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DISTRICT II

July 25, 2018

To:

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You are hereby notified that the Court has entered the following opinion and order:

2017AP2212-CR	State of Wisconsin v. Johnny Swanson (L.C. #2016CT1094)
2017AP2213-CR	State of Wisconsin v. Johnny Swanson (L.C. #2016CF1642)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

In these consolidated cases,¹ Johnny Swanson challenges the circuit court's imposition of two mandatory DNA surcharges, arguing the surcharges violate the Excessive Fines Clause of

¹ These cases were consolidated for the purposes of appeal by order of this court on December 22, 2017, and to facilitate consolidation, we also ordered that appeal No. 2017AP2212-CR be converted from a one-judge appeal to a three-judge appeal. *See* WIS. STAT. § 752.31(3) (2015-16); WIS. STAT. RULE 809.41(3) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

the Eighth Amendment of the United States Constitution.² Based upon our review of the briefs and record, we conclude at conference that these cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm as our supreme court's recent decision in *State v. Williams*, 2018 WI 59, 381 Wis. 2d 661, 912 N.W.2d 373, definitively resolves this issue.

In July 2016, Swanson was charged in circuit court case No. 2016CT1094 with operating a motor vehicle while intoxicated (OWI), fourth offense, operating a motor vehicle with a prohibited alcohol concentration (PAC), fourth offense, and operating while revoked. A few months later, Swanson again drove while under the influence and was charged in case No. 2016CF1642 with OWI, fifth or sixth offense, operating with a PAC, fifth or sixth offense, operating while revoked, possession of THC, and two counts of misdemeanor bail jumping. At a consolidated plea hearing, Swanson pled guilty to OWI-fourth and OWI-fifth, and the remaining charges were dismissed or dismissed and read in. The court sentenced Swanson to five and one-half years' imprisonment, bifurcated as thirty months' initial confinement and three years' extended supervision on his OWI-fifth, followed by a consecutive sentence of six months of incarceration for his OWI-fourth. Swanson was also ordered to pay two DNA surcharges: \$200 for his OWI-fourth and \$250 for his OWI-fifth.

Swanson filed a motion for postconviction relief, arguing that the DNA surcharges were a "punitive forfeiture" that violated the Excessive Fines Clause of the Eighth Amendment of the

² Swanson does not challenge his convictions. Swanson appeals from an order denying his motion for postconviction relief and from his judgments of conviction only to the extent that the judgments impose the DNA surcharges.

United States Constitution because they were “grossly disproportional to the gravity of [his] offense[s].”³ The circuit court denied Swanson’s motion, reasoning that the DNA surcharges were mandatory under the law.

The Eighth Amendment to the United States Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” See also WIS. CONST. art. I, § 6. “The Excessive Fines Clause limits the government’s power to extract payments, whether in cash or in kind, ‘as *punishment* for some offense.’” *Austin v. United States*, 509 U.S. 602, 609-10 (1993) (citation omitted). Whether a fine or forfeiture violates the Excessive Fines Clause is a question that we review de novo. *State v. Boyd*, 2000 WI App 208, ¶7, 238 Wis. 2d 693, 618 N.W.2d 251. Based on our supreme court’s decision in *Williams*, 381 Wis. 2d 661, ¶43, we conclude that the DNA surcharges do not constitute a constitutional violation.

In *Williams*, the defendant sought to vacate the DNA surcharge the court ordered him to pay, arguing that it violated the Ex Post Facto Clauses of the United States and Wisconsin Constitutions. *Williams*, 381 Wis. 2d 661, ¶1. Relying on the application of the “intent-effects” test applied in *State v. Scruggs*, 2017 WI 15, ¶¶3, 16, 373 Wis. 2d 312, 891 N.W.2d 786, and set forth in *Hudson v. United States*, 522 U.S. 93, 99, 104 (1997), our supreme court concluded that the DNA surcharge was not punitive in either intent or effect and thus did not violate the Ex Post Facto Clauses. *Williams*, 381 Wis. 2d 661, ¶43. The court reasoned that prior courts reaching

³ In his motion for postconviction relief, Swanson also argued that requiring an ignition interlock device would cause undue financial hardship and sought an order permitting him to perform community service in lieu of paying the fines. Swanson does not renew these arguments on appeal.

different conclusions failed to recognize the nonpunitive purpose underlying the mandatory DNA surcharge: to contribute funds to cover expenses incurred by the State in solving crimes utilizing the statewide DNA databank. *Id.*, ¶¶25, 27, 43. The court overruled prior case law declaring WIS. STAT. § 973.046 as punitive and a violation of the Ex Post Facto Clauses, *see State v. Elward*, 2015 WI App 51, ¶7, 363 Wis. 2d 628, 866 N.W.2d 756, and *State v. Radaj*, 2015 WI App 50, ¶35, 363 Wis. 2d 633, 866 N.W.2d 758. *Williams*, 381 Wis. 2d 661, ¶43.

Based on the holding in *Williams*, we conclude that the circuit court properly denied Swanson's motion for postconviction relief as the DNA surcharges imposed on Swanson are not punitive, and, therefore, Swanson has failed to establish a violation of the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.

IT IS ORDERED that the judgments and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals