STATE OF WISCONSIN
COURT OF APPEALS

Appeal No. 2016AP96 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAVIS J. MANTEUFFEL,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT TRAVIS J. MANTEUFFEL

On Appeal From the Circuit Court For Marathon County
Circuit Court Case No. 14-CF-1312
The Honorable Michael Moran, Judge Presiding

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DATED: March 29, 2016

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Statement of Issues Presented

I. WHETHER IMPOSING A DNA SURCHARGE ON DEFENDANT-APPELLANT IS UNCONSTITUTIONAL, AS APPLIED TO HIM, WHERE HE IS NOT REQUIRED TO PROVIDE A DNA SAMPLE?

The Circuit Court found the surcharge to be constitutional as applied to Mr. Manteuffel.

Statement on Oral Argument and Publication

Post-conviction counsel's brief adequately details Defendant-Appellant's position and therefore, there is no request for oral argument. However, publication would greatly aid in clarification as this is a case of first impression.

Statement of the Case

The Defendant-Appellant, Travis J. Manteuffel, was originally charged in a Criminal Complaint filed 7/21/14 with Misdemeanor Battery, Domestic, contrary to WIS. STAT. §940.19(1) and Disorderly Conduct, Domestic, contrary to WIS. STAT. §947.01(1). *Rec. 1.* The Complaint is appended hereto as "App-1".

On October 27, 2014, Mr. Manteuffel entered a plea of guilty to the Disorderly Conduct and the Battery was dismissed pursuant to a negotiated plea. The Court then followed the joint recommendation, imposing a $200.00 fine plus court costs, to include the Domestic Abuse surcharge. The Court then also imposed the $200.00 DNA Analysis surcharge. The Amended Judgment of Conviction (*Rec. 18*) is appended as "App-2".

Mr. Manteuffel had previously submitted a DNA smaple and paid the required surcharge in Marathon County case 2003-CF-808.

Mr. Manteuffel filed a Post-Conviction Motion to

vacate the DNA surcharge on February 28, 2015. *Rec. 17.* That motion was denied at hearing on June 16, 2015. *Rec. 28.* Trial Counsel filed a Motion for Reconsideration on August 6, 2015, which was denied by the Court in its Decision on Defendant's Motion for Reconsideration signed and entered on October 22, 2015 which is appended hereto as "App-3". *Rec 21 and 22.*

Mr. Manteuffel appeals from the Judgment of Conviction and the denial of his Motion to Vacate and Motion for Reconsideration. Additional facts will be included as necessary in the body of this brief.

Argument

I. WIS. STAT. §973.046, AS APPLIED TO DEFENDANT-APPELLANT, IS UNCONSTITUTIONAL.

A. Standard Of Review.

The constitutionality of a statute presents a question of law that is reviewed independently. *State v. Smith,* 323 Wis. 2d 377, 780 N.W.2d 90 (2010). Statutes benefit from a presumption of constitutionality. *Kenosha v. C & S Management, Inc.,* 223 Wis. 2d 373, 383, 588 N.W.2d 236 (1999). Because Mr. Manteuffel asserts that the law, as applied to him, is unconstitutional, he must demonstrate such beyond a reasonable doubt. *Id.*

B. Imposing A DNA Surcharge On Defendant-Appellant Violates His Rights To Substantial Due Process.

WIS. STAT. §973.046 provides:

> (1r) If a court imposes a sentence or places a person on probation, the court shall impose a deoxyribonucleic acid analysis surcharge, calculated as follows:
>
> (a) For each conviction for a felony, $250.
>
> (b) For each conviction for a misdemeanor, $200.
>
> (2) After the clerk of court determines the amount due, the clerk shall collect and transmit the amount to the county treasurer under s.

> 59.40(20)(m). The county treasurer shall then make payment to the secretary of administration under s. 59.25(3)(f)2.
> (3) All moneys collected from deoxyribonucleic acid analysis surcharges shall be deposited by the secretary of administration as specified in s. 20.455(23)(Lm) and utilized under s. 165.77.
> (4) If an inmate in a state prison or a person sentenced to a state prison has not paid the deoxyribonucleic acid analysis surcharge under this section, the department shall assess and collect the amount owed from the inmate's wages or other moneys. Any amount collected shall be transmitted to the secretary of administration.

WIS. STAT. §165.76(1) states that "[a] person shall provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis if he or she meets any of the following criteria: Is or was found guilty of any misdemeanor on or after April 1, 2015".

From this, the statute requires Mr. Manteuffel to pay the surcharge because he was convicted after January 1, 2014. However, he is not required to submit a DNA sample because he was found guilty before April 1, 2015. Thus, Mr. Manteuffel has been ordered to pay to maintain a database for which he will not be a

participant of because he cannot be ordered to provide a sample.

As per §973.04(3), all money collected must be utilized in accordance with §165.77.

§165.77(2) and (3) provide:

165.77 Deoxyribonucleic acid analysis and data bank.

(2)(a)

1. If the laboratories receive a human biological specimen pursuant to any of the following requests, the laboratories shall analyze the deoxyribonucleic acid in the specimen:

    a. A request from a law enforcement agency regarding an investigation.

    b. A. request, pursuant to a court order, from a defense attorney regarding his or her client's specimen.

    c. A request, subject to the department's rules under sub. (8), from an individual regarding his or her own specimen.

