Appeal No. 2015AP2525-CR **Cir. Ct. No. 2014CF950**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYDIS TRINARD ODOM,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2013-14),[1] this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

Does the imposition of multiple DNA surcharges constitute "potential punishment" under WIS. STAT. § 971.08(1)(a) such that a court's failure to advise a defendant about them before taking his or her plea establishes a prima facie showing that the defendant's plea was unknowing, involuntary, and unintelligent?

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

BACKGROUND

Tydis Trinard Odom was charged with two counts of second-degree sexual assault, kidnapping, and substantial battery based on allegations that, on March 11, 2014, he had beaten A.S.F., driven her to his uncle's house, and then had sexual contact with her without her consent.

On the day of trial, A.S.F. did not appear. The State made a new plea offer to Odom.[2] The State would amend the complaint to charge false imprisonment instead of kidnapping and two counts of fourth-degree sexual assault instead of second-degree sexual assault. Odom could plead guilty to substantial battery and false imprisonment and plead no contest to the two counts of fourth-degree sexual assault. The State would not file a charge of felony intimidation of a witness by a person charged with a felony. The State would recommend a sentence at the court's discretion.

Odom spoke with his attorney and then inquired of the court. The court advised him of the maximum penalties he was facing if he was convicted after trial versus if he accepted the plea offer. On the former, Odom was facing twenty-five years of initial confinement and fifteen years of extended supervision on each count of second-degree sexual assault and the count of kidnapping, along with fines of $100,000 for each count, and one-and-one-half years of initial confinement and two years of extended supervision and a fine of $10,000 on the count of substantial battery. On the latter, Odom was facing nine months in jail and a $10,000 fine on each count of fourth-degree sexual assault; three years of

[2] At the final pretrial conference, Odom rejected the State's plea offer.

initial confinement and three years of extended supervision and a $10,000 fine on the count of false imprisonment; and one-and-one-half years of initial confinement and two years of extended supervision and a fine of $10,000 on the count of substantial battery. In addition, the court noted, if Odom accepted the plea offer he would not have to register as a sex offender and he would not be subject to possible confinement, following his release from prison, as a sexually violent person. Thus, the plea offer reduced Odom's exposure from one hundred twenty-three-and-one-half years of confinement and $310,000 in fines to eleven years of confinement and $40,000 in fines.

Odom asked if "people in sexual assault cases [were] … eligible for boot camp or anything like that?" The court answered, "[Y]ou could be eligible for boot camp and I believe for substance abuse…. [The] Court would have to look at all the factors. And I also have to have a substance abuse issue need to be addressed for both of those programs."

After further discussion, Odom accepted the State's plea offer. Following a colloquy, the court accepted Odom's pleas of guilty and no contest.

At sentencing, the following day, defense counsel requested four years of probation. In arguing for that sentence, counsel argued that Odom was exposed to "a lot of drug usage in the family" and that "he smoked marijuana a lot … as a teenager."[3] The court imposed aggregate concurrent and consecutive sentences totaling five years and three months of initial confinement, followed by five years of extended supervision. The court imposed the mandatory DNA

[3] Odom was eighteen years old when he committed these offenses.

surcharge on all four counts, totaling $900. It also imposed the applicable mandatory penalty assessment, surcharges, and costs on each count. The court found that Odom was not eligible for the Challenge Incarceration Program or the Substance Abuse Program.

Subsequently, Odom moved to vacate his conviction, arguing that his plea was not entered knowingly, voluntarily, and intelligently because the circuit court misinformed him that he was statutorily eligible for the Challenge Incarceration Program and the Substance Abuse Program. Odom was statutorily ineligible for those programs because all of his convictions involved violations of WIS. STAT. ch. 940. Had he been accurately informed, Odom avers that he would not have agreed to plead guilty/no contest.

The circuit court denied Odom's motion. Reviewing the transcript from the plea, the court noted that all Odom was told was that he could be eligible for these programs, which denoted a possibility, not an automatic given, and Odom's claimed reliance on a possibility was not enough to warrant the withdrawal of his plea.

