

RECEIVED

09-26-2019

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

2019AP000432-CR

WISCONSIN COURT OF APPEALS
DISTRICT IV
APPEAL FROM THE CIRCUIT COURT
OF DANE COUNTY
HONORABLE WILLIAM E. HANRAHAN

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,
V.
AMANUEL A. AYELE,
DEFENDANT-APPELLANT.

REPLY BRIEF AND ARGUMENT OF APPELLANT

Michael J. Herbert
Wisconsin State Bar No. 1059100
10 Daystar Ct., Ste. C
Madison, Wisconsin 53704
(608) 249-1211
Attorney for Amanuel Ayele

TABLE OF CONTENTS

Table of Authorities Cited.....	1
---------------------------------	---

Argument

I. Mr. Ayele disagrees with the state’s position that the court may include a reference to “domestic abuse assessments” on the judgment of conviction when the court waives the domestic abuse surcharge.....	2
---	---

Conclusion	7
------------------	---

Electronic Filing Certification pursuant to Wis. Stats. §809.19(12)(f).....	8
---	---

Certification of Brief Compliance with Wis. Stats. § 809.19(8)(b) and (c).....	8
--	---

Table of Authorities Cited

<u>Koll v. Department of Justice</u> , 2009 WI App 74, 317 Wis. 2d 753, 769 N.W.2d 69 (Ct.App.2009).....	2,3
--	-----

<u>State v. Perry</u> , 136 Wis.2d 92, 401 N.W.2d 748 (1987).....	4
---	---

<u>State v. Prihoda</u> , 2000 WI 123, 239 Wis. 2d 244, 618 N.W.2d 857 (2000).....	5
--	---

<u>Wis. Stats. §973.055</u>	4,6
-----------------------------------	-----

ARGUMENT

- I. Mr. Ayele disagrees with the state's position that the court may include a reference to "domestic abuse assessments" on the judgment of conviction when the court waives the domestic abuse surcharge

Mr. Ayele disagrees with the state's position that the court may include the reference to "domestic abuse assessments" on a judgment of conviction when the court waives the domestic abuse surcharge.

In its written order and decision, the circuit court referenced Koll v. Department of Justice, 2009 WI App 74, 317 Wis. 2d 753, 769 N.W.2d 69 (Ct.App.2009), describing it as a case that "takes direct aim at those who would seek to avoid the collateral consequences of a conviction for a crime of domestic abuse." (DOC 61:2). Relying on Koll, the circuit court's order stated that if Mr. Ayele did not want to suffer the collateral consequences of a conviction for a crime of domestic abuse, he should not commit crimes of domestic abuse. (DOC 61:2).

The state submits that Koll is not relevant to the present matter. (State's Brief p.3). Mr. Ayele essentially

agrees – Koll does not support the circuit court’s action to include the reference to ‘domestic abuse assessments’ on the judgment of conviction despite waiving the domestic abuse assessment at the plea/sentencing hearing. Unlike the present case, Koll involved the application of federal law to the underlying facts in a determination of whether the petitioner-respondent could obtain a handgun permit. The present case raises a different issue – whether the circuit court can include on a judgment of conviction language referring to the domestic abuse assessment after specifically waiving the assessment.

To the extent that Koll sheds any light on the present case, it comes in the form of the concurring opinion, which noted that courts are not empowered to label crimes in a certain manner so as to avoid the attachment of collateral consequences. Koll v. Department of Justice, 2009 WI App 74, ¶15, 317 Wis. 2d 753, 769 N.W.2d 69 (Ct.App 2009)(P.J. Anderson, concurring opinion). Mr. Ayele simply notes that the corollary of that argument would suggest that a court is not empowered to label a crime so as to ensure that collateral consequences attach.

