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July 12, 2018

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

2016AP558-CR State of Wisconsin v. Daniel Ray Perry (L.C. # 2014CF3164)

Before Kessler, P.J., Brennan and Brash, 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).

Daniel Ray Perry pled guilty to three crimes: two counts of being a felon in possession of a firearm and one count of possessing not more than 6000 unstamped cigarettes. *See* WIS. STAT. §§ 941.29(2)(a), 139.321(1), and 139.44(8)(a) (2013-14).[1] He was sentenced to a total of

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

seven years of initial confinement and seven years of extended supervision. On appeal, he challenges the denial of his postconviction motion, which asked the trial court to: (1) vacate the $250 mandatory DNA surcharge applied for the one crime that was committed in 2013, on grounds that the surcharge was an unconstitutional ex post facto punishment as applied to Perry, who had already provided a DNA sample and paid the DNA surcharge for a prior felony conviction; and (2) modify his sentences to make him eligible for the Challenge Incarceration Program and the Wisconsin Substance Abuse Program. *See* WIS. STAT. §§ 302.045(3m) and 302.05(3)(c)2. We conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We summarily affirm the judgment and the order.

We begin with the $250 DNA surcharge applied to Perry's conviction for illegally possessing a firearm on July 18, 2013.[2] Our decision in this case is controlled by our supreme court's recent decision in ***State v. Williams***, 2018 WI 59, 381 Wis. 2d 661, 912 N.W.2d 373, which considered the defendant's claim that the imposition of a mandatory DNA surcharge for his 2013 crime "violated the Ex Post Facto Clauses of the Wisconsin and United States Constitutions." *See* ***id.***, ¶¶1-2.[3] The Wisconsin Supreme Court rejected Williams's challenge to the surcharge, concluding: "[T]he mandatory DNA surcharge statute is not an ex post facto law because the surcharge is not punishment under the intent-effects test." *See* ***id.***, ¶54. ***Williams*** also overruled ***State v. Elward***, 2015 WI App 51, 363 Wis. 2d 628, 866 N.W.2d 756, and ***State v.***

[2] Perry did not challenge the mandatory DNA surcharges imposed for his 2014 crimes.

[3] The court of appeals decision in ***Williams*** indicated that Williams "had already provided a DNA sample and been assessed a $250 surcharge in relation to a 2009 felony conviction." *See* ***State v. Williams***, 2017 WI App 46, ¶13, 377 Wis. 2d 247, 900 N.W.2d 310, *aff'd in part and rev'd in part*, 2018 WI 59, 381 Wis. 2d 661, 912 N.W.2d 373.

Radaj, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758. *See* ***Williams***, 381 Wis. 2d 661, ¶43.

Perry's appellate brief, which was filed prior to the Wisconsin Supreme Court's decision in ***Williams***, makes the arguments that were presented and rejected in ***Williams***.[4] We are bound by ***Williams***'s holding that application of the mandatory DNA surcharge to defendants sentenced after January 1, 2014, is not an unconstitutional ex post facto punishment. *See* ***id.***; ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case."). Thus, we reject Perry's challenge to the imposition of a mandatory $250 DNA surcharge for his July 18, 2013 crime.

The second issue on appeal concerns the trial court's discretionary decision to deny Perry eligibility for the Challenge Incarceration Program and the Wisconsin Substance Abuse Program. *See* WIS. STAT. §§ 302.045(3m) and 302.05(3)(c)2. Perry acknowledges that it was within the trial court's discretion to decide if he should be declared eligible for either of those programs.[5] *See* WIS. STAT. § 973.01(3g) & (3m);[6] ***State v. Steele***, 2001 WI App 160, ¶¶8-11, 246 Wis. 2d

[4] This court issued orders in December 2016 and August 2017 holding this appeal in abeyance pending the Wisconsin Supreme Court's resolution of two DNA surcharge cases: ***State v. Scruggs***, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786, and ***Williams***. On June 4, 2018, shortly after the Wisconsin Supreme Court's release of ***Williams***, Perry moved this court to "lift the hold it placed on this case and enter a final decision on the merits in regards to both of the issues presented." Perry did not seek to present additional legal argument concerning the DNA surcharge issue. This court grants the motion and will decide this case without ordering supplemental briefing.

[5] There is no dispute that Perry was statutorily eligible to participate in those early release programs based on the crimes he committed.

[6] WISCONSIN STAT. § 973.01 provides in relevant part:

(continued)

744, 632 N.W.2d 112; ***State v. Owens***, 2006 WI App 75, ¶¶8-9, 291 Wis. 2d 229, 713 N.W.2d 187. However, he asserts that the trial court erroneously exercised its discretion "because the goals of the sentence outlined by the trial court would be furthered by his participation in these programs." Perry argues that his history of addiction justifies allowing him to participate in "programs that would address his long term sobriety" and that the trial court's decision to deny him access to those programs "contradict[s] the sentencing goal of rehabilitation." Perry contends that it was "unreasonable" to deny him eligibility.

We are not persuaded that the trial court erroneously exercised its discretion. "When imposing a sentence, the trial court must consider the gravity of the offense, the offender's character and the public's need for protection." ***Steele***, 246 Wis. 2d 744, ¶10. The trial court considers those same factors when deciding whether to make a defendant eligible for early release programs. *See* ***id.***, ¶¶8-11; ***Owens***, 291 Wis. 2d 229, ¶¶8-9. "A trial court misuses its discretion when it fails to state the relevant and material factors that influenced its decision,

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> **(3g)** EARNED RELEASE PROGRAM ELIGIBILITY. When imposing a bifurcated sentence under this section on a person convicted of a crime other than a crime specified in ch. 940 or s. 948.02, 948.025, 948.03, 948.05, 948.051, 948.055, 948.06, 948.07, 948.075, 948.08, 948.085, or 948.095, the court shall, as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible to participate in the earned release program under s. 302.05(3) during the term of confinement in prison portion of the bifurcated sentence.
>
> **(3m)** CHALLENGE INCARCERATION PROGRAM ELIGIBILITY. When imposing a bifurcated sentence under this section on a person convicted of a crime other than a crime specified in ch. 940 or s. 948.02, 948.025, 948.03, 948.05, 948.051, 948.055, 948.06, 948.07, 948.075, 948.08, 948.085, or 948.095, the court shall, as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible for the challenge incarceration program under s. 302.045 during the term of confinement in prison portion of the bifurcated sentence.

relies on immaterial factors, or gives too much weight to one factor in the face of other contravening factors." ***Steele***, 246 Wis. 2d 744, ¶10.

In this case, when the trial court announced its sentence on the first felony count, it explained why it had decided not to make Perry eligible for the Challenge Incarceration Program and the Wisconsin Substance Abuse Program, stating:

> I note that while he does have a history of substance abuse and appears particularly with marijuana, I find that he is not eligible for those programs because I think that the full two years of initial confinement is necessary to accomplish the sentencing goals. Also noting that he's had opportunities before on probation, most recently on probation that was imposed on December 19, 2013, and was revoked in part as a result of criminal conduct in this case; and so for those reasons, I make him not eligible for those programs.

The trial court said that for the same reasons, it was also denying Perry eligibility for those early release programs for the second felony count, for which the trial court imposed a sentence that included four and one-half years of initial confinement.[7]

Later, in response to a *pro se* letter filed by Perry, the trial court again had an opportunity to explain its decision. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (trial court has an additional opportunity to explain its sentencing rationale in postconviction proceedings). In its written order denying Perry's *pro se* request to be declared eligible for those early release programs, the trial court stated: "The court declines to alter its

[7] The final count was a misdemeanor for which no term of extended supervision was imposed. As the State notes, a trial court determines eligibility for early release programs "only when imposing a bifurcated sentence on a felony conviction." *See* WIS. STAT. § 973.01(3g) and (3m).

original determination in this matter. To do so would frustrate the court's specific sentencing intent and sentencing goals as noted on page 36 of the sentencing transcript." After Perry filed his postconviction motion with the assistance of counsel, the trial court said in its order that "nothing" in the motion "persuades the court to alter its prior decision."

Perry argues that the trial court should have made him eligible for the early release programs because it would promote his rehabilitation and better protect the public by helping him stop using drugs. Further, he asserts that one of the trial court's stated reasons for denying him eligibility—that he was on probation when he committed new crimes—"is an unreasonable basis to deny Perry eligibility because it does not further the court's sentencing goals." While the reasoning Perry offers on appeal could have supported a decision by the trial court to declare Perry eligible for the early release programs, the trial court acted within its discretion when it decided that having Perry serve the full periods of initial confinement was necessary to meet the trial court's sentencing goals, which the trial court identified as "first and foremost, to protect the community, then to deter both [Perry] and others in the community not to engage in that dangerous conduct, to punish [Perry] for that dangerous conduct, and then the last sentencing goal that I am setting is rehabilitation." The trial court considered proper factors and adequately explained its sentencing decisions, including its determination that Perry should not be declared eligible for the early release programs. *See* ***Steele***, 246 Wis. 2d 744, ¶10. Perry is not entitled to relief.

Therefore,

IT IS ORDERED that Perry's June 4, 2018 motion to lift the hold on this appeal and decide the two issues presented is granted.

IT IS FURTHER ORDERED that the judgment and the order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals