

**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. 2009AP2834-CR

Cir. Ct. No. 2007CF1266

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DION JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
THOMAS P. DONEGAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Dion Johnson, *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 June 2007, Johnson pled guilty to one count of possession with intent to deliver more than forty grams of cocaine, as party to a crime, second or subsequent offense. He was sentenced in December 2007 to twelve years' imprisonment. As part of the sentence, the court ordered Johnson to provide a DNA sample and pay the attendant surcharge. A notice of intent to pursue postconviction relief was filed on January 2, 2008, but no postconviction motion or direct appeal was commenced.

¶3 On October 5, 2009, Johnson filed a *pro se* motion to vacate the DNA surcharge, on the grounds that *State v. Cherry*, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, so required. The court denied the motion two days later, and Johnson appeals.

¶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) (2009-10).¹ 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.*, 312 Wis. 2d 203, ¶9.

¶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, 277-78, 182 N.W.2d 512 (1971); *see also State v. Nickel*, 2010 WI

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

App 161, ¶8. A DNA surcharge is part of the sentence. *See Nickel*, 2010 WI App 161, ¶6.

¶6 To challenge the court's sentencing discretion, there are two available options. *See id.*, ¶5. The first is a motion for sentence modification, filed under WIS. STAT. § 973.19. However, a challenge under that statute must be brought within ninety days of sentencing. Johnson's motion was filed well beyond that time frame. The second option is direct postconviction review under WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30. However, those deadlines have lapsed here as well. Accordingly, Johnson's 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, ¶13, 268 Wis. 2d 77, 674 N.W.2d 526. As best we can discern from the record, Johnson's appellate rights expired by April 2, 2008, meaning his judgment of conviction became final at that time. *Cherry* was released on 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.

