STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP1745-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL L. COX,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM W. BRASH, III, AND THE HONORABLE T. CHRISTOPHER DEE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Michael Cox, 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

Cox pled guilty to one count of second-degree recklessly endangering safety, a felony offense that he committed in March 2015. (11:1, A-App. 101.) He argues on appeal that he should not be required to pay the $250 DNA surcharge included in the judgment of conviction because the circuit court stated at sentencing that it was waiving the surcharge.

Prior to 2014, the circuit court had the discretion whether to impose a DNA surcharge when sentencing a defendant convicted of a felony other than certain sex crimes. *See State v. Cherry*, 2008 WI App 80, ¶ 5, 312 Wis. 2d 203, 752 N.W.2d 393; Wis. Stat. § 973.046(1g), (1r) (2011–12). But before Cox committed his offense, the DNA surcharge statute was amended to state that "[i]f 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." Wis. Stat. § 973.046(1r)(a) (2015–16).

At Cox's sentencing, the circuit court said that it would "waive the imposition of a DNA surcharge." (24:36.) The

judgment of conviction, however, included a $250 DNA surcharge. (11:2, A-App. 102.)

Cox filed a postconviction motion asking the circuit court to vacate the surcharge, arguing that the oral pronouncement trumped the written judgment and that the circuit court had the authority to waive the DNA surcharge. (18:1–4.) The postconviction court denied the motion, holding that the sentencing court had no authority to waive the surcharge. (19:1–2, A-App. 103–04.)

Cox argues on appeal that, as a matter of statutory construction, circuit courts have the authority to waive the DNA surcharge. He also argues that the circuit court's oral pronouncement at sentencing waiving the surcharge trumps the imposition of the surcharge in the judgment of conviction. Because neither of those arguments has merit, this Court should affirm the judgment of conviction and the order denying Cox's postconviction motion.[1]

I. A circuit court does not have the authority to waive the DNA surcharge.

The DNA surcharge statute states that "the court shall impose" a DNA surcharge of $250 for each felony conviction. Wis. Stat. § 973.046(1r)(a) (2015–16). Cox argues that the imposition of the surcharge is discretionary because the legislature intended "shall" to be directory rather than

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[1] The Honorable William W. Brash, III, presided at sentencing and entered the judgment of conviction. The Honorable T. Christopher Dee entered the order denying the motion for postconviction relief.

In his postconviction motion, Cox argued that Wis. Stat. § 973.06 authorized the court to waive the DNA surcharge. (18:4.) He does not make this argument on appeal and has therefore abandoned it. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

mandatory. (Cox's Br. 4–8.) There are several problems with that argument.

1. Cox fails to acknowledge a series of cases challenging on ex post facto grounds the retrospective imposition of the amended DNA surcharge statute, in which this Court has described that surcharge as mandatory. *See State v. Hill*, 2016 WI App 29, ¶ 27, 368 Wis. 2d 243, 878 N.W.2d 709 ("the circuit court was required under the new law to impose a $250 DNA surcharge"); *State v. Scruggs*, 2015 WI App 88, ¶ 1, 365 Wis. 2d 568, 872 N.W.2d 146 (review granted) ("At the time Scruggs committed the crime, the imposition of a $250 DNA surcharge for that offense was subject to the court's discretion; however, by the time she was convicted and sentenced, the legislature had made the $250 DNA surcharge mandatory for all felony convictions."). *State v. Elward*, 2015 WI App 51, ¶ 2, 363 Wis. 2d 628, 866 N.W.2d 756 (noting that "circuit courts were mandated to impose the surcharge" under the amended statute); *State v. Radaj*, 2015 WI App 50, ¶ 1, 363 Wis. 2d 633, 866 N.W.2d 758 ("the revised statute provides for a mandatory surcharge in the amount of $250 per felony conviction"). Indeed, the change from a discretionary surcharge to a mandatory surcharge was the cornerstone of the argument that retrospectively applying the amended statute created an ex post facto violation. *See, e.g., Scruggs*, 365 Wis. 2d 568, ¶ 1.

This Court could not adopt Cox's proposed statutory interpretation without modifying or withdrawing the language in these published cases that characterizes the DNA surcharge as mandatory. But this Court lacks the authority to do that. *See Cook v. Cook,* 208 Wis. 2d 166, ¶ 55, 560 N.W.2d 246 (1997) ("the court of appeals may not overrule, modify or withdraw language from a previously published decision of

the court of appeals"). On this basis alone, this Court should reject Cox's statutory interpretation argument.

2. "Generally, 'the word "shall" is presumed mandatory when it appears in a statute.'" *Bank of N.Y. Mellon v. Carson*, 2015 WI 15, ¶ 21, 361 Wis. 2d 23, 859 N.W.2d 422 (quoted source omitted). As Cox correctly notes, "the legislature's use of the word 'shall' is not governed by a per se rule" and "'[s]hall' will be construed as directory if necessary to carry out the intent of the legislature." *Id.* ¶ 22 (quoted source and some internal quotation marks omitted). But that was not the Legislature's intent here.

A comparison of the prior and current versions of the DNA surcharge statute leaves no doubt that the legislature intended that "shall" in the current statute should be construed as mandatory. The previous version of the statute provided:

> **(1g)** Except as provided in sub. (1r), if a court imposes a sentence or places a person on probation for a felony conviction, *the court may impose* a deoxyribonucleic acid analysis surcharge of $250.
>
> **(1r)** If a court imposes a sentence or places a person on probation for a violation of s. 940.225, 948.02(1) or (2), 948.025, [or] 948.085, *the court shall impose* a deoxyribonucleic acid analysis surcharge of $250.

