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STATE OF WISCONSIN

C O U R T O F A P P E A L S

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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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.

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

Put simply: removing a court's discretion to choose whether to impose a DNA surcharge in the first place is different than removing a court's authority to ever waive it.

The State's response rests on the idea that these principles are one in the same: that because the Legislature replaced a DNA surcharge statute which authorized a circuit court to decide whether to impose the surcharge in the first place with a statute that says that a surcharge "shall" be imposed in all cases, that a circuit court now lacks authority to *ever* waive the DNA surcharge. But the Legislature's change does not compel this conclusion.

Indeed, the Legislature elsewhere treats the matter of a requirement to impose a surcharge and the matter of a court's authority to waive the surcharge as different. Take, for example, the domestic abuse surcharge set forth in Wisconsin Statute § 973.055. The statute provides that if a court sentences a person for particular offenses, and the defendant and victim share one of the listed relationships, "the court *shall* impose a domestic abuse surcharge". Wis. Stat. § 973.055(1)(emphasis added).

Under the State's rationale here, the use of the word "shall" (as opposed to "may") in the domestic abuse surcharge statute would suggest the court would not have authority to waive it—ever. However, the domestic abuse surcharge statute notes that "[a] court may waive part or all of the domestic abuse surcharge under this section if it determines that the imposition of the full surcharge would have a negative impact on the offender's family." Wis. Stat. § 973.055(4).

Now, perhaps the State would respond and say that the inclusion of this waiver language in the domestic abuse surcharge statute—which is not found in the DNA surcharge statute—would suggest that the Legislature did not intend to allow for the waiver of the DNA surcharge.

But such an argument would again lead us back to a comparison with the victim witness surcharge statute: the Legislature provides certain situations where a court may find waiver of the domestic abuse surcharge appropriate, explicitly prohibits waiver of the victim witness surcharge "for any reason," and—in the same act in which it prohibited waiver of the victim witness surcharge—changed the DNA surcharge statute but included no explicit waiver prohibition. (*Compare* Wis. Stat. § 973.055 *with* Wis. Stat. § 973.045 *and* Wis. Stat. § 973.046).

The Legislature's decision to include the language in the victim witness surcharge prohibiting waiver, (and its corresponding decision *not* to include this language in the new DNA surcharge statute) reflects that it did not intend to deprive a circuit court of the authority to ever waive the DNA surcharge.

Indeed, if use of the word "shall"—without an explicit discussion of situations where waiver may be appropriate—was all that the Legislature required to mandate that a court

lacks all authority to waive a surcharge, then the Legislature's explicit language prohibiting the waiver of the victim witness surcharge would all be surplusage. *See* ***State ex rel Kalal v. Circuit Ct. for Dane Cty.,*** 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 (courts interpret statutory language to give reasonable effect to every word, to avoid surplusage).

The State's only response to Mr. Cox's central statutory interpretation argument (a comparison with the language found in the victim witness surcharge statute) is that it would "have more force" if the Legislature had not already been changing the DNA surcharge statute from "may impose" to "shall impose". (Response at 6). But again, implicit in this argument is the incorrect conclusion that the Legislature's decision to change the DNA surcharge—from a default that the surcharge will not be imposed unless the court decides otherwise to a default that it will be imposed—requires that the Legislature intended the circuit court to lose all authority to waive it.

Similarly, the State correctly notes that, in a recent series of cases, this Court has addressed ex post facto challenges to the retrospective imposition of the new DNA surcharge statute. (Response at 3-4); *see also* ***State v. Elward***, 2015 WI App 51, 363 Wis. 2d 628, 866 N.W.2d 756; ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758; ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146.[1]

The State is further correct that in evaluating the ex post facto challenges, this Court referred to the new DNA surcharge as "mandatory", in contrast with the prior version

[1] The Wisconsin Supreme Court granted Ms. Scruggs' petition for review; the Wisconsin Supreme Court has yet to issue a decision. *See* Wisconsin Supreme Court and Court of Appeals Case Access, available online, ***State v. Tabitha A. Scruggs***, 2014AP002981-CR.

of the statute where the surcharge was "discretionary". *See* ***Elward***, 2015 WI App 51, ¶ 1 ("we must decide whether a mandatory $200 DNA surcharge imposed on misdemeanants is an unconstitutional ex post facto violation…"); ***Radaj***, 2015 WI App 50, ¶ 5 ("[u]nder the prior law, Radaj would have been subject to a discretionary $250 DNA surcharge…[u]nder the new law, given the number of Radaj's felony convictions, there was a mandatory $1000 DNA surcharge"); ***Scruggs***, 2015 WI App 88, ¶ 3 ("…the change in the DNA surcharge from discretionary to mandatory…").

But to hold that a circuit court has authority to waive the DNA surcharge would not—as the State suggests—require this Court to overrule the rationales of those cases. Again, the Legislature's change in the DNA surcharge statute does not automatically in turn mean that circuit courts have now lost all authority to ever waive what is otherwise a "mandatory" surcharge.

Ultimately, the "principal objective of statutory interpretation is to ascertain and give effect to the intent of the legislature." ***State v. Szulczewski***, 216 Wis. 2d 495, 503-504, 574 N.W.2d 660 (1998). Here, the language of the DNA surcharge statute—when compared with the language included in the similarly-structured victim witness surcharge statute—reflects that the Legislature did not intend to prohibit a circuit court from having any authority to ever waive the DNA surcharge.

But insofar as this Court finds the statutory language to be ambiguous, both (1) the "broad authority" Wisconsin law generally gives circuit courts at sentencing, and (2) the rule of lenity further support the conclusion that a circuit court has the authority to waive the DNA surcharge. *See* ***State v. Douglas***, 2013 WI App 52, ¶ 20, 347 Wis. 2d 407, 830 N.W.2d 126 (discussing a circuit court's broad authority at

sentencing); *see also* ***State v. Cole***, 2003 WI 59, 262 Wis. 2d 167, 663 N.W.2d 700 ("when there is doubt as to the meaning of a criminal statute, a court should apply the rule of lenity and interpret the statute in favor of the accused").

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

The State acknowledges that the circuit court's pronouncement at sentencing waiving the DNA surcharge was unambiguous. (Response at 8). The State here simply argues that an unambiguous oral pronouncement will not trump a written judgment where the oral pronouncement was illegal. (Response at 6-8). Mr. Cox does not disagree here.

Thus, if this Court finds that the circuit court did *not* have authority to waive the DNA surcharge, then the circuit court's oral pronouncement at sentencing will not trump the law mandating its imposition. If, on the other hand, as Mr. Cox argues, this Court finds that the circuit court *did* have authority to waive the DNA surcharge, then its unambiguous oral pronouncement trumps the error in the written judgment and the judgment must be amended to vacate the DNA surcharge.

CONCLUSION

For these reasons and those set forth in his Initial Brief, 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 14th day of February, 2017.

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 1,382 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 14th day of February, 2017.

Signed:

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