STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 09AP1399-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAYMOND ALLEN NICKEL,

Defendant-Appellant.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Appeal from an Order Entered in the Circuit Court for Waukesha County, the Honorable Lee S. Dreyfus, Jr., Presiding

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ARGUMENT

The core issue on this appeal is whether and when criminal defendants may challenge the imposition of a DNA surcharge under this Court's decision in ***State v. Cherry***, 2008 WI App 80, 312 Wis.2d 203, 752 N.W.2d 393. A number of potential procedural avenues exist for raising such a claim, depending on factors such as the date of the sentencing, the timing of the request, and the status of the defendant. WACDL will address the specific inquiries contained in the Court's Order of August 26, 2010, in the context of addressing this broader issue.

I. The Decision in *State v. Cherry*

Prior to so-called Truth in Sentencing (TIS), judges imposed criminal sentences on an indeterminate basis, in large part relying on the executive branch to determine when a defendant was to be released to society. Although at that time a defendant's period of actual incarceration was subject to change, a judge still was required to properly exercise his or her discretion by detailing the reasons for

selecting the particular maximum sentence imposed. As our Supreme Court explained:

> [T]he term [discretion] contemplates a process of reasoning. This process must depend on the facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.

McCleary v. State, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971).

With the advent of TIS applicable to those offenses committed on or after December 31, 1999, trial judges suddenly became the sole arbiter when it came to the length of time a defendant will actually serve. The Supreme Court observed that, despite the increased role, "sentencing courts [had] strayed from the directive [of ***McCleary***]," conflating "the exercise of discretion with decision-making" by merely "uttering the facts, invoking sentencing factors, and pronouncing a sentence . . . ." ***State v. Gallion***, 2004 WI 42, ¶2, 270 Wis. 2d 535, 678 N.W.2d 197.

Accordingly, ***Gallion*** "reinvigorated the ***McCleary*** directive", ***id.*** at ¶4, explaining how "the requirement of an on-the-record explanation will serve to fulfill the ***McCleary*** mandate that discretion of a sentencing judge be exercised on a 'rational and explainable basis.'" ***Id.*** at ¶49 (quoting ***Reiner v. Schlitz***, 49 Wis. 273, 276, 5 N.W. 493 (1880)).

In 2008, this Court addressed the exercise of discretion required of a sentencing judge in imposing a deoxyribonucleic acid (DNA) analysis surcharge. *See* ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393. The defendant in ***Cherry*** pled guilty to delivery of a controlled substance in violation of Wis. Stat. §§961.16(2)(b)1 & 961.41(1)(cm)1g (2005-06). ***Id.*** at ¶1. On appeal, the defendant filed a postconviction motion arguing that the trial court had improperly exercised its discretion when it imposed the DNA surcharge under Wis. Stat. §973.046(1g). ***Id.***

Chapter 973 houses two sections pertaining to the imposition of DNA surcharges. In cases where a defendant is sentenced or

placed on probation for violating Wis. Stat. §§940.225, 984.02(1) or (2), 984.025, or 948.085, the court is required to impose a DNA surcharge of $250. Wis. Stat. §973.046(1r). In all other cases, a court *may* impose the DNA surcharge. Wis. Stat. §973.046(1g). Neither section sets forth any factors for a trial court to consider in exercising its discretion.

The defendant in ***Cherry*** argued that because §973.046(1g) is permissive, *see* ***State v. Jones***, 2004 WI App 212, ¶ 7, 277 Wis. 2d 234, 689 N.W.2d 917 ("The language of the statute plainly states that the trial court has the discretion to order a DNA surcharge upon the entry of a judgment in this felony case"), the decision to impose the surcharge must be pursuant to a proper exercise of discretion. ***Cherry***, at ¶7.

This Court agreed, holding that, because imposition of a DNA surcharge is indeed a discretionary act,

> the trial court should consider any and all factors pertinent to the case before it, and that it should set forth in the record the factors it considered and the rationale underlying its decisions for imposing the DNA surcharge in that case.

Id. at ¶9. The Court emphasized that "[s]uch is the exercise of discretion contemplated both by statute and our supreme court's pronouncement in **[*Gallion*]**." ***Id.***

The decision in ***Gallion*** was not intended to apply retroactively. *See* 2004 WI 42, ¶8 ("[W]e reaffirm the sentencing standards established in ***McCleary*** and determine that the application of those standards . . . must be set forth on the record for future cases"); *see also* ***id.*** at ¶95 (Wilcox, J., concurring) ("[T]he standards announced today should not be applied retroactively to cases that are final. Indeed, the majority recognizes that the requirements it articulates apply only to future cases"). It is clear, however, that the ***Gallion*** Court intended the reinvigorated standards of ***McCleary*** to apply to all cases not yet final at the time of its decision.

Because ***Cherry*** was a straightforward application of ***Gallion***,

its application would presumably be retroactive to the date of ***Gallion***, but not before. Thus, ***Cherry's*** application of ***Gallion*** to the specific context of the DNA surcharge would only apply to defendants whose convictions were not yet final at the time ***Gallion*** was decided in 2004, regardless of the procedural mechanisms available to them.

II. The Decision in *State v. Galvan*

In ***State v. Galvan***, 2007 WI App 173, 304 Wis. 2d 466, 737 N.W.2d 890, this Court addressed a trial court's obligation to determine a defendant's ability to pay when imposing a surcharge as a condition of extended supervision pursuant to Wis. Stat. §973.01(5) & (8), when neither subsection expressly requires a court to do so. On appeal from the denial of his postconviction motion, the defendant argued that Wis. Stat. §973.06(1)(f)1 (2005-06), required the trial court to determine his ability to pay a surcharge, which was imposed at the time of sentencing and as a condition of his extended supervision. ***Id.*** at ¶6.

This Court rejected the defendant's claim, holding as a matter of statutory interpretation that the court's obligation to determine a defendant's ability to pay a surcharge under §973.06(1)(f)1 does not apply to imposed conditions of extended supervision under §973.01(5) and (8). ***Id.*** at ¶8. The Court first distinguished conditions of extended supervision from a contribution surcharge under §973.06. *See* ***id.*** at ¶¶11-12. It explained that, because a defendant's extended supervision can be revoked, the conditions imposed on a defendant are part of the entire sentence. ***Id.*** at ¶11. In contrast, however,

> a contribution surcharge under Wis. Stat. §973.06 is a financial obligation that a trial court may tax against a defendant together with other costs and fees in the action. *Such an obligation is not itself a sentence or component of a sentence. Instead, it stands separate and apart from the underlying sentence and is not dependent on an underlying sentence for its validity.*

Id. at ¶12 (emphasis added).[1]

Because Galvan's surcharge was imposed as a condition of his extended supervision rather than under §973.06, the Court therefore concluded that the ability-to-pay requirements of §973.06 did not apply. The Court did note, however, that Galvan was not without a remedy as Wis. Stat. §302.113(7m)(a) & (e)1 permit an inmate to petition for modification of any court-imposed conditions within a year of the scheduled date of release to extended supervision. ***Id.*** at ¶18.

Galvan thus appears to hold that, if the trial court imposes a surcharge as a condition of extended supervision, it is a component of a sentence while, if not imposed as such a condition but directly under §973.06, that surcharge is something else, neither a sentence nor a component of the sentence. The latter portion of that conclusion, however, is at odds with the Supreme Court's prior recognition that "§973.06 authorizes a court to impose certain costs, fees, and surcharges upon a defendant *as part of his sentence*." ***State v. Campbell***, 2006 WI 99, ¶68, 294 Wis. 2d 100, 718 N.W.2d 649 (emphasis added). The Supreme Court's position on this point would appear to be controlling.

Galvan's interpretation of §973.06 as imposing obligations independent of the underlying sentence is inapplicable here in any event given the significant differences in language of that section and that authorizing imposition of a DNA surcharge. The latter restricts the DNA surcharge to cases where "a court imposes a sentence or places a person on probation . . .," Wis. Stat. §973.046, and thus is dependent on the underlying sentence or probation for its validity. Section 973.06 contains no such restriction.

The distinction is critical here because, as will be seen below, availability of the various possible procedural mechanisms may turn on whether the DNA surcharge is considered a part of the sentence

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[1] The Legislature subsequently repealed §973.06(1)(f). *See* 2007 Act 84, §2e.

or something else.

III. Available Procedures for Raising a *Cherry* Violation

A. Direct appeal

Of course, the usual procedural vehicle for raising a ***Cherry*** violation, as in ***Cherry*** itself, is as part of the direct appeal process under Wis. Stat. §974.02 and (Rule) 809.30. Under those provisions, a defendant may seek "postconviction relief" on any valid grounds, including the erroneous exercise of discretion.

A motion for postconviction relief under Rule 809.30(2)(h) is contingent upon the timely compliance with the predicate requirements under Wis. Stat. (Rule) 809.30(2), i.e., filing of notice of intent to pursue postconviction relief and ordering of transcripts and court record. Such a motion, moreover, must be filed within 60 days after the service of transcript or circuit court case record, whichever is later. Wis. Stat. (Rule) 809.30(2)(h).

