

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 15, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP3317-CR

Cir. Ct. No. 2003CF1684

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHANIEL L. DOUGLAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS and JOHN SIEFERT, Judges. *Judgment affirmed; order affirmed in part, reversed in part and cause remanded.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Nathaniel L. Douglas appeals from an amended judgment of conviction for possessing cocaine and imposing a related fine, and from a postconviction order summarily denying his motion for plea withdrawal

and sentence modification.¹ The issues are whether Douglas is entitled to plea withdrawal and sentence modification for the trial court's respective failures to explain: (1) as a consequence of Truth-in-Sentencing (which abolished parole), he would be required to serve every day of confinement imposed; and (2) the amount of the fine, and its failure to determine Douglas's ability to pay. We conclude that: (1) the trial court was not obliged to inform Douglas of the collateral consequence that he would be serving every day imposed for confinement as a result of Truth-in-Sentencing (as we held in *State v. Plank*, 2005 WI App 109, ¶¶12-17, 282 Wis. 2d 522, 699 N.W.2d 235); and (2) the trial court erroneously exercised its discretion in failing to explain why it imposed the amount of the fine it did, and in failing to determine whether Douglas had the ability to pay that fine.² Therefore, we affirm the judgment and that part of the order controlled by *Plank*, and reverse the remainder of the order regarding the fine, and remand for further proceedings to determine the amount of the fine and Douglas's ability to pay that amount.

¶2 Douglas pled guilty to possessing cocaine as a subsequent offense, contrary to WIS. STAT. § 961.41(3g)(c) (2003-04).³ The trial court imposed a forty-two-month sentence to run consecutive to any other sentence, comprised of twelve- and thirty-month respective periods of confinement and extended

¹ The Honorable Elsa C. Lamelas presided over plea and sentencing proceedings. The Honorable John Siefert decided Douglas's postconviction motion.

² When Douglas litigated this issue, *Plank* had not yet been decided. See *State v. Plank*, 2005 WI App 109, ¶¶12-17, 282 Wis. 2d 522, 699 N.W.2d 235. We decided *Plank* after the briefs in this appeal had been filed.

³ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

supervision. Douglas pled guilty incident to a plea bargain, which included a sentencing recommendation of eight months in the House of Correction, as opposed to a prison term. Douglas moved for plea withdrawal, alleging that the trial court failed to inform him that, as a consequence of Truth-in-Sentencing, he would be serving every day of confinement imposed. He also moved for sentence modification for the trial court's failures to explain why it imposed \$117 of the fine, why it did not determine his ability to pay that fine, and whether he was eligible for the Earned Release Program. The trial court summarily denied the motion, except insofar as it vacated the DNA surcharge, reducing the challenged part of the fine to \$117. Douglas appeals, pursuing all of these issues with the exception of that involving his eligibility for the Earned Release Program.

¶3 In *Plank*, we recently held that Truth-in-Sentencing's elimination of parole and good-time credit, resulting in a convicted defendant serving every day of confinement imposed, is a collateral consequence of the plea; thus, the trial court is not obliged to explain to a defendant during the plea colloquy that he or she will serve one day in confinement for each day imposed. *See id.*, 282 Wis. 2d 522, ¶17 (citing and quoting *Birts v. State*, 68 Wis. 2d 389, 398-99, 228 N.W.2d 351 (1975) (addressing why trial courts are not obliged to explain to defendants the collateral consequences of their guilty pleas)). *Plank* controls, rejecting Douglas's position. *See id.*, 282 Wis. 2d 522, ¶¶15-17.

¶4 Douglas also challenges \$117 of his fine, which he contends was imposed absent an exercise of discretion. The trial court is obliged to exercise its discretion when imposing a fine incident to a sentence. *See State v. Kuechler*, 2003 WI App 245, ¶¶7-8, 268 Wis. 2d 192, 673 N.W.2d 335. The trial court is further obliged to determine whether the defendant has the ability to pay the fine imposed, if the defendant timely requests it to do so. *See id.*, ¶13.

¶5 After it imposed sentence, the prosecutor inquired whether there would be a fine, to which the trial court responded, “[o]h, I’m sorry, there will be a fine of \$500 inclusive of costs. ...That will be paid from up to 25% of the defendant’s prison wages. The remainder is made a condition of extended supervision.” In his postconviction motion, Douglas moved to vacate \$367 of the fine: \$250 for a repetitively imposed DNA surcharge, and the remaining \$117 for failing to explain why it imposed that amount, or alternatively, for an indigency hearing on his ability to pay. In its postconviction order, the trial court vacated the \$250 DNA surcharge and amended the judgment, but summarily rejected the challenge to the remainder of the fine, \$117. It concluded that

[t]he record of the sentencing transcript reflects that the imposition of the fine was based upon an appropriate consideration of the relevant sentencing factors in this case. ... Moreover, the court will not consider the defendant’s alleged inability to pay the fine since it is not known what his ability to pay the fine will be during the period of extended supervision.

¶6 We have independently reviewed the sentencing transcript and disagree that the trial court considered appropriate “relevant sentencing factors” when it imposed the fine. We further conclude that once Douglas timely requested a hearing on his ability to pay the fine, he was entitled to that hearing. *See id.* We consequently reverse that part of the order denying Douglas’s challenge to the fine and his request for an indigency determination, and remand this matter for the trial court to exercise its discretion in imposing a fine, and if it does so, to conduct a hearing to determine Douglas’s ability to pay the amount of the fine it imposes. *See id.*, ¶¶7-8, 13.

By the Court.—Judgment affirmed; order affirmed in part, reversed in part and cause remanded.

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

