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July 5, 2017

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

2016AP887-CR State of Wisconsin v. Morreal Caldwell (L.C. # 2014CF3495)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Morreal Caldwell appeals from a judgment convicting him of strangulation and suffocation and misdemeanor counts of bail jumping and resisting or obstructing an officer. Caldwell also appeals from a circuit court order denying his postconviction motion

seeking to vacate the $200 DNA surcharges imposed for each of his two misdemeanor convictions. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2015-16).[1] We conclude that the circuit court did not err when it declined to vacate the DNA surcharges imposed for the misdemeanor convictions. We affirm.

The following statutory scheme is relevant to this appeal:

> On July 1, 2013, the legislature published 2013 Wis. Act 20. In part, this law imposed a $200 DNA surcharge for defendants found guilty of misdemeanors. 2013 Wis. Act 20, § 2355. The Act called for circuit courts to begin imposing the surcharge on January 1, 2014. 2013 Wis. Act 20, § 9426(1)(am). However, the Act required the circuit courts to wait until April 1, 2015, before they could actually order misdemeanants to provide a biological specimen for DNA analysis. 2013 Wis. Act 20, § 9426(1)(bm).

State v. Elward, 2015 WI App 51, ¶2, 363 Wis. 2d 628, 866 N.W.2d 756. In ***Elward***, the defendant committed his misdemeanor before January 1, 2014, the surcharge imposition date, and the circuit court imposed a DNA surcharge at sentencing. ***Id.***, ¶3-4. The ***Elward*** court held that it was an ex post facto violation to impose a DNA surcharge upon a defendant who committed a misdemeanor prior to the January 1, 2014 surcharge imposition date, but who was sentenced after January 1, 2014. ***Id.***, ¶7.

Relying on ***Elward***, Caldwell argued postconviction that even though he committed his misdemeanors in August 2014, after the effective date for misdemeanor DNA surcharges, he was sentenced in February 2015 before a misdemeanant could be required to give a DNA sample. Therefore, Caldwell argued, the DNA surcharges imposed upon him should be vacated as ex post

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

facto violations. Acknowledging that Caldwell could not have not been required to submit a DNA sample, the circuit court reasoned that requiring Caldwell to pay the DNA surcharges was not an ***Elward*** ex post facto violation because the activities and costs associated with compiling, maintaining, and analyzing DNA samples go beyond the sample provided by any single defendant. The court also determined that the surcharges imposed in this case were not punitive. Relying on ***Elward***, Caldwell appeals.

Caldwell's reliance on ***Elward*** is misplaced. In ***Elward***, we explained that the DNA surcharge in that case was an ex post facto violation because Elward committed his misdemeanor "before the law imposed the surcharge," and the surcharge was imposed during the period when courts were mandated to impose the surcharge but not authorized to order a sample. ***Id.***, ¶¶3-7.

Here, Caldwell committed his offenses in August 2014, after the law imposing mandatory misdemeanor DNA surcharges took effect. Imposition of the misdemeanor surcharges upon Caldwell was not an ***Elward*** ex post facto violation.

The circuit court imposed DNA surcharges upon Caldwell even though Caldwell was not required to provide a DNA sample. We reject Caldwell's challenge to the surcharges as improper because they are unrelated to the direct cost of collecting a DNA sample from him. *See* ***State v. Scruggs***, 2017 WI 15, ¶¶24-27, 373 Wis. 2d 312, 891 N.W.2d 786 (explaining that the DNA surcharge does not relate solely to collecting a sample; the DNA surcharge "is specifically dedicated to fund the collection and analysis of DNA samples and the storage of DNA profiles").

We addressed Caldwell's argument in ***State v. Manteuffel***, No. 2016AP96-CR, unpublished slip op. ¶10 (WI App Dec. 6, 2016), *review denied*, 2017 WI 47, 375 Wis. 2d 129, ___ N.W.2d ___.[2] As the ***Manteuffel*** court explained:

> The legislature enacted the changes in the DNA surcharge law to provide greater funding for the state crime laboratory in the interest of more effectively and accurately administering justice in Wisconsin. The legislature has determined that such effective administration requires larger, better-funded crime laboratories to ensure that DNA testing relating to criminal cases is performed quickly and correctly. *See* 2013 A.B. 40, 1021. Requiring that criminal offenders pay in part for the cost for improving and maintaining the state crime labs is not unreasonable when the need for the database exists due to criminal activity. Assessing the surcharge against all offenders will provide greater funding to attain a more efficient system of justice, regardless of whether a specific DNA profile is tested. *See* LFB #410 at 2 (estimating surcharges would generate revenue of $1,989,400 in 2013-14, and $3,546,800 in 2014-15).
>
> Manteuffel fails to rebut these legislative findings or explain why the imposition of the surcharge is an irrational means of collecting funds for use in carrying out the functions listed in WIS. STAT. § 165.77. He only contends that the surcharge as applied to him is akin to a criminal fine unrelated to any valid activities because he has provided no DNA sample for analysis. However, the fact the surcharge may be viewed as having some punitive characteristic does not prove the statute requiring its imposition fails to further a legitimate government interest.
>
> We thus conclude that Manteuffel has not carried his burden to show beyond a reasonable doubt that the DNA surcharge, as applied to him, violates his right to substantive due process. The DNA surcharge is a rational means of furthering the state's interest in the administration of justice. The surcharge does not need to be conditioned on an offender providing a DNA sample to be rationally connected to that interest.

Manteuffel, unpublished slip op. ¶¶12-14.

[2] We cite to ***State v. Manteuffel***, No. 2016AP96-CR, unpublished slip op. ¶10 (WI App Dec. 6, 2016), for persuasive value under WIS. STAT. RULE 809.23(3)(b).

The ***Manteuffel*** court's analysis is persuasive. We apply it here to hold that the DNA surcharges imposed on Caldwell before he could have been required to give a DNA sample are not ex post facto violations.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals