

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 9, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1592-CR

Cir. Ct. No. 2006CF4601

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DANIEL T. LESNIEWSKI,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Daniel T. Lesniewski appeals *pro se* from a postconviction order denying his motion to modify his sentence. He challenges a DNA surcharge imposed pursuant to WIS. STAT. § 973.046(1g). The circuit court determined that Lesniewski's motion was not timely filed. We agree and affirm.

¶2 Lesniewski pled guilty in 2006 to a Class H felony, namely, operating a motor vehicle while intoxicated as a fifth offense. *See* WIS. STAT. §§ 346.63(1)(a), 346.65(2)(am)5. On November 28, 2006, the circuit court sentenced Lesniewski to a four-year term of imprisonment for the crime. As a condition of the sentence, the circuit court imposed a \$250 DNA surcharge. *See* WIS. STAT. § 973.046(1g).

¶3 Lesniewski did not pursue postconviction relief until May 26, 2009, when he filed a *pro se* motion to vacate the DNA surcharge, citing *State v. Cherry*, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393. In *Cherry*, we held that the circuit court is required to demonstrate on the Record a proper exercise of discretion when imposing a DNA surcharge pursuant to WIS. STAT. § 973.046(1g). *Cherry*, 2008 WI App 80, ¶¶9–11, 312 Wis. 2d at 207–209, 752 N.W.2d at 395–396. Lesniewski claimed that the circuit court erroneously exercised its discretion in his case by imposing the surcharge without giving adequate reasons for doing so. The claim cannot be heard.

¶4 When a defendant moves to vacate a DNA surcharge, the defendant seeks sentence modification. Pursuant to WIS. STAT. § 973.19, a defendant may move for sentence modification within ninety days after sentencing. Lesniewski filed his motion more than two years after the sentencing proceeding on November 28, 2006, long after expiration of his deadline under § 973.19. Pursuant to WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30, a defendant may obtain postconviction review of a sentence within the time limits for a direct appeal. Lesniewski's deadline for pursuing a direct appeal under § 974.02 and RULE 809.30, expired twenty days after his sentencing when he failed to file a notice of intent to pursue postconviction relief. *See State v. Lagundoye*, 2004 WI 4, ¶20 n.13, 268 Wis. 2d 77, 93–94 n.13, 674 N.W.2d 526, 534 n.13. Thus,

Lesniewski did not move to vacate the DNA surcharge within the statutory deadline for pursuing an appeal of right under § 974.02 and RULE 809.30.

¶5 The judgment of conviction in this case became final when Lesniewski did not challenge the conviction or the sentence within the deadlines for doing so. See *Lagundoye*, 2004 WI 4, ¶20 and n.13, 268 Wis. 2d at 93–94 and n.13, 674 N.W.2d at 534 and n.13 (judgment of conviction is final after a direct appeal from that judgment and any right to a direct review of the appellate decision are no longer available). As the State observes, *Cherry* does not give the circuit court authority to revisit a sentence after a criminal conviction becomes final.

¶6 *Cherry* requires the circuit court to state the factors it considered and the rationale supporting its decision when imposing a DNA surcharge under WIS. STAT. § 973.046(1g). *Cherry*, 2008 WI App 80, ¶9, 312 Wis. 2d at 207–208, 752 N.W.2d at 395. Thus, *Cherry* describes a rule of criminal procedure. See *Lagundoye*, 2004 WI 4, ¶21, 268 Wis. 2d at 94, 674 N.W.2d at 534 (procedural law regulates the steps for punishing those who violate criminal statutes). New rules of criminal procedure are generally inapplicable to cases that were final before the rule was announced. *Id.*, 2004 WI 4, ¶13, 268 Wis. 2d at 89, 674 N.W.2d at 531–532. We apply new procedural rules to cases on collateral review only when those rules place “‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe’ ... [or] encompass[] procedures that ‘are implicit in the concept of ordered liberty.’” *Id.*, 2004 WI 4, ¶¶31–33, 268 Wis. 2d at 101–103, 674 N.W.2d at 537–538 (citations and two sets of quotation marks omitted). Our decision in *Cherry* does not fit within the limited exceptions warranting retroactive application of a procedural rule.

¶7 Lesniewski fails to demonstrate a basis on which he may challenge the circuit court's exercise of sentencing discretion nearly thirty months after the sentencing proceedings concluded.¹ Accordingly, the circuit court correctly denied Lesniewski's motion to vacate the DNA charge.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

¹ Pursuant to WIS. STAT. § 974.06, a defendant who is in custody may file a collateral challenge to a sentence after the time limits for a direct appeal have passed, but § 974.06 limits the grounds for a challenge to jurisdictional or constitutional matters. *See id.* Lesniewski cannot use § 974.06 to challenge a sentence on the basis that the circuit court erroneously exercised its discretion. *See Smith v. State*, 85 Wis. 2d 650, 661, 271 N.W.2d 20, 24–25 (1978).

