

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 1, 2011

A. John Voelker
Acting 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. 2010AP1269-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2007CF1592

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

XAVIER LUIS PEREZ,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
THOMAS P. DONEGAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Xavier Luis Perez, *pro se*, appeals the circuit court orders denying his motion to vacate the DNA surcharge imposed pursuant to WIS. STAT. § 973.046(1g) and the order denying his subsequent motion for reconsideration. Perez argues that the sentencing court failed to properly exercise

its discretion when it imposed the DNA surcharge without articulating reasons to support its decision. In addition, Perez argues that the circuit court erred by not liberally construing his motion. Because Perez's motion was filed more than two years after judgment was entered, it was untimely. We therefore affirm.

BACKGROUND

¶2 Perez pled guilty to two counts of armed robbery as a party to a crime, Class C Felonies. In November of 2007, he was sentenced to two consecutive terms of three years of initial confinement and three years of extended supervision. The circuit court ordered that Perez provide a DNA sample and pay the surcharge. Perez did not appeal.

¶3 In 2008, this court released *State v. Cherry*, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, which discussed the on-the-record explanation required when a circuit court exercises its discretion to impose a DNA surcharge. *See id.*, 2008 WI App 80, ¶¶9–10, 312 Wis. 2d at 207–209, 752 N.W.2d at 395–396. In March of 2010, Perez filed a *pro se* motion to vacate the DNA surcharge based on *Cherry*. The circuit court denied the motion on the following grounds: *Cherry* does not apply retroactively; even if *Cherry* did apply, Perez's motion was untimely; and a challenge to the sentencing court's exercise of discretion is not permitted under WIS. STAT. § 974.06. The circuit court also denied the motion for reconsideration that followed. Perez now appeals.

DISCUSSION

¶4 We first consider whether Perez's motion to vacate the DNA surcharge was timely. Based on our recent decision in *State v. Nickel*, 2010 WI App 161, ___ Wis. 2d ___, ___ N.W.2d ___, we conclude that it was not.

¶5 “When a defendant moves to vacate a DNA surcharge, the defendant seeks sentence modification. Pursuant to WIS. STAT. § 973.19, a defendant may move for sentence modification within ninety days after sentencing.” *Nickel*, 2010 WI App 161, ¶5, ___ Wis. 2d at ___, ___ N.W.2d at ___. Perez was sentenced in 2007 and did not seek to vacate the DNA surcharge until more than two years later. As was the situation in *Nickel*, Perez’s late filing was “well outside the time limits imposed under § 973.19.” *Nickel*, 2010 WI App 161, ¶5, ___ Wis. 2d at ___, ___ N.W.2d at ___.

¶6 Additionally, “a defendant may obtain postconviction review of a sentence within the time limits of a direct appeal.” *Id.*, 2010 WI App 161, ¶5, ___ Wis. 2d at ___, ___ N.W.2d at ___; *see also* WIS. STAT. RULE 809.30. Perez, however, did not file a direct appeal and the time frame for him to do so has expired. Consequently, his judgment of conviction became final when it was not challenged within the deadlines for doing so. *See Nickel*, 2010 WI App 161, ¶5, ___ Wis. 2d at ___, ___ N.W.2d at ___. *Nickel* makes clear that “*Cherry* does not give the [circuit] court the authority to revise a sentence after a criminal conviction becomes final.” *Nickel*, 2010 WI App 161, ¶5, ___ Wis. 2d at ___, ___ N.W.2d at ___. Accordingly, we conclude that Perez’s motion to vacate his DNA surcharge was untimely.

¶7 Although a postconviction motion under WIS. STAT. § 974.06 is not subject to the time limits set forth in WIS. STAT. § 973.19 and WIS. STAT. RULE 809.30, in *Nickel*, we explained that “a § 974.06 motion is limited to constitutional and jurisdictional challenges. It cannot be used to challenge a sentence based on an erroneous exercise of discretion ‘when a sentence is within the statutory maximum or otherwise within the statutory power of the court.’” *Nickel*, 2010 WI

App 161, ¶7, ___ Wis. 2d at ___, ___ N.W.2d at ___ (citation omitted). Perez does not raise a constitutional or jurisdictional challenge.¹

¶8 In *Nickel*, we acknowledged that circuit courts have inherent power to modify sentences at any time based upon a new factor. *Id.*, 2010 WI App 161, ¶8, ___ Wis. 2d at ___, ___ N.W.2d at ___. We concluded, however, that the *Cherry* decision did not constitute a new factor justifying sentence modification.² *Nickel*, 2010 WI App 161, ¶8, ___ Wis. 2d at ___, ___ N.W.2d at ___. Perez does not argue the existence of a new factor.

¶9 Instead, Perez argues that because he is proceeding *pro se*, we should liberally construe his motion as a petition for a writ of mandamus. See *bin-Rilla v. Israel*, 113 Wis. 2d 514, 520–522, 335 N.W.2d 384, 388 (1983). Perez overlooks that a petition for a writ of mandamus would have been meritless because the imposition of the DNA surcharge was a discretionary act. An act which requires the exercise of discretion does not present a clear legal duty and cannot be compelled through mandamus. See *Law Enforcement Standards Bd. v. Village of Lyndon Station*, 101 Wis. 2d 472, 494, 305 N.W.2d 89, 100 (1981). The State is correct in its assessment: “Perez had to timely file a sentence modification motion under WIS. STAT. § 973.19 and/or a direct postconviction challenge under WIS. STAT. [RULE] 809.30. His failure to timely challenge the

¹ To the extent it can be construed as a constitutional argument, Perez’s allegation that postconviction counsel was ineffective for not challenging the DNA surcharge in a direct appeal is conclusory and undeveloped. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (An appellate court can “decline to review issues inadequately briefed.”).

² We further held that “*Cherry*’s holding is not a new procedural rule warranting retroactive application.” *State v. Nickel*, 2010 WI App 161, ¶8, ___ Wis. 2d ___, ___, ___ N.W.2d ___, ___. Thus, the circuit court correctly determined that *Cherry* cannot be applied retroactively to this case.

condition on direct review is fatal to his claim no matter how liberally it is construed.”

¶10 Perez fails to demonstrate a basis on which he may challenge the sentencing court’s exercise of discretion more than two years after the sentencing proceedings concluded. Accordingly, the circuit court correctly denied Perez’s motion to vacate the DNA surcharge.

By the Court.—Orders affirmed.

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

