

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 20, 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. 2011AP544-CR**

**Cir. Ct. No. 2004CF4134**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**EMMANUEL ROVON HAMILTON,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
DAVID A. HANSHER, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Emmanuel Rovon Hamilton, *pro se*, appeals from an order denying his second motion to vacate the DNA surcharge imposed when

he was sentenced in 2005.<sup>1</sup> He contends the circuit court misused its discretion when it imposed the surcharge. We affirm.

¶2 Citing *State v. Cherry*, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, Hamilton argues that the circuit court failed to adequately explain why the surcharge was imposed. In *Cherry*, we held that a circuit court is required to demonstrate on the record a proper exercise of discretion when imposing a DNA surcharge pursuant to WIS. STAT. § 973.046(1g) (2009-10).<sup>2</sup> See *Cherry*, 312 Wis. 2d 203, ¶¶9-10.

¶3 We recently held that a motion to vacate a DNA surcharge based on *Cherry* may not be brought after the time limits for filing either a direct appeal under WIS. STAT. RULE 809.30 or a motion for sentence modification under WIS. STAT. § 973.19 have elapsed. See *State v. Nickel*, 2010 WI App 161, 330 Wis. 2d 750, 794 N.W.2d 765. We explained that “[w]hen a defendant moves to vacate a DNA surcharge, the defendant seeks sentence modification.” *Id.*, ¶5. We further explained that a motion for sentence modification must be brought within the time limits for direct appeal under RULE 809.30 or within ninety days of sentencing under § 973.19. *Nickel*, 330 Wis. 2d 750, ¶5. Hamilton did not move to modify his 2005 sentence within the deadlines. Therefore, his motion is untimely.

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<sup>1</sup> Hamilton’s first *pro se* motion to vacate the DNA surcharge was filed in October 2009. The circuit court denied the motion, and he did not appeal.

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

*By the Court.*—Order affirmed.

This opinion will not be published.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

