COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP794-CR **Cir. Ct. No. 2004CF3789**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROOSEVELT CARDINE, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Dismissed.*

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

¶1 PER CURIAM. Roosevelt Cardine, Jr., *pro se*, appeals from an order denying his motion to reconsider an order denying his request to "quash" a DNA surcharge. We dismiss the appeal for lack of jurisdiction.

¶2 In September 2004, Cardine was convicted of armed robbery with the threat of force and false imprisonment, based upon his guilty plea. He was sentenced to concurrent terms of imprisonment, with the longer term consisting of twelve years' initial confinement and twelve years' extended supervision. Cardine was also ordered to submit a DNA sample and pay a $250 surcharge. Cardine did not appeal.

¶3 On April 8, 2008, this court released its opinion in ***State v. Cherry***, 2008 WI App 80, ¶¶9-10, 312 Wis. 2d 203, 752 N.W.2d 393, requiring a circuit court to demonstrate the exercise of discretion when imposing a DNA surcharge under WIS. STAT. § 973.046(1g) (2007-08).[1] On December 8, 2008, Cardine moved the circuit court to "quash DNA surcharges" and to refund the $250 he had already paid, claiming an erroneous exercise of discretion by the sentencing court. The court denied the motion on December 10, 2008, noting that Cardine's appellate rights had expired in 2004, foreclosing his challenge. On February 20, 2009, Cardine moved for reconsideration of the denial of the motion to quash. The court denied the motion for reconsideration on February 23.

¶4 Cardine appealed. The notice was dated March 7, 2009, but was not filed in the circuit court until March 19. *See* WIS. STAT. RULE 809.10(1)(a) (appeal initiated by filing notice with clerk of circuit court). By order dated April 23, 2009, this court noted that Cardine had ninety days from December 10,

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

2008, to appeal the order denying the motion to quash the surcharge. Thus, the March 19 notice of appeal was untimely as to that order. We noted, however, that the "prison mailbox tolling rule" might apply and, if Cardine had given his properly addressed notice of appeal to prison officials for mailing prior to expiration of the ninety-day time frame, his appeal might be timely. *See* ***State ex rel. Nichols v. Litscher***, 2001 WI 119, ¶32, 247 Wis. 2d 1013, 635 N.W.2d 292; ***State ex rel. Kelley v. State***, 2003 WI App 81, ¶5, 261 Wis. 2d 803, 661 N.W.2d 854; ***State ex rel. Shimkus v. Sondalle***, 2000 WI App 262, ¶15, 240 Wis. 2d 310, 622 N.W.2d 763. We gave Cardine an opportunity to present evidence that he timely surrendered his documents for mailing.

¶5 Cardine responded not by showing that he timely submitted his notice of appeal for mailing, but by stating that his appeal was actually an appeal from the February 23, 2009 order denying his reconsideration motion.[2] However, a motion for reconsideration ordinarily does not affect the time for appeal, *see* ***Continental Cas. Co. v. Milwaukee Metro. Sewerage Dist.***, 175 Wis. 2d 527, 533-35, 499 N.W.2d 282 (Ct. App. 1993), and appeal cannot be taken from an order denying a motion for reconsideration that presents the same issues as those determined in the order sought to be reconsidered, *see* ***Silverton Enters., Inc. v.***

[2] The notice of appeal had also indicated Cardine was appealing from a March 2008 order denying a request for transcripts. We noted any appeal from that order was untimely and dismissed that portion of the appeal. In response to the court's dismissal order, Cardine indicated that he was not appealing the order denying transcripts. In his appellate brief, Cardine again requests an order for the production of transcripts. We do not address any arguments on this previously dismissed issue.

General Cas. Co., 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988). Thus, this court directed the parties to brief, as a threshold issue on appeal, whether the reconsideration motion presented the same issues as those determined by the December 10, 2008 order and, consequently, whether this court has jurisdiction.

¶6 When no appeal is taken from a judgment or order within prescribed time limits, error in that judgment or order cannot be reached by appeal of an order denying a motion to set it aside. *See* ***Ver Hagen v. Gibbons***, 55 Wis. 2d 21, 26, 197 N.W.2d 752 (1972). A party is entitled to move for reconsideration, but "must present issues other than those determined by the order or judgment for which review is requested in order to appeal from the order entered on the motion for reconsideration." ***Id.*** We thus compare the issues raised in the reconsideration motion with the issues disposed of in the order denying the motion to quash the surcharge. *See* ***Harris v. Reivitz***, 142 Wis. 2d 82, 87, 417 N.W.2d 50 (Ct. App. 1987).

¶7 Cardine's motion to quash the DNA surcharge was denied because Cardine's appellate rights had expired and, as such, any challenge to the circuit court's sentencing discretion was untimely. Cardine's motion for reconsideration, although he attempts to reframe his argument as a constitutional challenge, raises the same issue: whether, in light of ***Cherry***, the circuit court properly exercised its sentencing discretion when imposing the DNA surcharge. Because the motion for reconsideration raised no new issue, Cardine was required to timely appeal from

the December 10, 2008 order denying the motion to quash. He did not, so this court has no jurisdiction over the appeal.[3]

By the Court.—Appeal dismissed.

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

[3] We would, alternatively, reject Cardine's appeal on the merits. First, Cardine's judgment of conviction became final on December 8, 2004, when his WIS. STAT. RULE 809.30 appellate rights expired. ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, which articulated a new procedural rule in April 2008, does not apply retroactively to Cardine's final judgment of conviction. *See* ***State v. Lagundoye***, 2004 WI 4, ¶¶13-14, 268 Wis. 2d 77, 674 N.W.2d 526 (discussing retroactivity).

Second, a challenge to the DNA surcharge at this stage is a call for sentence modification. However, the statutory time limits of WIS. STAT. RULE 809.30 and WIS. STAT. § 973.19 have expired; sentence modification is not available through a WIS. STAT. § 974.06 motion, *see* ***Smith v. State***, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978); and ***Cherry***'s call for the exercise of discretion can hardly be viewed as a "new factor" that would frustrate the purpose of the circuit court's original sentence, *see* ***State v. Champion***, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242.

Finally, to the extent Cardine is attempting to raise an as-applied constitutional challenge, any such claim is conclusory and underdeveloped. Statutes are presumed constitutional, and Cardine thus has the burden to show the statute permitting imposition of the DNA surcharge is unconstitutional beyond a reasonable doubt. *See* ***State v. Smith***, 2009 WI App 16, ¶4, 316 Wis. 2d 165, 762 N.W.2d 856. Cardine fails to adequately identify any actual infirmities in the statute's application. *See* ***id.***, ¶¶4-5, 8-9. At best, Cardine appears to be attempting an equal protection challenge, but does so with misplaced reliance on ***State v. Trepanier***, 204 Wis. 2d 505, 555 N.W.2d 394 (Ct. App. 1996). ***Trepanier*** simply concluded that, under the statutes in effect at the time, requiring burglars as a class to pay a DNA surcharge irrespective of whether they also provided a DNA sample violated equal protection. *See* ***id.*** at 508, 513.