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DISTRICT II

September 12, 2018

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

2016AP1882-CR	State of Wisconsin v. Antione P. Harris (L.C. #2010CF978)
2016AP1883-CR	State of Wisconsin v. Antione P. Harris (L.C. #2010CF1075)

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).

Antione P. Harris appeals from orders denying his postconviction motions that sought to vacate two \$250 DNA surcharges on grounds that they violated the constitutional prohibition 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 Because our supreme court has recently held that the mandatory DNA surcharge is not punishment and therefore its imposition is not an ex post facto violation, we affirm.

In 2010, Harris was charged with multiple crimes, including strangulation and kidnapping, both felonies. In February 2014, he pled no contest to both felonies. In April, the circuit court sentenced Harris to a total of ten years in prison (five years of initial confinement and five years of extended supervision). For each conviction, the court ordered a DNA sample, unless previously provided, and payment of the \$250 DNA surcharge.

Harris filed postconviction motions to vacate the DNA surcharges, pointing out that he had already paid a surcharge for a 2003 offense and that the surcharges violated the ex post facto prohibition because the underlying offenses were committed before the new surcharge requirement became effective in January 2014. The circuit court denied the motions, reasoning that the surcharges were mandatory for each conviction and that there was no ex post facto violation because the surcharges were not punishment but a funding mechanism for the DNA databank. Harris appeals.

Whether a statute violates the Ex Post Facto Clauses of the United States and Wisconsin Constitutions presents a question of law, subject to our independent review. *State v. Scruggs*, 2017 WI 15, ¶12, 373 Wis. 2d 312, 891 N.W.2d 786. An ex post facto violation arises when a new provision levels a punishment that is greater than the punishment that was in effect at the time the crime was committed. *State v. Thiel*, 188 Wis. 2d 695, 703, 524 N.W.2d 641 (1994). Effective on January 1, 2014, a statutory amendment made the surcharge mandatory for every

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

felony and misdemeanor conviction regardless of when the offense occurred. WIS. STAT. § 973.046(1r).²

Harris points out that he had provided a DNA sample and paid the surcharge for a prior offense well before these 2010 offenses and that, at the time of the 2010 offenses, imposition of the surcharge was discretionary. *See* WIS. STAT. § 973.046(1g) (2009-10). He argues that requiring him to pay again and pursuant to a law that was not in effect at the time of his offenses is an unconstitutional ex post facto violation. We disagree.

Our decision is controlled by *State v. Williams*, 2018 WI 59, 381 Wis. 2d 661, 912 N.W.2d 373. There, the defendant contended the imposition of a mandatory DNA surcharge for his pre-2014 crime violated the Ex Post Facto Clauses.³ Our supreme court rejected the contention, noting that the purpose of the surcharge is to fund the costs of the DNA databank and concluding that neither the intent nor effect of the surcharge was punitive. *Id.*, ¶43. “[T]he mandatory DNA surcharge statute is not an ex post facto law because the surcharge is not punishment under the intent-effects test.” *Id.*, ¶54. In reaching its conclusion, *Williams* overruled two cases cited by Harris in support of his argument: *State v. Elward*, 2015 WI App

² The statute provides that a court “shall” impose a DNA surcharge when it imposes a sentence or places a defendant on probation. WIS. STAT. § 973.046(1r).

³ Like Harris, the defendant in *Williams* had already provided a DNA sample and been assessed a \$250 surcharge for a previous 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.

51, 363 Wis. 2d 628, 866 N.W.2d 756, and *State v. Radaj*, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758.⁴ See *Williams*, 381 Wis. 2d 661, ¶43.

Upon the foregoing reasons,

IT IS ORDERED that the orders 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.

Sheila T. Reiff
Clerk of Court of Appeals

⁴ This court issued an order in October 2017 holding this appeal in abeyance pending the resolution of *Williams*. (Our order also referred to resolution of another DNA surcharge case, *State v Odom*, No. 2015AP2525-CR, but that appeal was voluntarily dismissed.)