

Wisconsin Supreme Court
9:45 a.m.
Thursday, Oct. 13, 2016

2014AP2981-CR

[State v. Scruggs](#)

Supreme Court case type: Petition for Review

Court of Appeals: District II

Circuit Court: Racine County, Judge Allan B. Torhorst, affirmed

Long caption: State of Wisconsin, Plaintiff-Respondent-Respondent, v. Tabitha A. Scruggs, Defendant-Appellant-Petitioner

Issue presented: This criminal case examines the constitutionality of retroactive application of the mandatory DNA surcharge, which requires defendants to pay a \$250 DNA surcharge for every felony conviction, and a \$200 DNA surcharge for every misdemeanor conviction. The Supreme Court reviews:

- whether the state and federal prohibitions against ex post facto laws are violated when the surcharges are imposed on defendants who committed their crimes before Jan. 1, 2014.
- whether the Court of Appeals misapplied the test for determining whether a law violates ex post facto by failing to separately consider the punitive intent *and* the punitive effect of the mandatory DNA surcharge.

Some background: The criminal complaint in this matter charged that on Dec. 30, 2013, Tabitha A. Scruggs committed one count of burglary as a party to a crime. She pled no contest to the offense on April 1, 2014, and was subsequently sentenced. As part of the sentence she was ordered to provide a DNA sample and pay a \$250 DNA analysis surcharge.

Scruggs filed a post-conviction motion seeking to vacate the DNA surcharge. At the time she committed the crime, the imposition of a \$250 DNA surcharge for the offense was subject to the circuit court's discretion. By the time she was convicted and sentenced, the Legislature had made the \$250 DNA surcharge mandatory for all felony convictions. Scruggs argued that because § 973.046(1r)(a), making the surcharge mandatory, did not take effect until Jan. 1, 2014, two days after she committed the crime, the change in the DNA surcharge from discretionary to mandatory could not be assessed against her without running afoul of the constitutional protections against ex post facto laws. Scruggs argued the circuit court should have applied § 973.046 as it existed at the time she committed the offense, meaning it would have been up to the discretion of the circuit court whether or not to impose the surcharge.

The circuit court concluded it was required to impose the \$250 DNA surcharge under the new statute. The court reasoned that since the amendment to the statute was enacted on June 30, 2013, and published on July 1, 2013, it was "in effect" at the time Scruggs committed the crime, even though the enabling legislation provided it was effective on the first day of the sixth month after publication or Jan. 1, 2014. Accordingly, the circuit court denied the post-conviction motion. The Court of Appeals affirmed.

On appeal, the state conceded that the circuit court erred when it held that the amendment to the statute was in effect when Scruggs committed the crime. However, the state argued that the statutory amendment as applied to Scruggs was not punitive and therefore there was no violation of the ex post facto clauses of the U.S. and Wisconsin Constitutions.

The Court of Appeals noted that it recently held, in an as-applied challenge, that the statutory amendment was an ex post facto law violation when the \$250 surcharge was imposed for each of multiple felony convictions. It noted in State v. Radaj, 2015 WI App 50, ¶¶21, 37, 363 Wis. 2d 633, 866 N.W.2d 758, the defendant had been convicted of four felonies and was assessed a \$1,000 DNA surcharge, or \$250 for each of the convictions. The Radaj court assumed without deciding that the Legislature's intent behind the statutory amendment was non-punitive, but it went on to conclude that the effect of assessing a separate \$250 DNA surcharge for each felony conviction was to punish a defendant.

Scruggs argues that the DNA surcharge is punitive in effect. She says the surcharge is completely unrelated to the costs of DNA analysis. She says the surcharge is collected for every conviction in every case, regardless of whether DNA is collected or analyzed. She asserts the fact that the penalty is called a "surcharge" does not control, and she says placement of the DNA surcharge statute within the criminal sentencing statutes reflects a legislative intent to impose a penalty.