

**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. 2010AP1060-CR**

**Cir. Ct. No. 2002CF5369**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DAVID A. SADDY,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for Milwaukee County:  
JEAN W. DI MOTTO, Judge. *Affirmed.*

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

¶1 PER CURIAM. David A. Saddy, *pro se*, appeals an order denying his motion to modify his sentence to remove the DNA surcharge imposed by the circuit court at the time of his original judgment of conviction in 2003. He also

appeals an order denying his motion to reconsider. He argues that the circuit court misused its discretion in imposing the surcharge. We affirm.

¶2 Saddy contends 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).<sup>1</sup> See *Cherry*, 2008 WI App 80, ¶¶9-11.

¶3 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, 794 N.W.2d 765. We explained in *Nickel* that “[w]hen a defendant moves to vacate a DNA surcharge, the defendant seeks sentence modification.” *Id.* 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. Saddy filed his motion over seven years after his sentence was imposed. Therefore, his motion is untimely.

¶4 Saddy contends that he received ineffective assistance of counsel because his attorney should have raised this claim before the time limits expired. *Cherry* was decided long after trial counsel and postconviction counsel had concluded their representation in this case. Neither counsel was ineffective for

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

failing to raise an objection to the DNA surcharge based upon case law that did not exist at the time. We reject Saddy's argument that he received ineffective assistance of counsel.

*By the Court.*—Orders affirmed.

This opinion will not be published.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

