

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 3, 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 No. 2011AP1554-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2010CF160

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WAYNE A. WAYKA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Wayne Wayka appeals a judgment convicting him of burglary and an order denying his motion to vacate the \$250 DNA surcharge and a ten-dollar jail surcharge. The postconviction motion argued that the court

failed to give a valid reason for imposing the DNA surcharge¹ and that the jail surcharge under WIS. STAT. § 302.46(1) (2009-10), can only be levied if the court imposes a fine.² The circuit court denied the motion as untimely. The State concedes that the motion was timely filed under WIS. STAT. RULE 809.30, but argues an alternative basis for affirming the order as to the DNA surcharge. Because we agree with the State's argument, we affirm the judgment and order on the DNA surcharge, but reverse and remand the matter for the circuit court to consider the jail surcharge issue.

¶2 Citing *State v. Nickel*, 2010 WI App 161, ¶1, 330 Wis. 2d 750, 794 N.W.2d 764, the assistant district attorney persuaded the circuit court that the postconviction motion had to be filed within ninety days of sentencing. In *Nickel*, the court considered alternative ways a challenge to the DNA surcharge could be raised because the time for filing a direct appeal under WIS. STAT. RULE 809.30 had expired. The court considered the applicability of WIS. STAT. § 973.19, which has a ninety-day deadline. *Nickel* does not stand for the proposition that any challenge to surcharges must be filed within ninety days. The ninety-day deadline only applies when the motion is brought under § 973.19. Because Wayka's motion was timely brought under RULE 809.30, the court should have considered the merits of the motion. Therefore we remand the matter to the circuit court to decide the merits of Wayka's motion as it relates to the jail surcharge.

¹ The circuit court required Wayka to give a sample of his DNA and pay the surcharge because Wayka had numerous arrests when he was too intoxicated to remember what happened. Having his DNA on file would assist police in determining whether Wayka committed crimes and could potentially exonerate him.

² Although the judgment of conviction indicates that the court imposed a twenty-dollar fine, the sentencing transcript does not indicate that any fine was imposed and it is likely that the twenty-dollar figure reflects two ten-dollar surcharges imposed under WIS. STAT. §§ 814.76(9) and 973.043(1), which are not challenged on appeal.

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

¶3 However, the State correctly notes that it may argue on appeal any valid ground to support the circuit court's ruling. *See State v. Holt*, 128 Wis. 2d 110, 123-26, 382 N.W.2d 679 (Ct. App. 1985). As the State observes, Wayka failed to preserve the issue regarding the DNA surcharge by failing to object at the sentencing hearing. *See State v. Baldwin*, 2010 WI App 162, ¶¶28, 62 n.15, 330 Wis. 2d 500, 794 N.W.2d 769. The basis for Wayka's challenge to the DNA surcharge, *State v. Cherry*, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393, had been published more than two years before Wayka's sentencing hearing. By his failure to object to the circuit court's alleged failure to state a valid reason for imposing the surcharge, Wayka forfeited his right to raise the issue by postconviction motion.

By the Court.—Judgment and 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.