Following this court's decision in ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, Odom supplemented his prior motion to vacate his plea by arguing that the imposition of a DNA surcharge for each conviction constituted a punishment, that the circuit court never informed him of that punishment before accepting his plea and, therefore, his plea was not entered knowingly, voluntarily, and intelligently.

The circuit court denied Odom's supplemental motion. The circuit court distinguished ***Radaj*** and concluded that the $900 surcharge was not a punishment. Therefore, the circuit court did not have to inform Odom about the

surcharge, and he was not entitled to withdraw his plea. Odom appeals from the judgment of conviction and the orders denying his motions for postconviction relief.

DISCUSSION

The Law on DNA Surcharge

Prior to January 1, 2014, outside certain specified felony violations, the imposition of a $250 DNA surcharge for a felony conviction was discretionary. *See* WIS. STAT. § 973.046(1g) (2011-12). Effective January 1, 2014, however, the law changed to make the imposition of a DNA surcharge mandatory, and to require the surcharge "[f]or each conviction for a felony, $250," and "[f]or each conviction for a misdemeanor, $200." Sec. 973.046(1r)(a), (b). Thus, in this instance, where Odom was convicted of two felonies and two misdemeanors, which were committed after January 1, 2014, the court imposed $900 in DNA surcharges.

In ***Radaj***, the defendant challenged the imposition of a $1000 DNA surcharge—$250 for each of his four felony convictions—as a violation of the constitutional prohibition against ex post facto laws because he committed the crimes that led to his conviction prior to when the new law took effect. ***Radaj***, 363 Wis. 2d 633, ¶¶1, 3, 11. We outlined the two-part test for an ex post facto violation: whether the legislature's intent was to punish or to impose a civil nonpunitive regulatory scheme and, if the latter, then whether the effect of the sanction was to impose a criminal sanction. ***Id.***, ¶¶13-14. We did not decide the legislature's intent behind the new law. Instead, we assumed without deciding that the legislature's intent was to impose a civil nonpunitive regulatory scheme. ***Id.***, ¶22. We did not need to decide this question because we concluded that the new

law as applied to the defendant had a punitive effect. ***Id.*** In reaching that conclusion, we could perceive of no reason why the DNA surcharge should be based on the number of convictions. ***Id.***, ¶¶29-30. "As is clear from the statutes," we said, "the DNA surcharge is used to cover the cost of the DNA 'analysis' of the biological specimen that the circuit court must order a defendant to provide at the time the court orders the surcharge," but we did not "see any link between the initial DNA analysis and the number of convictions." ***Id.***, ¶31. We noted that other costs might arise later, such as "the cost of comparing the defendant's DNA profile to the DNA profile of other biological specimens collected as part of a future investigation," but, again, we could "conceive of no reason why such costs would generally increase in proportion to the number of convictions, let alone in direct proportion to the number of convictions." ***Id.***, ¶32. Thus, we concluded that "the $1,000 DNA surcharge assessed against Radaj … is not rationally connected and is excessive in relation to the surcharge's intended purpose, and that its effect is to serve traditionally punitive aims," giving it a "punitive effect" as applied to the defendant. ***Id.***, ¶35.

Shortly thereafter, we were presented with a question left unanswered by ***Radaj***: is a single mandatory $250 DNA surcharge for a felony conviction for a crime committed before the change in the law an ex post facto violation? ***State v. Scruggs***, 2015 WI App 88, ¶9, 365 Wis. 2d 568, 872 N.W.2d 146, *review granted*, 2016 WI 78, 371 Wis. 2d 604, 885 N.W.2d 377. We began by setting forth the "intents-effects" test:

> First, the intent of the legislature in creating the law will be examined to determine whether it either expressly or impliedly indicated a preference that the statute in question be considered civil or criminal. If a court concludes that the legislature's intent was to punish, the law is considered punitive and the inquiry ends there. If, however, the legislature's intent was to impose a civil and nonpunitive

> regulatory scheme, a court must next determine whether the sanctions imposed by the law are so punitive either in purpose or effect so as to transform what was clearly intended as a civil remedy into a criminal penalty. Only the "clearest proof" will convince a court "that what a legislative body has labeled a civil remedy is, in effect, a criminal penalty."

Id., ¶7 (citations omitted). In short, was the intent behind the law to punish and, if not, is a single DNA surcharge "so punitive either in purpose or effect so as to transform what was clearly intended as a civil remedy into a criminal penalty"? ***Id.*** (citing ***State v. Rachel***, 2002 WI 81, ¶33, 254 Wis. 2d 215, 647 N.W.2d 762).

Applying the intent-effects test, we concluded that this fact pattern did not present an ex post facto violation. ***Scruggs***, 365 Wis. 2d 568, ¶¶7, 10-18. Looking at the statute and its history, we found that the legislature's motivation behind the change in the law was "to expand the State's DNA data bank and to offset the cost of that expansion." ***Id.***, ¶10. We noted that the change in the law "was part of a larger initiative by the State to expand the collection of DNA samples." ***Id.*** So as "to offset the increased burden on the Department of Justice (DOJ) in collecting, analyzing, and maintaining the additional DNA samples, the legislature imposed the $250 surcharge on felony convictions to be deposited with the DOJ to pay for operating its DNA data bank." ***Id.***, ¶11. The DNA surcharge, which "is specifically dedicated to fund the collection and analysis of DNA samples and the storage of DNA profiles—all regulatory activities—evidences a nonpunitive cost-recovery intent" as to the single mandatory surcharge of $250. ***Id.***, ¶12.

Recognizing that the correlation between the costs and the surcharge need not be perfect to be rational, we noted that the relatively small size of the fee also indicated that it was not intended to have a significant retributive or deterrent

value. ***Id.***, ¶13. Ultimately, the structure and design of the statute indicated that the surcharge was intended to be an administrative charge to pay for the costs to implement, operate, and maintain the DNA database. *See* ***id.***, ¶15. Finally, we noted that "our conclusion that the statute evidences a nonpunitive cost-recovery intent is bolstered by its language expressly denominating the fee assessed against felony offenders such as Scruggs as a 'surcharge,' a civil nonpunitive label, rather than as a 'fine' or 'penalty.'" ***Id.***, ¶17 (citations omitted).

We rejected summarily that the effect of the change in the law imposing a single mandatory surcharge of $250 was punitive under the relevant factors as we had previously rejected the same arguments in the context of Scruggs' arguments that the punitive effects demonstrated a punitive intent. ***Id.***, ¶18. Thus, we concluded that the legislature did not intend to punish a defendant, and, at least for a single surcharge, it did not have the effect of punishment.

While Odom concedes that there is no ex post facto violation here, he nevertheless argues that "***Radaj***'s conclusion that the surcharge is a punishment still applies." The circuit court's reliance on ***Scruggs***, Odom argues, was misplaced because she had only one conviction and, thus, only one surcharge of $250, whereas Odom has multiple convictions, making his case "like ***Radaj***." Since the multiple surcharges are punishment, Odom argues, he had to be informed that they would be imposed before he could knowingly, voluntarily, and intelligently enter a guilty/no contest plea.

Are Multiple DNA Surcharges Punishment for Purposes of Pleas?

"When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" ***State v. Brown***, 2006

WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted). "A manifest injustice occurs when there has been a 'serious flaw in the fundamental integrity of the plea.'" ***State v. Cross***, 2010 WI 70, ¶42, 326 Wis. 2d 492, 786 N.W.2d 64 (citation omitted). One way to show a manifest injustice is to establish that a guilty or no contest plea was not entered knowingly, voluntarily, and intelligently. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 635-36, 579 N.W.2d 698 (1998). When a guilty plea is not knowing, voluntary, and intelligent, a defendant may withdraw the plea as a matter of right because such a plea violates fundamental due process. ***State v. Finley***, 2016 WI 63, ¶13, 370 Wis. 2d 402, 882 N.W.2d 761.[4]

A knowing, voluntary, and intelligent plea requires, among other things, that the defendant be made aware of the "potential punishment" before entering a guilty or no contest plea. WIS. STAT. § 971.08(1)(a); ***State v. Bollig***, 2000 WI 6, ¶16, 232 Wis. 2d 561, 605 N.W.2d 199. In other words, "we must

[4] In order to be entitled to withdraw a guilty plea on grounds that it was not knowing, voluntary, and intelligent, a defendant must establish a prima facie case showing that the circuit court violated WIS. STAT. § 971.08 or other court-mandated duty and allege that the defendant did not know or understand the information that the circuit court should have provided at the plea hearing. *See* ***State v. Taylor***, 2013 WI 34, ¶32, 347 Wis. 2d 30, 829 N.W.2d 482. Once that showing is made, the defendant is entitled to an evidentiary hearing where the burden is on the State to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered despite the inadequacy of the record at the plea hearing. ***Id.*** If the State fails to meet its burden at the evidentiary hearing, the defendant is entitled to withdraw his or her plea as a matter of right. ***State v. Finley***, 2016 WI 63, ¶92, 370 Wis. 2d 402, 882 N.W.2d 761. Thus, if multiple DNA surcharges are considered punishment, the matter would have to be remanded to the circuit court for an evidentiary hearing.

Even if a plea is entered knowingly, voluntarily, and intelligently, there may be other circumstances under which a circuit court may, within its discretion, find that a manifest injustice exists, that is, a serious flaw in the fundamental integrity of the plea, thereby allowing a defendant to withdraw his or her plea. ***Taylor***, 347 Wis. 2d 30, ¶¶48-49. Odom, however, does not allege that there is any other circumstance that warrants granting his motion to withdraw his plea.

determine whether [the imposition of a DNA surcharge for each conviction] constitutes punishment." ***Bollig***, 232 Wis. 2d 561, ¶16; *see* ***State v. Dugan***, 193 Wis. 2d 610, 618, 534 N.W.2d 897 (Ct. App. 1995) ("The threshold question is whether restitution is *punishment*."). In addition, the consequence must be direct, not collateral. *See* ***Bollig***, 232 Wis. 2d 561, ¶¶16-17. As relevant here, the test for a direct, as compared to a collateral consequence, is "whether the result represents a definite, immediate, and largely automatic effect on the … defendant's [potential] *punishment*." ***Dugan***, 193 Wis. 2d at 618 & n.4 ("[E]ven if restitution is 'definite, immediate, and largely automatic' … it is not a mandatory component of a valid plea colloquy … if it is not punishment." (citation omitted)); *see* ***State v. Byrge***, 2000 WI 101, ¶68, 237 Wis. 2d 197, 614 N.W.2d 477 ("Parole eligibility in this discrete situation implicates punishment *and* constitutes a direct consequence of the plea." (emphasis added)).

In ***Dugan***, 193 Wis. 2d at 618-19, we addressed whether restitution is punishment. We rejected the defendant's notion that the answer turned on whether the restitution worked a rehabilitative or punitive effect. ***Id.*** at 619-20. Such a distinction was too simplistic since sentencing provisions such as incarceration, inpatient drug treatment, and restitution have components of both rehabilitation and punishment. ***Id.*** at 620. Thus, even though restitution could have a punitive effect, what was dispositive was "the fundamental purpose of the sentencing provision at issue." ***Id.*** In concluding "that the primary and fundamental goal of restitution is the rehabilitation of the offender," we found persuasive that the legislature did not list restitution as a potential penalty for any classification of crime or forfeiture, the plain meaning of the word restitution, and the purpose behind restitution, that being to strengthen the offender's sense of responsibility and to compensate the victim for the loss suffered. ***Id.*** at 620-23.

In ***Bollig***, 232 Wis. 2d 561, ¶16, the supreme court was asked to "determine whether the [sex offender] registration requirement constitutes punishment." The supreme court said that the question turned on whether the requirement was "one that has a definite, immediate, and largely automatic effect on the range of defendant's punishment." ***Id.*** In making that assessment, the court looked primarily to the underlying intent of the registration requirement, along with consideration of whether this was outweighed by any punitive effect. ***Id.***, ¶¶20-26. The intent of the registration statute, the court said, was "to protect the public and assist law enforcement," not "to punish sex offenders." ***Id.***, ¶21. While the registration requirement, which results in the release of an offender's information and the offense committed, "can work a punitive effect" such as vandalism, loss of employment, and community harassment, this did not override "the primary and remedial goal" of the registration requirement "to protect the public." ***Id.***, ¶26; *see* ***id.***, ¶20 (noting that other courts have concluded that the remedial goal of protecting the public outweighs any punitive effect of registration). Thus, the supreme court concluded, the duty to register was not punishment, and thus, it was a collateral consequence of the defendant's no contest plea as it did not affect the potential punishment. Bollig did not have a due process right to be informed of collateral consequences prior to entering his plea. ***Id.***, ¶27.

Bollig and ***Dugan*** provide that, for purposes of a valid plea, the intent behind the statute must be weighed against its punitive effect—but ultimately the analysis seeks to identify the primary and fundamental goal of the provision at issue. These cases counsel that a consequence can have a punitive effect, but still not be a "potential punishment" under WIS. STAT. § 971.08(1)(a). The ex post facto "effects" analysis weighs the purpose and effect to determine

whether it is so punitive as to transform what was clearly intended as a civil remedy into a criminal penalty. Simply because a civil regulatory surcharge is punitive in effect does not necessarily mean that it is intended as criminal penalty.

While Odom and the State assume that one analytical framework is applicable to another, neither party provides any case law that tells us whether this is so.

Moreover, even if the ex post facto analysis informs the question of whether a consequence of a plea is punitive, ***Scruggs*** says neither the intent nor the effect of a single $250 DNA surcharge is punitive. ***Radaj***, by contrast, holds that notwithstanding the intent behind the law, multiple surcharges have the effect of punishment. ***Radaj*** did not address whether the intent was punitive as to multiple surcharges. Nevertheless, ***Radaj*** referred to the additional DNA surcharges as "an additional criminal fine" and as "promot[ing] the traditional aims of punishment." ***Radaj***, 363 Wis. 2d 633, ¶¶24-25 (citation omitted).

The State, relying on ***Scruggs***, argues that the DNA surcharge serves a nonpunitive purpose, to expand the DNA databank and to cover the cost associated with that expansion. So, the State contends, imposing a surcharge for each conviction only "increases the pool of funds available to further enhance the State's ability to collect, store and analyze DNA samples." Odom, the State continues, "fails to explain how increasing the amount of funds available for these all-important law enforcement purposes is 'punishment.'" But, the problem for the State is that ***Scruggs*** involved only one DNA surcharge. And, in ***Radaj***, which involved multiple surcharges, we saw "no rational connection between the method of calculating the surcharge and the costs the surcharge is intended to fund." ***Radaj***, 363 Wis. 2d 633, ¶34.

However, not in ***Radaj***, nor in ***Scruggs***, nor here has a dollar-and-cents value been placed on the cost of running the DNA data bank so that we might be able to compare the costs associated with running the data bank, in collecting, storing, and analyzing DNA samples against the amount of fees collected from offenders. While we are bound by the language and conclusions of ***Radaj***, the factual issue remains as to whether there is a rational compensatory connection even as between multiple surcharges and multiple convictions and the overall purpose of the data bank that renders the surcharge primarily regulatory/compensatory rather than punitive. In any event, Odom fails to explain how the legislative intent could be different for one surcharge (civil nonpunitive regulatory fee) as compared to multiple surcharges (a criminal penalty).

The State also argues that ***Radaj*** is distinguishable because "Odom's punishment ... was not made more burdensome after his crimes." The burden did not increase between when Odom committed the crime and when he was sentenced, unlike in ***Radaj***, as the State rightly recognizes. However, Odom suggests that that comparison misses the point because, in determining whether the increased burden was a punishment, ***Radaj*** focused on determining whether the multiple surcharges were punitive in comparison to the single surcharge. ***Id.***, ¶35. In ***Radaj***, the critical and difficult question was not whether the DNA surcharge had increased—it obviously did so—but whether the new multiple DNA surcharges were punishment. ***Id.***, ¶12 ("[A]n ex post facto violation occurs if a

law 'inflicts a greater punishment than the law annexed to the crime at the time it was committed.'" (citation omitted))[5].

Other Considerations

If we follow ***Radaj*** and conclude that multiple DNA surcharges are punishment, it would have an effect on the "potential punishment" under WIS. STAT. § 971.08(1)(a). For example, as we pointed out in ***Radaj***, depending on how the plea is negotiated, a defendant may pay less in surcharges. ***Id.***, ¶30. So too, here, the negotiated plea allowed Odom to reduce his exposure on DNA

[5] The State also asserts that the circuit court's failure to advise Odom about the multiple DNA surcharges before accepting his plea was, if error, nevertheless harmless because it is irrational to risk one hundred twenty-three-and-one-half years of confinement and $310,000 in fines just to avoid a $900 surcharge which, if convicted after trial, he would have to pay anyway. While such a gamble may be irrational, "here the harmless error [doctrine] does not apply." ***Taylor***, 347 Wis. 2d 30, ¶40. This approach was affirmed in ***Finley***, 370 Wis. 2d 402, ¶¶92, 95 (holding that if the State fails to meet its burden at the evidentiary hearing on a ***Bangert*** motion, *see* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), the defendant is entitled to withdraw his or her plea as a matter of right).

The State suggests that we can consider whether Odom would have pleaded anyway had he been informed about the $900 DNA surcharge. The supreme court's decisions in ***Finley***, 370 Wis. 2d 402, ¶94, and ***State v. Cross***, 2010 WI 70, ¶¶24, 40, 326 Wis. 2d 492, 786 N.W.2d 64, however, appear to currently foreclose such a consideration. The cases the State cites in support of this proposition did not involve an alleged ***Bangert*** violation. *See, e.g.*, ***State v. Rockette***, 2005 WI App 205, ¶¶25-27, 287 Wis. 2d 257, 784 N.W.2d 382 (holding that result in the case—a guilty plea—would have been the same even if court had not erroneously denied defendant's motion to suppress). Nevertheless, if the supreme court answers our certified question in the affirmative, it may also want to consider the additional question of whether this de minimis error should be considered in the context of whether Odom would have pleaded anyway for, as the State argues, it defies common sense to pretend that Odom would not have pleaded given the reduction in his exposure from one hundred twenty-three-and-one-half years to eleven years of confinement, the reduction in applicable fines from $310,000 to $40,000, along with the elimination of the sexual offender registration requirement and risk of confinement as a sexually violent person.

The State also points out that Odom did not raise this claim until his supplemental motion to withdraw his plea, but Odom obviously did not think he had a viable argument until this court's decision in ***Radaj***. ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758.

surcharges from $1000 to $900. Further, if deemed punishment, imposition of the multiple DNA surcharges would have a definite, immediate, and automatic effect on the potential punishment. It does not depend on another governmental agency or different tribunal, *see* ***State v. Merten***, 2003 WI App 171, ¶10, 266 Wis. 2d 588, 668 N.W.2d 750, a potential future proceeding, *see* ***State v. Myers***, 199 Wis. 2d 391, 394, 544 N.W.2d 609 (Ct. App. 1996), the defendant's own conduct, *see* ***State v. Yates***, 2000 WI App 224, ¶13, 239 Wis. 2d 17, 619 N.W.2d 132, or a body of law collateral to state proceedings, *see* ***State v. Kosina***, 226 Wis. 2d 482, 488, 595 N.W.2d 464 (Ct. App. 1999).

