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DISTRICT II

February 17, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2014AP2662

State of Wisconsin v. Macaulay T. Krueger
(L.C. # 2010CF307 and 2010CF358)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Macaulay T. Krueger appeals from orders declining to remove the DNA surcharges from his two written judgments of conviction. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(2013-14).¹ According to the transcript of Krueger's sentencing hearing, the circuit court never ordered Krueger to pay a DNA surcharge. By including the DNA surcharges when the circuit court did not order them, the form of the judgment does not match the oral

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

pronouncement at sentencing, and the written judgments should be corrected to remove the DNA surcharge. We therefore reverse.

Across two cases,² Krueger was convicted of three counts of causing a child under thirteen to view or listen to a sex act, contrary to WIS. STAT. § 948.055 (2009-10). At sentencing, the court ordered Krueger “to provide a DNA sample and register as a sex offender.” Though the sentencing court did not mention or impose the DNA surcharge, both written judgments include a \$250 DNA surcharge.³

Krueger filed numerous pro se postconviction motions and pursued a WIS. STAT. RULE 809.30 direct appeal in which we affirmed his judgments and the circuit court’s order denying postconviction relief. *State v. Macaulay T. Krueger*, Nos. 2012AP51/52-CR, unpublished slip op. (WI App Mar. 13, 2013). It is undisputed that Krueger continued to file postconviction motions in the circuit court and commenced but voluntarily dismissed another appeal.

In 2014, Krueger filed a “Motion for Refund, DNA Surcharge” which was admittedly light on grounds. The circuit court construed the request as seeking sentence modification under WIS. STAT. § 973.19, and denied the motion as untimely. Krueger then filed a motion for reconsideration and to correct the judgments of conviction to conform to the sentencing court’s

² These are Sheboygan County Circuit Court case numbers 2010CF307 and 2010CF358.

³ Pursuant to WIS. STAT. § 973.047(1f) (2009-10), the law in effect at the time of Krueger’s sentencing, if the court imposes a sentence or places a person on probation for a felony offense, the court must require the defendant to provide a DNA sample. WISCONSIN STAT. § 973.046 (2009-10), provides that in the aforementioned circumstances where a DNA sample is required, the court “may impose a [DNA] surcharge” unless the felony of conviction is for an enumerated sex crime, in which case the surcharge is mandatory. Krueger was not convicted of any of the statutorily enumerated sex crimes and therefore, the circuit court was not required to order a DNA surcharge.

oral pronouncement. The circuit court denied Krueger's motion as procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994) (A defendant cannot raise claims in a WIS. STAT. § 974.06 postconviction motion that could have been raised in a WIS. STAT. § 974.02 postconviction motion, on direct appeal, or in a previous § 974.06 motion, unless he or she presents a sufficient reason for failing to raise the issue earlier).

On appeal, the State argues that Krueger's motion filed after the conclusion of his WIS. STAT. RULE 809.30 direct appeal, was an untimely WIS. STAT. § 973.19 sentence modification motion. In support, the State cites to *State v. Nickel*, 2010 WI App 161, ¶¶4-6, 330 Wis. 2d 750, 794 N.W.2d 765, holding that Nickel's motion to vacate his DNA surcharge, brought on grounds that the sentencing court failed to adequately exercise its discretion in imposing the surcharge, constituted a § 973.19(1)(a) sentence modification motion which, by statute, had to be brought within ninety days after sentencing. Krueger argues that because his motion seeks to correct an error in the judgment, it is not a sentence modification motion subject to the time limits in § 973.19.

We agree with Krueger and conclude that given the discrepancy between the circuit court's oral sentencing pronouncement and the written judgments, the judgments should be corrected to remove the DNA surcharges. "[T]he circuit court's unambiguous oral pronouncement of sentence trumps the written judgment of conviction." *State v. Prihoda*, 2000 WI 123, ¶15, 239 Wis. 2d 244, 618 N.W.2d 857; *see also State v. Perry*, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987). "A difference between the sentence portion of the written judgment of conviction and the circuit court's unambiguous oral pronouncement of the sentence is a clerical

error.” *Prihoda*, 239 Wis. 2d 244, ¶15. A defect in the form of the judgment of conviction may be corrected in accordance with the actual determination by the circuit court. *Id.*, ¶17.⁴ We therefore reverse and instruct the circuit court to modify the written judgments to remove the DNA surcharges. The circuit court may either correct the clerical error in the sentence portion of the written judgments or direct the clerk’s office to make these corrections. *Id.*, ¶5.

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are summarily reversed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

⁴ In *State v. Prihoda*, 2000 WI 123, ¶7, 239 Wis. 2d 244, 618 N.W.2d 857, the court stated “neither the doctrine of laches nor WIS. STAT. § 893.40 bars a correction of a clerical error in the sentence portion of a written judgment of conviction in the present case.” Neither of these theories was argued in the present case. We are not persuaded that Krueger’s motion is time-barred under *State v. Nickel*, 2010 WI App 161, 330 Wis. 2d 750, 794 N.W.2d 765, because here, the circuit court never ordered a DNA surcharge as part of its sentence and there is no “sentence” to modify. Similarly, while the circuit court’s frustration with Krueger’s successive litigation is understandable, his motion to correct the judgment was not brought pursuant to WIS. STAT. § 974.06, and does not fall under the procedural bar set in *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994). A § 974.06 postconviction motion is limited to constitutional and jurisdictional challenges. *Nickel*, 330 Wis. 2d 750, ¶7 (citation omitted).