STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2020AP1949

STATE OF WISCONSIN ex rel.
DELOREAN BRYSON,

Petitioner-Appellant,

v.

CATHY JESS,

Respondent-Respondent.

APPEAL FROM A FINAL ORDER OF
THE DANE COUNTY CIRCUIT COURT,
THE HONORABLE DAVID CONWAY, PRESIDING

BRIEF OF RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

Attorneys for Respondent-
Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792
(608) 294-2907 (Fax)
kilpatricksc@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

Appellant DeLorean Bryson, an inmate in the custody of the Wisconsin Department of Corrections (the "Department"), complains that the Department is deducting funds at a rate of 50 percent from his inmate trust account to pay surcharges and court fees ordered by his criminal sentencing court. Bryson asserts that the Department has no authority to deduct any funds at all. Alternatively, he contends that any deduction rate would be limited to 25 percent.

Respondent Department Secretary disagreed and dismissed Bryson's inmate grievance, and the circuit court affirmed. The court concluded that the Department has statutory authority to deduct Bryson's funds to pay court-ordered financial surcharge and court fee obligations at a rate of 50 percent, although it ruled that the Department may only deduct at a rate of 25 percent for the crime victim and witness assistance surcharge due to an administrative rule. Bryson appealed but the Secretary did not.

This Court should affirm because the circuit court was correct, and Bryson has failed to articulate any convincing legal argument to the contrary.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does the Department have statutory authority to deduct Bryson's inmate trust account funds at a rate of 50 percent to pay certain court-ordered surcharges and court fees?

The circuit court answered yes.

This Court should answer yes.

2. Has Bryson conceded and forfeited issues based on his failures to address the circuit court holdings on appeal, to raise arguments below, and to develop arguments on appeal?

The circuit court did not address the issue presented.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the briefs, taken together, will fully present the issues and relevant legal authority.

Publication is not warranted. None of the criteria in Wis. Stat. § 809.23(1) apply here.

STATEMENT OF THE CASE

I. Nature of the case

This is an appeal of a certiorari action in which the circuit court denied in part, and granted in part, Bryson's petition challenging the Secretary's[1] denial of his inmate grievance. The Dane County Circuit Court[2] decided that the Department lawfully deducts 50 percent of Bryson's inmate

---

[1] Cathy Jess was the Secretary at the time of the filing of this certiorari action. However, Kevin A. Carr is now the Secretary. Because this action names Jess in her official capacity, Carr is substituted for Jess and the caption can be amended. *See* Wis. Stat. § 803.10(4)(a) ("When a public officer . . . is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the successor is automatically substituted as a party.").

[2] The Honorable Peter C. Anderson presided over the action at its inception. (*E.g.,* R. 5:2.) The Honorable David Conway, however, issued the court's opinion and final order. (R. 35.)

trust account funds to pay certain surcharges and court fees stemming from a criminal conviction, but it determined that the Department only had authority to deduct for collection of the crime victim and witness assistance surcharge at a 25 percent rate. (R. 35:7.) Only Bryson appeals.

II. Statement of facts and procedural history

A. Bryson's criminal conviction

On July 10, 2014, Bryson was convicted of 1st degree reckless homicide and being a felon in possession of a firearm. (R. 13:6: *State of Wisconsin v. Delorean Latrell Bryson*, No. 2013CF5740 (Wis. Cir. Ct. Milwaukee Cty. Sept. 30, 2014).) He was sentenced to consecutive prison sentences of 37 years for the reckless homicide count and 5 years for the firearm possession count. (R. 13:6.) For each count, he was ordered to "[p]ay DNA surcharge, all other applicable costs and any other surcharges and assessments. To be collected by DOC from 25% of prison funds and to convert to civil judgment upon release from Extended Supervision." (R. 13:6.) The crime victim and witness assistance surcharge was $184, the DNA surcharge was $500, the crime laboratories and drug law enforcement surcharges were $26, and court fees were $326. (R. 35:2 (circuit court decision taking judicial notice of Bryson's judgment of conviction and assessment report).)

B. Bryson's inmate grievance

Bryson is incarcerated at the Green Bay Correctional Institution. (*See* R. 13.) He filed an inmate grievance on June 1, 2018. (R. 13:4, 9.) He alleged that the Department was improperly deducting funds (including gifted monies) from his inmate trust account at a rate of 50 percent to pay court-ordered financial obligations. Bryson alleged that 2015 Wisconsin Act 355 was improperly being applied to him retroactively, and the Department was ignoring his judgment

of conviction which limited, he claimed, the deduction rate to 25 percent. (R. 13:4.)

The institution complaint examiner recommended dismissal, citing a restitution statute, Wis. Stat. § 973.20(11), and the warden agreed. (R. 13:11, 13.) Bryson filed an appeal. (R. 13:15.) The corrections complaint examiner (CCE) also recommended that Bryson's appeal be dismissed, but on different grounds. (R. 13:24–25.) The CCE determined that DAI Policy 309.45.02 applied and was supported by the Department's authority to deduct funds to be applied toward court-imposed financial obligations in laws in chapters 301, 302, and 973 of the Wisconsin Statutes. The CCE also rejected Bryson's argument that Wis. Stat. § 973.05(4)(b) restricted the Department's authority to deduct funds to a rate of 25 percent, contrary to the circuit court decision in *Kerby v. Litscher*, No. 2017CV1363 (Wis. Cir. Ct. Dane Cty. Jan. 18, 2018). The CCE noted that many other circuit courts have not followed the *Kerby* decision. (R. 13:24–25.) The Office of the Secretary accepted the CCE's dismissal recommendation. (R. 13:27.)

C. The circuit court proceedings

On September 12, 2018, Bryson filed a petition for writ of certiorari with the Dane County Circuit Court. (R. 6.) A writ was issued on February 11, 2019. (R. 12.) The Department filed the certified record on March 6, 2019. (R. 13.)

Shortly thereafter, because this certiorari action included a legal issue being considered by this Court in *Kerby v. Litscher*, Case No. 2018AP0284, the circuit court invited briefing on a stay. (R. 14.) After considering the positions of the parties (R. 15; 17), the court ordered a stay pending a decision by this Court in *Kerby* (R. 18). In April 2020, this Court dismissed the *Kerby* appeal as moot and did not address the merits. (R. 24.) As a result, the circuit court issued a briefing schedule on the merits of this case. (R. 26.)

After briefing (R. 31; 32; 34), the circuit court issued a written decision and final order on October 21, 2020 (R. 35). The court granted in part, and denied in part, Bryson's petition. (R. 35:11.) The court then reversed in part and remanded the matter to the Department for further review consistent with the opinion and order. (R. 35:11.)

The court first explained that, unlike many other Department deduction cases before it, this case is not about restitution, but rather only surcharges and court fees. (R. 35:2, 4–5.)

Next, the court tackled the issue of deductions for the surcharges. It performed a plain language analysis of the statutes governing the three surcharges at issue: Wis. Stat. §§ 165.755(6) (drug labs), 973.045(4) (crime victim and witness), and 973.046(4) (DNA). The court held that the language in each statute giving the Department the authority to "assess and collect" an amount of the inmate's prison funds allowed it to set the rate and deduct Bryson's funds. (R. 35:5–6.)

The circuit court then addressed the Department's deduction of Bryson's funds to pay court fees ordered by the sentencing court. It noted that this statute, Wis. Stat. § 814.60(1),[3] did not contain the "assess and collect" language or a reference to Department action. Rather, the court relied on Department authority from other statutes to set the rate at which it deducts an inmate's wages and gifted monies, namely Wis. Stat. §§ 301.31, 301.21(1), and 303.01(8)(b) for payment of court fees. The court was also persuaded that this Court's reasoning in a restitution case, *State ex rel. Markovic*

[3] Wisconsin Stat. § 814.60(1) states, in pertinent part: "In a criminal action, the clerk of circuit court shall collect a fee of $163 for all necessary filing, entering, or recording, to be paid by the defendant when judgment is entered against the defendant."

v. Litscher, 2018 WI App 44, 383 Wis. 2d 576, 916 N.W.2d 202, applied here. (R. 35:7–9.)

Finally, the circuit court rejected Bryson's ex post facto and double jeopardy arguments about the application of 2015 Wisconsin Act 355 and Wis. Stat. § 973.20(11)(c).[4] It noted that the statute did not apply to Bryson's situation because he was not ordered to pay restitution and, in any event, the Department does not rely on Act 355 to deduct his funds. (R. 35:9–10.) The circuit court also rejected Bryson's argument that his judgment of conviction, which he claims capped any deduction rate at 25 percent, restricted the Department from deducting his funds at a rate of 50 percent. It explained that the Department "complies with the [judgment of conviction] by collecting 25 percent from Bryson" and "[b]eyond that, the [Department] is free to exercise its statutory authority to collect an additional percentage above what the [judgment of conviction] requires." (R. 35:10.)

Bryson filed a timely notice of appeal. (R. 36.)

STANDARD OF REVIEW

On certiorari review, this Court reviews the decision of the agency, not the decision of the trial court. *Markovic*, 383 Wis. 2d 576, ¶ 9.

"Certiorari is limited to review of the record brought up by the writ." *State ex rel. Richards v. Leik*, 175 Wis. 2d 446, 455, 499 N.W.2d 276 (Ct. App. 1993) (citation omitted).

---

[4] 2015 Wisconsin Act 355, § 15, effective July 1, 2016, created Wis. Stat. § 973.20(11)(c), which states: "If a defendant who is in a state prison or who is sentenced to a state prison is ordered to pay restitution, the court order shall require the defendant to authorize the department to collect, from the defendant's wages and from other moneys held in the defendant's prisoner's account, an amount or a percentage the department determines is reasonable for payment to victims."

The court may only consider whether:(1) the agency stayed within its jurisdiction, (2) it acted according to law, (3) its action was arbitrary, oppressive or unreasonable, and represented the agency's will and not its judgment, and (4) the evidence was such that the agency might reasonably make the determination in question. *State ex rel. Greer v. Wiedenhoeft*, 2014 WI 19, ¶¶ 35–36, 353 Wis. 2d 307, 845 N.W.2d 373. Whether the agency kept within its jurisdiction and acted according to law are questions that this Court reviews de novo, without deference to the agency or the circuit court. *Id.*

ARGUMENT

I. The Department properly deducts Bryson's inmate trust account funds at a rate of 50 percent to pay certain court-ordered surcharge and court fee obligations.

The circuit court held that the Department has statutory authority to deduct funds from Bryson's inmate trust account at a rate of 50 percent to pay certain surcharge and court fee obligations. It correctly affirmed the Secretary's decision, granting in part, and denying in part, Bryson's inmate grievance. This Court should affirm.

A. Several statutes provide the Department with authority to deduct Bryson's funds to pay court-ordered surcharge obligations.

"[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, [courts] ordinarily stop the inquiry.'" *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoting *Seider v. O'Connell*, 2000 WI 76, 236 Wis. 2d 211, 612 N.W.2d 659). "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of

surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46. Further, the dictionary may be used to discern the common meaning of a word. *See Otterstatter v. City of Watertown*, 2017 WI App 76, ¶ 24, 378 Wis. 2d 697, 904 N.W.2d 396.

In Wis. Stat. §§ 165.755(6) (drug labs), 973.045(4) (crime victim and witness), and 973.046(4) (DNA), the text states: "If an inmate in a state prison or a person sentenced to a state prison has not paid the [surcharge], the department shall *assess and collect* the amount owed from the inmate's wages or other moneys." As the circuit court explained, the Department's authority to deduct funds from Bryson's inmate trust account comes from the "assess and collect" phrase in these surcharge statutes. (R. 35:5.) The dictionary definition of the word "assess" means "to determine the rate or amount of (something such as a tax, charge, or fine)."[5] And the word "collect" means "to claim as due and receive payment for."[6] Further, because the statute uses the word "shall," the Department *must* "assess and collect." *State v. Schmidt*, 2021 WI 65, ¶ 76, 960 N.W.2d 888 (holding that imposition of a surcharge is mandatory because of word "shall") (citing *State v. Cox*, 2018 WI 67, ¶11, 382 Wis. 2d 338, 913 N.W.2d 780 ("The general rule is that the word 'shall' is presumed mandatory when it appears in a statute.")).

This statutory language provides a plain meaning basis to allow the Department to "set the surcharge deduction rate and to receive payment at that rate." (R. 35:6 (circuit court decision).) Thus, the circuit court properly concluded that the

---

[5] *See Assess*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/assess (last visited July 26, 2021).

[6] *See Collect*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/collect (last visited July 26, 2021).

language in these surcharge statutes[7] authorizes the Department to deduct the funds in Bryson's inmate trust account at a rate of 50 percent to pay his surcharge obligations.[8]

B. Other Wisconsin statutes provide authority for the Department to deduct Bryson's funds at a rate of 50 percent to pay his surcharge and court fee obligations.

In addition to the surcharge statutes discussed above, other Wisconsin statutes, and the case law interpreting them, demonstrate that the Department has broad authority to deduct funds from Bryson's inmate trust account at a rate of 50 percent to pay the surcharge and court fee obligations.

The Department's authority to deduct for Bryson's court-ordered obligations is also found in Wis. Stat. § 301.32(1). This statute states that "[a]ll money" received by a Department correctional institution "for the benefit of the prisoner" is placed into an account (commonly known as a

---

[7] In addition, to the extent any of the funds in Bryson's inmate trust account are wages, a similar statute supports the Department's deduction authority for two surcharges—Wis. Stat. § 303.01(8)(b). This statute states, "The department shall distribute earnings of an inmate . . . for the crime victim and witness assistance surcharge under s. 973.045(4) [and] for the deoxyribonucleic acid analysis surcharge under s. 973.046(4)." Wis. Stat. § 303.01(8)(b). Whether Bryson's funds are comprised of prison wages is not completely clear from the record, but the Secretary assumes they are, given that Bryson took pains in his inmate grievance to distinguish "prison funds" from "gift money" from family and friends, the latter of which he argued (incorrectly) was not subject to any deduction at all. (R. 13:4 (inmate grievance), 15 (appeal).)

[8] Despite this holding, the circuit court concluded that the Department's own administrative rule limited its deduction rate for the crime victim and witness assistance surcharge to 25 percent. (R. 35:7.) The Department did not appeal that ruling.

trust account). Wis. Stat. § 301.32(1). That money may then be used "only under the direction and with the approval of the . . . warden" for payment of "the crime victim and witness assistance surcharge under s. 973.045(4)," certain other surcharges and restitution, and "for . . . the benefit of the prisoner." *Id.*

Here, Bryson's judgment of conviction expressly directs him to pay the DNA surcharge, all other applicable costs, and any other surcharges and assessments. (R. 13:6.) Thus, in addition to the surcharge statutes, the Department has express statutory authority under Wis. Stat. § 301.32(1) to deduct Bryson's funds for the payment of the "crime victim and witness assistance surcharges under s. 973.045(4)" referenced in that statute. Wis. Stat. § 301.32(1).

In addition, the Department has authority under Wis. Stat. § 301.32(1) to deduct Bryson's funds for payment of the court fees ordered by the criminal sentencing court. (R. 13:6.) This Court's decision in *State ex rel. Markovic v. Litscher*, 2018 WI App 44, 383 Wis. 2d 576, 916 N.W.2d 202, addressed the meaning of the "for . . . the benefit of the prisoner" language in Wis. Stat. § 301.32(1). Its holding confirms the breadth of the Department's authority to deduct Bryson's funds for these obligations.

In *Markovic*, the Department began deducting funds from the inmate's trust account to satisfy a restitution obligation from a criminal sentence he had already completed. *Id.* ¶ 6. (Markovic was still incarcerated because of a separate conviction. *Id.* ¶ 5.) This Court noted that Wis. Stat. § 301.32(1) provides that money delivered to "any state correctional institution for the benefit of a prisoner . . . may be used . . . under the direction and with the approval of the . . . warden and *for . . . the benefit of the prisoner*." *Id.* ¶ 32 (emphasis added). It then concluded that the "for . . . the benefit of the prisoner" language authorizes the Department to deduct funds from Markovic's account to satisfy the

restitution obligation he previously failed to pay, because it benefits him to pay that obligation. *Id.* ¶ 38.

The same reasoning in *Markovic* can apply to the court fees here. Like restitution, the act of satisfying court-ordered financial obligations can be for the prisoner's benefit. To be sure, this Court in *Markovic* acknowledged that "the provision 'for . . . the benefit of the prisoner' is *broad*." *Id.* ¶ 37 (emphasis added). A logical extension of *Markovic* is that the "for . . . the benefit of the prisoner" provision applies to other court-ordered financial obligations beyond restitution, such as surcharges and court fees. *Id.*

This Court can so hold here, based on "for the benefit of the prisoner" language in a similar statute. *Kalal*, 271 Wis. 2d 633, ¶ 44 ("the legislature's intent is expressed in the statutory language"). Wisconsin Stat. § 301.31 allows prison wages to be used to pay the prisoner's obligations "which have been reduced to judgment." And, in that same statute, prison wages "shall be used for the benefit of the prisoner." Wis. Stat. § 301.31. Thus, the Legislature has already determined that paying down financial obligations which have been reduced to judgment is for the benefit of the prisoner.

