, if this court were to accept Freiboth's argument, the circuit court should have informed him not only about the amount of the DNA surcharge but also the amount of the domestic abuse assessments and the other surcharges that were imposed on

him as a result of his guilty pleas. Yet Freiboth does not argue that the circuit court violated Wis. Stat. § 971.08 or *Bangert* by failing to inform him of these other surcharges, which, in total, exceed the amount of the DNA surcharge.

Freiboth's position would require significant changes to guilty plea procedures to ensure that defendants are informed of all of the surcharges that will be imposed upon conviction. The standard Plea Questionnaire/Waiver of Rights (10:1-2) will have to be amended to add a checklist of surcharges in criminal cases. Defense counsel will have to discuss all of those surcharges when advising a client who is considering entering a plea.

The supreme court has held that "careful adherence to [Wis JI-Criminal] SM-32 will satisfy the constitutional standard of a voluntary and knowing plea, as well as the *Ernst* requirements, the procedure of Section 971.08, Stats., and the other mandatory procedures described" in *Bangert*. *State v. Bangert*, 131 Wis. 2d 246, 272, 389 N.W.2d 12 (1986). SM-32 advises trial courts to identify the maximum term of imprisonment and the maximum fine and uses this example: "And do you understand that the maximum penalty for burglary is 12 ½ years of imprisonment, composed of 7 ½ years of initial confinement and 5 years extended supervision, and a fine of $25,000?" Wis JI-Criminal SM-32 (2007) at 2, 15. If

Freiboth is correct, the supreme court was wrong when it said that adherence to SM-32 will satisfy the constitutional standard of a knowing and voluntary plea; those materials will need to be revised to add a list of surcharges. And courts will need to address in the plea colloquy all of the surcharges applicable in a case.

Freiboth may respond that none of those other surcharges have been determined to be punishments. But at the time he entered his plea, *Radaj* had not been decided. The court and the parties could not have anticipated that this court would hold that multiple DNA surcharges have a punitive effect. Freiboth nevertheless contends that *Radaj*'s subsequent holding established the requirements for a valid plea.

The State emphasizes that it does not believe that any of these surcharges constitute punishment for purposes of a valid plea colloquy. Rather, it is simply acknowledging the possibility that a court might determine, in the context of an ex post facto challenge, that these surcharges have a punitive effect.[6] If Freiboth is correct that a "punitive effect" for ex post facto purposes is punishment about which a defendant entering

[6] Courts in other jurisdictions have held that other surcharges are punishment for ex post facto purposes. *See, e.g., United States v. Prather*, 205 F.3d 1265, 1272 (11th Cir. 2000) ("special assessment" imposed on convictions); *People v. Stead*, 845 P.2d 1156, 1159 (Colo. 1993) (drug offender surcharge).

a guilty plea must be informed, courts must inform defendants of the many surcharges that will be imposed upon conviction.

This court should reject Freiboth's far-reaching expansion of a circuit court's plea colloquy duties. The circuit court had no duty to inform Freiboth of the mandatory DNA surcharges before accepting his guilty pleas. It did not err, therefore, when it denied Freiboth's motion to withdraw his pleas.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 31st day of May, 2016.

BRAD D. SCHIMEL
Wisconsin Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar #1009170
Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,901 words.

_____
JEFFREY J. KASSEL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 31st day of May, 2016.

_____
JEFFREY J. KASSEL
Assistant Attorney General