

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 7, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2011AP378-CR
2011AP379-CR
2011AP380-CR
2011AP381-CR
2011AP382**

**Cir. Ct. Nos. 2003CM927
2004CF125
2004CF248
2004CF383
2004TR2660**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

Nos. 2011AP378-CR, 2011AP379-CR, 2011AP380-CR, 2011AP381-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY B. CAMPBELL,

DEFENDANT-APPELLANT.

No. 2011AP382

COUNTY OF WOOD,

PLAINTIFF-RESPONDENT,

V.

GARY B. CAMPBELL,

DEFENDANT-APPELLANT.

APPEALS from an order of the circuit court for Wood County:
GREGORY J. POTTER, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Lundsten, P.J., Vergeront and Sherman, JJ.

¶1 PER CURIAM. Gary Campbell appeals from an order denying his motion for sentence modification. Campbell contends that: (1) the circuit court erred by applying bail money from a separate case to satisfy the financial obligations in these cases; and (2) the clerk of the circuit court entered fines, costs and surcharges in the judgments of conviction that were not ordered by the court. The State asserts that Campbell's challenge to the assessed monetary obligations is untimely and lacks merit. However, the State concedes that Campbell overpaid as to one of the cases.

¶2 We conclude that the record establishes that Campbell did not contest the court's statement that the funds from Campbell's bond in another case would be used to pay the monetary obligations in these cases, and thus Campbell may not now argue that the court erred by doing so. However, we also conclude that the record does not support the imposition of jail surcharges in three of the cases. Accordingly, we affirm in part, reverse in part, and remand for the circuit

court to enter modified judgments of conviction and an order directing a partial refund to Campbell.

Background

¶3 On January 24, 2007, the circuit court held a global plea and sentencing hearing for four criminal cases pending against Campbell. Campbell pled guilty to multiple charges and the State dismissed the rest. The court noted that Campbell had posted \$3,000 bond in a separate case, and stated: “All right. What I’ll do, then, on the drunk driving it would be \$150 plus costs. Take it out of the bond. We will take the court costs on all the rest of it, so you still got a couple grand. Is that fair enough?” And Campbell replied, “Yes, Your Honor” The court then stated: “And we have an unpaid fine here for an old battery, another \$355 ... so we can pay that off. And you’re all done with us, and you’ll still get some money back. All right.” Campbell replied: “Okay.”

¶4 In May 2010, Campbell moved to modify his sentence, seeking a refund of money. The court held a hearing in June 2010, and denied the motion. Campbell appeals.

Discussion

¶5 Campbell contends that the circuit court erred by applying money that Campbell had posted as bond in a separate case to satisfy the monetary obligations imposed in these cases.¹ The State asserts that Campbell’s challenge

¹ Campbell also argues that he did not sign a valid bond agreement when he deposited his bond. However, Campbell does not explain why he believes his failure to sign an agreement would result in an order to refund the money to him.

to the use of his bond to satisfy his monetary obligations in these cases was untimely because Campbell knew in January 2007 that that was going to occur. The State also asserts that Campbell's challenge is untimely because Campbell knew of the court's decision on his motion in June 2010, and yet did not obtain a written appealable order until six months later.

¶6 We are not persuaded by the State's argument that Campbell's challenge to the court's use of the bond money is untimely. We conclude, however, that Campbell forfeited his challenge by expressly agreeing to the use of the bond money to satisfy the monetary obligations in these cases.

¶7 At the January 2007 plea and sentencing hearing, the court informed Campbell that the money Campbell posted as bond in another case would be applied to satisfy Campbell's monetary obligations in these cases. Campbell expressly agreed. Campbell may not now argue that the court erred by doing so. *See, e.g., State v. Magnuson*, 220 Wis. 2d 468, 471-72, 583 N.W.2d 843 (Ct. App. 1998) (a defendant who agrees to a sentence is judicially estopped from attacking that sentence on appeal).

¶8 Next, Campbell challenges specific amounts assessed against him in the judgments of conviction. First, Campbell asserts that the circuit court increased the amount owed in the older battery case in ordering that the bond money be used to satisfy that obligation. Campbell contends that the judgment of conviction reflected a total monetary obligation of \$335, but the court withheld \$385. Additionally, Campbell asserts that the \$335 assessed against him was contrary to the court's oral sentence of "\$200 and 20 days." Campbell argues that the judgment of conviction, signed by the clerk, erroneously reflects a

fine/forfeiture of \$258 rather than \$200, and included costs when the court's oral sentence was limited to a fine.

¶9 The State contends that the court properly assessed \$385 against Campbell, which included both the original \$335 and a \$50 warrant fee. The State concedes that the record indicates Campbell made one payment of \$30, and thus his outstanding balance was \$355, as stated by the circuit court at the January 2007 hearing. The State does not dispute that the court erroneously withheld \$385 rather than \$355.

¶10 We agree with the State. At the February 2004 sentencing hearing in the battery case, the State recommended "a fine of \$200 plus costs and 20 days jail." The circuit court stated its sentence as "\$200 and 20 days." The court did not say that it was not allowing costs, and we conclude that it would be unreasonable to interpret the court's oral statement as excluding costs. The judgment of conviction reflects a total monetary assessment of \$335, including a "fine & forfeiture" amount of \$258. Campbell's correspondence with the clerk of the circuit court, which Campbell has included in his appendix on appeal, indicates that the total fine breaks down to a \$200 fine; a \$10 jail surcharge; and a \$48 penalty surcharge. The record indicates that the court assessed an additional \$50 warrant fee after Campbell failed to make payments, and that Campbell made one payment of \$30. Campbell's outstanding balance on the battery case, then, was \$355. We discern no error in the total amount assessed against Campbell. Because it is undisputed that the circuit court withheld \$30 more than Campbell owed, we direct the circuit court to enter an order directing that amount be refunded to Campbell.

¶11 Campbell contends that the clerk also signed an erroneous order in his operating while intoxicated conviction. Campbell contends the court stated at sentencing that the fine was \$150, but the judgment of conviction reflects a fine of \$196. Again, however, Campbell's correspondence with the clerk of the circuit court indicates that the total \$196 fine includes the \$150 fine plus imposed costs. Campbell has not explained why he believes those costs were erroneously imposed.

¶12 Campbell also contends that two other judgments of conviction, also signed by the clerk, reflect \$10 fines despite the circuit court's oral statement that the sentences would be time served plus costs. Campbell again cites his correspondence with the clerk of the circuit court, indicating that the \$10 fine in each case is a jail surcharge. Campbell argues that the clerk did not have authority to assess the jail surcharge absent imposition of a fine or forfeiture by the court, citing *State v. Carter*, 229 Wis. 2d 200, 598 N.W.2d 619 (Ct. App. 1999) (under WIS. STAT. § 302.46(1) (2009-10),² imposition of a jail assessment is only authorized if the circuit court assesses a fine or forfeiture as part of the sentence). The State asserts that Campbell's argument fails because the judgments of conviction reflect that the circuit court imposed \$10 fines in each case, thus supporting a jail assessment.

¶13 We agree with Campbell. The State does not dispute that the \$10 fine *is* the jail surcharge, and does not explain how the jail surcharge, itself, may

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

be the fine that *supports* the jail surcharge. Additionally, the State does not dispute that the circuit court stated at the plea and sentencing hearing that the sentence would be time served plus costs. Our review of the record does not reveal any indication that the circuit court imposed a fine. Accordingly, the clerk was not authorized to assess a jail surcharge. Campbell does not develop any persuasive argument that the other costs were erroneously assessed against him, and we do not address those challenges further.

¶14 Finally, Campbell contends that the circuit court did not impose any sentence for one of the cases, and thus the judgment of conviction reflecting fines and costs was erroneously entered by the clerk. While it is true that the court did not specifically address the sentence for that case at the sentencing hearing, the court did state that the court was going to “take the court costs on all the rest of it” out of Campbell’s bond, indicating that the court was going to impose costs in each case.³ Thus, we do not agree that the judgment of conviction erroneously imposed costs. However, the judgment of conviction again reflects \$10 fines, which the clerk of the circuit court indicated was a jail assessment. For the reasons explained above, we conclude those fines were improperly imposed.

¶15 In sum, we affirm in part, reverse in part, and remand with directions for entry of modified judgments of conviction and an order directing that Campbell is entitled to a refund of \$90. We conclude that the \$10 fines in case numbers 2004CF383, 2004CF125, and 2004CF248 shall be vacated. The court

³ The court also sentenced Campbell to time served, consistent with the sentences imposed in the other cases.

shall enter modified judgments consistent with this opinion. Additionally, because the jail surcharges total \$60, and the State concedes that Campbell overpaid by \$30 in case number 2003CM927, we direct the circuit court to enter an order directing that Campbell shall be issued a refund of \$90.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

