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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  
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**DISTRICT II**

July 6, 2016

To:

Hon. Stephen A. Simanek  
Reserve Judge

Hon. David P. Wilk  
Circuit Court Judge  
912 56th St.  
Kenosha, WI 53140

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

Dustin C. Haskell  
Assistant State Public Defender  
735 N. Water St., Rm. 912  
Milwaukee, WI 53203

Sandra L. Tarver  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

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

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

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2015AP2073-CR

State of Wisconsin v. Jeffrey R. Cossman (L.C. #2009CF1269)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Jeffrey R. Cossman appeals from a judgment of conviction and an order denying his motion for postconviction relief. He contends that the circuit court erroneously exercised its discretion when it imposed a DNA surcharge. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).<sup>1</sup> We reverse and remand for further proceedings consistent with this opinion.

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

In 2013, Cossman was convicted following guilty pleas to three counts of failure to pay child support. The circuit court withheld sentence, placed Cossman on probation, and waived what was then a discretionary \$250 DNA surcharge.

In 2014, Cossman's probation was revoked, and the circuit court imposed a sentence after revocation. Although the court did not address the DNA surcharge at sentencing, Cossman's post-revocation judgment of conviction indicated that he would have to pay three \$250 DNA surcharges. This was the result of a change in the law, effective January 1, 2014, which required courts to impose a \$250 DNA surcharge for each felony conviction at sentencing. *See* WIS. STAT. § 973.046(1r)(a); 2013 Wis. Act 20, §§ 2355, 9426(1)(am).

Cossman subsequently filed a motion for postconviction relief, arguing that the mandatory DNA surcharge statute was an unconstitutional ex post facto law as applied to him because he committed his felonies before the statute's effective date. In support of his motion, Cossman relied on *State v. Radaj*, 2015 WI App 50, ¶¶1, 35, 363 Wis. 2d 633, 866 N.W.2d 758 (holding that the mandatory DNA surcharge statute was an unconstitutional ex post facto law as applied to a defendant who committed multiple felonies before the statute's effective date but was sentenced after its effective date).

At a hearing on the motion, the circuit court vacated the mandatory DNA surcharges pursuant to *Radaj*. However, it indicated that its decision would "result in one single DNA assessment." When defense counsel asked the court not to impose any surcharge, the court declined, saying "The court will impose one DNA surcharge in the amount of \$250." It then issued an order to that effect. This appeal follows.

On appeal, Cossman contends that the circuit court erroneously exercised its discretion when it imposed a DNA surcharge. He complains that the court offered no reasons for its decision, which was discretionary.<sup>2</sup> The State concedes this was error, and we agree.

In cases where the decision to impose a DNA surcharge is discretionary, we have held that the circuit court must explain its decision. *See State v. Cherry*, 2008 WI App 80, ¶¶9-11, 312 Wis. 2d 203, 752 N.W.2d 393. This requires the court to set forth on the record the rationale underlying its decision based upon factors specific to that particular case. *Id.*, ¶9. We have offered a nonexclusive list of factors for courts to consider such as: (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.

Here, the circuit court did not provide any reasons for imposing a DNA surcharge. Because the record does not reflect a process of reasoning for the court's decision, we conclude that the court erroneously exercised its discretion. *Id.*, ¶7. Consequently, we reverse and remand for further proceedings. On remand, the court shall conduct proceedings necessary to reassess whether a DNA surcharge should be imposed in this case and to set forth the factors and rationale it considered in making such a determination.

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<sup>2</sup> Under *State v. Radaj*, 2015 WI App 50, ¶38, 363 Wis. 2d 633, 866 N.W.2d 758, a remedy for an ex post facto violation is for the circuit court to apply the surcharge statute that was in effect when the defendant committed the crimes. The statute in effect at the time of Cossman's offenses made the decision to impose a DNA surcharge discretionary. *See* WIS. STAT. § 973.046(1g) (2011-12).

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily reversed and the cause is remanded with directions, pursuant to WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*