Appeal No. 2016AP1745-CR **Cir. Ct. No. 2015CF1187**

WISCONSIN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL L. COX,

DEFENDANT-APPELLANT.

FILED

AUG 29, 2017
Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Stark, P.J., Hruz and Seidl, JJ.

Pursuant to WIS. STAT. RULE 809.61, this appeal is certified to the Wisconsin Supreme Court for its review and determination.

This case raises a single question: whether a sentencing court retains any discretion under WIS. STAT. § 973.046 (2015-16), to waive DNA surcharges for crimes committed after January 1, 2014.

BACKGROUND

Michael Cox pled guilty to one count of second-degree recklessly endangering safety based on a March 14, 2015 incident in which Cox drove intoxicated against oncoming freeway traffic for more than three miles. The circuit court imposed a prison sentence but, because Cox had previously submitted

a DNA sample, the court waived the $250 DNA surcharge. The judgment of conviction, however, imposed the DNA surcharge. Cox filed a postconviction motion requesting the circuit court to modify the judgment of conviction to conform with the court's oral pronouncement. The successor judge denied the motion, concluding the sentencing court had no authority to waive or vacate the surcharge.

DISCUSSION

For crimes committed before January 1, 2014, the effective date of 2013 Wis. Act 20, the sentencing court had discretion to impose a DNA surcharge based on the language of WIS. STAT. § 973.046(1g) (2011-12): "The court may impose a deoxyribonucleic acid analysis surcharge of $250." An exception was made for certain sex offenses for which the court "shall impose a deoxyribonucleic acid surcharge of $250." WIS. STAT. § 973.046(1r) (2011-12). Effective January 1, 2014, the statutes were modified to provide:

> If a court imposes a sentence or places a person on probation, the court shall impose a deoxyribonucleic acid analysis surcharge, calculated as follows:
>
> (a) For each conviction for a felony, $250.
>
> (b) For each conviction for a misdemeanor, $200.

WIS. STAT. § 973.046(1r) (2015-16).

The State contends the word "shall" is presumed mandatory and will be construed as directory only if necessary to carry out the intent of the legislature. *See* ***Bank of New York Mellon v. Carson***, 2015 WI 15, ¶¶21-22, 361 Wis. 2d 23, 859 N.W.2d 422. By replacing the word "may" with "shall" the legislature evinced intent to make imposition of the surcharge mandatory rather than

directory. Allowing a sentencing court any discretion to waive the surcharge would mean the change from "may" to "shall" would have no effect. The State also argues that this court lacks authority to interpret the statute as allowing any discretion to waive the surcharge because doing so would be inconsistent with precedent. In ***State v. Scruggs***, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786, and in numerous decisions by the Wisconsin Court of Appeals, the revised version of WIS. STAT. § 973.046 has been described as "mandatory," although the specific argument of statutory construction raised in this appeal was not considered in those opinions.

Using well-established rules of statutory construction, Cox contends the circuit court retains authority to waive the DNA surcharge. As part of the same Act that amended the DNA surcharge provisions, the legislature modified WIS. STAT. § 973.045(1) (2015-16), the crime victim and witness assistance surcharge. The legislature used the same language: "the court shall impose" a victim and witness assistance surcharge. However, unlike the provision for the DNA surcharge, the legislature included a provision to the victim and witness surcharge: "A surcharge imposed under this section may not be waived, reduced, or forgiven for any reason."

Statutory language is interpreted in the context in which it is used, not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes. ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. When another statute contains a similar provision, the omission of a portion of the similar statute concerning a related subject is significant in showing that a different intention existed. ***State v. Welkos***, 14 Wis. 2d 186, 192, 109 N.W.2d 889 (1961). Because the legislature chose to specify that the victim and witness surcharge cannot be waived, but it

included no such language regarding the DNA surcharge, Cox contends the legislature intended to allow a sentencing court the discretion to waive the DNA surcharge. If use of the word "shall" was meant to remove all discretion, the portion of the additional sentence prohibiting waiver of the victim and witness surcharge would be mere surplusage. Statutes should be construed to avoid surplusage. ***Kalal***, 271 Wis. 2d 633, ¶46. Cox contends Act 20 changed the DNA surcharge from providing a default that the surcharge will not be imposed unless the sentencing court decides otherwise, to a default that it will be imposed unless the court exercises its discretion to waive the surcharge. Cox notes that generally, sentencing courts are accorded substantial discretion. We recognize that in a given case courts may choose to use that discretion to waive all or parts of DNA surcharges to preserve a defendant's ability to meet other financial obligations such as restitution to the victim.

Although the principles of statutory construction seemingly favor Cox's construction of the statute, we hesitate to rule in his favor for two reasons. First, as the State notes, that conclusion might run afoul of the precedent describing the amended statute as "mandatory." Because this court lacks authority to overrule published precedent, ***Cook v. Cook***, 208 Wis. 2d 166, 185, 189, 560 N.W.2d 246 (1997), and that precedent is based on the assumption that waiver of the DNA surcharge is not permitted, we submit the issue to the supreme court as suggested in ***Marks v. Houston Casualty Co.***, 2016 WI 53, ¶¶79-80, 369 Wis. 2d 547, 881 N.W.2d 309. Second, Cox's construction of the statute would allow waiver of the DNA surcharge for sex criminals, which we believe was not allowed under the previous version of the statute and which we doubt the legislature intended.

There are two cases concerning DNA surcharges currently pending before the Wisconsin Supreme Court. In ***State v. Odom***, No. 2015AP2525-CR, this court certified the issue of whether a court must advise a defendant about the surcharges before taking a guilty or no-contest plea. Odom argues that the court was required to advise him at the plea hearing that it would impose four DNA surcharges, characterizing the surcharges as "potential punishment" under WIS. STAT. § 971.08(1)(a) (2015-16). ***Odom***, No. 2015AP2525-CR at 9 n.4. Whether a surcharge constitutes punishment depends upon whether the direct consequence is "definite, immediate and largely automatic." ***State v. Bollig***, 2000 WI 6, ¶16, 232 Wis. 2d 561, 605 N.W.2d 199. We submit that whether the circuit court retains any discretion to waive the DNA surcharge impacts the question of whether the surcharge constitutes punishment.

A petition for review is also pending in ***State v. Williams***, 2017 WI App 46, ___ Wis. 2d ___, ___ N.W.2d ___ (No. 2016AP883-CR), in which this court reluctantly concluded requiring Williams to pay a DNA surcharge after he had already provided a DNA sample and had been assessed a surcharge constituted an ex post facto violation. Characterizing the current version of the statute as "mandatory" and "required," we concluded the current statute could not be applied to crimes committed before January 1, 2014, because that would constitute an ex post facto violation. ***Id.***, ¶23. We reached that conclusion based on the holdings in ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, and ***State v. Elward***, 2015 WI App 51, 363 Wis. 2d 628, 866 N.W.2d 756. In each of these cases, this court assumed the statutory change eliminated any sentencing court discretion regarding the DNA surcharge. It is not clear whether the same decisions would have been reached if the statute had been construed as merely changing the default condition from no surcharge unless ordered by the

sentencing court to imposition of the surcharge unless waived by the sentencing court.

Because cases currently pending before the Wisconsin Supreme Court and published decisions of this court may turn on the issue presented here, and because this court lacks authority to make rulings inconsistent with the supreme court's ruling in ***Scruggs*** and this court's decisions in ***Radaj***, ***Elward***, and ***Williams***, we respectfully request the supreme court to accept this certification to clarify the sentencing court's authority.