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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2020AP000616-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY M. SCHMIDT,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in Walworth County Circuit Court, the Honorable Phillip A. Koss Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov
Attorney for Defendant-Appellant

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ISSUES PRESENTED

1) Is the child pornography surcharge a "punishment" that must be explained to the defendant during a plea colloquy?

   The circuit court concluded that the surcharge was not a punishment and that it was not required to explain its application to Mr. Schmidt before accepting his pleas. (30:2); (App. 106).

2) Did Mr. Schmidt adequately allege that he did not understand how the child pornography surcharge would be applied to his case, thereby triggering an evidentiary hearing on his motion for plea withdrawal?

   The circuit court held that, even if it was a defect for the child pornography surcharge to be omitted from the colloquy, Mr. Schmidt had an adequate understanding of the surcharge's function such that his plea was still knowing, intelligent, and voluntary. (30:4); (App. 108).

3) In the alternative, was the circuit court empowered to impose a child pornography surcharge for dismissed and read-in charges?

   The circuit court concluded that the plain language of the statute allowed it to impose a surcharge on read-in offenses. (30:5); (App. 109).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is warranted as this case involves two important legal questions relating to the child pornography surcharge. Oral argument is not requested given that the facts are straightforward and uncomplicated.

STATEMENT OF THE CASE AND FACTS

The State filed an information alleging fourteen counts of possession of child pornography contrary to Wis. Stat. § 948.12(1m) and (3)(a) as well as a single charge of failure to comply with sex offender registry requirements contrary to Wis. Stat. § 301.45(6)(a)1. (13).

Mr. Schmidt resolved his case with a plea agreement. (18:1). According to the terms of that agreement, Mr. Schmidt pleaded guilty to six counts of possessing child pornography. (39:2). The remaining charges in the information were dismissed and read-in. (39:2). Thereafter, the circuit court sentenced Mr. Schmidt to a term of imprisonment. (27:1); (App. 101). The court also imposed $7,000 in child pornography surcharges, or $500 for each child pornography count in the information. (27:1); (App. 101).

Mr. Schmidt filed a postconviction motion alleging that he was entitled to plea withdrawal because the circuit court failed to advise him about a potential punishment, the child pornography

surcharge, prior to pleading guilty. (42:3). In addition, and in the alternative, Mr. Schmidt argued that the circuit court could not impose a child pornography surcharge for read-in counts. (42:8). He asked the circuit court to vacate the surcharges imposed for dismissed and read-in charges of possession of child pornography. (42:8).

The circuit court denied the motion in a written order, without a hearing. (30:5); (App. 109). With respect to the asserted plea colloquy defect, the circuit court applied the factors in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) and concluded that the child pornography surcharge is not punitive in effect. (30:2); (App. 106).[1] Because the court concluded that the child pornography surcharge is not a "punishment," the court found that it was under no duty to advise Mr. Schmidt about its existence during the plea colloquy. (30:2); (App. 106). In addition, the court also made a finding that Mr. Schmidt was "aware he was subject to the child pornography surcharge" and therefore concluded that Mr. Schmidt was not entitled to a hearing on his motion to withdraw the plea. (30:4): (App. 108).

As to the secondary argument—that the child pornography surcharge cannot be applied to read-in offenses—the circuit court flatly rejected Mr.

[1] Mr. Schmidt did not argue the statute was punitive in intent.

Schmidt's statutory construction argument due to its reading of the surcharge statute. (30:5); (App. 109).

This appeal follows. (31).

ARGUMENT

I. The child pornography surcharge is a punishment which a court is required to explain to the defendant during the plea colloquy.

A. Legal principles and standard of review.

Before accepting a plea, the circuit court must establish that the defendant understands the range of punishments to which he is subject by the entry of his plea. *State v. Brown*, 2006 WI 100, ¶ 35, 293 Wis. 2d 594, 716 N.W.2d 906. The general practice in this regard is to advise the defendant of the minimum and maximum penalties associated with a plea. *State v. Chamblis*, 2015 WI 53, ¶ 24, 362 Wis. 2d 370, 864 N.W.2d 806.

In determining whether a particular consequence is a constitutionally cognizable punishment that must be communicated to the defendant, this Court must utilize the "intent-effects" test. *State v. Muldrow*, 2018 WI 52, ¶ 30, 381 Wis. 2d 492, 912 N.W.2d 74.

Under that legal rubric, this Court must first ask whether the child pornography surcharge statute evinces a punitive intent. *Id.*, ¶ 31. This Court must

determine whether the legislature "expressly or impliedly indicated" that the statute is intended to function as a penalty or as a "civil remedy." *State v. Scruggs*, 2017 WI 15, ¶ 18, 373 Wis. 2d 312, 891 N.W.2d 786.

Here, Mr. Schmidt concedes that the statute does not plainly evince a punitive intent. While the statute's harsh impact on convicted offenders is apparent from the statutory language, it is also clear that these monies are being used for a regulatory purpose—the funding of investigations into child pornography offenses, among other uses. *See* Wis. Stat. § 20.455(5)(gj). Thus, Mr. Schmidt does not have evidence to support an argument that the statute is therefore punitive in intent.

However, regardless of the statute's intent, this Court must still ask whether the statute is punitive in effect. *Muldrow*, 2018 WI 52, ¶ 49. This Court does so with reference to the factors outlined in *Mendoza-Martinez*, 372 U.S. at 168 : whether (1) it imposes an affirmative disability or restraint; (2) it has historically been regarded as punishment; (3) it comes into play only on a finding of scienter; (4) it promotes the traditional aims of punishment, retribution and deterrence; (5) the behavior to which it applies is already a crime; (6) it is rationally connected to an alternative purpose; and (7) it appears excessive in relation to the alternative purpose. However, these factors are "neither exhaustive nor dispositive." *Smith v. Doe*, 538 U.S. 84, 97 (2003).

In determining whether the surcharge is punitive in effect and thus a punishment that must be communicated to the defendant during a plea colloquy, this Court applies *de novo* review. *Muldrow*, 2018 WI 52, ¶ 25.

B. The child pornography surcharge is punitive in effect.

Because this Court must examine the statute on its face and not as applied to Mr. Schmidt, *Hudson v. United States*, 522 U.S. 93, 100 (1997), it is worth briefly considering the scope of the child pornography surcharge. Here, the controlling statute reads as follows:

> If a court imposes a sentence or places a person on probation for a crime under s. 948.05 or 948.12 and the person was at least 18 years of age when the crime was committed, the court shall impose a child pornography surcharge of $500 for each image or each copy of an image associated with the crime. The court shall determine the number of images or copies of images associated with the crime by a preponderance of the evidence and without a jury.

Wis. Stat. § 973.042(2).

The statutory definition of an "image" includes "a video recording, a visual representation, a positive or negative image on exposed film, and data representing a visual image." Wis. Stat. § 973.042(1). However, the operative phrase creating financial

liability—whether an image is "associated with the crime"—is not further defined. Instead, the statute delegates that mixed question of law and fact to the sentencing court. Wis. Stat. § 973.042(2).

"Associated with the crime" is a superficially broad phrase that, depending on the reading assigned, can be construed to place convicted defendants on the hook for staggering financial responsibilities. For example, according to the presentence investigation in this case, there were at least 4,500 images recovered from Mr. Schmidt's phone "that were described as erotica and child pornography." (22:5). According to Mr. Schmidt's girlfriend, who ultimately cooperated with the investigation, she deleted an additional 4,000 images of child pornography. (22:5).

If each of these images is "associated with" the crime, then that means a convicted offender like Mr. Schmidt is hypothetically responsible for paying thousands of surcharges: If the $500 surcharge is applied to each image discovered by law enforcement, that means a convicted offender like Mr. Schmidt may have a maximum exposure of $2,250,000 in surcharges. If the sentencing court accepts the girlfriend's testimony as credible, then the tally increases by another two million dollars. Notably, this does not reflect other images referenced in the presentence investigation that could have been recovered from other electronic devices. (22:5-6).

