COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2309-CR **Cir. Ct. No. 2001CF1773**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRIL A. WYNN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Darril A. Wynn appeals *pro se* from a postconviction order denying his motion to quash the DNA surcharge imposed as a condition of his sentence. The issues are whether the trial court failed to follow alleged precedent and to liberally construe Wynn's *pro se* motion to allow his

untimely challenge. We conclude that the trial court was not obliged to re-open a final judgment entered in 2002 to retroactively apply a Wisconsin case decided in 2008, and that liberal construction cannot render timely Wynn's belated challenge to the trial court's exercise of discretion in imposing a DNA surcharge as a condition of his sentence. Therefore, we affirm.

¶2 Wynn pled guilty to failure to pay child support in 2001. The trial court imposed and stayed a five-year sentence comprised of two- and three-year respective periods of initial confinement and extended supervision, in favor of a four-year probationary term. As a condition of that sentence, the trial court imposed various costs, fees and surcharges, including a $250 DNA surcharge. Wynn did not object to that surcharge when imposed. He failed to challenge that surcharge pursuant to sentence modification within ninety days of his sentence pursuant to WIS. STAT. § 973.19(1) (2001-02), or a direct appeal pursuant to WIS. STAT. RULE 809.30(2) (amended July 1, 2001).[1] Consequently, Wynn's judgment became final. (A conviction becomes final after a direct appeal from that judgment and any right to directly review the related appellate decision is no longer available). *See* ***State v. Howard***, 211 Wis. 2d 269, 282 n.8, 564 N.W.2d 753 (1997) (citing ***Griffith v. Kentucky***, 479 U.S. 314, 321 n.6 (1987)), *overruled on other grounds by* ***State v. Gordon***, 2003 WI 69, ¶5, 262 Wis. 2d 380, 663 N.W.2d 765.

[1] Wynn has repeatedly sought postconviction relief on bases other than challenges to the DNA surcharge. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted, with the exception of WIS. STAT. RULE 809.30, which was amended July 1, 2001.

¶3 On August 21, 2008, Wynn moved to quash the DNA surcharge, relying on this court's recent decision ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393. The trial court denied the motion, ruling that his challenge was untimely. Wynn appeals.

¶4 Wynn contends that his status as a *pro se* litigant entitles him to a liberal construction of his motion to effectuate justice, citing ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 335 N.W.2d 384 (1983). The courts are obliged to liberally construe pleadings of *pro se* prisoners to analyze the relief sought, as opposed to limiting the analysis to the pleading's label. *See* ***id.*** at 521-24. Although we may disregard labels for *pro se* prisoners, we cannot disregard the rules.

¶5 Wynn challenges the trial court's failures to follow a subsequently decided Wisconsin case that he claims "is directly on point," and to exercise discretion in imposing a DNA surcharge for a non-sexual offense. He relies on this court's recent ***Cherry*** decision, in which we reversed and remanded the matter to the trial court for its failure to exercise discretion when it imposed the DNA surcharge. *See* ***id.***, 312 Wis. 2d 203, ¶¶9-11.

¶6 Wynn contends that the trial court is compelled to follow ***Cherry*** because it "is directly on point." ***Cherry***, assuming *arguendo* that it is "on point", was decided in 2008; Wynn's surcharge was imposed in 2002, more than six years earlier. We are not obliged to re-open a final judgment of conviction to apply ***Cherry***, even if it was "on point".[2]

[2] ***Cherry*** identifies the DNA surcharge as subject to the trial court's exercise of discretion; it does not create a new or different principle of law. *See* ***State v. Cherry***, 2008 WI App 80, ¶¶9-11, 312 Wis. 2d 203, 752 N.W.2d 393.

¶7 Wynn also challenges the DNA surcharge pursuant to WIS. STAT. §§ 973.19 and 809.30. Section 973.19(1)(a) allows a person to move to modify a sentence or the amount of a fine within ninety days of the order imposing the sentence or the fine. This section allows a defendant, whose challenge is limited to the sentence or fine imposed, an expeditious method of review. *See* Judicial Council Note, 1984, § 973.19. A defendant may challenge the judgment in any respect (limited to or beyond the scope of the sentence or fine) pursuant to RULE 809.30(2). That type of challenge requires a defendant to file a notice of intent to pursue postconviction relief within twenty days of the imposition of sentence. *See* RULE 809.30(2)(b). There are other applicable deadlines for challenging the judgment by motion and/or appeal that require compliance with particular deadlines dependent upon whether a transcript and the appointment of counsel are warranted. *See* RULE 809.30(2).

¶8 The trial court imposed the DNA surcharge on January 18, 2002, and entered the judgment of conviction three days later. Wynn's motion to quash that surcharge was filed August 21, 2008. The motion is well beyond the ninety-day deadline of WIS. STAT. § 973.19(1)(a), and beyond the deadline for filing a notice of intent to seek postconviction relief, or any other relief pursuant to WIS. STAT. RULE 809.30(2)(b). ***Bin-Rilla*** does not extend or remove these statutory deadlines for *pro se* prisoners.

¶9 If we construe Wynn's motion as seeking postconviction relief pursuant to WIS. STAT. § 974.06 (2007-08), it would also fail. Section 974.06 "is not a remedy for an ordinary rehearing or reconsideration of sentencing on its merits." ***State ex rel. Warren v. County Court***, 54 Wis. 2d 613, 617, 197 N.W.2d 1 (1972). Wynn challenges the surcharge as an erroneous exercise of discretion.

A challenge to the trial court's discretion is not the constitutional or jurisdictional challenge contemplated by § 974.06.

¶10 If we construe Wynn's motion as seeking sentence modification, it also fails. A sentence may be modified if the defendant-appellant shows the existence of a new factor. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). A new factor is

> "a fact or set of facts highly relevant to the imposition of sentence, but 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."

Id. (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Once the defendant has established the existence of a new factor, the trial court must determine whether that '"new factor' … frustrates the purpose of the original sentence." ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989).

¶11 Although our decision in ***Cherry*** was relatively recent, our reversal was because the trial court's expressed reasons for imposing the DNA surcharge were insufficient to demonstrate an actual exercise of discretion. *See* ***Cherry***, 312 Wis. 2d 203, ¶¶6-7. The obligation to apply the law to the facts and provide reasons and reasoning to explain the basis of a decision is not "new," and does not constitute a new factor warranting sentence modification.

¶12 Wynn's motion for relief, regardless of how it was labeled, fails. Nothing in ***Cherry*** warrants the extraordinary action of re-opening a final judgment entered over six years ago. Wynn's motion, pursuant to WIS. STAT. §§ 973.19 and 809.30, is also untimely. WISCONSIN STAT. § 974.06 is not the

proper method to challenge the trial court's sentencing discretion. *See* ***Warren***, 54 Wis. 2d at 617. ***Cherry*** is not a new factor warranting sentence modification. *See* ***Franklin***, 148 Wis. 2d at 8. Consistent with the spirit of ***bin-Rilla***, we have construed Wynn's claim by considering multiple forms of relief. *See* ***bin-Rilla***, 113 Wis. 2d at 521-22. Wynn's problem is not one of labeling or interpretation; it is one of timing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).