FWS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN ex rel.
DELOREAN BRYSON,

Petitioner-Appellant,

v. Appeal No. 2020AP1949

Cathy Jess,

Respondent-Respondent,

**BRIEF AND APPENDIX
OF APPELLANT**

On appeal from Dane County. Honorable Peter Anderson presiding.

DeLorean Bryson
#487033

Green Bay Correctional Inst.
P.O. Box 19033
Green Bay, WI 54307

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes

PAGE

STATUTES PAGES

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary as the issues can be resolved upon a common sense review of the applicable statutes. Publication may be necessary considering that the issues involve a state-wide practice which affects thousands of inmates.

STATEMENT OF ISSUES

1. Wis. Stat. § 973.05(1) states that unless expressly stated otherwise during sentencing any fines, costs, fees and surcharges are immediately due. Subsection (4)(b) further states that if any fines, costs, fees or surcharges remain outstanding, the court may issue an order assigning not more than 25% of his income for payment of these obligations. When the appellant was sentenced in 2014, the court ordered that the DOC collect and forward 25% of his prison funds until both debts were satisfied. The DOC complied with this order until 2016 when it began applying an amended version of DAI Policy 309.45.02 to the appellant, which unilaterally increased the rate of collection of all court obligations from 25% to 50%.

   Did the DOC possess the the statutory authority to set the rate it collects surcharges and costs in excess to the rate set by § 973.05(4)(b) and the sentencing court and did it act contrary to law when it disregarded the court's order?

   Even if the DOC was duly authorized to promulgate a rule which enabled it to set a superceding rate of collection for surcharges and court costs, can it legally implement the new rule set out in the amended version of 309.45.02 where it failed to comply with Act 21 or take any of the steps required under the Wisconsin Administrative Procedure Act?

DOC's Answer: Throughout these proceedings the DOC has asserted that several statutes provide it with an unfettered authority to set these rates.

STATEMENT OF FACTS

When the appellant was sentenced to prison after being convicted of (2) felonies, the court ordered him to pay various surcharges and court costs. Pursuant to Wis. Stat. 973.05(4)(b), the court ordered the DOC to collect 25% of his prison funds so that they could be forwarded to the clerk of court to satisfy these obligations.

In 2016, the DOC increased the rate that it collected costs, fees and surcharges from 25 to 50 percent, in accordance to DAI Policy 309.45.02 which had been recently amended to reflect this rate change. The appellant filed a complaint since the new rule exceeded the rate allowed by statute and the order of the sentencing court.

At the institution-level, his complaint was denied upon a finding that Wis. Stat. § 973.20(11)(c), a newly created subsection of the restitution statute, authorized the DOC to set the rate of deductions. On appeal, the respondent affirmed the dismissal upon finding that the DOC had the authorization to apply prisoner wages and other funds towards court-ordered obligations under Wis. Stat. §§ 301.31-32.

The certiorari court reviewed the DOC's ability to set the rates for surcharges and court costs individually and found that the language used in the applicable surcharge statutes authorizing the DOC to "assess and collect the amount owed" granted the DOC

the ability to set rates based on the definition of "assess" which means "to determine the rate or amount of." (Ap. 105) The court then found that even though the Victim/Witness Surcharge statute, Wis. Stat. § 973.045 used the same language, that rate of collection was capped at 25% pursuant to DOC 309.465. (Ap. 107)

As for the DOC's authority to set the rate in which it collects court fees, the court found that Wis. Stat. §§ 301.31 and 303.01(8)(b) allowed it to do so when it came to prison wages, while Wis. Stat. §301.32(1) provided the necessary exclusive authority to set the rate of deduction from non-wage inmate funds. (Ap. 108)

ARGUMENT

I. THE DOC ACTED WITHOUT JURISDICTION AND CONTRARY TO LAW

The Legislature has intentionally passed laws which prevents agencies from implementing rules without explicit statutory authority and which require they take several steps prior to promulgation of any rule. (See Act 21; REINS Act). When viewed under these restrictive parameters it is clear that the Legislature has yet to enact a statute which authorizes the DOC to independently set the rate it collects surcharges and court costs, something that would have been apparent had the DOC followed any of the steps set out by the Wisconsin Administrative Procedure Act prior to implementing the new rate of collection in the amended rule in 309.45.02.

A. Applicable Legal Principles

On certiorari review, the Court of Appeals reviews the decision of the agency and not the decision of the circuit court. *State ex rel. Curtis v. Litscher*, 2002 WI App 172, ¶10, 256 Wis.2d 787, 650 N.W.2d 43.

In conducting its review, the Court is limited to determining:

> (1) whether [the DOC] acted within the bounds of its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable, and represented its will, and not its judgment; and (4) whether the evidence was sufficient that [the DOC] might reasonably make the determination that it did.

State ex rel. Green v. Wiedenhoeft, 2014 WI 19, ¶35, 353 Wis.2d 307, 845 N.W.2d 373. The two inquiries upon which the Court bases its decision, whether the DOC acted within its jurisdiction and according to law, are questions of law that are reviewed de novo. *State ex rel. Sprewell v. McCaughtry*, 226 Wis.2d 389, 393, 595 N.W.2d 39 (Ct. App. 1999).

B. Current Statutes Do Not Confer The Authority For The DOC To Increase The Rate It Collects Court Costs, Fees, And Surcharges From 25% to 50% Of All Funds

It makes no difference whether its the statute cited by the Warden, § 973.20(11)(c); the Secretary, §§ 301.31 & 301.32; or even the statute cited by the lower court, § 973.046(4); none of them expressly confer the authority needed to affirm the actions at issue here.

Prior to 2011, the DOC might have gotten away with citing general "collection" statutes for its authority to also set the rates but post-Act 21 it is unlawful for several reasons. Act 21 created Wis. Stat. § 227.11(2)(a)1-3, which impose specific limitations on agencies and makes clear that they do not possess any inherent or implied authority to promulgate rules unless it is "explicitly conferred on the agency by the legislature," i.e., by statute. See § 227.11(2)(a)1-2. An example of when the legislature intended to explicitly authorize the DOC to do something can be found in 2016's Act 355 which created subsection (11)(c)

of the restitution statute. It did not use words like "assess" or any other language which would require one to infer or resort to a dictionary to ferret out intent, it wanted the DOC to have the ability to set the rate upon which it collected restitution and to collect it from any funds in the inmate's account, regardless of the source:

> "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 [DOC] to collect, from the defendant's wages and from other moneys held in the defendant's prisoner account, an amount or percentage it determines is reasonable for payment to victims."

Wis. Stat. § 973.20(11)(c). That is the explicit authority that must be found in the statutes offered by the DOC to support its assertion that it has been conferred the power to set an increased rate of collection for court costs, fees and surcharges and it does not exist.

Another reason that the DOC's actions offend the law is Act 21's clear statement barring any agency from promulgating a rule which sets a threshold or rate which is more restrictive than the rate set out in the relevant statutory provision, (§227.11(2)(a)3), or **any** rule which sets a specific standard, requirement, or threshold unless it is explicitly permitted by statute. Wis. Stat. § 227.10(2m). As is shown above, there is no equivalent statute allowing the DOC to set a reasonable rate of collection for these obligations and without language specifically permitting the 50% rate or permission to set a "reasonable rate" of collection for costs, fees and surcharges, the DOC cannot bootstrap these completely separate debts to statutory authority conferred by the restitution statute.

In addition to not having the explicit permission to implement a rule increasing the rate, the new rate of 50% exceeds the rate already set out in the relevant statute. Wis. Stat. § 973.05(4)(b) specifically sets a cap on the collection of these obligations at 25 percent. This Court has repeatedly stated this in unpublished cases. *See State v. White*, 2016 WI App 88, *12(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); *State v. Adams*, 2017 WI App 41, ¶4, n.4 (Wis. Stat. §973.05(4)(b) caps garnishments by the prison at 25%).

C. The Amended Policy Was Not Lawfully Promulgated Under The Wisconsin Administrative Procedure Act

Even if the Legislature had explicitly conferred the authority to set the rate of collection at issue here, this Court would still have to find that the implementation of 309.45.02 was contrary to law because the DOC failed to take the necessary steps to lawfully promulgate this new policy. While the 2017 REINS Act also added the requirement that all agencies must submit scope statements to the Department of Administration so that it can make a determination of whether the agency has the authority to promulgate the proposed rule, it did not alter Act 21's requirement that agencies submit a statement of scope to the Governor for approval prior to drafting a proposed rule, and also submit a final draft of the rule to the Governor for approval prior to being able to submit it to the Legislature. The DOC does not even attempt to allege that it complied with any of the requirements listed in Chapter 227 and, accordingly, even the portion of 309.45.02 increasing the rate of restitution which is authorized by statute, is invalid.

D. The DOC's 2016 Rule Cannot Overrule The 2014 Order Of The Sentencing Court

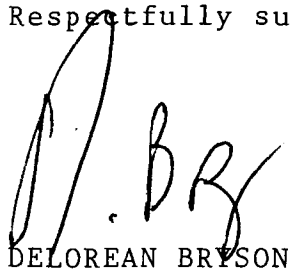
Even if the DOC's amended rule was properly promulgated under the WAPA, it would not have the effect of nullifying the valid and lawful order of the circuit court limiting the DOC to collecting the appellant's surcharges and court costs at the rate of 25%. For example, had 309.45.02 been properly enacted, while the amendment setting the collection rate of restitution at 50% was explicitly authorized by § 973.20(11)(c), the increased rate would not apply to inmates who had been sentenced prior to Act 355 and where the court lawfully set the collection of restitution payments at 25%. Under the proper procedures and with the explicit statutory authority, the DOC can enact Rules which change the law, but there is no legal basis to find that the amendment of 309.45.02 falls into either category, and even if that were not the case, the amendment would not have the effect of retroactively nullifying the valid order of the sentencing court. The DOC has simply gone too far and the Legislature obviously did not see the need to alter the rate in which the government is paid the various fees, surcharges and court costs which come with every criminal conviction.

CONCLUSION

For the above reasons, this Court should find that the DOC acted without jurisdiction when it implemented a Rule without explicit statutory authority and without following the WAPA and that it acted contrary to law when it collected these debts at a rate which exceeded the statutory cap and the order of the sentencing court.

Dated at Green Bay, Wisconsin on this 22nd day of June, 2021.

Respectfully submitted,



DELOREAN BRYSON