COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP507-CR **Cir. Ct. No. 2008CF6434**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EARNEST M. MOFFETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and 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. Earnest M. Moffett appeals from an amended judgment of conviction for being a felon in possession of a firearm and possession with intent to deliver 200–1000 grams of marijuana, second or subsequent offense, as a party to the crime, contrary to §§ 941.29(2)(a), 961.41(1m)(h)2., 961.48 and

939.05 (2007–08),[1] and from an order denying his motion for postconviction relief. Moffett presents a single issue on appeal: whether the trial court erroneously exercised its discretion when it imposed a DNA surcharge. We affirm.

BACKGROUND

¶2 Moffett entered guilty pleas to the two felonies noted above, pursuant to a plea bargain with the State. The State recited the plea bargain at the plea hearing:

> In exchange for a plea of guilty to the charges … the State is making a [global] recommendation of six years in the Wisconsin State Prison [System].
>
> We're asking that that be broken up into three years of initial confinement and three years of extended supervision. We're also requesting a $300 fine and costs and that the defendant provide a DNA sample and pay a surcharge. We're asking that the sentence be served consecutive to any other sentence.

Trial counsel agreed with this recitation, adding only that under the terms of the plea bargain, the defense was "free to argue."

¶3 After Moffett was found guilty, the parties agreed to proceed immediately to sentencing. In its sentencing argument, the State reiterated that it was asking the court to order Moffett to pay the DNA surcharge. Neither trial counsel nor Moffett offered any argument with respect to the DNA surcharge.

[1] All references to the Wisconsin Statutes are to the 2007–08 version unless otherwise noted.

¶4 The trial court sentenced Moffett to two years of initial confinement and one year of extended supervision for possessing a firearm, consecutive to four years of initial confinement and two years of extended supervision for possession with intent to deliver. With respect to providing a DNA sample and paying the surcharge, the trial court stated: "[Y]ou are required to provide a DNA sample if you have not previously provided one to the Department of Corrections, and if you haven't provided a sample previously, then you are ordered to pay the DNA surcharge since you would be providing the sample in connection with this case."[2]

¶5 Postconviction counsel was appointed for Moffett and he filed a postconviction motion seeking to modify his sentence to eliminate the DNA surcharge.[3] The basis for the motion was Moffett's allegation that the trial court "failed to exercise discretion in imposing" the DNA surcharge. The motion asserted that the trial court had failed to comply with ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, which held that "in exercising discretion, the trial court must do something more than stating it is imposing the DNA surcharge simply because it can." *See* ***id.***, 2008 WI App 80, ¶10, 312 Wis. 2d at 208, 752 N.W.2d at 395. Moffett also argued that the facts of his case did not support imposition of the DNA surcharge, where no DNA had been collected

[2] The parties do not offer any information with respect to whether Moffett has, in fact, previously provided a DNA sample or paid the DNA surcharge. Online circuit court records suggest that Moffett has previously been ordered to do both, in prior felony cases. Whether Moffett complied with previous orders is unknown, but it is clear that his postconviction motion seeking relief from the DNA surcharge was not based on an assertion that he had already paid a DNA surcharge.

[3] Moffett also filed two *pro se* postconviction motions that are not at issue on appeal and will not be discussed.

in prosecuting the case and Moffett was indigent and would be incarcerated for six years.[4]

¶6 The trial court denied Moffett's motion without a hearing. The written decision stated:

> [Moffett] claims that the court's order to provide a DNA sample if he hadn't done so previously and pay a DNA surcharge in connection with that sample does not comport with the reasons set forth in [***Cherry***] … for paying a DNA surcharge.
>
> The court does not agree. If this is the defendant's first felony case in which he is providing a sample, there is a cost involved in connection with this case. There is a cost of drawing the sample, a cost for having it analyzed, and a cost for having it put into the state DNA database. ***Cherry*** specified that the assessment of a DNA surcharge was appropriate if the defendant has provided a DNA sample in connection with the case so as to have caused a DNA cost. The court did not simply impose a DNA surcharge because the court could do so, but because the [S]tate incurred a cost for DNA in this case where there was no prior DNA taken or submitted. This is not an inadequate reason under ***Cherry*** and, thus, [there was] not an erroneous exercise of discretion.

(Citation and underlining omitted; bolding and italics added.) This appeal follows.

STANDARD OF REVIEW

¶7 Sentencing is within the discretion of the trial court, and our review is limited to determining whether the trial court erroneously exercised that discretion. ***McCleary v. State***, 49 Wis. 2d 263, 277–278, 182 N.W.2d 512, 519–

[4] The argument that the DNA surcharge should not have been imposed was raised for the first time in Moffett's postconviction motion. As noted, Moffett did not present any argument against imposition of the DNA surcharge at sentencing, even though part of the plea bargain was that the State would ask for imposition of the surcharge and Moffett was "free to argue."

520 (1971). Where the exercise of discretion has been demonstrated, appellate courts follow "'a consistent and strong policy against interference with the discretion of the trial court in passing sentence.'" ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203 (citation omitted).

DISCUSSION

¶8 At issue is whether the trial court erroneously exercised its discretion when it imposed the DNA surcharge. We considered this same issue in ***Cherry*** and concluded that reversal was required because the record did "not reflect a sufficient exercise of discretion to support the surcharge." *See* ***id.***, 2008 WI App 80, ¶4, 312 Wis. 2d at 206, 752 N.W.2d at 394. ***Cherry*** recognized that if a defendant is convicted of a felony that does not involve a sex crime under certain statutes identified in WIS. STAT. § 940.225, then it is within the trial court's discretion to order the defendant to pay the $250 DNA surcharge. *See* ***Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d at 206, 752 N.W.2d at 395 (citing WIS. STAT. § 973.046(1g)).[5] In order to properly exercise that discretion, a trial court must "properly set forth on the record the reasoning underlying its exercise of discretion." ***Id.***, 2008 WI App 80, ¶7, 312 Wis. 2d at 207, 752 N.W.2d at 395.

¶9 In ***Cherry***, the trial court said it would impose the DNA surcharge even if it had been paid or assessed in the past. ***Id.***, 2008 WI App 80, ¶2, 312 Wis. 2d at 205, 752 N.W.2d at 394. ***Cherry*** noted that the trial court appeared to have two reasons for its decision to impose the DNA surcharge: "(1) the trial court's

[5] WISCONSIN STAT. § 973.046(1g) provides: "Except as provided in sub. (1r), if a court imposes a sentence or places a person on probation for a felony conviction, the court *may* impose a deoxyribonucleic acid analysis surcharge of $250." (Emphasis added.)

policy is to impose the surcharge whenever possible; and (2) the court has the statutory authority to order the surcharge for the purpose of supporting the DNA database program." ***Id.***, 2008 WI App 80, ¶6, 312 Wis. 2d at 207, 752 N.W.2d at 395. ***Cherry*** held that these reasons did not demonstrate a proper exercise of discretion, stating:

> We … do not find the trial court's explanation that the surcharge was imposed to support the DNA database costs sufficient to conclude that the trial court properly exercised its discretion. To reach such a conclusion would eliminate the discretionary function of the statute as a DNA surcharge could be imposed in every single felony case using such reasoning.

Id., 2008 WI App 80, ¶10, 312 Wis. 2d at 208, 752 N.W.2d at 395–96.

¶10 ***Cherry*** recognized that although WIS. STAT. § 973.046(1g) gives a trial court discretion to impose the DNA surcharge, the statute does not set forth factors for the trial court to use in exercising that discretion. *See* ***Cherry***, 2008 WI App 80, ¶8, 312 Wis. 2d at 207, 752 N.W.2d at 395. ***Cherry*** declined to "attempt to provide a definite list of factors for the trial courts to consider in assessing whether to impose the DNA surcharge" so that it would not place limits on factors the trial court could consider. ***Id.***, 2008 WI App 80, ¶10, 312 Wis. 2d at 208, 752 N.W.2d at 396. Nonetheless, ***Cherry*** "provide[d] some guidance to the trial courts," noting:

> [S]ome factors to be considered could include: (1) whether the defendant has provided a DNA sample in connection with the case so as to have caused DNA cost; (2) whether the case involved any evidence that needed DNA analysis so as to have caused DNA cost; (3) financial resources of the defendant; and (4) any other factors the trial court finds pertinent.

Id., 2008 WI App 80, ¶10, 312 Wis. 2d at 208–209, 752 N.W.2d at 396.

¶11 With those legal standards in mind, we consider the trial court's exercise of discretion in this case. The trial court ordered Moffett to provide a DNA sample if he had not already done so. The trial court said that if Moffett was providing a first-time sample, then he was to pay the DNA surcharge "since you would be providing the sample in connection with this case."

¶12 After Moffett filed his postconviction motion, the trial court had an additional opportunity to explain its sentence. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243, 247 (Ct. App. 1994). The trial court explained that "if this is the defendant's first felony case in which he is providing a sample," then the surcharge was justified because of the cost required to draw the sample, analyze it and pay for it to be put in the DNA database. The trial court noted that its exercise of discretion was based on one of the factors explicitly noted in ***Cherry***—whether the DNA sample was provided "in connection with the case so as to have caused DNA cost." *See* ***Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d at 208, 752 N.W.2d at 396. The trial court stated that unlike the trial court in ***Cherry***, it had "not simply impose[d] a DNA surcharge because the court could do so, but because the state incurred a cost for DNA in this case where there was no prior DNA taken or submitted."

¶13 Moffett argues that the record "does not demonstrate a process of reasoning by the trial court." We disagree. The trial court explicitly cited a factor sanctioned in ***Cherry*** when it imposed the DNA surcharge at sentencing, and it determined that Moffett should be required to pay the surcharge only if he had not paid it in the past. The trial court's explanation of its reasoning was sufficient.

¶14 The more challenging issue is whether the trial court's exercise of discretion was "'based on a logical rationale founded upon proper legal

standards.'" *See* ***Gallion***, 2004 WI 42, ¶19, 270 Wis. 2d at 549–550, 678 N.W.2d. at 203 (citation omitted). Moffett argues that the ***Cherry*** factor the trial court cited was inapplicable because *at the time of sentencing*, Moffett had not "provided a DNA sample in connection with the case so as to have caused DNA cost." *See* ***id.***, 2008 WI App 80, ¶10, 312 Wis. 2d at 208, 752 N.W.2d at 396. Even if ***Cherry*** was referring only to DNA samples provided prior to sentencing when it described this factor—an issue we need not decide—***Cherry*** explicitly stated that its list of potential factors that a court could consider was not exclusive. *See* ***ibid.*** We conclude that the fact that the State will incur costs to collect a sample from Moffett, analyze the DNA and put the results in the DNA database, was an appropriate factor for the trial court to consider when deciding whether to impose a DNA surcharge. We fail to see how the State's actual costs to collect DNA prior to sentencing should be considered differently than the State's actual costs it will incur to collect a particular defendant's DNA after sentencing.

¶15 Moffett suggests that the State's cost of taking a DNA sample from a defendant for the first time is not an appropriate factor to consider because then the surcharge could be imposed in every case where a DNA sample was collected for the first time. Moffett notes that ***Cherry*** criticized this line of reasoning when it rejected "the trial court's explanation that the surcharge was imposed to support the DNA database costs" because "[t]o reach such a conclusion would eliminate the discretionary function of the statute as a DNA surcharge could be imposed in every single felony case using such reasoning." *See* ***id.***, 2008 WI App 80, ¶10, 312 Wis. 2d at 208, 752 N.W.2d at 395–396.

¶16 We are not convinced. The problem with Moffett's analysis is that if it were applied to two of the factors sanctioned in ***Cherry***—consideration of whether the State had already incurred costs for DNA testing of the defendant or

evidence in the case—then those factors would also, by Moffett's reasoning, be improper. In other words, one could argue that considering those two factors "would eliminate the discretionary function of the statute as a DNA surcharge could be imposed in every single felony case" where the State had already incurred costs for DNA testing. *See* ***ibid.*** The fact that considering a certain factor might lead to similar results in similar cases does not render consideration of the factor improper. Rather, ***Cherry*** directs trial courts to consider the facts of the individual case and not automatically impose blanket rules on any particular group of defendants. *See* ***ibid.***

¶17 In this case, the trial court considered case-specific facts and arguments in determining an appropriate sentence for Moffett, which included imposing the DNA surcharge. The trial court concluded that if Moffett had not previously provided a DNA sample, he should pay the cost of doing so because of the cost the State would have to incur to collect, analyze and store Moffett's DNA information. The trial court did not suggest that it had a blanket policy of always imposing the surcharge on first-time DNA contributors. Indeed, it explicitly stated that it was not imposing the surcharge simply because it could, but because "the [S]tate incurred a cost of DNA in this case where there was no prior DNA taken or submitted." We discern no erroneous exercise of discretion and, therefore, we affirm.

By the Court.—Judgment and order affirmed.

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