And, because the law also forbids *viewing* images of child pornography over the internet, *see State v. Mercer*, 2010 WI App 47, ¶ 1, 324 Wis. 2d 506, 782 N.W.2d 125, the total surcharge could be exponentially increased even further if diligent law enforcement were to present the circuit court with forensic reports from a convicted offender's computer or phone. If, for example, someone like Mr. Schmidt clicked through two or three preview "thumbnails" before opting to download specific content, then the total surcharge may need to be doubled or even tripled.

All of this is to point out that the statute has the potential of imposing crippling, potentially inescapable, financial hardship on a convicted offender. Thus, when the statute's structure is considered, several of the enumerated factors counsel in favor of a finding of punitive effect.

First, the high level of financial harm which can be meted out to a convicted offender imposes an affirmative disability or restraint, *see Scruggs*, 2017 WI 15, ¶ 41, especially in context of the other severe consequences which attach to a child pornography conviction.

In asking whether this surcharge imposes an affirmative disability or restraint, this Court must ask "how the effects of the [statute] are felt by those subject to it." *Doe*, 538 U.S at 100. This statute takes direct aim at convicted criminals, who by virtue of mandatory minimum sentencing laws, will always

spend at least several years behind bars. Wis. Stat. § 939.617(1). In addition to the child pornography surcharge, a person convicted of possessing child pornography is also required to repay a baffling array of other surcharges and court costs on each separate conviction, including a $163 clerk fee, Wis. Stat. § 814.60(1), a $13 crime laboratory surcharge, Wis. Stat. § 165.755; a $92 victim/witness surcharge, Wis. Stat. § 973.045(1); and a $250 DNA surcharge, Wis. Stat. § 973.046(1r)(a).

These onerous financial responsibilities are paired with further consequences that harshly limit the defendant's ability to reintegrate into society upon release, including sex offender registration requirements, the vast body of civil regulations governing multiple aspects of the defendant's life, stringent terms of community supervision, and in some cases, civil commitment. In the context of these challenges, requiring a convicted offender to also be responsible for thousands—perhaps tens of thousands, if not millions—of dollars in child pornography surcharges imposes harsh economic hardship on a class of citizens that is already subjected to other significant sanctions which constrain their ability to become productive, financially secure, members of society. These financial consequences therefore take on the character of a "punishment," especially when one considers that the vast scope of the potential surcharge will likely create lifetime financial liabilities.

Second, the extreme nature of the surcharge, in terms of these financial liabilities, clearly promotes the traditional goals of retribution and deterrence. *See Scruggs*, 2017 WI 15, ¶ 41. When analyzing the retributive or deterrent effect of monetary sanctions, courts assess the absolute amount of the fee, and its significance compared with the other elements of the defendant's sentence. *Id.*, ¶ 45. As noted above, the amount of the fee is extreme and is directly connected to the number of individual moral transgressions or criminal acts (in terms of number of images possessed) the defendant has committed. The statute then attaches a harsh financial penalty for each image associated with the defendant's crime. The overall effect is a harshly escalating financial scheme that can swiftly expose a defendant to crippling financial obligations. The statute is therefore calibrated to maximize financial hardship in direct relationship to how many specific acts of child pornography possession, on a granular level, the defendant committed. Because the surcharge structure has the potential to swiftly escalate into large values, this means that the most aggravated offenders will often face the most severe financial penalties. This directly supports a finding of punitive effect.

Of course, these astronomical values also relate to two other factors—whether the surcharge is rationally connected to an alternative purpose and whether it is excessive in relation to those non-punitive aims. *See Scruggs*, 2017 WI 15, ¶ 41. Here, the money collected is directed to three objectives: the

funding of investigations into child exploitation, the funding of child pornography investigations, and grant funding for organizations providing services to survivors of sexual assault. Wis. Stat. § 20.455(5)(gj). While it may be "rational," at least in the abstract, for convicted offenders to repay the costs of investigating their criminality, here, the surcharge is excessive in relation to those aims. As stated above, a plain reading of the statute requires an individual offender to pay thousands, and perhaps millions, of dollars in an individual case. Simply put, there is not a rational connection between the large amounts of revenue that may be collected pursuant to the statute and those objectives the legislature has funded with those monies.

