COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1196-CR **Cir. Ct. No. 2009CF5163**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY V. HOWARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

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

¶1 PER CURIAM. Larry V. Howard, *pro se*, appeals from a judgment of conviction for solicitation for first-degree intentional homicide, *see* WIS. STAT.

§ 939.30(1) (2007-08), and an order denying his postconviction motion to remove the $250 DNA surcharge.[1] At the time Howard committed the crime, the imposition of a $250 DNA surcharge for the offense was subject to the circuit court's discretion; however, by the time he was sentenced, the $250 DNA surcharge was mandatory for all felony convictions. Howard argues that WIS. STAT. § 973.046(1r) as it is applied to him violates the *ex post facto* clauses of the United States and Wisconsin Constitutions. We disagree and affirm the judgment and order of the circuit court.

I. BACKGROUND

¶2 In 2009, Howard was charged with one count of first-degree intentional homicide as a party to a crime arising out of events that took place in 2007. According to the complaint, Howard arranged a "hit" that resulted in the shooting of the victim. The State later filed an amended information charging Howard with three counts of solicitation of first-degree intentional homicide. Howard pled no-contest to the charges in 2011. In 2015, the circuit court sentenced Howard on count one to seven years and six months of initial confinement and five years of extended supervision. The circuit court withheld sentences on counts two and three. The circuit court ordered Howard to pay a $250 DNA surcharge.

¶3 After sentencing, Howard made multiple requests to have the DNA surcharged removed. Howard explained that he had previously paid a DNA

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

surcharge in 2001 on a felony drug case. All of Howard's requests were denied, with the circuit court concluding that the surcharge was mandatory.

II. DISCUSSION

A. The single mandatory DNA surcharge as applied to Howard does not violate the *ex post facto* clauses.

¶4 At the time Howard committed the offenses in 2007, imposition of the DNA surcharge was discretionary. *See* WIS. STAT. § 973.046(1g) (2007-08); *see also* ***State v. Cherry***, 2008 WI App 80, ¶¶9-11, 312 Wis. 2d 203, 752 N.W.2d 393. In 2013, however, the legislature amended WIS. STAT. § 973.046 to require the DNA surcharge for every felony conviction. *See* 2013 Wis. Act 20, § 2355; sec. 973.046(1r)(a). The act specified that the amended statute would apply to any sentencing held on or after January 1, 2014. 2013 Wis. Act 20, § 9426(1)(am). Therefore, when Howard was sentenced on January 9, 2015, the circuit court imposed the mandatory DNA surcharge of $250 for his conviction on one count of solicitation of first-degree intentional homicide.

¶5 Howard argues that because he was convicted before the amendment to WIS. STAT. § 973.046(1r), the mandatory DNA surcharge is an *ex post facto* violation as applied to him. An *ex post facto* violation arises when there is a law "'which makes more burdensome the punishment for a crime.'" ***State v. Scruggs***, 2015 WI App 88, ¶7, 365 Wis. 2d 568, 872 N.W.2d 146 (citations omitted; one set of quotation marks omitted), *review granted* (WI Mar. 7, 2016) (No. 2014AP2981-CR).

¶6 Whether the mandatory DNA surcharge violates the *ex post facto* clauses of the United States and Wisconsin Constitutions is a question of law we

review *de novo*. *See* ***id.***, ¶6. Howard has the burden to establish a violation beyond a reasonable doubt. *See* ***id.***

¶7 In ***Scruggs***, we recently had occasion to consider an "as applied" challenge relating to the imposition of the mandatory $250 surcharge for a single felony conviction.[2] ***Id.***, ¶14. According to the criminal complaint, Scruggs committed burglary as a party to a crime in 2013. ***Id.***, ¶2. She pled no contest to that offense on April 1, 2014, and was sentenced. ***Id.*** As part of the sentence, the judgment ordered her to provide a DNA sample and pay a $250 DNA surcharge. ***Id.***

¶8 We concluded that the $250 surcharge in ***Scruggs*** did not violate the *ex post facto* clauses. ***Id.***, ¶19. Following ***Scruggs***, we arrive at the same conclusion in this case.

¶9 In an effort to avoid this result, Howard misstates the law when he frames the issue as follows: "[I]s a DNA surcharge which would not have been ordered under the previous controlling statute, WIS. STAT. § 973.046(1g), but now is required due to the enactment of WIS. STAT. § 973.046(1r) punitive?" It is inaccurate to state that the DNA surcharge would not have been ordered before—the DNA surcharge *could* have been imposed under the old statute, which gave the circuit court discretion to determine whether to impose it.[3]

[2] Briefing in this case was completed before we issued our decision in ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, *review granted* (WI Mar. 7, 2016) (No. 2014AP2981-CR).

[3] Howard writes in his reply brief that the circuit court, under the discretionary DNA surcharge statute, "routinely overlooked the DNA surcharge if it had been paid in a previous case." Even if this is true, the law did not require the circuit court to do so.

¶10 Additionally, Howard argues:

> [K]nowing of the change in law surrounding the DNA surcharges would have provided Howard with information and permitted Howard to either not accept the plea, or request an expedited sentencing, allowing for Howard not to be exposed to this new statute.
>
> It is important to note, had Howard been sentenced prior to January 1, 2014, this issue would not have occurred.

Here, even if Howard had requested an expedited hearing, the DNA surcharge could have been imposed as an act of the circuit court's discretion. Had Howard been sentenced prior to January 1, 2014, this issue would not have occurred because so long as it was the result of an appropriate exercise of discretion, there would have been no basis for Howard to challenge the imposition of the DNA surcharge in this case. *See* WIS. STAT. § 973.046(1g) (2007-08).

¶11 In his reply brief, Howard argues for the first time that the varying amount of the DNA surcharge imposed on those convicted of a misdemeanor ($200) compared to those convicted of a felony ($250) reflects that it was intended as a punishment. *See* WIS. STAT. § 973.046(1r)(a) & (b). We do not consider arguments raised for the first time in a reply brief. ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). Moreover, this argument was squarely rejected in ***Scruggs***. ***Id.***, 365 Wis. 2d 568, ¶14.

B. Howard's previous payment of the discretionary DNA surcharge does not preclude the imposition of the mandatory DNA surcharge in this case.

¶12 The second issue Howard raises is whether requiring him to pay a DNA surcharge, when he previously paid the surcharge in another case, is an

ex post facto violation. Howard submits that he previously provided a DNA sample and paid the DNA surcharge in a 2001 case.[4] According to Howard, "the question which remains is whether, requiring [him] to pay for a DNA surcharge in two different cases, is deemed punitive, when in fact, only one DNA sample was processed."

¶13 First, we address Howard's contention that because his DNA is already "on file" and another sample was not ordered to be collected, it is punitive to impose an additional DNA surcharge. The DNA surcharge does not simply relate to the collecting of the sample, rather, "the DNA surcharge is specifically dedicated to fund the collection *and* analysis of DNA samples *and* the storage of DNA profiles." *See* ***Scruggs***, 365 Wis. 2d 568, ¶12 (emphasis added). Howard has pointed to nothing, other than speculation, that requiring him to pay the surcharge, even though a sample is not being taken, is punitive. *See* ***State v. Radaj***, 2015 WI App 50, ¶34, 363 Wis. 2d 633, 866 N.W.2d 758 ("acknowledg[ing] that the burden is on Radaj to show by the 'clearest proof' that there is no rational connection between the method of calculating the surcharge and the costs the surcharge is intended to fund") (citation omitted).

¶14 Next, we consider Howard's assertion that the circumstances of his case are analogous to those present in ***Radaj***. Radaj committed crimes before the effective date of WIS. STAT. § 973.046(1r) but was sentenced after that date. ***Id.***, ¶¶3-4. He was convicted of four felonies; therefore, his DNA surcharge was $1000 rather than the discretionary $250 amount it would have been under the

[4] There is no proof in the record that Howard previously paid the DNA surcharge; however, the State does not dispute this.

prior law. ***Id.***, ¶5. We concluded that § 973.046(1r)(a) as applied to Radaj was an unconstitutional *ex post facto* law given that his DNA surcharge was more than it would have been under the law in effect at the time he committed his crimes. ***Id.***, ¶1.

¶15 Howard contends that the determination of whether § 973.046(1r)(a) is punitive "should not rest on the number of DNA surcharges ordered within the case at bar, but rather the number of DNA surcharges previously ordered and paid."

¶16 We are not convinced by Howard's attempts to analogize this case to ***Radaj***, given that in that case "[t]here [was] … no dispute that, as applied to Radaj, the DNA surcharge that he was required to pay increased." ***Id.***, 363 Wis. 2d 633, ¶12 (four felonies x $250). Here, in contrast, Howard was convicted of a single offense and was ordered to pay a single DNA surcharge. The circuit court could have exercised its discretion and ordered Howard to pay the DNA surcharge under the old statute. Therefore, unlike in ***Radaj***, the DNA surcharge that Howard was required to pay did not increase. *Cf.* ***id.*** Howard has not met his burden of showing that the single DNA surcharge imposed in this case "'makes more burdensome the punishment for [his] crime.'" ***Scruggs***, 365 Wis. 2d 568, ¶7 (citation omitted; one set of quotation marks omitted).

¶17 Howard has failed to demonstrate beyond a reasonable doubt that the $250 DNA surcharge that the circuit court imposed on him for a single felony conviction violates the prohibitions against *ex post facto* laws in the United States and Wisconsin Constitutions. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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