Thus, *Markovic* and Wis. Stat. § 301.32(1) provide an additional basis for the Department's deduction authority here.[9]

---

[9] Also, to the extent Bryson's inmate trust account is comprised of inmate wages, the Department agrees with the circuit court that it possesses authority under Wis. Stat. §§ 301.31 and 303.01(8)(b) to deduct them for payment of all the court-ordered financial obligations. (R. 35:8.) Under Wis. Stat. § 301.31, the Department "may provide for . . . the payment, either in full or *ratably*, of their obligations acknowledged by them in writing or which have been reduced to judgment" from inmate wages. Here, the Department has chosen to deduct funds at a 50 percent rate to

C. The Department's 50 percent deduction rate is proper.

Bryson alternatively challenges the ability of the Department to deduct his funds at a rate of 50 percent. First, Bryson contends that Wis. Stat. § 973.05(4)(b) limits deduction of funds from his inmate trust account to a rate of 25 percent. (Bryson's Br. iiii, 5.) Second, he claims that his judgment of conviction similarly restricts the Department's power. (Bryson's Br. 6.) Neither argument is persuasive.

1. Wisconsin Stat. § 973.05(4)(b) does not preclude the Department's 50 percent deduction rate.

Wisconsin Stat. § 973.05(4) applies to a defendant's failure to pay a "fine, surcharge, costs, or fees." Subsection (b) allows a court to then "issue an order assigning not more than 25 percent of the defendant's commissions, earnings, salaries, wages, pension benefits, benefits under ch. 102, and other money due or to be due in the future *to the clerk of circuit court* for payment of the unpaid fine, surcharge, costs, or fees." Wis. Stat. § 973.05(4)(b).

On its face, Wis. Stat. § 973.05(4)(b) only limits "the clerk of circuit court," not the Department. Bryson's argument fails under the "plain reading" of the statute, as the circuit court correctly explained. (R. 35:6.) *Kalal*, 271 Wis. 2d 633, ¶ 45. Moreover, even if the statute did apply to the Department, the circuit court properly recognized that the statute "contemplate[s] the entry of a court order subsequent to the [judgment of conviction], after a defendant has failed to pay his or her debts within a court-mandated time period." (R. 35:6.) And, as the circuit court noted, Bryson "has not

---

pay Bryson's financial obligations that have been reduced to judgment through his judgment of conviction. (R. 13:6.)

identified any court order in his criminal case that has either of these qualities." (R. 35:6.)

Bryson cites two unpublished decisions of this Court in support of his Wis. Stat. § 973.05(4)(b) argument, but neither helps him. (Bryson's Br. 5.) The first decision he cites, *State v. White*, 2016 WI App 88, 372 Wis. 2d 458, 888 N.W.2d 247 (Table) (per curiam), cannot properly be cited under Wis. Stat. § 809.23(3)(b) because it is not judge-authored, and so it should not be considered. Further, it simply does not stand for the proposition he claims—that "payment of the crime victim and witness surcharge is governed by §973.05, which subjects White to a deduction not to exceed 25% of prison funds." (Bryson's Br. 5.) In fact, he provides a pinpoint citation to "*12," but that page does not exist. The other decision he cites for his proposition that "Wis. Stat. § 973.05(4)(b) caps garnishment by the prison at 25%" is *State v. Adams*, 2017 WI App 41 ¶ 4 n.4, 376 Wis. 2d 526, 900 N.W.2d 344 (Table), and that is of no help to him, either. The *Adams* decision is easily distinguishable. In that case, the sentencing court expressly issued an order pursuant to Wis. Stat. § 973.05(4)(b), but, as explained by the circuit court, that did not happen here. (R. 35:6; 13:6 (judgment of conviction).)

2. Bryson's judgment of conviction does not preclude the Department's 50 percent deduction rate.

Bryson also asserts that the Department's 50 percent deduction rate conflicts with his sentencing court's judgment of conviction rate of 25 percent. (Bryson's Br. 6.) He is wrong.

Here, the sentencing court ordered Bryson to pay the "DNA surcharge, all other applicable costs and any other surcharges and assessments. To be collected by DOC from 25 percent of prison funds and to convert to civil judgment upon release from Extended Supervision." (R. 13:6.) Because Bryson's argument is unsupported by any legal authority, it

is undeveloped and this Court may disregard it. *See State v. Pettit*, 171 Wis. 2d 627, 643, 492 N.W.2d 633 (Ct. App. 1992).

Even if this Court chooses to address Bryson's argument, the circuit court rightly rejected it. (R. 35:10–11.) The phrase in Bryson's judgment of conviction, "To be collected by DOC from 25% of prison funds," does not include any limiting language revealing that the 25 percent rate is a cap. (R. 13:6.) This order does not mean that the Department is prevented from deducting *more* than 25 percent of Bryson's prison funds. The judgment of conviction could have included the phrase "*not more than* 25 percent of prison funds" if the sentencing court intended to prohibit the Department from deducting at a rate over 25 percent. Indeed, the Legislature uses such limiting language in Wis. Stat. § 973.05(4)(b), which governs a circuit court order assigning "*not more than* 25 percent of the defendant's . . . wages . . . to the clerk of circuit court for payment of the unpaid fine, surcharge, costs, or fees." Wis. Stat. § 973.05(4)(b). Rather, here, the sentencing court's language merely sets the *minimum* percentage rate at which the Department must deduct. Put another way, for every dollar placed in Bryson's inmate trust account, the Department must take a quarter to pay his court-ordered obligations.[10] But the text of the judgment of conviction places no limitation on the Department's authority to deduct at a *higher* percentage than 25 percent. Consequently, this 25 percent rate in Bryson's judgment of conviction is a floor, not a ceiling, on the Department's deduction authority. Thus, the

[10] Because the Department takes 50 percent from Bryson's inmate trust account to pay the court-ordered obligations, it does not contest the sentencing court's authority to issue an order placing a floor of 25 percent, as the Department's deduction exceeds that floor.

Department may deduct more than 25 percent of his inmate trust account funds. The circuit court got it right.

***

The Secretary's decision dismissing Bryson's inmate grievance was correctly affirmed by the circuit court because the Department has statutory authority to deduct Bryson's inmate trust account funds to pay surcharge and court fee obligations. The Secretary acted "according to law." *Greer*, 353 Wis. 2d 307, ¶ 36. Thus, this Court should affirm.

II. Bryson has conceded and forfeited issues on appeal.

Bryson raises additional issues in his brief. However, like some of the issues above, he has forfeited them—and for three different reasons. First, Bryson wholly fails to explain why the circuit court's reasoning that several state statutes provide the Department with authority to deduct inmate trust account funds is erroneous. Second, he raises an issue that he failed to raise below. Third, he has failed to develop legal arguments in support of an issue that he has properly raised on appeal. The result is concession and forfeiture of the issues.

A. Bryson's failure to address the circuit court's reasoning

First, Bryson generally contends that the Department has no authority to deduct his funds for the purpose of paying court-ordered surcharges and court fees because no statutes expressly confer such authority. He argues that the Legislature was required to pass laws more akin to Wis. Stat. § 973.20(11)(c), which uses language other than "assess and collect," if it intended to give the Department such deduction authority. (Bryson's Br. 3–4.) However, Bryson ignores the surcharge statutes and does not explain why Wis. Stat. §§ 301.21(1), 301.31, and 303.01(8)(b) are insufficient legal authority to provide the Department with deduction power. To be sure, he does not even address these statutes in any

developed argument, despite the circuit court making them the foundation of its decision. (Bryson's Br. 3; R. 35:5–9.)

"Failure to address the grounds on which the circuit court ruled constitutes a concession of the ruling's validity." *West Capitol, Inc. v. Village of Sister Bay*, 2014 WI App 52, ¶49, 354 Wis. 2d 130, 848 N.W.2d 875. Thus, Bryson's silence is a concession that the several statutes cited in the circuit court's decision provide the Department with the authority to deduct his inmate trust account funds to pay court-ordered surcharge and court fee obligations. *Id.* On this basis alone, this Court can affirm.

B. Bryson's failure to raise Act 21 and unpromulgated rule issues

Second, Bryson raises the issue of the Department's DAI Policy 309.45.02. He argues that it violates 2011 Wisconsin Act 21 and is an unpromulgated administrative rule. (Bryson's Br. 2, 5.) This policy, effective in July 2016, increased the Department's deduction rate for restitution, surcharges, and court fees from 25 to 50 percent. (R. 35:4.)[11] These arguments are nonstarters.

This Court cannot address this unpromulgated rule argument because Bryson did not properly commence a challenge to the DAI Policy in circuit court as required by statute.[12]

---

[11] The Department policy is not part of the agency record. Nonetheless, the circuit court reviewed the policy on the Department's website. (R. 35:4 (citing Division of Adult Institutions, *Inmate Trust System Deductions, DAI Policy 309.45.02* (Apr. 4, 2016), https://doc.wi.gov/DepartmentPolicies DAI/3094502.pdf).)

[12] Bryson likely raises this issue because of a footnote in the circuit court's decision. (*See* R. 35:7 n.5.) Nonetheless, the circuit court stated that the issue was "not raised in this case." (R. 35:7 n.5.)

Wisconsin Stat. § 227.40—a declaratory judgment proceeding—is the standard vehicle to challenge an agency rule or an alleged unpromulgated rule. *See Mata v. DCF*, 2014 WI App 69, ¶ 13, 354 Wis. 2d 486, 849 N.W.2d 908 (requirements of Wis. Stat. § 227.40 apply to challenges that a policy is an unpromulgated rule). Apart from a declaratory judgment action under Wis. Stat. § 227.40(1), the validity of a rule may be challenged in other limited "judicial proceedings when material therein." Wis. Stat. § 227.40(2). The Legislature provided a list of permissible judicial proceedings, but certiorari is not one of them. *See* Wis. Stat. § 227.40(2)(a)–(f). When the type of judicial proceeding is not listed in the statute, the validity of a rule still may be challenged, but only according to the statutory procedure in Wis. Stat. § 227.40(3).

To challenge the validity of a rule in any proceeding not listed in Wis. Stat. § 227.40(2), like this one, Wis. Stat. § 227.40(3) requires the challenger to seek "an order suspending the . . . proceeding until after a determination of the validity of the rule . . . in an action for declaratory judgment under sub. (1)." Wis. Stat. § 227.40(3)(ag). Then, if the circuit court is satisfied that the validity of the rule is material to the issues of the case, "an order shall be entered staying the . . . proceeding until the rendition of a final declaratory judgment in proceedings to be instituted forthwith by the party asserting the invalidity." Wis. Stat. § 227.40(3)(ar). Further, "[u]pon entry of a final order in the declaratory judgment action, it shall be the duty of the party who asserts the invalidity of the rule . . . to formally advise the court of the outcome of the declaratory judgment action." Wis. Stat. § 227.40(3)(b). "After the final disposition of the declaratory judgment action the court shall be bound by and apply the judgment so entered in the trial of the proceeding in which the invalidity of the rule . . . is asserted . . . ." Wis. Stat. § 227.40(3)(b).

Importantly, "[f]ailure to . . . prosecute the declaratory judgment action without undue delay *shall preclude the party from asserting or maintaining that the rule . . . is invalid*." Wis. Stat. § 227.40(3)(c).

Here, Bryson prosecuted no Wis. Stat. § 227.40 rule challenge against the DAI Policy in the circuit court. As noted above, his inmate complaint filed with the Department does not raise an unpromulgated rule challenge to Department policy. (R. 13:4.) And, unsurprisingly, there is nothing in the circuit court record showing that: (1) Bryson applied for an order suspending the certiorari action to allow him to commence a separate declaratory judgment challenge; (2) the circuit court suspended the certiorari action; or (3) any such judgment exists or was applied, as required under Wis. Stat. § 227.40(3)(ag)–(b). Thus, because Bryson failed to prosecute a challenge to Department policy at the circuit court level, he is statutorily "preclude[ed] . . . from asserting or maintaining" that the policy is an unpromulgated rule on appeal. Wis. Stat. § 227.40(3)(c).

