

**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. 2010AP424-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2001CF5633

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KOFI A. EASTERLING,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
PATRICIA D. McMAHON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Kofi A. Easterling, *pro se*, appeals orders denying his motions 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 Easterling 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, 208, 752 N.W.2d 393, 395. 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). See *Cherry*, 2008 WI App 80, ¶¶9-11, 312 Wis. 2d at 207–209, 752 N.W.2d at 395–396. Easterling argues that the DNA surcharge should be vacated because the circuit court did not consider whether he had previously paid a DNA surcharge, whether he was actually tested, thus generating a cost, and whether he had the ability to pay.

¶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, ¶5, 330 Wis. 2d 750, 756, 794 N.W.2d 765, 767. We explained that “[w]hen a defendant moves to vacate a DNA surcharge, the defendant seeks sentence modification.” *Id.*, 2010 WI App 161, ¶5, 330 Wis. 2d at 755, 794 N.W.2d at 767. 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. *Nickel*, 2010 WI App 161, ¶5, 330 Wis. 2d at 756, 794 N.W.2d at 767. Easterling filed his motion over seven years after his sentence was imposed. Therefore, his motion is untimely.

¶4 Easterling contends his motion is brought pursuant to WIS. STAT. § 974.06, which is not subject to the time limits set forth in WIS. STAT. RULE 809.30 and WIS. STAT. § 973.19. We rejected this very argument in *Nickel*, 2010 WI App 161, ¶7, 330 Wis. 2d at 757, 794 N.W.2d at 768. We explained that a

motion under § 974.06 is limited to constitutional and jurisdictional challenges, and thus may not be used to belatedly argue for sentence modification under *Cherry* based on a DNA surcharge imposed at sentencing. We reject Easterling’s argument that his motion is properly brought under § 974.06.

¶5 Easterling next argues that he received ineffective assistance of counsel. As aptly explained by the circuit court: “*Cherry* was decided long after trial counsel and postconviction counsel had concluded their representation in this case. Neither counsel was ineffective for failing to raise an objection to the DNA surcharge based upon case law that did not exist at the time.” We reject Easterling’s argument that he received ineffective assistance of counsel.¹

By the Court.—Orders affirmed.

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

¹ After this appeal was submitted for decision, Easterling filed a motion “to hold Wisconsin court of appeal[s] in contempt,” because we had not, according to Easterling, timely decided this appeal. Easterling’s contempt motion was brought within a week of the date this case was screened. Even if we had contempt powers over particular judges on the court, which we do not, we would deny the motion as meritless.

