



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II/IV

May 11, 2015

To:

Hon. Wilbur W. Warren III
Circuit Court Judge
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Pamela Moorshead
Assistant State Public Defender
735 N. Water St., Ste 912
Milwaukee, WI 53202-4116

Anne Christenson Murphy
Assistant Attorney General
P. O. Box 7857
Madison, WI 53707-7857

Robert D. Zapf, District Attorney
Molinaro Bldg
912 56th Street
Kenosha, WI 53140-3747

You are hereby notified that the Court has entered the following opinion and order:

2014AP1713-CR

State of Wisconsin v. Fernando Torrez, Jr. (L.C. # 2013CF298)

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

Fernando Torrez, Jr. appeals a judgment of conviction and an order denying his motion to vacate the imposition of a DNA surcharge. Torrez argues that the sentencing court erroneously exercised its discretion when it imposed the surcharge. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Torrez's argument, and summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21.¹

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

The State charged Torrez with one count of armed robbery, one count of misdemeanor retail theft, and two counts of misdemeanor bail jumping. In exchange for his guilty pleas to the armed robbery and retail theft charges, the other offenses were dismissed and read in. At sentencing, the court imposed concurrent terms resulting in eight years of initial confinement followed by seven years of extended supervision. The court also imposed the \$250 DNA surcharge. Torrez's postconviction motion to vacate the DNA surcharge was denied and this appeal follows.

All defendants convicted of a felony are required to provide a DNA sample to the State Crime Laboratory. WIS. STAT. § 973.047(1f). At the time of sentencing in this case, however, not all convicted felons were automatically required to pay the DNA surcharge.² Although the DNA surcharge was mandatory for certain classes of sexual assault, the circuit court had discretion in determining whether to impose the surcharge in all other felony cases. *See* WIS. STAT. § 973.046(1g) and (1r) (2011-12). As Torrez was convicted of a nonsexual assault felony, the circuit court's decision to impose a surcharge upon him was discretionary.

In *State v. Cherry*, 2008 WI App 80, ¶¶9-10, 312 Wis. 2d 203, 752 N.W.2d 393, this court held that when determining whether to impose the surcharge under WIS. STAT. § 973.046(1g), a circuit court “must do something more than stat[e] it is imposing the DNA surcharge simply because it can.” Rather, a sentencing court should consider any and all factors pertinent to the case, and set forth in the record the factors it considered and the rationale underlying its decision for imposing the surcharge. *Id.*, ¶9. We offered a nonexclusive list of

² The DNA surcharge is mandatory for sentences imposed after January 1, 2014. *See* WIS. STAT. § 973.046(1r) (through 2013 Wisconsin Act 20 §§ 2355, 9426).

factors that a circuit court could consider, including: (1) whether the defendant provided a DNA sample in connection with the case; (2) whether the case involved any evidence that needed DNA analysis; (3) the financial resources of the defendant; and (4) any other factors a circuit court may find relevant. *Id.*, ¶10.

Cherry, however, “does not require a circuit court to use any ‘magic words.’” *State v. Ziller*, 2011 WI App 164, ¶2, 338 Wis. 2d 151, 807 N.W.2d 241. Further, the DNA surcharge is a component of a sentence, see *State v. Nickel*, 2010 WI App 161, ¶6, 330 Wis. 2d 750, 794 N.W.2d 765, and a reviewing court “will not interfere with the circuit court’s sentencing decision unless the circuit court erroneously exercised its discretion.” *State v. Lechner*, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998). We will search the record for reasons to sustain the circuit court’s exercise of sentencing discretion if the circuit court fails to adequately explain the reasons for the sentence it imposed. *State v. Hall*, 2002 WI App 108, ¶6, 255 Wis. 2d 662, 648 N.W.2d 41.

When imposing the DNA surcharge in the present matter, the sentencing court stated:

The court will order – I think this is your first felony. The court will order a DNA surcharge on this. There is typically evidence, DNA evidence that can be gleaned from objects that are touched such as firearms and the like. And I think under *State vs. Cherry*, there’s a direct cause and effect relationship between this type of offense and the need for potential DNA findings and testing.

Torrez claims it is unclear whether the court’s “first felony” reference militated in favor of or against imposing the surcharge. Torrez also contends it is not self-evident that DNA is typically found on firearms; there was no firearm recovered in this case; and, ultimately, no DNA testing was done, as Torrez immediately confessed his guilt.

With specific respect to the DNA surcharge, the court recognized that this was Torrez's first felony. Thus it was reasonable to assume there was no DNA sample on file for Torrez and costs relating to Torrez providing a DNA sample would be a cost involved in connection with this case. Based on this observation alone, we conclude the sentencing court did not impose the surcharge simply because it could. *See Cherry*, 312 Wis. 2d 203, ¶10. Because the record supports the sentencing court's exercise of discretion, we affirm.

Upon the foregoing,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to Wis. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals