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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.

REPLY BRIEF OF
DEFENDANT-APPELLANT

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TABLE OF CONTENTS

	Page
ARGUMENT	1
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	1
CONCLUSION	8

CASES CITED

<i>Brady v. United States</i> , 397 U.S. 742 (1970)	1
<i>State v. Bollig</i> , 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199	3
<i>State v. Brown</i> , 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543	2
<i>State v. Dugan</i> , 193 Wis. 2d 610, 534 N.W.2d 897 (Ct.App.1995).....	2, 3
<i>State v. Harris</i> , 119 Wis. 2d 612, 350 N.W.2d 633 (1984).....	7

<i>State v. Radaj,</i>	
2015 WI App 50, 363 Wis. 2d 633,	
866 N.W.2d 758	1, passim

<i>State v. Scruggs,</i>	
2015 WI App 88, 365 Wis. 2d 568,	
872 N.W.2d 146	4

WISCONSIN STATUTES CITED

59.54(28)(b).....	6
167.31(5)	5
165.755(1)(a), 2	6
961.41(5)(a)	5
971.08	2
973.04(2)	5
973.042(2)	5
973.043(1)	5
973.045	6
973.045(1)	6
973.0455	6
973.0455(1)	6
973.046	6

973.055(1)	5
973.057(1)	5
973.20(11)(a)	5

OTHER AUTHORITIES

“Wisconsin Circuit Court Fee, Forfeiture, Fine, and Surcharge Table,” http://wicourts.gov/courts/circuit/docs/fees.pdf (June 20, 2016)	6
2013 Wis. Act. 20, §§ 2355, 9326, 9426 (January 1, 2014)	1

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.

The State first responds by arguing that the circuit court did not have an obligation at the plea hearing to inform Mr. Freiboth that he would be required to pay a \$250 DNA surcharge for each of the four felony counts because Mr. Freiboth's pleas pre-dated this Court's decision in *State v. Radaj*, 2015 WI App 50, ¶30, 363 Wis. 2d 633, 866 N.W.2d 758. (Response Brief at 3-4).

While Mr. Freiboth acknowledges the State's point, and recognizes that the circuit court may have been more cognizant of this issue had this Court's decision in *Radaj* been issued at the time of his pleas, that *Radaj* had not yet been issued does not change the fact that the law imposing multiple DNA surcharges for each felony count was indeed in existence at the time of Mr. Freiboth's pleas. *See* 2013 Wis. Act. 20, §§ 2355, 9326, 9426 (effective January 1, 2014).

The State points to *Brady v. United States*, 397 U.S. 742 (1970). In *Brady*, the defendant entered a plea having been informed that a jury could impose the death penalty; nine years later, the Court concluded that the provision allowing the jury to do so was unconstitutional. *Id.* at 756-757. Thus, in *Brady*, the defendant *was* informed of the correct punishment as it existed at the time. The Court concluded that his guilty plea was not unknowing simply

because “it later develops that...the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.” *Id.* at 757.

Here, on the other hand, the court failed to explain to Mr. Freiboth the law that *did* exist at the time of his pleas. The fact that this Court had not yet formally acknowledged its punitive effect does not change the fact that it was punitive at the time of Mr. Freiboth’s pleas; nor, accordingly, did it alleviate the circuit court of its responsibility to advise the defendant of the range of punishments he faces before he enters a plea. *See State v. Brown*, 2004 WI App 179, ¶35, 276 Wis. 2d 559, 687 N.W.2d 543; Wis. Stat. § 971.08.

That this Court, for example, has not issued a decision explaining the maximum length of sentence a defendant faces under a particular statute does not mean that a circuit court has no obligation to advise the defendant of that maximum penalty. Indeed, the circuit court here seemed to recognize some need to advise Mr. Freiboth of the DNA surcharge, as it told Mr. Freiboth that he would have to “provide a DNA sample if you have not already done so” and “pay for it no matter what.” (33:9; Initial Brief App.126). The problem is that advising Mr. Freiboth that he would have to “pay for *it*” (it meaning a DNA sample), *see* (33:18; App.128)(emphasis added), did not explain that in fact what he would be automatically required to pay was \$250 on each of the felony counts to which he pled.

The State nevertheless maintains that the court had no obligation to advise Mr. Freiboth of the DNA surcharges he would be required to pay on each felony count. For support, the State points to *State v. Dugan*, 193 Wis. 2d 610, 534 N.W.2d 897 (Ct.App.1995), in which this Court held that a circuit court does not need to inform a defendant at a

plea hearing that the court could order restitution, and *State v. Bollig*, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199, in which the Wisconsin Supreme Court held that a court at a plea hearing does not have to advise a defendant of the sex offender registration requirement.

Contrary to the State's arguments, however, *Dugan* and *Bollig* illustrate why this case is different: unlike restitution or the sex offender registration requirement, this Court in *Radaj* could not find any non-punitive reason to justify the imposition of multiple DNA surcharges in a single case; why, stated differently, the surcharges would correspond "not to costs, but to the number of convictions." *Radaj*, 2015 WI App 50, ¶30.

Thus, where both restitution and the sex offender registration requirement have some punitive effects, the primary purposes of those statutes are *not* punitive: for restitution, this Court concluded that the primary purpose of the statute is to rehabilitate offenders and make victims whole; the Wisconsin Supreme Court concluded that the primary purpose of the sex offender registration requirement is protection of the public. *Dugan*, 193 Wis. 2d at 620-622; *Bollig*, 2000 WI 6, ¶26.

This distinction makes the difference: because the primary effect of the imposition of multiple DNA surcharges in a single case is punitive, the imposition of multiple DNA surcharges is a direct (not collateral) consequence of a defendant's pleas to multiple charges in a single case; it has a "definite, immediate, and largely automatic effect on the range of the defendant's punishment." *Bollig*, 2000 WI 6, ¶16. "Courts are constitutionally required to notify defendants of the 'direct consequences' of their pleas." *Id.*

The State repeatedly emphasizes that this Court in *Radaj* assumed without deciding that the Legislature's intent in creating the new DNA surcharge statute was non-punitive, and notes that in *State v. Scruggs*, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, this Court clarified that the Legislature's intent was indeed not punitive. (Response Brief at 8,13).

But these points do not change the fact that in *Radaj* this Court held that the DNA surcharge statutory scheme functions as punishment when multiple surcharges are imposed in a single case. *Radaj*, 2015 WI App 50, ¶¶14, 35. The holding of *Scruggs* is inapplicable because it deals with the imposition of a single DNA surcharge. 2015 WI App 88.¹ Indeed, the very problem this Court identified in *Radaj* was that the statutory scheme increased the surcharge based on each count, not based on the correlating cost. 2015 WI App 50, ¶30. Thus, this Court in *Scruggs* recognized that the single surcharge alone reflects an administrative charge to cover the cost of the sample and costs of maintaining the DNA database, not a punishment. 2015 WI App 88, ¶13. But this case involved four DNA surcharges.

The State's last argument is, in essence, that if this Court holds that the circuit court was required to advise Mr. Freiboth of the multiple DNA surcharges he would be required to pay, circuit courts will be required to advise defendants of all of the surcharges they may be required to pay. (Response at 17-22). Other surcharges, however, are not at issue in this case.

¹ The Wisconsin Supreme Court granted Scruggs' petition for review and, according to online records, the case is currently scheduled for oral argument in October.

Further, a review of the surcharges listed by the State reveals how those surcharges differ from the DNA surcharge:

- Most of the surcharges only apply when a defendant is convicted of a particular offense or particular offenses. *See* Wis. Stat. § 973.042(2) (Child Pornography Surcharge), Wis. Stat. § 973.055(1) (Domestic Abuse Surcharge), Wis. Stat. § 961.41(5)(a) (Drug Abuse Program Improvement Surcharge), Wis. Stat. § 973.043(1) (Drug Offender Diversion Surcharge), Wis. Stat. § 973.057(1) (Global Positioning System Tracking Surcharge), and Wis. Stat. § 167.31(5) (Weapons Surcharge). The limitation of those surcharges to a particular offense or offenses reflects a specific connection which is not found in the DNA surcharge statute.
- Some surcharge statutes require courts to make particularized findings to impose the respective surcharges. *See*, Wis. Stat. § 973.055(1) (Domestic Abuse Surcharge), Wis. Stat. § 973.042(2) (Child Pornography Surcharge).
- Other surcharges cover the administrative costs of the sentence. *See, e.g.*, Wis. Stat. § 973.20(11)(a) (Restitution Administrative Surcharge).
- Lastly, and most importantly, the vast majority of the surcharges are not imposed in every criminal case with the surcharges tallied by the number of counts. The only other surcharges where this appears to be the case are: the Crime Lab and Drug Law Enforcement Surcharge, which imposes a \$13 surcharge on each count, the Crime Prevention

Funding Board Surcharge², which imposes a \$20 surcharge on each count, and the Victim Witness Surcharge, which imposes a \$67 surcharge for each misdemeanor count and a \$92 surcharge for each felony count. Wis. Stat. §§ 165.755(1)(a), 2, 973.0455(1), and 973.045(1).

The Crime Lab and Drug Law Enforcement Surcharge and Crime Prevention Funding Board Surcharge, aimed at assisting larger criminal justice objectives, both involve small amounts of money when compared to the DNA surcharge.

Thus, the only other surcharge which functions similarly to the DNA surcharge is the Victim Witness Surcharge. Yet, even there, the DNA surcharge on each count is more than double the Victim Witness Surcharge on each count. *Compare* Wis. Stat. § 973.046 *with* Wis. Stat. § 973.045.

Again, the question of whether a court needs to advise defendants that they will be required to pay a Victim Witness Surcharge on each count is not at issue in this case. But it is worth noting that the Victim Witness Surcharge serves a different purpose than the DNA Surcharge. One-hundred percent of the revenue for the Victim Witness surcharge goes to the Wisconsin Department of Justice to fund victim and witness services. *See* “Wisconsin Circuit Court Fee, Forfeiture, Fine, and Surcharge Table,” at 17, *available online at* <http://wicourts.gov/courts/circuit/docs/fees.pdf> (last visited June 20, 2016).

² This surcharge, however, only applies if the county involved has created a crime funding board under Wisconsin Statute § 59.54(28)(b). *See* Wis. Stat. § 973.0455.

While not every crime will involve a direct victim, given that one of the primary sentencing factors is protection of the public, *see State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984), it reasons that—if there is no direct victim—the harm to the public as a whole increases with each criminal conviction. And if there is a direct victim or victims, it reasons that the amount of harm to that victim or those victims also likely increased with each count. Further, though most cases do not proceed to trial and some cases may not involve non-law enforcement witnesses, witnesses are a central component of criminal cases. It also reasons that the higher the number of counts, the more witnesses necessary to prosecute the case.

As this Court recognized in *Radaj*, increasing the DNA surcharges based on the number of counts, on the other hand, does not serve any purpose other than a punitive one. 2015 WI App 50, ¶30. The DNA surcharge statute requiring the imposition of a surcharge per count was in effect at the time of Mr. Freiboth's pleas to multiply felonies. These surcharges were a direct consequence of his pleas, and the circuit court erred both in failing to advise Mr. Freiboth of these direct consequences and in failing to grant an evidentiary hearing on his post-conviction motion.

CONCLUSION

For these reasons and those set forth in his Initial Brief, 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 20th day of June, 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 1,872 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 20th day of June, 2016.

Signed:

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