Further, "[i]t is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency." *Bunker v. LIRC*, 2002 WI App 216, ¶ 15, 257 Wis. 2d 255, 650 N.W.2d 864. The law is also clear that a litigant must raise an issue with the circuit court to preserve it on appeal. *State v. Huebner,* 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727 ("Issues that are not preserved at the circuit court . . . generally will not be considered on appeal."). Here, Bryson has done neither with regard to his Act 21 and unpromulgated rule arguments. He did not raise these issues in his inmate complaint. (R. 13:4.) And he did not raise the issues before the circuit court, either. (R. 6 (petition for writ of certiorari), 31 (opening brief), 34 (reply brief).) As a result of his failure to raise these two issues until now, Bryson has forfeited them and this Court should disregard them.

C. Bryson's forfeiture of his 2015 Wisconsin Act 355 argument

Finally, Bryson contends that 2015 Wisconsin Act 355 cannot be retroactively applied to him. (Bryson's Br. 3–4, 6.) The Court can also dispose of this argument because, although he raised it below, Bryson still forfeits it because he fails to develop it on appeal.

This Court has long held that it will ignore arguments in briefs that do no more than make general statements and do not cite legal authority. *See Pettit*, 171 Wis. 2d 627 at 646. Doing "no more than stat[ing] the proposition without any elaboration" is considered unacceptable briefing. *Riley v. Town of Hamilton*, 153 Wis. 2d 582, 588, 451 N.W.2d 454 (Ct. App. 1989). The court cannot "creat[e] an issue and mak[e] an argument for the litigant." *State ex rel. Harris v. Smith*, 220 Wis. 2d 158, 165, 582 N.W.2d 131 (Ct. App. 1998).

Here, Bryson makes only passing reference to Act 355, asserting that, even assuming it allows the Department to deduct inmate funds at a rate of 50 percent, it could not "have the effect of retroactively nullifying the valid order of the sentencing court" which set the deduction rate at 25 percent. (Bryson's Br. 6.) But he cites no legal authority for his proposition. Thus, it is in an undeveloped argument. *Pettit*, 171 Wis. 2d at 646. As a result, this Court can ignore it, as it did in another Department inmate fund deduction case. *Markovic*, 383 Wis. 2d 576, ¶ 36 ("Because Markovic fails to develop this argument, we do not consider it further.").

Regardless, any argument that Act 355 and Wis. Stat. § 972.30(11)(c) were improperly retroactively applied to Bryson is without merit for three reasons. First, this statute, created by the Act, only applies to restitution, *see* Wis. Stat. § 973.20(11)(c), and Bryson was not ordered to pay restitution. (R. 13:6 (judgment of conviction).) Second, even if this case

concerned restitution, this Court has already rejected the argument that the Department unlawfully applies Act 355 to inmates sentenced before its enactment when it deducts their trust account funds for restitution obligations. *See State v. Williams*, 2018 WI App 20, ¶¶ 1–2, 380 Wis. 2d 440, 909 N.W.2d 177 (Wis. Stat. § 973.20(11)(c) simply "codified the common law by specifically authorizing the [Department] to take restitution from an inmate's account at 'an amount or a percentage the department determines is reasonable for payment to victims.'" (citation omitted)). And third, as explained above, the sentencing court did not cap any rate of deduction of Bryson's inmate account for payment of surcharge and court fee obligations at 25 percent in the first instance.

This Court has explained that a "party must do more than simply toss a bunch of concepts into the air" by stating general rights without development through case citation, comparison, or legal reasoning. *State v. Butler*, 2009 WI App 52, ¶ 17, 317 Wis. 2d 515, 768 N.W.2d 46 (quoting *State v. Jackson*, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999)). That is what Bryson has done in most of his brief. His assertions should be rejected.

CONCLUSION

Respondent asks this Court to affirm the final order of the circuit court, which affirms her decision.

Dated this 28th day of July 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

Attorneys for Respondent-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792
(608) 294-2907 (Fax)
kilpatricksc@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 5948 words.

Dated this 28th day of July 2021.

Electronically signed by:

s/ Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

I further certify that a copy of the above document was mailed on July 28, 2021 to:

Delorean Bryson #487033
Green Bay Correctional Institution
Post Office Box 19033
Green Bay, WI 54307-9033

Dated this 28th day of July 2021.

Electronically signed by:

s/ Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General