Finally, this surcharge attaches to conduct that is already a crime, another factor meriting consideration. *Scruggs*, 2017 WI 15, ¶ 41.

Thus, a careful consideration of the facial characteristics of the statute, in conjunction with the requisite multi-factor test, shows that the surcharge has a punitive effect. Accordingly, it is a "punishment" and must be accurately explained to a defendant before obtaining a valid plea of guilty or no contest.

C. Mr. Schmidt was entitled to a hearing on his plea withdrawal motion.

1. Legal standard applying to motions alleging a defective plea colloquy.

Failure to engage the defendant in a proper colloquy prior to accepting a plea of guilty or no contest will give rise to plea withdrawal when the identified defect is linked to an actual misunderstanding on the defendant's part. In order to warrant a hearing, the defendant must do two things: 1) identify a defect in the court's colloquy and 2) allege that they "did not know or understand the information that should have been provided at the plea colloquy." *State v. Howell*, 2007 WI 75, ¶ 27, 301 Wis. 2d 350, 734 N.W.2d 48. In making such a claim, the pleading requirements are intentionally "relaxed" for the simple reason that "the circuit court bears the responsibility of preventing failures in the plea colloquy." *Id*. ¶ 28.

In determining whether Mr. Schmidt was entitled to a hearing on his plea withdrawal motion, this Court applies *de novo* review. *Id*., ¶ 30.

2. The court failed to discuss the child pornography surcharge during the colloquy.

Because the child pornography surcharge is a penalty, as set forth above, the circuit court needed to inform Mr. Schmidt about it during the plea colloquy. Here, the record demonstrates that the court never discussed the child pornography surcharge on the record. Mr. Schmidt made this allegation in his postconviction motion. (42:8). Accordingly, his motion satisfied the first prong of the controlling legal framework.

3. Mr. Schmidt adequately alleged he did not understand how the child pornography surcharge would apply to his case.

In this case, Mr. Schmidt has never claimed outright ignorance of the child pornography surcharge's existence. As the circuit court correctly concluded in its decision and order, Mr. Schmidt had a prior conviction for possession of child pornography and was assessed a single surcharge, relating to his single conviction, in that case. (30:3); (App. 107).

However, as set forth in the motion, Mr. Schmidt did not understand, prior to pleading guilty, that the surcharge could be applied to dismissed and read-in conduct, as ultimately occurred. (42:8). This distinction matters. If the surcharge is a punishment, the circuit court was obligated to ensure that Mr. Schmidt understood how it would be applied to his case, including any minimum or maximum amount that he would be required to pay—i.e., the "range of punishments to which he is subjecting himself by entering a plea." *Brown*, 2006 WI 100, ¶ 35. Understanding that one may receive $3,000 in surcharges is distinct from an understanding that this amount will be more than doubled, to $7,000.

Here, there is no proof to rebut Mr. Schmidt's claim that he did not understand this information. The circuit court's reliance on the inclusion of the child pornography surcharge statute in the presentence investigation, for example, obviously

fails to save the plea, as that information was only communicated *after* the plea colloquy occurred. (30:4); (App. 108). And, even if the text of the statute were given to Mr. Schmidt pre-plea, this still would not salvage the plea. While the circuit court concluded that it was not responsible for ensuring that Mr. Schmidt understood that the surcharge could be applied to read-in offenses (30:4); (App. 108), that assertion is at odds with the circuit court's general duty to ensure the defendant's actual understanding of the range of penalties prior to accepting a plea. *Brown*, 2006 WI 100, ¶ 35. Finally, any further questions as to Mr. Schmidt's credibility would be proper grounds for cross-examination at an evidentiary hearing and not a basis for denial of the motion on its face.

Thus, the circuit court erred in concluding that Mr. Schmidt was not entitled to a hearing. Accordingly, this Court should reverse and remand for an evidentiary hearing.

II. In addition and in the alternative, this Court should vacate the surcharge for the dismissed and read-in counts.[2]

A. Legal principles and standard of review.

[2] This issue is also before District I in *State v. Kuehn*, Appeal No. 2018AP2355-CR. That case was submitted on briefs as of November 5, 2019.

