COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2009

David R. Schanker
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. 2008AP2378-CR **Cir. Ct. No. 2003CF4227**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRAIG STEVEN BURNETT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed*.

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

¶1 PER CURIAM. Craig Steven Burnett appeals *pro se* from a postconviction order denying his motion to quash the DNA surcharge imposed as a condition of his sentence. The issue is whether the trial court failed to liberally construe Burnett's *pro se* motion to allow his untimely challenge. We conclude

that liberal construction cannot render timely Burnett's belated challenge to the trial court's exercise of discretion in imposing a DNA surcharge as a condition of his sentence. Therefore, we affirm.

¶2 Burnett pled guilty to escape incident to a criminal arrest in 2004. The trial court imposed a six-year sentence comprised of equal three-year periods of initial confinement and extended supervision, to run concurrent with another sentence. As conditions of that six-year sentence, the trial court imposed various costs, fees and surcharges, including a $250 DNA surcharge. Burnett did not object to that surcharge when imposed. He failed to challenge that surcharge pursuant to sentence modification within ninety days of his sentence pursuant to WIS. STAT. § 973.19(1) (2003-04), or a direct appeal pursuant to WIS. STAT. RULE 809.30(2) (2003-04).[1]

¶3 Burnett was released to extended supervision in 2006, which was revoked in 2007; he was reconfined. In September of 2008, Burnett moved to quash the DNA surcharge, relying on WIS. STAT. §§ 973.19 and 809.30. The trial court denied the motion, ruling that his challenge was untimely. Burnett appeals.

¶4 Burnett contends that his status as a *pro se* litigant entitles him to a liberal construction of his motion to effectuate justice, citing ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 335 N.W.2d 384 (1983). The courts are obliged to liberally construe pleadings of *pro se* prisoners to analyze the relief sought, as opposed to limiting the analysis to the pleading's label. *See* ***id.*** at 521-24. Although we may disregard labels for *pro se* prisoners, we cannot disregard the rules.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶5 Burnett challenges the trial court's exercise of discretion in imposing a DNA surcharge for a non-sexual offense. He relies on this court's recent decision ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, in which we reversed and remanded the matter to the trial court for its failure to exercise discretion when it imposed the DNA surcharge. *See* ***id.***, ¶¶9-11.

¶6 Burnett challenges the DNA surcharge pursuant to WIS. STAT. §§ 973.19 and 809.30. Section 973.19(1)(a) allows a person to move to modify a sentence or the amount of a fine within ninety days of the order imposing the sentence or the fine. This section allows a defendant, whose challenge is limited to the sentence or fine imposed, an expeditious method of review. *See* Judicial Council Note, 1984, § 973.19. A defendant may challenge the judgment in any respect (limited to or beyond the scope of the sentence or fine) pursuant to RULE 809.30(2). That type of challenge requires a defendant to file a notice of intent to pursue postconviction relief within twenty days of the imposition of sentence. *See* RULE 809.30(2)(b). There are other applicable deadlines for challenging the judgment by motion and/or appeal that require compliance with particular deadlines dependent upon whether a transcript and the appointment of counsel are warranted. *See* RULE 809.30(2).

¶7 The trial court imposed the DNA surcharge Burnett is challenging on February 10, 2004, and entered the judgment of conviction the following day. Burnett's motion to quash that surcharge was filed September 4, 2008. The motion is well beyond the ninety-day deadline of WIS. STAT. § 973.19(1)(a), and beyond the deadline for filing a notice of intent to seek postconviction relief, or any other relief pursuant to WIS. STAT. RULE 809.30(2)(b). ***Bin-Rilla*** does not extend or remove these statutory deadlines for *pro se* prisoners.

¶8 If we construe Burnett's motion as seeking postconviction relief pursuant to WIS. STAT. § 974.06 (2007-08), it would also fail. Section 974.06 "is not a remedy for an ordinary rehearing or reconsideration of sentencing on its merits." ***State ex rel. Warren v. County Court***, 54 Wis. 2d 613, 617, 197 N.W.2d 1 (1972). Burnett challenges the surcharge as an erroneous exercise of discretion. A challenge to the trial court's discretion is not the constitutional or jurisdictional challenge contemplated by § 974.06.

¶9 If we construed Burnett's motion as seeking sentence modification, it would also fail. A sentence may be modified if the defendant-appellant shows the existence of a new factor. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). A new factor is

> "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."

Id. (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Once the defendant has established the existence of a new factor, the trial court must determine whether that "new factor … frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989).

¶10 Although our decision in ***Cherry*** was relatively recent, our reversal was because the trial court's expressed reasons for imposing the DNA surcharge were insufficient to demonstrate an actual exercise of discretion. *See* ***Cherry***, 312 Wis. 2d 203, ¶¶6-7. The obligation to apply the law to the facts and provide reasons and reasoning to explain the basis of a decision is not "new," and does not constitute a new factor warranting sentence modification.

¶11 Burnett's motion for relief, pursuant to WIS. STAT. §§ 973.19 and 809.30, is untimely. WISCONSIN STAT. § 974.06 is not the proper method to challenge the trial court's sentencing discretion. *See* ***Warren***, 54 Wis. 2d at 617. ***Cherry*** is not a new factor warranting sentence modification. *See* ***Franklin***, 148 Wis. 2d at 8. Consistent with the spirit of ***bin-Rilla***, we have construed Burnett's claim by considering multiple forms of relief. *See* ***bin-Rilla***, 113 Wis. 2d at 521-22. Burnett's problem is not one of labeling or interpretation; it is one of timing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).