Wis. Stat. § 973.046(1g), (1r) (2011–12) (emphasis added).

The 2013 legislation repealed sub. (1g) and amended sub. (1r). *See* 2013 Wis. Act 20, §§ 2353–2355. As amended, the statute now 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.

Wis. Stat. § 973.046(1r) (2015–16) (emphasis added).

The 2013 amendment replaced statutory language that said that "the court may impose" a DNA surcharge on a person convicted of a non-sex offense felony with statutory language that says that "the court shall impose" a DNA surcharge on all felony convictions. The Legislature's replacement of "may" with "shall" is compelling evidence that the Legislature intended "shall" in the amended statute to be mandatory rather than directory.

Cox acknowledges that "[u]nder 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" and that "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." (Cox's Br. 7.) But he does not explain why, given the Legislature's decision to the change the statutory language from "may" to "shall," the Legislature intended "shall" to be directory. Under Cox's proposed interpretation of the statute, "shall" still means "may" and the Legislature's change of "may" to "shall" had no effect.

3. Cox invokes the statutory interpretation principle 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). He notes that when the Legislature amended the DNA surcharge statute, it added language to the Victim Witness

Surcharge statute stating that "[a] surcharge imposed under this subsection may not be waived, reduced, or forgiven for any reason." Wis. Stat. § 973.045(1). The fact that the legislature did not include similar language in the DNA surcharge statute, he contends, "demonstrates that the Legislature intended for circuit courts to have the authority to waive the DNA surcharge." (Cox's Br. 7.)

That argument would have more force if the original version of the DNA surcharge statute stated that the court "shall" impose the surcharge and the legislature left that language intact. But because the Legislature changed the statutory language from "may impose" to "shall impose," it did not have to add "and we really mean it" to convey its intent that the amended statute made imposition of the DNA surcharge mandatory.

II. The circuit court's unauthorized oral pronouncement does not trump the written judgment.

Cox also argues that because the sentencing court unambiguously waived the DNA surcharge when it pronounced sentence, that oral pronouncement controls. He relies on the well-established principle when there is a conflict between a court's oral pronouncement at sentencing and the judgment of conviction, "the circuit court's unambiguous oral pronouncement of sentence trumps the written judgment of conviction." *State v. Prihoda*, 2000 WI 123, ¶ 15, 239 Wis. 2d 244, 618 N.W.2d 857.

But it makes no sense to apply that principle when the unambiguous oral pronouncement is not just unauthorized by law but is contrary to the governing statute. "The fashioning of a criminal disposition is not an exercise of broad, inherent court powers." *State v. Horn*, 226 Wis. 2d 637, 646, 594 N.W.2d 772 (1999) (quoted source omitted). "It is for the

legislature to prescribe the punishment for a particular crime and it is the duty of the court to impose that punishment; if the authority to fashion a particular criminal disposition exists, it must derive from the statutes." *Id*. For the reasons discussed in the previous section of this brief, the circuit court in this case had no authority to waive the DNA surcharge.

The Second Circuit addressed a similar argument in *United States v. Pagan*, 785 F.2d 378 (2nd Cir. 1986). A federal statute, 18 U.S.C. § 3013, imposed a $50 special assessment per felony conviction. *See Pagan*, 785 F.2d at 379–80. Pagan was convicted of two counts, but at sentencing the court imposed the assessment only on one of the counts. *See id*. at 380. The written judgment imposed two assessments, one on each of the counts. *See id*.

Pagan argued that the imposition of the second assessment was invalid because it was a variance from the orally pronounced sentence. *See id*. The Second Circuit concluded that the written judgment controlled, for two reasons.

First, the court concluded that the written judgment could be construed as a clarification of an ambiguous sentence. The court agreed that when a variance exists, the general rule is that the oral sentence controls. *See id*. But, the court concluded, the district court's oral pronouncement regarding special assessments was ambiguous and "[i]t was not improper for the court to resolve that ambiguity in the judgment by clearly imposing special assessments as to both counts as required by section 3013." *Id*.

Second, the court held that the judgment also controlled as a correction of an illegal sentence. The court reasoned that "because the imposition of special assessments under section 3013 was mandatory, a sentence lacking such an assessment

would have been illegal." *Id*. And, the court said, "[i]t is well established that a trial court has the power to correct an illegal sentence." *Id*. "Thus, whether we characterize it as a clarification or a correction of the oral sentence, the district court's judgment here was proper." *Id*. at 381. In other words, even if the district court had unambiguously imposed only a single assessment in its oral pronouncement, the resulting sentence would have been illegal and that illegal sentence would not have trumped the legal sentence set forth in the written judgment.

In this case, unlike *Pagan*, the sentencing court's statement regarding the surcharge was unambiguous. But, as in *Pagan*, the court's failure to impose a mandatory surcharge rendered the oral pronouncement an illegal sentence. And just as federal trial courts have the power to correct illegal sentences, Wisconsin circuit courts have the power to correct an illegal sentence at any time. *See State v. Stenklyft*, 2005 WI 71, ¶ 60, 281 Wis. 2d 484, 697 N.W.2d 769.

"A sentencing proceeding is not a game, and when a trial judge mistakenly fashions a criminal disposition that is not authorized in the law, the result should not be a windfall to the defendant." *Grobarchik v. State*, 102 Wis. 2d 461, 471, 307 N.W.2d 170 (1981). The circuit court's unauthorized waiver of the mandatory DNA surcharge should not result in a windfall to Cox.

CONCLUSION

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

Dated this 31st day of January, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2209 words.

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JEFFREY J. KASSEL
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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 January, 2017.

_____
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