2. The laboratories may compare the data obtained from the specimen with data obtained from other specimens. The laboratories may make data obtained from any

> analysis and comparison available to law enforcement agencies in connection with criminal or delinquency investigations and, upon request, to any prosecutor, defense attorney, or subject of the data. The data may be used in criminal and delinquency actions and proceedings. The laboratories shall not include data obtained from deoxyribonucleic acid analysis of the specimens received under this paragraph in the data bank under sub. (3).
>
> (3) If the laboratories receive a human biological specimen under s. … the laboratories shall analyze the deoxyribonucleic acid in the specimen. If the laboratories receive a human biological specimen under s. 165(7)(ah), the laboratories shall analyze the deoxyribonucleic acid in the specimen as provided under 165.8(am)1m. The laboratories shall maintain a data bank based on data obtained from deoxyribonucleic acid and of those specimens. The laboratories may compare the data obtained from one specimen with the data obtained from other specimens. The laboratories may make data obtained from any analysis and comparison available to law enforcement agencies in connection with criminal or delinquency investigations and, upon request, to any prosecutor, defense attorney or subject of the data. The data may be used in criminal and delinquency actions and proceedings.

From the above, the legislature has clearly indicated that the money collected from the DNA surcharge is to be used to analyze DNA samples

collected from convicted defendants, to analyze samples collected as part of law enforcement investigations and to compare DNA profiles from collected samples. Obviously, none of these activities would ever apply to Mr. Manteuffel because he is not required to submit a sample. There is no nexus between the surcharge and the legislative use of those funds and is therefore violative of Mr. Manteuffel's right to substantial due process.

Although not exactly on point, the Court of Appeals has recently provided an analysis which focused on any rational connection between the surcharge and its permissible uses. *State v. Gregory M. Radaj,* 2015 WI App. 50, 866 N.W.2d 758 (2015). The defendant in *Radaj* was convicted on four (4) felony counts, which were committed before the effective date of the surcharge statute. The defendant asserted that the law was unconstitutional as applied to him, as ex post facto.

The Court applied a "two-part intent-effects test." First, the Court made the assumption that it was the legislature's intent in promulgating the new DNA law, to impose a non-punitive regulatory scheme and not to impart additional punishment on a defendant. This was because the legislature labeled it a "surcharge" as opposed to a "fine" and their directive that the funds be used to defray the costs of DNA related analysis as indicated under §165.77. *Radaj*, 866 N.W.2d, at 763.

The Court then addressed the "effect" of the application of the surcharges to the defendant. In doing so, it examined the factors identified and applied in *In RE the Commitment of Rachel*, 254 Wis. 2d 215, 647 N.W.2d 762 (2002). In *Rachel*, the State Supreme Court analyzed the following factors:

> (1) Whether [the statute] 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 statute] applies is already a crime;
> (6) Whether an alternative process to which it may rationally be connected is assignable for it; and
> (7) Whether it appears excessive in relation to the alternative purpose assigned. *Rachel*, 254 Wis. 2d at 234, citing *Hudson v. United States*, 522 U.S. 93 (1997) and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

The *Radaj* Court found that the fourth, sixth and seventh factors were closely related and most relevant when "… a monetary amount intended to fund specialized activities under a non-punitive regulatory scheme is at issue." *Radaj*, 866 N.W.2d, at 765.

The Court continued:

> When that is the situation a critical inquiry is whether there is a rational connection between the amount of the fee and the non-punitive activities that the fee it intended to fund, or if instead the amount of the fee is excessive in relation to that purpose. If 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.*

Here, as in *Radaj*, there is no rational

connection between the fee and the non-punitive use of the fee, as applied to Mr. Manteuffel. Any surcharge collected from him will not be applied to any use as directed by the legislature. Therefore, the fee serves as an additional criminal fine and is unconstitutional, as applied.

By the same analysis, the fee is unconstitutional, as applied to Mr. Manteuffel.

C. The Defendant-Appellant Belongs To The Same Class Of Other Criminal Misdemeanants, Whose Surcharges Were Found To Be Unconstitutional, As Ex Post Facto.

The Court of Appeals has recently found the imposition of the DNA surcharge to be unconstitutional, as ex post facto, where individuals convicted of misdemeanors received a sentence when circuit courts were mandated to impose the surcharge but the requirement to submit a DNA sample was not yet in place. *State v. Elward*, 2015 WI App. 51, 866 N.W.2d 756 (2015). The Defendant in *Elward* committed his crime on July 25, 2013 and entered a plea on January 14, 2014. Thus, as mandated, the Court ordered the

$200.00 DNA surcharge. Just as in Mr. Manteuffel's situation, the Defendant in *Elward* was ordered to pay the surcharge but the State was not permitted to collect a DNA sample. The Court stated:

> As a result, the $200 surcharge bore no relation to the cost of a DNA test because he never had to submit to a test. The State received money for nothing. This served only to punish Elward without pursuing any type of regulatory goal. Therefore, the surcharge as applied to Elward was a fine, not a fee, and violated the Constitution's ex post facto clause. *Id.*

Here, Mr. Manteuffel finds himself in the same situation. The only difference between Mr. Elward and Mr. Manteuffel is the type of constitutional violation, i.e. ex post facto and substantial due process. This is a distinction without a difference, it remains a violation of constitutional rights.

Conclusion

Based upon the clear violation of Mr. Manteuffel's constitutional rights to due process, Counsel respectfully requests an Order vacating that part of the Judgment of Conviction requiring payment of the $200.00 DNA surcharge.

Dated: March 29, 2016

Chris A. Gramstrup
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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 using a monospaced font. The length of the brief is 15 pages.

Dated: March 29, 2016

Chris A. Gramstrup
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Appendix

Certification of Mailing

I certify that this brief or appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on March 29, 2016. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

Dated: March 29, 2016

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Appellant's Brief Appendix Certification

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 s.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 trial 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.

Dated: March 29, 2016

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