

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 23, 2007

David R. Schanker
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. 2007AP241-CR

Cir. Ct. No. 2002CF2106

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ALFREDO RIVERA, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
TIMOTHY G. DUGAN, Judge. *Order reversed and cause remanded with
directions.*

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

¶1 PER CURIAM. Alfredo Rivera, Jr., appeals from an order denying his motion to correct clerical errors in his original judgment of conviction. We reverse.

Background

¶2 Rivera pled guilty in 2002 to escape from custody, a felony, and entry into locked vehicle, a misdemeanor. *See* WIS. STAT. §§ 946.42(3)(a), 943.11 (2001–02)¹. The Honorable Karen A. Christenson imposed and stayed a bifurcated term of imprisonment for the felony and placed Rivera on probation. The court’s oral pronouncement included its order that “[y]ou have to give a DNA sample if you have never done that before. You are going to have to pay costs and surcharges associated with this proceeding.”

¶3 The judgment of conviction was signed by a court official on behalf of the Milwaukee County Clerk of Courts four days after Rivera’s sentencing. The written judgment provides, in pertinent part:

“Costs. Pay all costs and surcharges associated with this action

Other. Provide DNA sample, pay surcharge.”

¶4 In 2006, following revocation of both his probation and his extended supervision, Rivera brought a postconviction motion before a successor judge, the Honorable Timothy G. Dugan. He asked the court to correct the original written judgment of conviction by vacating the orders that he provide a DNA sample and pay a DNA analysis surcharge.² He argued that the sentencing court did not

¹ All references to the Wisconsin Statutes are to the 2001–02 version unless otherwise noted.

² Rivera filed his notice of appeal from both the order for reconfinement after revocation of supervision and the order denying his motion to correct clerical errors in the original judgment of conviction. Substantively, he pursues relief only from the order denying his motion to correct the judgment. We deem abandoned any issues relating to the order for reconfinement and we do not address them.

intend that he pay two DNA surcharges; rather, the sentencing court's oral order was contingent on his never previously incurring DNA obligations. In support of his request for relief from payment, Rivera submitted evidence showing that he had paid a DNA surcharge pursuant to an order for a DNA sample in an earlier felony case.

¶5 The court denied the motion. It found Rivera's materials insufficient to show that he had previously submitted a DNA sample. It further concluded that a circuit court has discretion to impose multiple DNA surcharges and therefore declined to vacate the surcharge here. This appeal followed.

Discussion

¶6 Whether the sentence portion of a written judgment of conviction should be corrected is a question of law. *State v. Prihoda*, 2000 WI 123, ¶8, 239 Wis. 2d 244, 248, 618 N.W.2d 857, 860. The sentencing judge's intent determines the terms of a sentence. *State v. Brown*, 150 Wis. 2d 636, 642, 443 N.W.2d 19, 22 (Ct. App. 1989). We review the record independently to determine that intent. *See ibid.* Uncertainties are ordinarily resolved in favor of the defendant. *See State v. Perry*, 136 Wis. 2d 92, 114, 401 N.W.2d 748, 758 (1987) (citation omitted).

¶7 Pursuant to WIS. STAT. § 973.046(1g), the sentencing court had discretion to impose a DNA surcharge in this case or relieve Rivera of that obligation. *See State v. Jones*, 2004 WI App 212, ¶6, 277 Wis. 2d 234, 239, 689 N.W.2d 917, 920. The court's oral pronouncement, however, neither expressly ordered Rivera to pay the surcharge nor excused him if he had paid a surcharge in a previous case. In the context of stating that Rivera must submit his DNA if he had not done so before, the court's silence as to the surcharge allows reasonably well-informed persons to reach different conclusions as to the court's actual order.

See *State v. Oglesby*, 2006 WI App 95, ¶19, 292 Wis.2d 716, 725–726, 715 N.W.2d 727, 732 (test for ambiguity in a sentencing situation is whether reasonably well-informed persons could understand the language in two or more different ways).

¶8 The State urges us to look only at the written judgment to resolve ambiguities in the court’s oral pronouncement, citing *State v. Lipke*, 186 Wis. 2d 358, 364, 521 N.W.2d 444, 446 (Ct. App. 1994). Such a limited review is inadequate. See *Oglesby*, 2006 WI App 95, ¶25, 292 Wis. 2d at 728, 715 N.W.2d at 733–734. Although *Lipke* holds that it is proper to look at the written judgment to ascertain the court’s intent, it does not hold that such a limited review is sufficient. Rather, we are required to look to the entire record. *Oglesby*, 2006 WI App 95, ¶25, 292 Wis. 2d at 728, 715 N.W.2d at 734.

¶9 The parties addressed the DNA issue once before the sentencing proceeding. At the start of Rivera’s plea hearing, the State described the plea bargain, including its request that the court order a DNA specimen and a surcharge. Rivera then informed the court that he had submitted his DNA and been assessed a surcharge in a previous case. He stated that he would try to submit proof of prior compliance by the sentencing date and asked the court to waive the DNA obligations.

¶10 Rivera’s request is illuminating because the court ultimately imposed a sentence that largely followed the defense recommendations. See *Brown*, 150 Wis. 2d at 642, 443 N.W.2d at 22 (reflecting that in appropriate circumstances, a reviewing court will examine the parties’ recommendations to determine the court’s intent). The court accepted the defense request for an imposed and stayed sentence with probation, and rejected the State’s

recommendation for a bifurcated term of confinement and supervision. The court further adopted Rivera's recommendation for condition time in the amount he requested and with the work release structure he proposed. We conclude that the circuit court intended to grant Rivera's request with respect to the DNA component as well. The court intended to order that Rivera pay a DNA surcharge only in the event that he had not been assessed the surcharge previously.

¶11 The written judgment of conviction does not persuade us otherwise. It contains two payment orders while the court pronounced one; it was issued on October 29, 2006, four days after the sentencing proceeding; and it was not signed by the sentencing court. These circumstances provide no assurance that the written document reflects the court's intent rather than a scrivener's error. On the totality of this record, we have no hesitation in resolving any question as to the DNA component of the sentence in Rivera's favor.

¶12 We reverse the order denying Rivera's motion to correct the judgment of conviction. On remand, the circuit court shall correct the clerical error or direct the clerk's office to do so by entering an amended judgment that orders payment of a DNA surcharge only if Rivera has never paid one before. *See Prihoda*, 2000 WI 123, ¶5, 239 Wis. 2d at 247–248, 618 N.W.2d at 860. Because no party disputes that Rivera did in fact pay a surcharge in an earlier case, the court shall relieve Rivera of the obligation to pay a DNA surcharge here.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005–06).

