COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP96-CR **Cir. Ct. No. 2014CM1312**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVIS J. MANTEUFFEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: MICHAEL MORAN, Judge. *Affirmed*.

¶1 STARK, P.J.[1] Travis Manteuffel appeals the imposition of a $200 deoxyribonucleic acid (DNA) surcharge on his conviction for misdemeanor disorderly conduct and an order denying his postconviction motion to vacate that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

surcharge. He argues the surcharge, as applied to him, violates his substantive due process rights. Because Manteuffel fails to prove beyond a reasonable doubt that the statute is unconstitutional as applied to him, we affirm.

BACKGROUND

¶2 Under WIS. STAT. § 973.046(1r)(b), all persons convicted of a misdemeanor after January 1, 2014, are subject to a mandatory DNA surcharge that is calculated at $200 per conviction.[2] *See* 2013 Wis. Act 20, §§ 2355, 9426(1)(am). The funds gathered through those surcharges are directed by WIS. STAT. § 973.046 to be used pursuant to WIS. STAT. § 165.77 to fund the state crime laboratories' DNA analysis and maintenance of the data bank containing such results. *See* 2013 Wis. Act 20, § 390. However, under WIS. STAT. § 165.76(1)(as), a circuit court can only order persons convicted of a misdemeanor to provide a biological specimen to the state crime labs if they were found guilty of that offense after April 1, 2015. *See* 2013 Wis. Act 20, § 9426(1)(bm).

¶3 In this case, Manteuffel was arrested and charged with misdemeanor battery and disorderly conduct, both with a domestic abuse enhancer, stemming from a July 20, 2014 incident. Manteuffel pled guilty to the disorderly conduct charge, a class B misdemeanor, on March 18, 2015, and the battery charge was dismissed outright. The circuit court imposed the $200 DNA surcharge required under WIS. STAT. § 973.046(1r)(b) but did not order Manteuffel to provide a biological sample.

[2] Previously, a circuit court could only impose a surcharge on persons convicted of a felony; that imposition was discretionary, save for exceptions related to certain offenses. *See* WIS. STAT. § 973.046(1g) (2011-12). Under current law, specifically § 973.046(1r)(a), it is mandatory for a circuit court to impose a $250 surcharge per felony conviction.

¶4 Manteuffel filed a postconviction motion to vacate the $200 surcharge. He argued that, as applied, the surcharge violated his constitutional rights.[3] The circuit court denied the motion. Manteuffel now appeals.

DISCUSSION

¶5 Manteuffel argues that because he is not required to submit a DNA sample, there is no nexus between his surcharge and the use of those funds. Therefore, he asserts, the imposition of the surcharge under WIS. STAT. § 973.046(1r)(b) violates his due process rights. We review de novo the question of a statute's constitutionality. ***State v. Jorgensen***, 2003 WI 105, ¶14, 264 Wis. 2d 157, 667 N.W.2d 318. A statute is ordinarily presumed constitutional, and a challenging party shall only overcome that presumption upon showing the statute is unconstitutional beyond a reasonable doubt. ***State v. Smith***, 2010 WI 16, ¶8, 323 Wis. 2d 377, 780 N.W.2d 90. As Manteuffel expressly raises an "as-applied" challenge to the statute, we must focus on the facts of this particular case, and if we determine "the law actually violates the challenger's rights, then 'the operation of the law is void as to the party asserting the claim.'" ***Blake v. Jossart***, 2016 WI 57, ¶26, 370 Wis. 2d 1, 884 N.W.2d 484 (citation omitted).

[3] The Marathon County District Attorney argued on behalf of the State in the circuit court and does so again on appeal. Nothing in the record expressly indicates Manteuffel served the attorney general with notice of this constitutional challenge below in compliance with WIS. STAT. § 806.04(11). *See generally* ***O'Connell v. Blasius***, 82 Wis. 2d 728, 733-34, 264 N.W.2d 561 (1978). During the hearing on Manteuffel's postconviction motion, however, the circuit court stated that it received word from the attorney general that the Department of Justice would not be participating. Given the court's statement at the postconviction motion hearing and the fact the attorney general has been copied with all case correspondence, we presume the attorney general has received notice and has declined to participate in this appeal.

¶6 The Due Process Clause of the Fourteenth Amendment to the United States Constitution offers individuals "heightened protection against government interference with certain fundamental rights and liberty interests[,]" regardless of the procedure employed by the government. ***Washington v. Glucksberg***, 521 U.S. 702, 719-20 (1997). Substantive due process thus guards against state action that either "shocks the conscience ... or interferes with rights implicit in the concept of ordered liberty." ***Blake***, 370 Wis. 2d 1, ¶47. If a fundamental right or liberty interest is not raised in a substantive due process claim, however, the state action in question is reviewed under rational basis analysis, similar to an equal protection claim not implicating a "suspect class." *See* ***Jorgensen***, 264 Wis. 2d 157, ¶32 (citing ***Chapman v. United States***, 500 U.S. 453, 464-65 (1991)).

¶7 Under rational basis review, the act or means of the legislature must be "rationally related to achieving a legitimate governmental interest." ***Blake***, 370 Wis. 2d 1, ¶48. If no dispute exists regarding whether a statute serves a legitimate governmental interest, under an as-applied challenge, rational basis analysis requires a "search for any facts upon which the legislation reasonably could be applied" to the challenger. *See* ***Smith***, 323 Wis. 2d 377, ¶¶12, 15; *see also* ***Wroblewski v. City of Washburn***, 965 F.2d 452, 457-58 (7th Cir. 1992) (whether the "identified justification was the actual motivation" for passing the law need not be controlling in whether the law is arbitrarily applied).

¶8 As an initial matter, we note Manteuffel has not provided any legal authority or constitutional analysis for what he misguidedly terms a "substantial" due process claim. Instead, Manteuffel devotes much of his argument to comparing his legal claim to ex post facto challenges to the imposition of the mandatory DNA surcharge against misdemeanor and felony offenders whose crimes occurred before the effective date of WIS. STAT. § 973.046(1r)(b). *See*,

e.g., ***State v. Elward***, 2015 WI App 51, ¶7, 363 Wis. 2d 628, 866 N.W.2d 756; ***State v. Radaj***, 2015 WI App 50, ¶38, 363 Wis. 2d 633, 866 N.W.2d 758. The ex post facto clause[4] bars sanctions by the legislature that "make[] more burdensome the punishment for a crime[] after its commission." ***State v. Thiel***, 188 Wis. 2d 695, 700, 524 N.W.2d 641 (1994). Here, Manteuffel committed the crime in question after the effective date of the statute. As a result, Manteuffel's citations to ex post facto law are inapt.

¶9 Manteuffel does not identify a fundamental right or liberty interest at stake. He merely argues that imposing the $200 surcharge upon his conviction for a single misdemeanor is irrational because his particular surcharge will not be used to fund analysis of his own DNA sample.[5] Therefore, we must determine if the imposition of a surcharge without collection of a DNA sample from Manteuffel serves a legitimate government interest. *See* ***Blake***, 370 Wis. 2d 1, ¶48.

¶10 The plain language of WIS. STAT. § 973.046(1r)(b) does not condition payment of a surcharge upon collection of a sample. The funds collected under § 973.046(3), and used pursuant to WIS. STAT. § 165.77, cover various activities by the state crime labs related to general criminal investigations. *Cf.* ***State v. Scruggs***, 2015 WI App 88, ¶¶10-12, 365 Wis. 2d 568, 872 N.W.2d 146, *review granted*, 2016 WI 78, 371 Wis. 2d 604, 885 N.W.2d 377; ***Radaj***, 363 Wis. 2d 633, ¶10. Section 165.77 also provides for several functions that are not limited to the initial processing and entry of a defendant's particular DNA sample.

[4] U.S. CONST. art. I, §§ 9 & 10; WIS. CONST. art. I, § 12.

[5] We also understand Manteuffel to argue that *any* application of the surcharge to him, regardless of the cost, violates his substantive due process rights. We thus do not address whether the amount of the surcharge in this case was excessive or arbitrary.

See, e.g., WIS. STAT. § 165.77(2)(a)1.a. (analysis of DNA samples when requested by law enforcement agencies in connection with investigation); § 165.77(2)(a)2. (comparing data obtained from separate specimens upon request); § 165.77(3) (maintaining data bank based upon DNA analysis of specimens). Funds collected from an offender and used pursuant to § 165.77 are not required to be allocated to activities regarding that specific offender's DNA sample or databank profile.

¶11 In enacting WIS. STAT. § 973.046(1r)(b), the legislature stated

> that the state has a compelling interest in the accurate identification of criminal offenders and that there is a critical and urgent need to provide law enforcement officers and agencies with the latest scientific technology available for accurately and expeditiously identifying, apprehending, arresting, and convicting criminal offenders and exonerating individuals wrongly suspected or accused of a crime.

2013 A.B. 40, 1021. The legislature determined that more expansive DNA testing "will prevent time-consuming and expensive investigations of innocent individuals." ***Id.*** The changes in the law also are intended to enable the Department of Justice to pay for operating costs of the state crime labs in addition to costs for equipment and supply costs, something it was unable to do previously. *See* PAUL ONSAGER, WISCONSIN LEGISLATIVE FISCAL BUREAU, Paper #410, DNA COLLECTION AT ARREST AND THE DNA ANALYSIS SURCHARGE 2-3 (May 23, 2013).

¶12 The legislature enacted the changes in the DNA surcharge law to provide greater funding for the state crime laboratory in the interest of more effectively and accurately administering justice in Wisconsin. The legislature has determined that such effective administration requires larger, better-funded crime laboratories to ensure that DNA testing relating to criminal cases is performed

quickly and correctly. *See* 2013 A.B. 40, 1021. Requiring that criminal offenders pay in part for the cost for improving and maintaining the state crime labs is not unreasonable when the need for the database exists due to criminal activity. Assessing the surcharge against all offenders will provide greater funding to attain a more efficient system of justice, regardless of whether a specific DNA profile is tested. *See* LFB #410 at 2 (estimating surcharges would generate revenue of $1,989,400 in 2013-14, and $3,546,800 in 2014-15).

¶13 Manteuffel fails to rebut these legislative findings or explain why the imposition of the surcharge is an irrational means of collecting funds for use in carrying out the functions listed in WIS. STAT. § 165.77. He only contends that the surcharge as applied to him is akin to a criminal fine unrelated to any valid activities because he has provided no DNA sample for analysis. However, the fact the surcharge may be viewed as having some punitive characteristic does not prove the statute requiring its imposition fails to further a legitimate government interest.

¶14 We thus conclude that Manteuffel has not carried his burden to show beyond a reasonable doubt that the DNA surcharge, as applied to him, violates his right to substantive due process. The DNA surcharge is a rational means of furthering the state's interest in the administration of justice. The surcharge does not need to be conditioned on an offender providing a DNA sample to be rationally connected to that interest. Accordingly, we affirm.

By the Court.—Judgment and order affirmed

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.