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STATE OF WISCONSIN

I N THE S U P R E M E C O U R T

Case No. 2012AP1582-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREW MATASEK,

Defendant-Appellant-Petitioner.

ON APPEAL FROM A JUDGMENT ENTERED IN OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE THOMAS WOLFGRAM, PRESIDING AND ON PETITION FOR REVIEW FROM THE DISTRICT TWO WISCONSIN COURT OF APPEALS ORDER AFFIRMING THE CIRCUIT COURT

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED

Whether the circuit court has the discretion under Wis. Stat. § 973.015 to withhold its judgment on expungement until the defendant successfully completes probation.

STATEMENT ON PUBLICATION AND ORAL ARUGMENT

Mr. Matasek requests publication and oral argument. This is an issue of first impression in Wisconsin and an issue of importance to all circuit courts. Moreover, as of the writing of this brief counsel is aware that oral argument has been scheduled in this case for February 20, 2014.

STATEMENT OF FACTS

On June 28, 2010 Deputy Bratcher from the Ozaukee County Anti-Drug Task Force initiated an undercover purchase of approximately 799 grams of marijuana. (R.1, p.1). Deputy Bratcher met two individuals in a Jeep in Cedarburg, Wisconsin to complete the sale. (R.1, p.2). One of the individuals in the Jeep was identified as Andrew Matasek, the petitioner. *Id.*

While Deputy Bratcher was in the Jeep with Mr. Matasek and the third party, Deputy Bratcher was handed a bag of marijuana by the third party. (R.1, p.2). At that time, Mr. Matasek and the other individual in the car asked Deputy Bratcher for money. *Id.* Deputy Bratcher then alerted surveillance officers who initiated an arrest of the suspects. *Id.*

Mr. Matasek was questioned by officers after his arrest. *Id.* During his questioning, Mr. Matasek admitted to delivering the marijuana. *Id.* Mr. Matasek was under 25 years of age at the time of this offense. (R. 19).

STATEMENT OF THE CASE

Mr. Matasek was charged with one count of Manufacture/Deliever THC (>200-1000 Grams) as party to a

crime. (R.1, p.1). Mr. Matasek waived his preliminary hearing on July 7, 2011 and entered a no contest plea on November 21, 2011. (R.32). In exchange for Mr. Matasek's no contest plea, the State agreed to recommend probation with six months of condition time and all other conditions of probation left to the court's discretion. (R.38, p.6)

Sentencing proceeded on January 12, 2012. (R.38). The Court heard arguments from the State and the defense. (R.38). The defense argued that Mr. Matasek met all the requirements for expungement under Wis. Stat. § 973.015. *Id.*

Ultimately, the Court withheld a sentence and placed Mr. Matasek on three years of probation. (R.38, p.30). One condition of probation was that Mr. Matasek was to serve one year in the county jail. *Id* at 31. However, that time was stayed until January of 2013, at which time the Court hinted it may stay the time indefinitely if Mr. Matasek complied with all the conditions of his probation. *Id.*

After talking to Mr. Matasek about his condition time, the Court turned to the expungement issue. (R.38, p.33). The Court held that Mr. Matasek would benefit from expungement but, at this time, society would be harmed. *Id.* The Court indicated that it wished it could revisit expungement for Mr. Matasek at a later time but, according to the Court's interpretation of the statute, the Court could not revisit the issue. *Id* at 34.

Consequently, defense counsel argued that the statute simply asked the Court find eligibility on the sentencing date and allowed the Court to order expungement at the end of the probationary period. (R.38, p.32). The Court again said the statute would not allow the Court to consider expungement after a term of probation. *Id.* Inside, the Court explained that

it would have to order expungement at that time upon successful completion of probation. *Id*. The Court also requested that defense counsel appeal its ruling. *Id* at 34.

The petitioner filed a timely appeal based solely on the expungement issue. The Court of Appeals for District Two published an opinion and entered an order affirming the ruling of the circuit court.

ARGUMENT

I. THE CIRCUIT COURT HAS THE AUTHORITY UNDER WIS. STAT. § 973.015 TO EXERCISE ITS DISCRETION AND WITHHOLD ITS DECISION ON EXPUNGEMENT UNTIL THE DEFENDANT SUCCESSFULLY COMPLETES PROBATION

The petitioner is challenging the circuit court and Court of Appeals' ruling that a circuit court does not have the authority to withhold its ruling on expungement until the court has proof of successful completion of probation. The circuit court in this case explained that it believed § 973.015 does not allow a circuit court could stay its decision on expungement until the defendant successfully completes probation and returns to court to request the court lift the stay of its expungement order.

This case is about how § 973.015 should be interpreted by the circuit court. A question of statutory construction is a question of law that is reviewed independently of the lower court's ruling. *State v. Leitner*, 2002 WI 77, ¶ 16, 253 Wis.2d 449, 646 N.W.2d 341.

Wis. Stat. § 973.015 reads:

(1) (a) Subject to par. (b) and except as provided in par. (c), when a person is under the age of 25 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law for which the maximum period of imprisonment is 6 years or less, the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition. This subsection does not apply to information maintained by the department of transportation regarding a conviction that is required to be included in a record kept under s. 343.23 (2) (a) (b) The court shall order at the time of sentencing that the record be expunged upon successful completion of the sentence if the offense was a violation of s. 942.08 (2) (b), (c), or (d), and the person was under the age of 18 when he or she committed it.

(c) No court may order that a record of a conviction for any of the following be expunged:

1. A Class H felony, if the person has, in his or her lifetime, been convicted of a prior felony offense, or if the felony is a violent offense, as defined in s. 301.048 (2) (bm), or is a violation of s. 940.32, 948.03 (2) or (3), or 948.095

2. A Class I felony, if the person has, in his or her lifetime, been convicted of a prior felony offense, or if the felony is a violent offense, as defined in s. 301.048 (2) (bm), or is a violation of s. 948.23

(2) A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked and the

> probationer has satisfied the conditions of probation. Upon successful completion of the sentence the detaining or probationary authority shall issue a certificate of discharge which shall be forwarded to the court of record and which shall have the effect of expunging the record. If the person has been imprisoned, the detaining authority shall also forward a copy of the certificate of discharge to the department.

Any question of statutory interpretation must begin with the plain language of the statute. *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis.2d 78 (*citing State ex rel Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis.2d 663, 681 N.W.2d 110). The words and phrases of a statute are given their "common, ordinary and accepted meaning." *Id*. However, the plain meaning of a statute is not determined in a vacuum. *Id* (citing *Osterhues v. Bd. Adjustment for Washburn County*, 2005 WI 92, ¶ 24, 282 Wis.2d 228, 698 N.W.2d 701).

This court has stated that to interpret the plain meaning of a particular statute, a court may consider the scope, context and purpose of the statute. *See Kalal*, 2004 WI 58 at ¶ 48. "A statute's purpose or scope may be readily apparent from its plain language or its relationship to surrounding or closely related statutes - - that is, from its context or the structure of the statute as a coherent whole." *Id* at ¶ 49.

"[T]he cardinal rule in interpreting statutes is that the purpose of the whole act is to be sought and is favored over a construction which will defeat the manifest object of the act." *Id* at ¶ 38 (*quoting Student Ass'n v. Baum*, 74 Wis.2d 283, 294-95, 246 N.W.2d 622 (1976) (citation omitted)).

In *Kalal*, this Court provided an expansive explanation of both the history of statutory interpretation in Wisconsin and method of statutory interpretation to be used by lower courts. According to *Kalal*, the purpose of statutory interpretation is the "determine what the statute means so that it may be given its full, proper, and intended effect." *Kalal*, 2004 WI 58 at ¶ 44.

State v. Dinkins is instructive for the case at hand. *Dinkins* involved a challenge to a circuit court's interpretation of the sex offender registration statute, Wis. Stat. § 301.45. *Dinkins*, 2012 WI 24 at ¶ 8. Dinkins was a sex offender who was serving a prison sentence. Dinkins was required by § 301.45(2)(a)5 and § 301.45(2)(e)(4) to provide "[t]he address" at which he "will be residing" to the Department of Corrections at least ten days prior to being released from prison. *Dinkins*, 2012 WI 24 at ¶ 44. Dinkins did not comply with the notification requirements of § 301.45 because, he argued, he was homeless and had no address. *Id* at ¶ 1.