This procedure accordingly is unavailable to those, such as Mr. Nickel, who seek to challenge the DNA surcharge long after sentencing. If grounds exist, however, this Court could extend the time for pursuing postconviction relief for a defendant who did not pursue such an appeal previously, thereby allowing the defendant to pursue postconviction motions and a direct appeal raising a challenge under ***Cherry*** or on any other grounds available. ***State v. Quackenbush***, 2005 WI App 2, 278 Wis.2d 611, 692 N.W.2d 340; Wis. Stat. (Rule) 809.82(2).

B. Wis. Stat. §973.19

Under Wis. Stat. §973.19(1)(a), a defendant who has not yet requested transcripts may move the court to modify his or her sentence within 90 days of sentencing or final adjudication. *See* ***State v. Scaccio***, 2000 WI App 265, ¶3, 240 Wis. 2d 95, 622 N.W.2d 449 (defendant may move to modify his or her sentence under Wis. Stat. §973.19 as a matter of right).

When filing a motion under §973.19(1)(a), a defendant

waives his or her right to file an appeal or postconviction motion under Rule 809.30(2). *See* Wis. Stat. §973.19(5); ***State v. Norwood***, 161 Wis. 2d 676, 681, 468 N.W.2d 714 (Ct. App. 1991) ("The *quid pro quo* is that the defendant using [§973.19] forfeits his right to a full blown appeal allowing the challenge of issues to sentence modification"). The intent of §973.19 was to serve "as an expeditious alternative to the procedure prescribed in s. 809.30(2) when the only claim for postconviction relief relates to the severity of the sentence." *See* Judicial Council Note 1984.

The motion under §973.19 is identified as one to "modify the sentence." Modification of a sentence is a legal term of art generally limited to the modification of a valid sentence based on a new factor. *See, e.g.*, ***State v. Kluck***, 210 Wis.2d 1, ¶12, 563 N.W.2d 468 (1997).[2] However, this Court has held that §973.19 is not so limited. Rather, it also authorizes assertions that the sentencing court erroneously exercised its discretion. *See* ***State v. Noll***, 2002 WI App 273, ¶10, 258 Wis.2d 573, 653 N.W.2d 895.

Section 973.19 accordingly could provide *one* possible procedure for raising a ***Cherry*** claim, assuming that the DNA surcharge is deemed a component of the "sentence." By its terms, §973.19 applies only to challenges to "the sentence or the amount of the fine." Wis. Stat. §973.19(1)(a). If ***Galvan*** is construed to hold that the DNA surcharge is not a component of the sentence, then it would appear that the surcharge could not be challenged on ***Cherry*** grounds under §973.19(1)(a).

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[2] The Supreme Court distinguished between motions to *modify* a valid sentence and those to *vacate* an invalid one in ***Hayes v. State***, 46 Wis.2d 93, 107, 175 N.W.2d 625 (1970):

> While the modification took the form of vacating the judgment and ordering a new sentence, we do not consider this procedure to be relevant in this case although the proper procedure to modify a valid judgment is to amend the judgment and not to vacate it. The amending of a valid judgment by order or judgment rather than vacating it and resentencing also avoids questions of double jeopardy and of credit for prior time served. However if, the judgment is void or the manner in which it is made is defective, the judgment should be vacated and a new sentence made.

Of course, even if the DNA surcharge could be challenged pursuant to §973.19(1)(a), the question for defendants such as Nickel is whether the 90 day deadline for filing such a motion is extendable. The statutory text does not itself state whether the prescribed 90-day deadline is extendable and, if so, by whom. Unlike the deadlines under Rule 809.30, the 90-day limit in §973.19(1)(a) is statutory and thus does not fall within the Court's authority under Wis. Stat. (Rule) 809.82(2) to extend deadlines set by Rule or court order. However, "[t]ime periods in Wisconsin statutes may be directory or mandatory." ***State v. Perry***, 181 Wis.2d 43, 53, 510 N.W.2d 722 (Ct. App.1993), and *amicus* can find no authority either way regarding §973.19.

The point appears academic, however, as §973.19 is available only if the defendant has not pursued a post-conviction motions and appeal under Rule 809.30. Accordingly, any circumstance where a §973.19(1)(a) motion may be available but untimely would also permit the same relief under Rule 809.30, the deadlines of which clearly *can* be extended under Rule 809.82(2). ***Quackenbush***, *supra*.

C. Wis. Stat. §974.06

Although postconviction motions may be filed under Wis. Stat. §974.06 at any time after conviction, such motions are limited to constitutional or jurisdictional grounds. ***State v. Nicholson***, 148 Wis.2d 353, 360, 435 N.W.2d 298, 301 (1988). Accordingly, a defendant cannot move for relief under §974.06 based on a claim of erroneous exercise of discretion at sentencing. *See* ***Smith v. State,*** 85 Wis.2d 650, 661, 271 N.W.2d 20 (1978).

A defendant may, however, raise an ineffective assistance of sentencing or postconviction counsel claim under §974.06 based on counsel's failure to object to imposition of the DNA surcharge. *E.g.*, ***State v. Littrup***, 164 Wis.2d 120, 135-37, 473 N.W.2d 164 (Ct. App.1991) (ineffectiveness of counsel at sentencing), *overruled on other grounds by* ***State v. Tiepelman***, 2006 WI 66, 291 Wis.2d 179, 717 N.W.2d 1; ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d

675, 556 N.W.2d 136 (Ct. App.1996) (ineffectiveness of postconviction counsel). Of course, the defendant would have to demonstrate that counsel acted unreasonably in failing to object or challenge imposition of the DNA surcharge.[3]

If the defendant previously sought postconviction relief, he also would have to show sufficient reason why the issue was not raised in the prior motion. Wis. Stat. §974.06(4); *see* ***State v. Escalona-Naranjo,*** 185 Wis.2d 168, 517 N.W.2d 157 (1994).

Finally, §974.06 may or may not be available for raising a ***Cherry***-based ineffectiveness claim depending on whether this Court holds that the DNA surcharge is part of the sentence. A motion under §974.06 is limited to claims that "the *sentence* was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose *such sentence*, or that the *sentence* was in excess of the maximum authorized by law or is otherwise subject to collateral attack." Wis. Stat. §974.06(1) (emphasis added). The remedy provided is for the Court "to vacate, set aside or correct *the sentence*." *Id.* (emphasis added). If the surcharge is not part of the sentence, therefore, even a constitutional challenge to the surcharge would appear to be unavailable under §974.06.

At the same time, "sentence" under §974.06 (or §973.19, for that matter) may be construed differently than the term generally is construed in criminal law. After all, although straight probation is not a sentence but an alternative to a sentence, ***State v. Horn***, 226 Wis.2d 637, 647, 594 N.W.2d 772 (1999), this Court has held that someone serving straight probation nonetheless is entitled to bring a motion under §974.06. ***State v. Mentzel***, 218 Wis.2d 734, 581

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[3] This should not be difficult for omissions after ***Cherry*** was decided, or even for those before ***Cherry*** was decided but after ***Gallion***. Although "counsel is not required to argue a point of law that is unclear," ***State v. Thayer***, 2001 WI App 51, ¶14, 241 Wis.2d 417, 626 N.W.2d 811, ***Cherry*** is merely a straight-forward application of established law in ***Gallion***. Of course, there would be no ineffectiveness for failure to raise the claim in a pre-***Gallion*** case as ***Gallion*** is not retroactive.

N.W.2d 581 (Ct. App. 1998).

D. Wis. Stat. §973.09

A defendant also may move the trial court to vacate a DNA surcharge under Wis. Stat. §973.09(3)(a) if the court imposed the surcharge as a condition of probation. Under §973.09(3)(a), a court "for cause and by order, may extend probation for a stated period or modify the terms and conditions thereof." Such a motion may be filed, and the requested relief granted, at any time "[p]rior to the expiration of [the] probation period." *Id.*

There appears to be no reason why relief would not be available for a ***Cherry*** violation under this provision at any time while the defendant remains on probation. Indeed, this Court's decision in ***Galvan***, *supra*, regarding the parallel provisions applicable to supervised release would require as much.

E. Wis. Stat. §302.113

As this Court recognized in ***Galvan***, 2007 WI App 173, ¶18, a defendant also may move the trial court to vacate a DNA surcharge under Wis. Stat. §302.113, if the court imposed the surcharge as a condition of extended supervision. A petition to the court to modify the conditions of extended supervision may be made *within* one year of release to extended supervision and after one year has passed *after* release to extended supervision. *See* Wis. Stat. §302.113(7m)(a) and (e). The number of times a defendant may petition the court is limited. A defendant may only petition the court once before being released to extended supervision. Wis. Stat. §302.113(7m)(e)1. In addition, upon filing a petition after one year has passed after being released to extended supervision, a defendant must wait another year before filing a subsequent petition. The process can be repeated annually up and until the termination of the defendant's supervision, Wis. Stat. §302.113(7m)(e)2, although principles of *res judicata* would bar successive challenges based on the same grounds.

F. Trial Court's Inherent Power

The trial court is vested with the inherent power "to correct

formal or clerical errors or an illegal or void sentence at any time." ***Hayes***, 46 Wis.2d at 101-02; *see* ***State v. Trujillo*** 2005 WI 45, ¶10 n.8, 279 Wis.2d 712, 694 N.W.2d 933. The court also has the inherent power to modify its sentencing judgment based on new factors at any time after the execution of the sentence imposed has commenced. *E.g.,* ***Hayes***, *supra*; ***State v. Noll***, 2002 WI App 273, ¶12, 258 Wis.2d 573, 653 N.W.2d 895 (the circuit court's "inherent authority [to modify a sentence based on new factors] may be exercised as a matter of discretion *and is not governed by a time limitation*") (citing ***State v. Machner***, 101 Wis.2d 79, 82, 303 N.W.2d 633 (1981)) (emphasis added).

The test for determining whether a sentence modification is in order based on a new factor is well settled. The circuit court must first determine whether a new factor exists. ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609 (1989). A new factor is defined as "a fact or set of facts highly relevant to the imposition of sentence, but which is not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69 (1975).

A new factor must be an event or development that frustrates the purpose of the original sentence. ***State v. Johnson***, 210 Wis.2d 196, 203, 565 N.W.2d 191 (Ct. App. 1997). "There must be some connection between the factor and the sentencing – something [that] strikes at the very purpose for the sentence selected by the trial court." ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989).

Second, the court must make the discretionary determination "whether the new factor justifies modification of the sentence." ***Franklin***, 148 Wis.2d at 8.

Because a new factor need be either unknowingly overlooked or not in existence at the time of sentencing, a judge is not required to second-guess his or her discretion – assuming it is properly

exercised. A judge cannot, for example, be faulted for failing to consider even a highly relevant legal requirement that was not in force at the time of sentencing. *E.g.*, ***Trujillo***, *supra* (non-retroactive change in statutory maximum sentence not a new factor). There are some situations, however, where a judge overlooks a highly relevant fact by failing to apply the applicable law. This is problematic because a judge's "conclusion [must be] based on a logical rationale founded upon proper legal standards." ***McCleary***, 49 Wis. 2d at 277.

While not an evidentiary fact, the applicable law is a fact nonetheless and, if overlooked, becomes "new" to the sentencing judge. The applicable law is also "highly relevant" because it controls the proper imposition of a sentence. The failure to comply with the applicable law frustrates the purpose of the original sentence because a court must impose a sentence consistent with the law.

The question of whether this Court's decision in ***Cherry*** constitutes a new factor thus necessarily turns not on interpretation of new factors law, but on whether the principles underlying that decision apply to the particular case. This is a question of retroactivity.

If the sentencing took place after ***Cherry*** was published but that decision was overlooked by the court and the parties, it is a new factor. Likewise if the defendant's conviction was not yet final at the time ***Cherry*** was decided, the rule of criminal procedure set forth in that decision applies, ***State v. Lagundoye***, 2004 WI 4, ¶12, 268 Wis.2d 77, 674 N.W.2d 526, and the sentencing court's lack of knowledge of its requirements would constitute a new factor.

Only slightly more difficult is the question concerning those convictions that became final before ***Cherry*** but *after* ***Gallion***. As discussed previously, although ***Gallion*** apparently does not apply retroactively, such that defendants whose convictions became final prior to ***Gallion*** are out of luck, ***Cherry*** was a straight-forward application to a particular factual setting of ***Gallion's*** requirement that a sentencing court must explain its discretionary acts. ***Cherry***, ¶¶9-11. Because that explanation requirement was established in

Gallion and not in ***Cherry***, it is the former that should establish the application date.

CONCLUSION

For the reasons stated, any of a number of possible post-conviction procedures may be available for raising a ***Cherry*** challenge to the imposition of a DNA surcharge in a particular case. Whether a specific procedure in fact is available and appropriate turns on the facts of the case and this Court's interpretation of ***Galvan***.

Dated at Milwaukee, Wisconsin, October 25, 2010.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Rule 809.19(8)(b) for a non-party brief produced with a proportional serif font. This brief does not conform to the rules regarding length in Rule 809.19(8)(c). The length of this brief is 3,993 words. Counsel has requested leave to file this overlength brief.

_____
Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

_____
Robert R. Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 25th day of October, 2010, I caused 10 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____
Robert R. Henak