



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

August 16, 2017

To:

Hon. Allan B. Torhorst
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Thomas Brady Aquino
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Patricia J. Hanson
District Attorney
730 Wisconsin Avenue
Racine, WI 53403

Jeffrey J. Kassel
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2015AP1121-CR

State of Wisconsin v. Courtney D. Hodges (L.C. # 2013CF1729)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

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).

Courtney D. Hodges appeals from a judgment of conviction and an order denying his motion for postconviction relief. He contends that the circuit court's imposition of a mandatory DNA surcharge violated his constitutional rights against ex post facto laws. 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 (2015-16).¹ We reverse the judgment in part, reverse the order, and remand for further proceedings.

In 2013, Hodges committed the felony offense of battery by a prisoner as a repeater. He pled no contest and was sentenced on December 4, 2014.

On January 1, 2014, an amendment to the DNA surcharge statute took effect that made the previously discretionary DNA surcharge mandatory. *See State v. Scruggs*, 2017 WI 15, ¶¶7-8, 373 Wis. 2d 312, 891 N.W.2d 786. Accordingly, when Hodges was sentenced, the circuit court imposed a single mandatory DNA surcharge of \$250 pursuant to the new law.

Hodges moved to vacate the DNA surcharge in a postconviction motion. He argued that the surcharge violated his constitutional rights against ex post facto laws because his offense was committed before 2014 and he had previously given a DNA sample and been ordered to pay a surcharge in an unrelated case. The circuit court denied Hodges' motion. This appeal follows.

On appeal, Hodges renews his challenge to the DNA surcharge. We conclude that his case is governed by our recent decision in *State v. Williams*, 2017 WI App 46, ___ Wis. 2d ___, ___ N.W.2d ___.

In *Williams*, we considered whether the imposition of a single mandatory DNA surcharge for a felony offense committed before 2014 (and sentenced after January 1, 2014) violated constitutional prohibitions against ex post facto laws when the defendant had already given a DNA sample and been ordered to pay a surcharge due to a prior conviction. We concluded that

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

it did, likening the mandatory surcharge to a fine under such circumstances. *See id.*, ¶26. Accordingly, we reversed the portion of the judgment and postconviction order relating to the DNA surcharge and remanded the case with directions that the circuit court apply the DNA surcharge statute that was in effect when the defendant committed his crime. *Id.*, ¶27.

Because Hodges is similarly situated to the defendant in *Williams*, we will afford him the same relief. Accordingly, we reverse the portion of the judgment and postconviction order relating to the DNA surcharge and remand for further proceedings. On remand, the circuit court shall apply the DNA surcharge statute that was in effect when Hodges committed his crime. Under that statute, the circuit court exercises discretion to determine whether Hodges should be assessed a DNA surcharge of \$250. *See* WIS. STAT. § 973.046(1g) (2011-12); *State v. Cherry*, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393.

Upon the foregoing reasons,

IT IS ORDERED that the judgment is reversed in part, the order is reversed, and the cause is remanded with directions, 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