

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 29, 2011**

A. John Voelker  
Acting 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. 2010AP345-CR**

**Cir. Ct. No. 2000CF5191**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LARRY DAVIDSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
M. JOSEPH DONALD, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Larry Davidson, *pro se*, appeals an order of the circuit court, which denied his motion to vacate a DNA surcharge imposed at sentencing. We affirm.

¶2 In December 2000, Davidson pled guilty to one count of possession with intent to deliver less than five grams of cocaine. He was sentenced in March 2001 to twenty-four months' initial confinement and thirty months' extended supervision. He was also ordered to provide a DNA sample and pay a fine of \$1,000 "plus all applicable costs, surcharges, and assessments, including the DNA surcharge[.]" Davidson never directly appealed his conviction, although he reappeared in the circuit court for reconfinement hearings in 2004, 2007, and 2009.

¶3 In October 2009, Davidson filed a *pro se* motion to vacate the DNA surcharge, alleging that *State v. Cherry*, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, entitled him to a refund because the circuit court did not properly exercise its discretion in imposing the surcharge. The circuit court denied the motion as untimely. Davidson appeals, arguing that there was "nothing in his sentencing transcript that allows DOC to make Larry Davidson pay the above money."

¶4 When a defendant is sentenced or placed on probation for a felony, "the court shall require" the defendant to provide a DNA sample. *See* WIS. STAT. § 973.047(1f). In addition, "the court may impose" a \$250 DNA surcharge. *See* WIS. STAT. § 973.046(1g). In *Cherry*, we clarified that imposition of the surcharge is discretionary with the circuit court and, therefore, we expect on appellate review to be able to find a proper exercise of discretion articulated at sentencing. *Id.*, 2008 WI App 80, ¶9, 312 Wis. 2d at 207–208, 752 N.W.2d at 395.

¶5 *Cherry* did not, however, rewrite the law on sentencing. Indeed, for much longer than *Cherry* has been in effect, it has been clear that pronouncement

of a sentence generally is a discretionary exercise. *See, e.g., McCleary v. State*, 49 Wis. 2d 263, 277–278, 182 N.W.2d 512, 519–520 (1971); *see also State v. Nickel*, 2010 WI App 161, ¶8. The DNA surcharge is part of a sentence. *See Nickel*, 2010 WI App 161, ¶6.

¶6 To challenge the court’s sentencing discretion, Davidson had two available options. *See id.*, ¶5. The first was a motion for sentence modification, filed under WIS. STAT. § 973.19. However, a challenge to a sentence under that statute must be brought within ninety days of sentencing. Davidson’s motion here is well beyond that time frame. The second option would have been direct postconviction review under WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30. However, those deadlines have lapsed as well. Accordingly, a challenge to the circuit court’s sentencing discretion is untimely and was properly denied.

¶7 Even if *Cherry* somehow created new law, it has been determined that the rule in that case does not apply retroactively. *Nickel*, 2010 WI App 161, ¶8; *State v. Lagundoye*, 2004 WI 4, ¶19, 268 Wis. 2d 77, 93, 674 N.W.2d 526, 533–534. Davidson’s appellate rights expired some time in 2001, meaning his judgment of conviction became final at that time. *Cherry* was released April 8, 2008, and would therefore be inapplicable. *See Nickel*, 2010 WI App 161, ¶5.

*By the Court.*—Order affirmed.

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

