RECEIVED
12-05-2016
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP001745-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL L. COX

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable William W. Brash, III, Presiding, and from an Order Denying Postconviction Relief, Entered in the Milwaukee County Circuit Court, the Honorable T. Christopher Dee, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

HANNAH SCHIEBER JURSS
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
17 S. Fairchild Street, 3rd Floor
Madison, WI 53703
(608) 267-1773
jurssh@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

OTHER AUTHORITIES

ISSUE PRESENTED

I. Did the circuit court have the authority to waive the $250 DNA surcharge in this post-January 1, 2014, felony case?

At sentencing, the circuit court, the Honorable William W. Brash, III, presiding, waived the $250 deoxyribonucleic acid (hereinafter "DNA") surcharge. Despite the court's oral pronouncements, the judgment of conviction reflected that Mr. Cox was required to pay the surcharge. The circuit court, the Honorable T. Christopher Dee now presiding, denied Mr. Cox's post-conviction motion to vacate the surcharge on grounds that it did not have authority to waive it.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Cox does not request oral argument or publication.

STATEMENT OF THE FACTS AND CASE

The State charged Mr. Cox with one count of second degree recklessly endangering safety (Count 1) and one count of possession of tetrahydrocannabinols, second and subsequent offense (Count 2), after he was stopped for driving the wrong way on a highway. (1).

As support for the second and subsequent penalty enhancer on the second count, the State attached to the complaint a certified judgment of conviction from Milwaukee Case Number 10-CF-4234, signed March 30, 2011, which stated that Mr. Cox was required to "[p]rovide DNA sample". (1:5).

Mr. Cox pled guilty to second degree recklessly endangering safety with the possession of tetrahydro-cannabinols charge ordered dismissed and read-in. (23). Additionally, though not a criminal charge, he also pled guilty to a first-offense operating while intoxicated as part of the plea agreement. (23).

The sentencing occurred the same day.[1] The circuit court, the Honorable William W. Brash, III, presiding, sentenced Mr. Cox to prison. (24:33-34).

The court further ordered that—assuming that Mr. Cox had been previously ordered to provide a DNA sample—he would not be responsible for paying the DNA surcharge in this case:

> THE COURT: I'm assuming, Counsel, he's previously submitted a DNA sample?
>
> ATTORNEY SHELTON: I believe he has.
>
> THE COURT: All right. I'll order him to submit one if he hasn't previously done so. He doesn't have to repeat that process. And assuming for the sake of argument that he's already done that, *I'm going to waive the imposition of the DNA surcharge with regards to this matter*.

(24:36)(emphasis added).

The circuit court later at sentencing again declared its intention that Mr. Cox *not* be required to pay the DNA surcharge. Defense counsel asked: "how much are court costs?" (24:37). The court responded: "The answer is I don't know because *when I take out the DNA surcharge*—was [sic] is the DNA surcharge currently? 250 minus. So whatever the balance of the court costs are." (24:37)(emphasis added).

---

[1] The plea and sentencing hearings are set forth in two separate transcripts. (23;24).

The judgment of conviction states that Mr. Cox is required to pay the $250 DNA surcharge. (11;App.101-102).

Mr. Cox filed a post-conviction motion arguing that this was a clerical error in conflict with the circuit court's oral pronouncements at sentencing and asserting that the court had authority to waive the surcharge. (18).

The circuit court, the Honorable T. Christopher Dee now presiding, issued an order denying the post-conviction motion to vacate the $250 DNA surcharge. (19;App.103-104). The court concluded that it "had no authority under the statute to waive or vacate the surcharge on the basis that the defendant previously provided the DNA sample in another case." (19:1;App.103). The court further held that "[a]lthough Judge Brash apparently believed that he had the authority to waive the surcharge in this case, the fact remains that the defendant was sentenced for a felony offense committed after January 1, 2014, and therefore, the court was required by law to impose the surcharge." (19:2;App.104).

Mr. Cox now appeals.

ARGUMENT

I. The Circuit Court Had the Authority to Waive the $250 DNA Surcharge. The Court's Oral Pronouncement Trumps the Written Judgment and this Court Should Order that the Circuit Court Amend the Judgment to Vacate the $250 DNA Surcharge.

In general, circuit courts have broad discretion at sentencing. *See, e.g.,* ***State v. Douglas***, 2013 WI App 52, ¶ 20, 347 Wis. 2d 407, 830 N.W.2d 126. At the same time, the court's authority at sentencing is controlled by statute. ***State v. Maron***, 214 Wis. 2d 384, 388, 571 N.W.2d 454 (Ct. App. 1997).

