COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2230-CR **Cir. Ct. No. 2009CF3020**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROMALE R. RICHARDSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Romale A. Richardson appeals from a judgment of conviction, entered upon his guilty plea, and an order denying his postconviction motion. The sole issue on appeal is whether the circuit court

erroneously exercised its discretion when it ordered Richardson to pay a $250 DNA surcharge. We affirm.

¶2 On June 20, 2009, there was a disturbance outside of Richardson's home involving several people, including some neighbors with whom he evidently has an ongoing feud. Richardson, who claimed he was fearful for his safety and the safety of others in his home, fired a shotgun. There is a dispute as to whether he aimed the gun at anyone in particular or whether he fired into the air and the ground simply to scare people away, but it is undisputed that birdshot from the gun struck Lavida Tucker in the knee, causing injury.

¶3 Richardson was charged with second-degree recklessly endangering safety with a dangerous weapon and possession of a firearm by a felon, both as a repeater. In exchange for his guilty pleas, the State agreed to drop the repeater enhancers and leave the sentence length up to the court. The court sentenced Richardson to four years' initial confinement and four years' extended supervision on each count, concurrent to each other but consecutive to any other sentence.

¶4 The circuit court also ordered Richardson to pay the $250 DNA surcharge, stating, "I'm requiring a D.N.A. sample to be provided in 30 days. And you will be required to pay the D.N.A. surcharge given the nature of this offense. Given the prior record I think it is appropriate that you pay that surcharge and pay all costs, surcharges, and assessments."

¶5 Richardson filed a postconviction motion, alleging that the circuit court had failed to properly exercise its discretion regarding the DNA surcharge as contemplated by ***State v. Cherry***, 2008 WI App 80, ¶9, 312 Wis. 2d 203, 752 N.W.2d 393. The circuit court concluded it had considered appropriate factors when imposing the surcharge and denied the motion. Richardson appeals.

¶6 A defendant convicted of a felony must provide a DNA sample. *See* WIS. STAT. § 973.047 (2009-10).[1] In certain sexual assault cases, the court is obligated to order the defendant to also pay a $250 surcharge. *See* WIS. STAT. § 973.046(1r). In all other cases where the sample is required, the decision whether to order the surcharge is a matter of the circuit court's sentencing discretion. *See* ***Cherry***, 312 Wis. 2d 203, ¶9; *see also* WIS. STAT. § 973.046(1g) ("if a court imposes a sentence or places a person on probation for a felony conviction, the court *may* impose" surcharge) (emphasis added).

¶7 In ***Cherry***, we noted that while WIS. STAT. § 973.046(1g) clearly contemplated the exercise of discretion, the statute did not set forth any factors that the circuit court should consider. ***Cherry***, 312 Wis.2d 203, ¶8. Ultimately, we suggested that

> some factors to be considered could include: (1) whether the defendant has provided a DNA sample in connection with the case so as to have caused DNA cost; (2) whether the case involved any evidence that needed DNA analysis so as to have caused DNA cost; (3) financial resources of the defendant; and (4) any other factors the trial court finds pertinent.

Id., ¶10. We also cautioned that we were not "attempt[ing] to provide a definite list of factors for the trial courts to consider in assessing whether to impose the DNA surcharge. We do not want to limit the factors to be considered, nor could we possibly contemplate all the relevant factors for every possible case." ***Id.***

¶8 Here, the circuit court imposed the surcharge on the basis of the nature of the offense and Richardson's prior record. Richardson complains that

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

the circuit court offered no rational or explained basis for its decision, but only uttered "magic words"; that the court must consider "pertinent" factors; and that the two factors the court articulated here are irrelevant.

¶9 The DNA surcharge is part of a sentence. ***State v. Nickel***, 2010 WI App 161, ¶6, 330 Wis. 2d 750, 794 N.W.2d 765. "We will not interfere with the circuit court's sentencing decision unless the circuit court erroneously exercised its discretion." *See* ***State v. Lechner***, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998). The term "discretion" contemplates a process of reasoning based on facts of record or reasonably derived inferences, and a conclusion based on logical rationale, founded on proper legal standards. ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). "On appeal, we will 'search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.'" *See* ***Lechner***, 217 Wis. 2d at 419 (quoting ***McCleary***, 49 Wis. 2d at 282). In addition, a criminal defendant challenging a sentence "has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue." ***Lechner***, 217 Wis. 2d at 418.

¶10 The circuit court may not have given the most artful pronouncement of sentence when it imposed the DNA surcharge, but we conclude discretion was properly exercised. First, Richardson does not persuade us that the nature of the offense and his prior record are irrelevant or impertinent considerations. Both are valid factors that a sentencing court may consider. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695.

¶11 Second, Richardson appears to be suggesting that a factor will not be "pertinent" to the imposition of the surcharge unless the factor has some other nexus to DNA, like when DNA evidence is collected and tested. However, we do

not subscribe to this line of reasoning. It is perfectly logical for the court to conclude that, because Richardson's particular crime involved a reckless, volitional act designed to intimidate others despite having been previously informed that he could not to possess a firearm, he—and not the citizens of Wisconsin—should subsidize collection of the mandatory DNA sample.

By the Court.—Judgment and order affirmed.

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