Appeal No. 2008AP2614-CRNM **Cir. Ct. No. 2007CF4832**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NORBERT AARON MATHIS,

DEFENDANT-APPELLANT.

FILED

SEP 16, 2009

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

We certify this appeal to the Wisconsin Supreme Court pursuant to WIS. STAT. RULE 809.61 (2007-08),[1] to resolve a conflict among the districts of the court of appeals that has arisen as a result of our decision in ***State v. Cherry***, 2008 WI App 80, ¶¶8-9, 312 Wis. 2d 203, 752 N.W.2d 393. We require guidance

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[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

on whether a circuit court that orders a defendant to provide a deoxyribonucleic acid (DNA) sample under WIS. STAT. § 973.047(1f) and at the same time orders the defendant to pay the DNA surcharge under WIS. STAT. § 973.046(1g), must state on the record its reasoning for imposing the surcharge.

This issue arises in the context of a no-merit appeal. In a no-merit appeal, the issue before the court of appeals is whether to accept the no-merit report and relieve appellate counsel from further representation of the appellant, or to reject the no-merit report and order counsel to pursue, through the usual adversarial process, any issue of arguable merit. An issue has "arguable merit" if it is not "wholly frivolous," meaning that it would be unethical for counsel to make the argument. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 436-39 (1988).

There are two statutes that establish when a court must order a defendant to provide a DNA sample and pay the DNA analysis surcharge. WISCONSIN STAT. § 973.047 requires the circuit court to order anyone convicted of a felony to provide a DNA sample. The statute also directs the department of justice to promulgate rules governing the procedures for collecting these samples. Section 973.047 provides in part:

> **(1f)** If a court imposes a sentence or places a person on probation for a felony conviction or for a conviction for a violation of s. 940.225 (3m), 944.20, or 948.10, the court shall require the person to provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis.
>
> ….
>
> **(2)** The department of justice shall promulgate rules providing for procedures for defendants to provide specimens when required to do so under this section and for the transportation of those specimens to the state crime laboratories for analysis under s. 165.77.

The second statute, WIS. STAT. § 973.046, gives the circuit court discretion to impose a DNA surcharge on persons convicted of most felonies, but mandates that the surcharge be imposed upon a defendant convicted of certain sex offenses. ***State v. Jones***, 2004 WI App 212, ¶6, 277 Wis. 2d 234, 689 N.W.2d 917. Section 973.046 provides in part:

> **(1g)** Except as provided in sub. (1r), if a court imposes a sentence or places a person on probation for a felony conviction, the court may impose a deoxyribonucleic acid analysis surcharge of $250.
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> **(1r)** If a court imposes a sentence or places a person on probation for a violation of s. 940.225, 948.02 (1) or (2) or 948.025, 948.085, the court shall impose a deoxyribonucleic acid analysis surcharge of $250.

The interplay between these two statutes has raised a number of questions in different factual scenarios. We have already decided that WIS. STAT. § 974.046(1g) allows a circuit court to require a defendant to pay the surcharge even when the court is not requiring the defendant to provide a sample. ***Jones***, 277 Wis. 2d 234, ¶¶3, 7. In ***Jones***, we concluded that "[t]he language of the statute plainly states that the trial court has the discretion to order a DNA surcharge upon the entry of judgment in this felony case. Nothing in § 973.046(1g) requires a DNA sample to be collected before the court can order the payment of the surcharge." ***Jones***, 277 Wis. 2d 234, ¶7. We further noted that, although WIS. STAT. § 973.047 requires the circuit court to order a defendant convicted of a felony to provide a sample, and the statute does not make an

exception for anyone who has already provided a sample, the State Crime Laboratory could not use more than one sample. ***Jones***, 277 Wis. 2d 234, ¶5.[2]

In ***Cherry***, we held that the surcharge statute, WIS. STAT. § 973.046, gives the circuit court discretion to order the surcharge in many cases, and when the trial court exercises this discretion, it must explain why. ***Cherry***, 312 Wis. 2d 203, ¶¶8-9. We held that § 973.046(1g) "clearly contemplates the exercise of discretion by the trial court," and that when the circuit court orders a defendant to pay the surcharge, it "should consider any and all factors pertinent to the case before it, and that it should set forth in the record the factors it considered and the rationale underlying its decision for imposing the DNA surcharge in that case." ***Cherry***, 312 Wis. 2d 203, ¶¶8-9.

We further stated:

> Thus, in exercising discretion, the trial court must do something more than stating it is imposing the DNA surcharge simply because it can. We also do not find the trial court's explanation that the surcharge was imposed to support the DNA database costs sufficient to conclude that the trial court properly exercised its discretion. To reach such a conclusion would eliminate the discretionary function of the statute as a DNA surcharge could be imposed in every single felony case using such reasoning. We are not going to attempt to provide a definite list of factors for the trial courts to consider in assessing whether to impose the DNA surcharge. We do not want to limit the factors to be considered, nor could we possibly contemplate all the relevant factors for every possible case. In an effort to provide some guidance to the trial courts, however, we conclude that some factors to be considered could include: (1) whether the defendant has provided a DNA sample in connection with the case so as to have caused DNA cost;

[2] This explains why even though WIS. STAT. § 973.047(lf) requires a circuit court to order a defendant convicted of a felony to provide a sample, the courts often state that a defendant need not provide a sample if he or she has previously given one.

> (2) whether the case involved any evidence that needed DNA analysis so as to have caused DNA cost; (3) financial resources of the defendant; and (4) any other factors the trial court finds pertinent.

Id., ¶10.

We concluded that the record in ***Cherry*** did not "reflect a process of reasoning before the trial court imposed the $250 DNA surcharge," and we remanded for the court "to conduct proceedings necessary to reassess whether the $250 DNA surcharge should be imposed in this case and to set forth the factors and rationale it considered in making such a determination." ***Id.***, ¶11.

The factual situation presented by this no-merit appeal is slightly different from either ***Jones*** or ***Cherry***. It is, however, representative of a fact situation that arises in many no-merit appeals, and in direct appeals as well. The defendant was convicted of a felony, but not one of the sex offenses listed in WIS. STAT. § 973.046(1r). The circuit court, therefore, was statutorily obligated under WIS. STAT. § 973.047(1f) to order the defendant to provide a sample, but the court was not required under § 973.046(1r) to impose the surcharge. The court ordered both the sample and the surcharge, saying: "You're to provide for DNA, surcharges, [and] restitution…." The court arguably did not "set forth the factors and rationale it considered" in deciding to impose the surcharge, other than to say that defendant was to provide the sample and the surcharge. *See* ***Cherry***, 312 Wis. 2d 203, ¶11.

The different districts of the court of appeals have reached contrary conclusions on whether such a situation creates a potential issue of arguable merit in the no-merit context. District IV has concluded that, in situations such as the one presented by this appeal, the issue of whether the circuit court properly

exercised its discretion, is not "wholly frivolous" for the purposes of a no-merit appeal, relying on ***McCoy***. The position taken by District IV also suggests that an appellant might be successful on an appeal to this court.

The three other districts have concluded, however, that when the circuit court is required to order a defendant to provide a DNA sample under WIS. STAT. § 973.047(1f), and at the same time orders the defendant to pay the DNA surcharge without offering further explanation for ordering the surcharge, the circuit court has properly exercised discretion under the statutes. An appellant, therefore, would not succeed on an appeal to this court on this issue. The other districts believe that it would not be administratively prudent, therefore, to send these cases back to the circuit court for a further hearing on the issue.

Districts I, II, and III acknowledge that the position taken by District IV suggests that an argument on this issue would not be wholly frivolous in the no-merit context. But the three other districts are convinced that simply answering the question of whether the issue is frivolous in the no-merit context does not resolve the underlying dispute among the districts, nor does it provide needed guidance to the circuit courts on what they must consider when imposing the surcharge to satisfy the statutory requirements. The need for guidance is even more compelling given the high volume of no-merit appeals currently pending in the court of appeals and the frequency with which this issue occurs.[3] Further, it

[3] Because of the high volume of no-merit appeals in District I, some of these appeals are routinely transferred to other districts. Because of the conflict among the districts, a circuit court may receive conflicting decisions from the court of appeals on whether there is an arguable issue about the appropriate way to exercise discretion under WIS. STAT. § 973.046(1g) when imposing the DNA surcharge when also ordering a defendant to provide a DNA sample under WIS. STAT. 973.047(1f).

seems unduly burdensome to repeatedly send this issue back to the circuit courts until the issue can make its way to the court of appeals in a direct appeal. An opinion from the supreme court on the underlying issue, however, would establish both whether the issue is frivolous, and give needed direction to the circuit courts on the merits of the issue. Consequently, we ask the supreme court for guidance on the underlying issue.[4]

Specifically, under the facts presented by this case, Districts I, II, and III have concluded that a circuit court does not erroneously exercise its discretion when it orders a defendant to pay the surcharge, without offering additional reasons for imposing the surcharge, when the court was required by WIS. STAT. § 973.047(1f) to order the defendant to provide a sample. In other words, the very fact that a defendant *must* provide a DNA sample where that defendant has not previously provided it, is ample justification for the circuit court to also order the defendant to pay the surcharge, since one logically flows from the other as a matter of common sense. Therefore, the three districts believe that ordering payment for the actual taking of DNA *is* the act of discretion, standing by itself. The circuit court need not utter magic words on the record to make the connection that, if a DNA sample must be provided, the defendant is statutorily required to pay for it. Consequently, when a no-merit appeal presents these facts, these districts would not require appellate counsel to further pursue the issue.

District IV, on the other hand, concludes that, when a circuit court imposes the DNA surcharge, even when it is required to order the sample under

[4] Conflict among court of appeals' decisions is recognized as an appropriate ground for granting petitions for review, *see* WIS. STAT. RULE 809.62(1r)(d).

WIS. STAT. § 973.047(1f), without stating any reason or applying potentially relevant factors described in ***Cherry***, 312 Wis. 2d 203, ¶10, it may not be frivolous to file a postconviction motion arguing that the court erroneously exercised its discretion.[5]

All the districts agree that when a circuit court orders a defendant to pay the surcharge without requiring him or her to provide a sample, the circuit court must explain its reasons for doing so as discussed in ***Cherry***. But the districts disagree about whether the circuit court must explain its reasons for imposing the surcharge when it is statutorily obligated under WIS. STAT. § 973.047(1f), as it is in all felony cases, to require the defendant to provide a DNA sample.

A related issue presented by this appeal involves a regulation issued by the Department of Justice, WIS. ADMIN. CODE § JUS 9.08 (Sept. 2001). It provides, in relevant part, that if a court orders a defendant to provide a DNA sample, then "the court shall impose a DNA analysis surcharge." This regulation has been used to support the proposition that a circuit court has not erroneously exercised its discretion when it orders the surcharge without explaining its reasoning when the court is required to order the sample under WIS. STAT. § 973.047(lf).

[5] Consequently, District IV directs appellant's counsel to review the issue and consult with the defendant. If the defendant wants to raise the issue, counsel must either raise it or explain why it is frivolous in a supplemental no-merit report. District IV does not adopt the conclusion that such a postconviction motion is always frivolous if the circuit court also ordered a DNA sample to be provided, because no statute or published case law provides to that effect. District IV also has concluded that an arguable issue may exist when the circuit court orders a defendant to provide a sample and pay the surcharge only if the defendant has not previously provided a sample or paid the surcharge, but the court does not state any reason for ordering the surcharge.

District IV questions whether an administrative rule setting court fees is outside the scope of the rulemaking authority conveyed to the Department of Justice by WIS. STAT. § 973.047(2), and whether the rule is invalid because it conflicts with the current statute by making the surcharge mandatory under circumstances in which WIS. STAT. § 973.046(1g) has made the surcharge discretionary.[6] While the regulation has been used to support the position taken by Districts I, II, and III, those districts do not believe that the regulation is necessary to support the position that the circuit court has not erroneously exercised its discretion by imposing the surcharge without further explanation when the court orders that a sample be provided under § 973.047(1f). Guidance on whether the regulation is valid, however, would also be helpful to the court of appeals and to the circuit courts.

CONCLUSION

The districts have reached contradictory conclusions about whether it is frivolous for a defendant to argue that a circuit court erroneously exercises its discretion when it orders a defendant to provide a DNA sample under WIS. STAT. § 973.047(lf), and at the same time orders the defendant to pay the surcharge under WIS. STAT. § 973.046(1g), without stating on the record its reasons for imposing the surcharge. The resolution as to whether this issue is frivolous depends on the resolution of the underlying issue. Because this issue has appeared and will continue to appear in many no-merit appeals, as well as in direct appeals, we ask for guidance. If the court of appeals is to remain true to the ideal that it is a

[6] The rule was clearly consistent with the statute when it was issued in July 1997. At that time, the statute required imposition of the DNA surcharge in all cases where a DNA sample was ordered. *See* WIS. STAT. § 973.046(1) (1995-96).

unified court, we cannot continue to issue contradictory orders on no-merit opinions. And, to allow the present situation to fester will cause confusion in the circuit courts because how to handle DNA surcharge orders will be dependent on where the circuit court happens to be located, the very reason why the court of appeals was designed to be a unified court. We respectfully certify the issue to the supreme court.