COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3031-CR **Cir. Ct. No. 2003CF3369**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD THOMAS NISIEWICZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. Edward Thomas Nisiewicz, *pro se*, appeals from an order denying his motion to "quash" or "vacate" the DNA surcharge that was

imposed when he was sentenced in 2003.[1] Citing ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, Nisiewicz argues that the sentencing court erroneously exercised its discretion when it imposed the DNA surcharge because it failed to set forth adequate reasons for imposing the surcharge. Because Nisiewicz's motion was filed seven years after judgment was entered, it was untimely under WIS. STAT. § 973.19(1)(a) (2007-08).[2] We therefore affirm the trial court's order denying Nisiewicz's motion.

¶2 Nisiewicz pled guilty to five counts of armed robbery. In September 2003, he was sentenced to five concurrent terms of seventeen years of initial confinement and seven years of extended supervision. He was ordered to provide a DNA sample and was assessed a single DNA surcharge. Nisiewicz did not appeal.

¶3 In 2008, this court released ***Cherry***, which discussed the on-the-record explanation required when a trial court exercises its discretion to impose a DNA surcharge. *See* ***Cherry***, 312 Wis. 2d 203, ¶¶9-10. In October 2009, Nisiewicz filed a *pro se* motion seeking to vacate the DNA surcharge, arguing that the sentencing court's explanation for imposing the DNA surcharge was inadequate under ***Cherry***. The trial court denied the motion on grounds that it was untimely. Two weeks later, in November 2009, Nisiewicz filed a motion to quash the DNA surcharge, which the trial court said it was denying for the same reasons

[1] Nisiewicz's motion was entitled "MOTION TO QUASH DNA SURCHARGE," but he used the terms quash and vacate interchangeably in his motion and in his appellate brief.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

cited in its October 2009 order. Nisiewicz now appeals from the order denying his November 2009 motion.[3]

DISCUSSION

¶4 At issue is whether Nisiewicz's motion to quash or vacate the DNA surcharge was timely. We conclude it was not, for the same reasons we recently discussed in ***State v. Nickel***, 2010 WI App 161, ___ Wis. 2d ___, ___ N.W.2d ___. Like Nisiewicz, Nickel did not file a direct appeal and later sought to vacate a DNA surcharge years after it was imposed. *See* ***id.***, ¶¶2-3. We concluded that Nickel's motion was untimely on several bases.

¶5 First, we discussed sentence modification:

> When a defendant moves to vacate a DNA surcharge, the defendant seeks sentence modification. Pursuant to WIS. STAT. § 973.19, a defendant may move for sentence modification within ninety days after sentencing. Nickel filed his motion more than six years after entry of his judgment of conviction on December 11, 2002, well outside the time limits imposed under § 973.19. While a defendant may obtain postconviction review of a sentence within the time limits of a direct appeal, *see* WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30, Nickel's deadline for pursuing a direct appeal expired twenty days after his sentencing when he failed to file a notice of intent to pursue postconviction relief, *see* ***State v. Lagundoye***, 2004 WI 4, ¶20 and n.13, 268 Wis. 2d 77, 674 N.W.2d 526. Therefore, Nickel's judgment of conviction became final when he did not challenge the conviction or the sentence within the deadlines for doing so. *See* ***id.*** (judgment of conviction is final after a direct appeal from that judgment and any right to a direct review of the appellate decision is no longer available). Despite Nickel's contention to the contrary,

[3] Nisiewicz's notice of appeal does not reference the trial court's October 2009 order denying his motion to vacate the DNA surcharge.

> ***Cherry*** does not give the trial court the authority to revise a sentence after a criminal conviction becomes final.

Nickel, 2010 WI App 161, ¶5 (footnote omitted). The same reasoning applies here. Nisiewicz did not file a direct appeal and his judgment of conviction became final over seven years ago. His motion to quash or vacate his DNA surcharge was an untimely sentence modification motion.

¶6 In ***Nickel***, we also held that Nickel could not challenge the imposition of the DNA surcharge under WIS. STAT. § 974.06. *See* ***Nickel***, 2010 WI App 161, ¶7. We explained:

> While a postconviction motion under WIS. STAT. § 974.06 is not subject to the time limits set forth in WIS. STAT. § 973.19 and WIS. STAT. RULE 809.30, a § 974.06 motion is limited to constitutional and jurisdictional challenges. It cannot be used to challenge a sentence based on an erroneous exercise of discretion "when a sentence is within the statutory maximum or otherwise within the statutory power of the court." ***Smith v. State***, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978). Nickel raises no constitutional or jurisdictional challenge.

Nickel, 2010 WI App 161, ¶7. Like Nickel, Nisiewicz has not raised a constitutional or jurisdictional challenge and, therefore, he cannot rely on § 974.06 as a basis for seeking to vacate the DNA surcharge.[4] *See* ***Nickel***, 2010 WI App 161, ¶7.

¶7 Next, ***Nickel*** recognized that trial courts have inherent power to modify a sentence based upon a new factor at any time, but the court concluded

[4] While Nisiewicz's brief is difficult to comprehend, we are satisfied that he has not raised a constitutional or jurisdictional challenge.

that the issuance of the ***Cherry*** decision did not constitute a "new factor." *See* ***Nickel***, 2010 WI App 161, ¶8. ***Nickel*** explained:

> 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." ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (citation omitted). Whether a set of facts is a "new factor" is a question of law that we review de novo. ***Id.*** The defendant must establish the existence of a new factor by clear and convincing evidence. ***Id.*** at 8-9. Our decision in ***Cherry*** requires a trial court to state the factors it considered and the rationale supporting its decision when imposing a DNA surcharge under WIS. STAT. § 973.046(1g). ***Cherry***, 312 Wis. 2d 203, ¶9. While ***Cherry*** is a relatively recent decision, the call for the exercise of discretion on the record when imposing the DNA surcharge does not present a new factor nor is the DNA surcharge highly relevant to the imposition of the sentence.

Nickel, 2010 WI App 161, ¶8 (indenting omitted). Consistent with ***Nickel***, we reject Nisiewicz's argument that the ***Cherry*** decision is a new factor justifying sentence modification.

¶8 Finally, ***Nickel*** concluded that "***Cherry***'s holding is not a new procedural rule warranting retroactive application." ***Nickel***, 2010 WI App 161, ¶8. Thus, ***Cherry*** cannot be retroactively applied in this case.

¶9 For these reasons, Nisiewicz's motion to quash or vacate the DNA surcharge was properly denied as untimely. We affirm the order.

By the Court.—Order affirmed.

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