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DISTRICT II

January 16, 2013

To:

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

2012AP274

State of Wisconsin v. Jamie L. Carr (L.C. # 2004CF48)

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

Jamie L. Carr appeals pro se from an order denying his WIS. STAT. § 974.06 postconviction motion to vacate the DNA surcharge allegedly imposed at sentencing. Carr argues that the trial court erred by denying his postconviction motion without first holding an evidentiary hearing to determine whether trial counsel's failure to object to the DNA surcharge constituted ineffective assistance of counsel. 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 (2009-10).¹

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

Upon Carr's burglary conviction, the sentencing court ordered that he provide a DNA sample. Carr filed a WIS. STAT. § 974.06 motion alleging that the sentencing court imposed a DNA analysis surcharge pursuant to §973.046(1g), and that the court failed to adequately explain its rationale on the record. In its written order denying Carr's § 974.06 motion, the trial court concluded that the imposition of the DNA surcharge at sentencing was an appropriate exercise of discretion. However, as pointed out in the State's brief, no DNA surcharge was actually ever ordered or imposed in connection with this case.

Where a defendant is convicted of a felony, the trial court must order that he or she provide a DNA sample. *See* WIS. STAT. § 973.047(1f). The trial court may also in its discretion impose a \$250 DNA analysis surcharge, and should explain its rationale on the record. *See* §973.046(1g); *State v. Cherry*, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. Carr's claim confuses the provision of a DNA sample with the imposition of a DNA surcharge. While the sentencing court ordered that Carr was "required to provide a DNA sample" it never imposed the discretionary DNA surcharge. Trial counsel therefore did not perform deficiently by failing to object to a surcharge never ordered, and we affirm the trial court's order.²

Upon the foregoing reasons,

IT IS ORDERED that the order of the trial court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

² We may affirm if the trial court reached the right result for the wrong reason. *See State v. Rogrud*, 156 Wis. 2d 783, 789, 457 N.W.2d 573 (Ct. App. 1990).