COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2986-CR **Cir. Ct. No. 2005CF407**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD L. WILLIAMS,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Edward L. Williams, *pro se*, appeals from an order denying his motion to vacate or quash the DNA surcharge that was imposed when

he was sentenced in 2005.[1] Citing ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, Williams 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 Williams's motion was filed over four years after judgment was entered, it was untimely under WIS. STAT. § 973.19(1)(a) (2009-10).[2] We therefore affirm the trial court's order denying Williams's motion.

¶2 Williams pled guilty to one count of robbery with threat of force and no contest to one count of first-degree recklessly endangering safety, contrary to WIS. STAT. §§ 943.32(1)(b) and 941.30(1) (2005-06). In May 2005, he was sentenced to eight years of initial confinement and five years of extended supervision on the first count, to be served concurrently with seven years and six months of initial confinement and five years of extended supervision on the second count. Williams was ordered to provide a DNA sample and was assessed a single DNA surcharge. Williams did not appeal.[3]

¶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 November 2009, Williams filed a *pro se* motion seeking to vacate the DNA surcharge, arguing that

[1] Williams's motion and appellate brief use the terms quash and vacate interchangeably. For purposes of this opinion, we will use the term vacate.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[3] In May 2007, Williams filed a *pro se* motion to "annul" the judgment of conviction on grounds that the trial court had not personally signed it. The motion was denied and Williams did not appeal.

the sentencing court's explanation for imposing the DNA surcharge was inadequate under ***Cherry*** because the trial court did not offer reasons why the defendant should pay the $250 DNA surcharge. The trial court denied the motion on grounds that it was untimely. This appeal follows.

DISCUSSION

¶4 At issue is whether Williams's motion to 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 Williams, Nickel did not file a direct appeal and later sought to challenge 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, ***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. Williams did not file a direct appeal and his judgment of conviction became final in 2005. His 2009 motion to 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, Williams 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. *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 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; some formatting altered). Consistent with ***Nickel***, we reject Williams'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, Williams's motion to 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.