

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 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. 2009AP1972-CR

Cir. Ct. No. 2001CF6402

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER D. SMITH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
KEVIN E. MARTENS, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Christopher D. Smith, *pro se*, appeals an order denying his motion to vacate a DNA surcharge imposed when he was sentenced in 2002. He contends the circuit court misused its discretion when it imposed the surcharge. We affirm.

¶2 Smith argues that the circuit court failed to adequately explain why the surcharge was imposed as required by *State v. Cherry*, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393. In *Cherry*, we held that a circuit court is required to demonstrate on the record a proper exercise of discretion when imposing a DNA surcharge pursuant to WIS. STAT. § 973.046(1g) (2009-10).¹ See *Cherry*, 2008 WI App 80, ¶¶9-11.

¶3 We recently held that a motion to vacate a DNA surcharge based on *Cherry* may not be brought after the time limits for filing either a direct appeal under WIS. STAT. RULE 809.30 or a motion for sentence modification under WIS. STAT. § 973.19 have elapsed. See *State v. Nickel*, 2010 WI App 161, 330 Wis. 2d 750, 794 N.W.2d 765. We explained that “[w]hen a defendant moves to vacate a DNA surcharge, the defendant seeks sentence modification.” *Id.*, 2010 WI App 161, ¶5. We further explained that a motion for sentence modification must be brought within the time limits for direct appeal under RULE 809.30 or within ninety days of sentencing under § 973.19. *Id.*, 2010 WI App 161, ¶5. Smith did not move to modify his 2002 sentence within the deadlines. Therefore, his motion is untimely.

By the Court.—Order affirmed.

This opinion will not be published.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

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