The Koll concurrence also observed that it is the function of the legislature “to decide if different types of disorderly conduct should be treated differently.” Koll

v. Department of Justice, 2009 WI App 74, ¶15, 317 Wis. 2d 753, 769 N.W.2d 69 (Ct.App 2009)(P.J. Anderson, concurring opinion). The Wisconsin legislature has decided that domestic related disorderly conduct is treated differently by virtue of a monetary assessment.¹ The legislature has not created a distinct specific offense of domestic abuse or domestic disorderly conduct that would appear on a judgment of conviction independent of the application of the surcharge set forth in Wis. Stats. §973.055.

The state does not provide any authority for the proposition that the court may include the ‘domestic abuse assessment’ language on the judgment of conviction after waiving the application of the monetary assessment. Since the assessment is nothing more than a monetary surcharge, there is no basis for the language to appear on the judgment of conviction when the court waives the surcharge, regardless of whether the underlying facts required its initial application.

Contrary to the state’s argument, there is authority that supports Mr. Ayele’s argument that the

¹ In addition, the legislature has provided that individuals who have been assessed that surcharge on multiple occasions within a specified period of time may have their sentences enhanced. See Wis. Stats. §939.621. However, that provision is not applicable to the present case. All references to Wisconsin Statutes are to the 2017-2018 Edition.

court can and should correct an erroneous judgment of conviction. See for example, State v. Perry, 136 Wis.2d 92, 114-115, 401 N.W.2d 748 (1987)(the circuit court's oral pronouncement at the plea and sentencing hearing is controlling); State v. Prihoda, 2000 WI 123, ¶17, ¶22, 239 Wis. 2d 244, 618 N.W.2d 857 (2000)(a court has the power to correct clerical errors on a judgment of conviction at any time; that authority also extends beyond clerical errors).

At the plea and sentencing hearing, the court announced that it was waiving the surcharge. (DOC 70:16). The court made no announcement that it would nonetheless include the domestic abuse assessment language on the judgment of conviction. Under the law in Wisconsin, the court's oral pronouncement at the plea and sentencing hearing controls. Since the circuit court's oral pronouncement waived the assessment/surcharge, there is no basis for its reference on the judgment of conviction.

In a hypothetical case in which the court accepts a plea agreement that calls for the state to dismiss the habitual criminal penalty enhancer, would the circuit court have the authority to nonetheless include a reference to 'repeater' or 'habitual criminality' on the judgment of conviction? Although the domestic abuse assessment refers to a surcharge and the habitual

criminal penalty enhancer refers to a status, the same question arises – does the court have the authority to include a reference on the judgment of conviction to something – a surcharge or status – that has been waived or dismissed? Mr. Ayele submits that the answer is that the circuit court does not have that authority.

In its conclusion, the state appears to suggest that the reference on the judgment of conviction is appropriate, despite the court waiving the surcharge, because the underlying facts satisfy the statutory criteria for inclusion on the judgment of conviction. (State’s Brief p.5). However, Wis. Stats. §973.055, does not appear to contemplate a case in which the surcharge is waived but the court includes the domestic abuse assessment language on the judgment of conviction.

Mr. Ayele respectfully submits that the judgment of conviction in the present case is erroneous in that it contains references to the waived domestic abuse assessment, and that the circuit court has the authority to correct the error by removing/striking that language. Since there is no statutory or caselaw basis for the inclusion of the waived domestic abuse assessment on the judgment of conviction, the language must be stricken.

CONCLUSION AND REQUEST FOR RELIEF

Mr. Ayele respectfully requests that this court reverse the denial of his postconviction motion and order the circuit court to amend the judgment of conviction to remove all references to the domestic abuse assessment, consistent with the court's oral pronouncement at the plea and sentencing hearing.

Dated this 26th day of September, 2019.

Respectfully submitted,

Michael J. Herbert
Wisconsin State Bar No. 1059100
10 Daystar Ct., Ste. C
Madison, Wisconsin 53704
(608) 249-1211
Attorney for Amanuel Ayele

Electronic Filing Certification pursuant to Wis. Stats. §809.19(12)(f).

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Certification of Brief Compliance with Wis. Stats. § 809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rule contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1059 words.