Whether the circuit court properly assessed the child pornography surcharges in this case requires interpretation of Wis. Stat. § 973.042(2), the child pornography surcharge statute. This is a question of law which is reviewed *de novo*. *State v. Lopez*, 2019 WI 101, ¶ 9, 389 Wis. 2d 156, 936 N.W.2d 135.

Statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, a reviewing court stops the inquiry there. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶¶ 44-45, 271 Wis. 2d 633, 681 N.W.2d 110.

B. The circuit court could not impose a child pornography surcharge for dismissed and read-in conduct.

The plain language of the child pornography surcharge statute specifies that a child pornography surcharge shall be imposed for each image associated with the crime if a court imposes a sentence or places a person on probation for a crime under s. 948.05 or 948.12. Wis. Stat. § 973.042(1). Here, the court only imposed a sentence on six counts, and accordingly, only six child pornography surcharges could be ordered. The remaining surcharges imposed on Mr. Schmidt's dismissed and read-in counts, for which he was not sentenced or placed on probation, should be vacated.

While the circuit court focused on the statutory language "for each image…associated with the crime" in concluding it could order the child pornography

surcharge for the dismissed and read-in counts, its interpretation ignores the language of the statute that specifically provides that a surcharge shall be imposed "*if* a court imposes a sentence or places a person on probation for a crime under s.948.05 or 948.12…." Wis. Stat. § 973.042(2) (emphasis added). That language would be rendered superfluous if the surcharge can be ordered on dismissed and read-in counts for which no sentence or probation was imposed. *See Lake City Corp. v. City of Mequon*, 207 Wis. 2d 155, 162, 558 N.W.2d 100 (1997) ("[I]t is a basic rule of statutory construction that effect is to be given to every word of a statute if possible, so that no portion of the statute is rendered superfluous.").

In this particular case, the six crimes for which Mr. Schmidt was sentenced correspond to six specified, individual images, as defined in Wis. Stat. § 973.042(1). (11:1-2).

An examination of the restitution statute is useful in this case, because the language of the child pornography surcharge statute differs in an important way from that in the restitution statute. Wis. Stat. § 973.20(2) allows for a restitution order "[i]f a crime considered at sentencing resulted in damage to or loss or destruction of property[.]" Wis. Stat. § 973.20(lg)(a) defines "crime considered at sentencing" as "any crime for which the defendant was convicted and any read-in crime." Subsection (b), in turn, defines "read-in crime." Notably, similar language is entirely absent from the child pornography surcharge statute. *See* Wis. Stat. §

973.042(2). Instead, the legislature only authorized the imposition of child pornography surcharges on those counts for which a sentence was imposed.

Under the plain language of the statute, the circuit court could only impose the child pornography surcharge for the six images associated with the six counts for which Mr. Schmidt was convicted and on which a sentence was imposed. *See Kalal*, 271 Wis. 2d 633, ¶¶ 44-5. Like it did in the restitution statute, here, the legislature could have chosen to define "associated with the crime" to specify that a surcharge could be assessed on dismissed and read-in counts, but it did not do so. *See Graziano v. Town of Long Lake*, 191 Wis. 2d 812, 822, 530 N.W.2d 55 (Ct. App. 1995) ("When interpreting the language of a statute, '[i]t is reasonable to presume that the legislature chose its terms carefully and precisely to express its meaning.'"). Therefore, because "a sentence" was only imposed on six counts, assessing the child pornography surcharge for each of Mr. Schmidt's dismissed and read-in counts was improper. Accordingly, this Court should vacate the remaining child pornography image surcharges for the dismissed and read-in counts.

CONCLUSION

Mr. Schmidt respectfully requests that, for the reasons outlined herein, this Court reverse and remand for an evidentiary hearing on his plea withdrawal claim. In addition and in the alternative, he asks the Court to vacate the child pornography surcharges imposed for the read-in charges.

Dated this 13th day of July, 2020.

Respectfully submitted,

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,516 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 13th day of July, 2020.

Signed:

Christopher P. August
Assistant State Public Defender

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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically 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 13th day of July, 2020.

Signed:

Christopher P. August
Assistant State Public Defender

APPENDIX

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