"[I]t is the legislative province to prescribe the punishment for a particular crime and the judicial province to impose that punishment." ***State v. Machner***, 101 Wis. 2d 79, 81, 303 N.W.2d 633 (1981). "Trial courts have broad discretionary power to deal with individual cases on their merits. These powers are as broad and inclusive as in the opinion of the legislature was consistent with sound public policy." ***Id.*** at 81-82 (quoting ***Drewniak v. State ex rel. Jacquest***, 239 Wis. 2d 475, 488, 1 N.W.2d 899 (1942)).

Statutory interpretation is a question of law subject to de novo review. ***State v. Peters***, 2003 WI 88, ¶ 13, 263 Wis. 2d 475, 665 N.W.2d 171.

Statutory interpretation begins with the plain language of the statute. ***State ex rel. Kalal v. Circuit Ct. for Dane Cty.***, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

Though the use of the word "shall" is generally presumed to impose a mandatory requirement, "the legislature's use of the word 'shall' is not governed by a per se rule." ***Bank of New York Mellon v. Carson***, 2015 WI 15, ¶ 22, 361 Wis. 2d 23, 859 N.W.2d 422. Indeed, the

Wisconsin Supreme Court has explained that the word "shall" "will be construed as directory if necessary to carry out the intent of the legislature." ***Id.*** (quoting ***State v. R.R.E.***, 162 Wis. 2d 698, 707, 470 N.W.2d 283 (1991)).

"Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole." ***State ex rel. Kalal***, 2004 WI 58, ¶ 46.

Statutory language is interpreted "in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.*** Further, statutory language is read "to give reasonable effect to every word, in order to avoid surplusage." ***Id.***

Another important rule of statutory construction is that "where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed." ***State v. Welkos***, 14 Wis. 2d 186, 192, 109 N.W.2d 889 (1961); *see also* ***Kimberly-Clark Corp. v. Public Service Com'n of Wisconsin***, 110 Wis. 2d 455, 463, 329 N.W.2d 143 (1983).

A. The circuit court had authority to waive the $250 DNA surcharge.

Wisconsin Statute § 973.046 provides that "[i]f a court imposes a sentence or places a person on probation, the court shall impose a deoxyribonucleic acid analysis surcharge," in an amount of $250 for "each felony conviction" and $200 for "each misdemeanor conviction." Wis. Stat. § 973.046(1r);(App.105-106).

The statute imposing the DNA surcharge is set forth in Wisconsin Statute § 973.046. In close proximity to the DNA

Surcharge statute is the Crime Victim and Witness Assistance Surcharge (hereinafter "Victim Witness Surcharge"), set forth in Wisconsin Statute § 973.045. (App.105-106).

The statutes are similarly structured in many ways: the Victim Witness Surcharge statute, like the DNA Surcharge statute, provides that "[i]f a court imposes a sentence or places a person on probation, the court shall impose" a victim and witness assistance surcharge. Wis. Stat. § 973.045(1); (App.105-106). The Victim Witness Surcharge statute, like the DNA Surcharge statute, provides that a specific amount be imposed for each felony conviction ($92) and for each misdemeanor conviction ($67). ***Id.***;(App.105-106).

But, unlike the language of the DNA Surcharge statute, the Legislature chose to include the following language in the Victim Witness Surcharge statute: "A surcharge imposed under this subsection may not be waived, reduced, or forgiven for any reason." *Compare* Wis. Stat. § 973.045(1) *with* Wis. Stat. § 973.046. (App.105-106).

The Legislature added this statutory language prohibiting a court from waiving the Victim Witness Surcharge as part of 2013 Wisconsin Act 20, published July 1, 2013. 2013 Wis. Act. 20, § 2348. Prior to this act, the Victim Witness Surcharge statute provided that a sentencing court "shall impose" the surcharges, but did not include language prohibiting waiver of the surcharges. *Compare* Wis. Stat. § 973.045 (2011-12) *with* Wis. Stat. § 973.045 (2013-14).

Importantly, in the same act in which the Legislature added the language prohibiting a court from waiving the Victim Witness Surcharge, the Legislature implemented the current DNA Surcharge statute. 2013 Wis. Act 20, §§ 2355, 9326, 9426.