If we were to agree with Odom, we question what the practical effect would be. The State notes correctly that there are a host of other surcharges that are imposed upon conviction and, like with the DNA surcharge, on a per-conviction basis. For example, WIS. STAT. § 973.045 imposes a crime victim and witness assistance surcharge if a sentence or probation is imposed and for each felony and misdemeanor conviction. Is this surcharge punishment and, thus, would courts have to advise of this surcharge before accepting a guilty or no contest plea?

Moreover, the oddity of finding that multiple surcharges are punishment would mean that in those cases where a defendant pleads to multiple counts, a court would have to inform him or her of the amount of surcharges that would be imposed. However, if a defendant pleads only to one count, then a court has no obligation to inform him or her of the DNA surcharge. This inconsistency has the potential to cause confusion.

We note that, like in ***Dugan***, the placement of the DNA surcharge with other statutes related to surcharges in WIS. STAT. ch. 973 and not with the penalty or fine provisions of WIS. STAT. ch. 939 also speaks to the legislature's intent behind the law. ***Dugan***, 193 Wis. 2d at 621. The legislature's intent is also evident in the very use of the word "surcharge," as opposed to penalty, the former which means "to charge one an extra or additional fee usually for some special service." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2299 (1993); *see* ***Dugan***, 193 Wis. 2d at 621. Odom fails to point to a single case indicating that surcharges are punitive in the context of required advisements before taking a guilty plea.

Other jurisdictions have come to different conclusions on whether a surcharge may be considered punishment. *See* ***State v. Fisher***, 877 N.W.2d 676, 685-86 & n.6 (Iowa 2016) (a thirty-five-percent criminal penalty surcharge, a $10 drug abuse resistance education surcharge, and a $125 law enforcement initiative surcharge were considered punishment because they were mandatory and were not compensatory like restitution and court costs and, thus, plea colloquy was not in actual compliance with statutory standard); *cf.* ***Hermann v. State***, 548 S.E.2d 666, 667-68 (Ga. Ct. App. 2001) (defendant not entitled to withdraw his plea where court did not advise him of surcharges and fees because they are mandatory, they did not lengthen or alter the pronounced sentence but merely had a collateral effect); ***People v. Guerrero***, 904 N.E.2d 823, 824 (N.Y. 2009) (holding that mandatory surcharge and crime victim assistance fee did not constitute part of defendant's sentence; therefore, surcharge and fee did not need to be pronounced in his presence during sentencing, and defendant was not entitled to be resentenced).

CONCLUSION

The supreme court is "designated by the constitution and the legislature as a law-declaring court." ***State v. Grawien***, 123 Wis. 2d 428, 432, 367 N.W.2d 816 (Ct. App. 1985); *see* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). The issue raised by this appeal—does the imposition of multiple DNA surcharges constitute "potential punishment" under WIS. STAT. § 971.08(1)(a) such that a court's failure to advise a defendant about them before taking his or her plea renders the plea potentially invalid—is best suited for resolution by the supreme court. We believe that the supreme court should clarify the law on this issue. *See* WIS. STAT. § 809.62(1r)(c).

Currently pending before the supreme court is ***Scruggs***, which raises a similar issue: whether one DNA surcharge is punishment and constitutes an ex post facto violation. In deciding ***Scruggs***, the supreme court will address both the intent and effects of the DNA surcharge law. If this analysis is deemed relevant, either because it is similar or informative in the context of a valid plea colloquy, considering the two issues together is likely to clarify both analyses. Moreover, we believe the supreme court should address the significance, if any, of the difference between single and multiple surcharges in both the ex post facto and plea contexts, so as to provide consistency in the law.

The question of whether a court's failure to advise a defendant that multiple DNA surcharges must be imposed renders a guilty plea potentially invalid "is a question of law" and one "that is likely to recur unless resolved by the supreme court." WIS. STAT. § 809.62(1r)(c)(3). Most criminal dispositions are resolved via the plea process. *See* ***State v. LeMere***, 2016 WI 41, ¶110, 368 Wis. 2d 624, 879 N.W.2d 580 (Bradley, Ann Walsh, J., dissenting). The law requires a DNA surcharge for each misdemeanor and felony conviction, and that has been the state of the law for now over two years. Circuit courts are not yet in the habit of advising defendants about the DNA surcharge prior to accepting a plea. Indeed, WIS JI—CRIMINAL SM-32 (2007) at 1-2, 20-23 (2007) does not mention a DNA surcharge, or any surcharge for that matter, that a court must advise a defendant of before taking his or her plea. *See* ***Brown***, 293 Wis. 2d 594, ¶23 n.11 ("We strongly encourage courts to follow [WIS JI—CRIMINAL SM-32]."). Thus, a decision on this novel issue has the potential to impact thousands of convictions. Sec. 809.62(1r)(c)(2). Currently, we have one other appeal pending that raises this same issue. *See* ***State v. Freiboth***, 2015AP2535.

Thus, we believe these are "special and important reasons" for the supreme court to review the issue presented, and we respectfully urge the supreme court to accept certification of this appeal. *See* WIS. STAT. §§ 809.61, 809.62(1r).[6]

[6] As an additional basis for withdrawing his plea, Odom cites the erroneous advice the court gave him about his eligibility for the Substance Abuse and Challenge Incarceration Programs. We are not certifying this question to the supreme court. The issue certified relates to a failure to advise while this issue relates to erroneous advice. This issue is not that the plea varied from the mandatory procedural requirements of WIS. STAT. § 971.08. *See* ***Bangert***, 131 Wis. 2d 246. Instead, Odom argues that the court's erroneous advice about a concededly collateral consequence renders his plea unknowing and involuntary. The cases Odom cites in support, however, are distinguishable, as they involved misinformation from defense counsel and the prosecutor with the acquiescence of the court. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 121-22, 128, 332 N.W.2d 744 (1983); ***State v. Brown***, 2004 WI App 179, ¶¶8, 13-14, 276 Wis. 2d 559, 687 N.W.2d 543. Odom did not allege in his motion that counsel misinformed him about his eligibility for these programs.

In any event, the circuit court did not erroneously exercise its discretion in determining that this erroneous advice does not rise to a "manifest injustice," that is, "a *serious* flaw in the fundamental integrity of the plea." *See, e.g.*, ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (citations omitted; emphasis added). The court told Odom that he "could be eligible for boot camp" and it "believe[d]" for a substance abuse program, but the court would have to look at all the factors. The court's language clearly shows that placement was only a possibility, not a certainty. *See* ***State v. Steele***, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 632 N.W.2d 112 (stating that even if the offender meets all the eligibility requirements, the circuit court still has the discretion to declare an offender ineligible for the Challenge Incarceration Program). The mere chance of placement is unlike the situations in ***Riekkoff*** and ***Brown***. In ***Riekkoff***, the State promised that appellate review would be available despite the defendant's guilty plea, but that agreement was legally ineffective. ***Riekkoff***, 112 Wis. 2d at 121. This "error undermined an important part of the 'inducement' that motivated the defendant to plead guilty." ***State v. Lichty***, 2012 WI App 126, ¶19, 344 Wis. 2d 733, 823 N.W.2d 830 (quoting ***Riekkoff***, 112 Wis. 2d at 129 ("it nevertheless was a primary inducement for [defendant's] guilty plea")). Similarly, in ***Brown***, the plea was "*structured*" or "*purposefully crafted*" so that the defendant would avoid having to register as a sex offender and the possibility of postincarceration commitment. ***Brown***, 276 Wis. 2d 559, ¶¶2, 13 (emphasis added). The plea here was not structured or purposefully crafted so that Odom could participate in one of these programs. Even if Odom were eligible for these programs, the Department of Corrections would have been entitled to make its own determination of eligibility. WIS. STAT. §§ 302.045(2)(d), 302.05; ***Steele***, 246 Wis. 2d 744, ¶7. Given the uncertain and collateral nature of these programs, we see no erroneous exercise of discretion in the circuit court's determination that there was no manifest injustice.