The State charged Dinkins with failing to comply with the registration requirements of § 301.45 and the circuit court adjudged Dinkins guilty of a Class H Felony. *Id*. Dinkins appealed the conviction arguing that he attempted to comply with the statute but was unable to because he did not have a valid address. *Id*. The State argued that the statute clearly indicated that Dinkins must give some address, any address.[1]

This Court explained that § 301.45(2)(a)5 and (2)(e)(4) cannot be looked at in a vacuum and must be interpreted in

[1] One of the State's arguments in *Dinkins* was that the defendant could have complied with the statute by listing a park bench or other on-street location as his address. This Court disagreed with the State's argument. *Dinkins*, 2012 WI 24 at ¶ 3.

context with other related statutes. *Dinkins*, 2012 WI 24 at ¶ 33. The Court went on to look at § 301.45(2)(f) that allows the Department of Corrections to require a registrant to report to a police state to provide the address information. *Id* at ¶ 39. Even though *sub. (2)(f)* does not, on its face, exempt the registrant from the requirements of *sub. (2)(a)5*, the Court found that the intent of the statute allowed a homeless person to comply with *sub. (2)(a)5*, by simply following the procedure in *sub. (2)(f)*. *Dinkins*, 2012 WI 24 at ¶ 40.

The Court explained that the sex offender registration requirements as a whole were meant to "protect the public by assisting law enforcement officers to monitor know sex offenders." *Id* at ¶ 41. By asking a registrant to report to a police station, and not give a specific address until he has one, the Court found that the offender can be "effectively monitored without resorting to a preemptive prosecution." *Id*.

Ultimately, the Court held that a registrant cannot be convicted of violating § 301.45(6) for failing to report the address at which he will be residing when that information does not exist. *Id*. The Court found that the context of § 301.45 indicated that the statute's purpose was to insure that sex offenders were monitored and that purpose could be met through a different portion of the statute. *Id*.

1. The Context of § 973.015 Allows the Circuit Court Wide Discretion when Ordering Expungement, including When to Execute the Order.

This Court in *Dinkins* noted several times that the plain meaning of a statute is "seldom determined a vaccum" and the Court does not read the words of the statute in isolation *Dinkins*, 2012 WI 32, ¶¶ 29, 33 (*citing Osterhues*, 2005 WI

92, ¶ 24). Rather, the statute must be viewed as part of a whole, in relation to the language of surrounding or closely related statutes. In other words, context is important to statutory interpretation.

Just as this Court in *Dinkins*, looked at the entire statute to gather the meaning of § 301.45, we must look at the entirety of § 973.015 to determine when a circuit court is allowed to order expungement.

Reading § 973.015 as a whole, in context, one theme becomes abundantly clear: the legislature granted the circuit court wide discretion with regard to expungement.

The only objective criteria the legislature ordered the circuit court to find before expungement is ordered are: (1) the defendant is under 25 at the time of the offense; (2) the maximum period of imprisonment for the charge that the defendant has pleaded guilty to is six years or less; (3) the defendant has successfully completed his or her sentence or successfully completed probation.[2]

After those three criteria are met, the circuit court must find that "the person will benefit and society will not be harmed. . . ." § 973.015(1)(a). The legislature did not provide the court with criteria or a yardstick to measure when a person will benefit or society will not be harmed.

The legislature did this for a reason: it wanted the circuit court to have discretion.

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[2] § 973.015(1)(c) does list a number of offenses in which expungement is not possible. However, for the purposes of this case those offenses in subsection (c) are not relevant.

Sentencing discretion has a long history in Wisconsin sentencing law. *See State v. Killory*, 73 Wis. 2d 400, 408, 243 N.W.2d 475 (1976), *State v. Stuhr*, 92 Wis.2d 46, 284 N.W.2d 259 (Ct. App. 1979); *Cumminghan v. State*, 76 Wis.2d 277, 251 N.W.2d 65 (1977). "It is a well-settled principle of law that a circuit court exercises discretion at sentencing." *State v. Gallion*, 2004 WI 42, 270 Wis.2d 535, 678 N.W.2d 197 (*citing McCleary v. State*, 49 Wis.2d 263, 277, 182 N.W.2d 512 (1971)).

In fact, this Court has recognized that the legislature has placed sentencing discretion with the circuit court. *See McCleary*, 49 Wis.2d at 276. While the sentencing issues in *McCleary* were admittedly different from the issues in this case, *McCleary's* statement regarding the discretion of the circuit court applies here especially when considering the context of the entire statute.

Certainly, the legislature placed a great amount of discretion in the circuit court when it passed § 973.015. After the circuit court determines that the defendant meets the objective criteria, it must use its wide discretion to determine if the defendant will benefit and society will not be harmed.

The context of § 973.015 demonstrates that the legislature granted the circuit court with wide discretion regarding whose record to expunge. Thus, it is reasonable to assume the legislature also granted the circuit court the same discretion regarding the timing of the expungement, particularly after probation has ended.

2. The Purpose of the Expungement Statute Would Be Undermined if the Sentencing Court Could Not Stay a Decision on Expungement Order Until After The Defendant Completes Probation.

One of the main purposes of § 973.015 is to shield youthful offenders from some of the harsh consequences of criminal convictions. *See State v. Anderson*, 160 Wis.2d 435, 466 N.W.2d 681, (Wis. Ct. App. 1991). Hopefully, a young criminal defendant that has only one conviction will complete his or her sentence and never be in criminal court again. The expungement statute is meant to be an avenue for young offenders, who are not likely to reoffend, to be able to stop a criminal conviction for following the offender around for the rest of the offender's life.

Obviously, a criminal conviction (especially a felony conviction) can significantly affect a person's employment opportunities, educational opportunities and society's overall view of the person. The plain language of the expungement statute indicates that the legislature wanted to provide the sentencing court with the discretion to negate those effects from harming a defendant's life forever.

However, the statute also clearly indicates that the legislature intended expungement only for young (under 25) defendants and only for certain types of cases.

Moreover, the legislature specifically placed in the statute that expungement will only be granted if the sentencing court found that society will not be harmed by the expungement.

By doing this, the legislature indicated that it wanted the Court to make the decision as to whether the expungement of a defendant's record would harm society. The sentencing court is in a much better position to make that determination after the Court has a chance to see what the defendant did while the defendant was on probation.

Thus, the circuit court and Court of Appeals' interpretation of the expungement statute in this case undermines the purpose of the statute.

II. MR. MATASEK WAS NEVER SENTENCED. THUS, UNDER §973.015 HIS CONVICTION CAN STILL BE EXPUNGED BECAUSE HE WAS NEVER "AT SENTENCING."

Mr. Matasek was never given a sentence. He was placed on probation and a sentence was withheld. Thus, because Mr. Matasek was never sentenced the circuit court still has the authority to expunge his conviction.

Generally, probation itself is not a sentence. *State v. Horn*, 226 Wis.2d 637, 647, 594 N.W.2d 772 (1999)(*citing Prue v. State*, 63 Wis.2d 109, 114, 216 N.W.2d 43 (1974); *State v. Hayes*, 173 Wis.2d 439, 444, 496 N.W.2d 645 (Ct. App. 1992); *State v. Meddaugh*, 148 Wis.2d 204, 211, 435 N.W.2d 269 (Ct. App. 1988). However, probation and sentencing are closely related as a possible disposition for criminal defendants. *Id.*

When a circuit court places a criminal defendant on probation but withholds sentence the circuit court has exercised its discretionary function but has not "sentenced" the defendant. *Id.* at 649. If a defendant's probation is revoked the circuit court will then have to exercise its *sentencing* discretion when the defendant comes before the circuit court for his sentencing hearing. *Id*. at 649 (emphasis added).

In *Horn*[3], this Court stated that probation is an alternative to sentencing. *Horn*, 226 Wis.2d at 648. *Horn* went on to state that the legislature and judiciary share the power to place a defendant on probation and sentence that defendant. *Id*. While *Horn* does acknowledge that probation and sentencing irrefutably linked, they are not the same.

The idea of probation and sentencing being separate and distinct is also reflective in the Wisconsin sentencing statutes. For example, Wis. Stat. § 973.045, dealing with the crime victim and witness surcharge states: "If a court imposes a sentence *or* places a person on probation, the court shall impose a crime victim and witness assistance surcharge. . ." (emphasis added). If the legislature intended to include probation in the various sentencing options it would not need to use the words "or probation" after the word "sentence." If probation were a sentence, the term "sentence" could stand alone in the above-mentioned statute without specific mention of probation.

Wis. Stat. § 973.043 has similar wording: "If a court imposes a sentence or places a person on probation for a crime under ch. 943 that was . . . ." Wis. Stat. §§973.043 and 973.045 are just two examples of "sentencing statutes" that specifically refer to a sentence and probation as two distinctly different dispositions for a criminal defendant.

Therefore, since Mr. Matasek was never actually sentenced, pursuant to Wisconsin statutory and case law, the

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[3] The question in *Horn* dealt with the constitutionality of Wis. Stat. § 973.10(2) which required administrative, rather than, judicial probation revocation. This Court found that § 973.10(2) was constitutional. While the issues in this case are certainly different from *Horn*, the discussion of the relationship between probation and sentencing in *Horn* is instructive for the issues in this case.

question now becomes whether he is still eligible for expungement under §973.015. Looking at the plain language, purpose and context of § 973.015, Mr. Matasek is still eligible for expungement.

As was stated above, one of the main purposes of § 973.015 is to shield youthful offenders from some of the harsh consequences of criminal convictions. *See State v. Anderson*, 160 Wis.2d 435, 466 N.W.2d 681, (Ct. App. 1991). This Court has held that probation is a privilege and not a right. *See Edwards v. State,* 74 Wis.2d 79, 83, 246 N.W.2d 109 (1976). Certainly a circuit court will use its wide discretion in determining which criminal defendants are worthy of the privilege of probation and which are not.

Probation (especially probation with a withheld sentence) is less harsh a punishment that a period of incarceration. Thus, if a circuit court places a defendant on probation the circuit court has found that the less severe punishment of probation, with a withheld sentence, is appropriate for that criminal defendant.

If this Court reads § 973.015 like the Circuit Court and Court of Appeals ruled, then a criminal defendant like Mr. Matasek would never be able to seek expungement because he was never sentenced. This interpretation of § 973.015 is absolutely contrary to the purpose and context of the statute.

The purpose of § 973.015 is to allow defendants like Mr. Matasek, defendants who the Circuit Court has felt are worthy of the privilege of probation, to seek expungement and avoid the harsh consequences of a criminal conviction later in life. Interpreting § 973.015 as the circuit court and Court of Appeals has in this case would result in criminal defendants most worthy of expungement not being able to seek it.

This outcome is unreasonable and would contravene the purpose of the statute. Statutory language should be interpreted to avoid absurd or unreasonable results. *Dinkins*, 2012 WI ¶ 29. Moreover, any interpretation that does not follow the manifest purpose of the statute is unreasonable. *Id*.

Not allowing criminal defendants who are placed on probation, and not sentenced, to seek expungement under § 973.015, is an unreasonable interpretation of § 973.015. Thus, § 973.015 should be interpreted to mean that criminal defendants who are placed on probation and not sentenced, can seek expungement after the term of probation has expired. This is a reasonable reading of § 973.015.

CONCLUSION

Mr. Matasek meets all the objective conditions for expungement. He was under 25 at the time of the offense and his charge was a felony with a maximum term of imprisonment for three and one half years. The Circuit Court erred when it ruled that it could not stay its decision on expungement until after Mr. Matasek successfully completed probation. For the foregoing reasons, the defendant-appellant-petitioner requests this case be remanded back to the trial court for a new sentencing hearing based solely on the expungement issue.

Dated this 23rd day of December, 2013

Signed:

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,670 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 23rd day of December, 2013

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court and Court of Appeals; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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