Under the previous version of the DNA Surcharge statute, if a court imposed a sentence or placed a person on probation for a felony offense other than certain sex offenses, the court had discretion to choose to impose a single $250 DNA surcharge. *See* Wis. Stat. § 973.046(1g), (1r) (2011-12). Pursuant to 2013 Wisconsin Act 20, the statute was amended to create the current language, which provides that the court "shall" impose a DNA surcharge for each felony and misdemeanor conviction, effective January 1, 2014. 2013 Wis. Act 20, §§ 2355, 9326, 9426.

The Legislature's decision to include the language prohibiting the waiver of the Victim Witness Surcharge and decision not to include the same language in the DNA Surcharge statute thus—under multiple principles of statutory interpretation and construction—demonstrates that the Legislature intended for circuit courts to have the authority to waive the DNA surcharge:

- The statutes are close in proximity and share similar structures; consideration of the DNA surcharge statute in "[c]ontext" "in relation to the language of" this "surrounding" and "closely-related" statute reflects that the Legislature intended the DNA Surcharge statute and Victim Witness Surcharge statutes to function in similar ways. *See* ***State ex rel. Kalal***, 2004 WI 58, ¶ 46.

- However, the Legislature's decision—in the very same act—to include a specific provision explaining that the Victim Witness Surcharge cannot be waived, but to not include this language in the newly-revised DNA Surcharge statute, reflects the Legislature's "different intention"; specifically, that circuit courts cannot waive the Victim Witness Surcharge but can waive the DNA surcharge. *See* ***Welkos***, 14 Wis. 2d at 192.

- Further, to hold that the Legislature intended the word "shall" to impose on circuit courts a mandatory requirement to both impose *and* never waive such surcharges would be to render the Legislature's language prohibiting waiver of the Victim Witness surcharge surplusage. *See* ***State ex rel. Kalal***, 2004 WI 58, ¶ 46.

The fact that the Legislature chose to specify which surcharge could *not* be waived—the Victim Witness Surcharge—further reflects the Legislature's recognition of the broad authority circuit courts generally hold when imposing and modifying criminal sentences. *See* ***Douglas***, 2013 WI App 52, ¶ 20; *see also* ***State v. Harbor***, 2011 WI 28, ¶ 35, 333 Wis. 2d 53, 797 N.W.2d 828 (discussing circuit courts' inherent authority to modify criminal sentences).

The circuit court had the authority to waive the DNA surcharge here. It did just that at sentencing.

B. The circuit court's oral pronouncements at sentencing trump the written judgment of conviction.

When a conflict exists between a court's oral pronouncement at sentencing and the judgment of conviction, "[t]he record of the circuit court's unambiguous oral pronouncement trumps the written judgment of conviction". ***State v. Prihoda***, 2000 WI 123, ¶ 15, 239 Wis. 2d 244, 618 N.W.2d 857.

The circuit court's unambiguous oral pronouncements provided that, assuming that Mr. Cox had been previously ordered to provide a DNA sample, he would not be required to pay the $250 DNA surcharge in this case. (24:36-37). The certified judgment of conviction from Milwaukee County Case Number 10-CF-4234, attached to the complaint in this

case, established that Mr. Cox had been previously ordered to provide a DNA sample. (1:5). Thus, the circuit court's oral pronouncement trumps the error in the written judgment. This Court should therefore enter an order reversing the circuit court's denial of Mr. Cox's post-conviction motion and amending the judgment of conviction to vacate the $250 DNA surcharge.

CONCLUSION

For these reasons, Mr. Cox respectfully requests that this Court enter an order reversing the circuit court's decision denying his motion for postconviction relief and remanding this matter to the circuit court with an order to amend the judgment of conviction to vacate the $250 DNA surcharge.

Dated this 5th day of December, 2016.

Respectfully submitted,

_____

HANNAH SCHIEBER JURSS
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
17 S. Fairchild Street, 3rd Floor
Madison, WI 53703
(608) 267-1773
jurssh@opd.wi.gov
Attorney for Defendant-Appellant

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 2,063 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 5th day of December, 2016.

Signed:

HANNAH SCHIEBER JURSS
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
17 S. Fairchild Street, 3rd Floor
Madison, WI 53703
(608) 267-1773
jurssh@opd.wi.gov

Attorney for Defendant-Appellant

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 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 this 5th day of November, 2016.

Signed:

HANNAH SCHIEBER JURSS
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
17 S. Fairchild Street, 3rd Floor
Madison, WI 53703
(608) 267-1773
jurssh@opd.wi.gov

Attorney for Defendant-Appellant

A P P E N D I X

I N D E X
T O
A P P E N D I X

Page