STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2012AP1582-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREW J. MATASEK,

Defendant-Appellant-Petitioner.

BRIEF AND APPENDIX OF NON-PARTY WISCONSIN STATE PUBLIC DEFENDER

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INTRODUCTION

The issue in this case is whether, under Wis. Stat. § 973.015(1)(a), a circuit court ***must*** decide whether to order expunction of a young offender's conviction at the time of sentencing or whether the circuit court ***may*** order expunction at the time of sentencing, but is not prohibited from addressing expunction at a later date. The Wisconsin State Public Defender believes the latter interpretation is correct because it respects and preserves the circuit court's discretion and furthers the legislature's goal in passing § 973.015—to give a break to young offenders who demonstrate an ability to comply with the law. ***State v. Leitner***, 2002 WI 77, ¶38, 253 Wis. 2d 449, 646 N.W.2d 341.

I. The Plain Language of § 973.015 Supports the SPD's Interpretation, Not the Court of Appeals' and State's Interpretation.

The analysis of a statute always begins with its plain language, with consideration of the context in which it is used, and the language of surrounding statutes. ***State ex rel. Kalal v. Circuit Court for Dane Cnty***., 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. Here is the plain language at issue in this case:

> 973.015 *Special Disposition*. (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 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). (Emphasis supplied).

Now consider these supposed "plain language" interpretations of this statute:

- The court of appeals, in one breath, held that "§ 973.015(1)(a) *requires* a court to make its decision on expunction at the time of sentencing" but, in the next breath, held that "§ 973.015(1)(a) clearly and unambiguously states that expunction decisions *should* be made 'at the time of sentencing[.]'" ***State v. Matasek***, 2013 WI App 63, ¶¶ 10 & 11, 348 Wis. 2d 243, 831 N.W.2d 450. (Emphasis supplied).

- The State asserts over and over that § 973.015 "*requires*" circuit courts to decide expunction at the time of sentencing and that under § 973.015 circuit courts "*must*" decide expunction at the time of sentencing. *See* State's Br. at 4, 5, 6, 9, 11, 16.

- Matasek argues that § 973.015(1)(a) permits the circuit court to "withhold" or "stay" its decision on expunction until after the defendant successfully completes probation. *See* Matasek's Initial Br. at 4.

- Just this week (*after* the parties filed their briefs in this case) the court of appeals issued a decision holding that where a circuit court orders expunction at the time of sentencing it still retains discretion to reverse that decision even if the defendant successfully completes probation. ***State v. Hemp***, No. 2013AP1163-CR, Slip op., ¶16 (WI App Feb. 4, 2014)(recommended for publication). (App. 108).

Look again at § 973.015(1)(a). Nowhere does it use the words "must" or "requires." The court of appeals and the State read these words into the statute. Nor does this subsection use the term "withhold" or "stay." The word it

uses is "may." The State and the court of appeals insist that by using "may" the legislature restricted circuit courts to exactly two options: they may order expunction or they may deny expunction but they must do it at the time of sentencing.

A more reasonable—and literal—interpretation of the statute is that the circuit court simply "may order at the time of sentencing that the record be expunged." In other words, the court *may* order expunction at the time of sentencing or it may take a "wait and see" approach, allowing consideration of the issue later after it has information about how the defendant has performed on probation. There is no language in § 973.015(1)(a) precluding the circuit court from considering expunction *after* sentencing.

II. There is Significant Intrinsic and Extrinsic Support for the SPD's Interpretation of § 973.015(1)(a).

There are at least three reasons why the SPD's reading of § 973.015(1)(a) is the correct one.

First, the parties agree that the word "may" is permissive and allows for the exercise of discretion, whereas the word "shall" mandates action. ***Rotfeld v. DNR,*** 147 Wis. 2d 720, 726, 434 N.W.2d 617 (Ct. App. 1988). When the words "may" and "shall" are used in the same statutory section, the Court assumes that the legislature understood the difference between the two and intended them to have their precise meanings. ***Heritage Farms, Inc. v. Markel Ins. Co***., 2012 WI 26, ¶¶32, 339 Wis. 2d 125, 810 N.W.2d 465 (declining to read "may" as "shall.")

Here, the legislature knew how to mandate circuit court action at the time of sentencing when that was its intent. Section 973.015(1)(b) provides: "The court *shall* order at the time of sentencing that the record be expunged upon successful completion of the sentence if [list of conditions omitted]." (Emphasis supplied). In § 973.015(1)(a), by

contrast, the legislature used "*may*," thus conferring discretion, not mandating or restricting action.

Second, § 973.015 sits under a subheading called "*special* disposition." *See* ***Mireles v. Labor & Industry Review Com'n***, 2000 WI 96, ¶60 n.13, 237 Wis. 2d 69, 613 N.W.2d 875 (although a title is not part of a statute it may be persuasive evidence of a statutory interpretation.) The word "special" means "different from what is normal or usual." (www.mermiam-webster.com last visited Feb. 5, 2014). Indeed, this Court has explained that § 973.015 serves an important purpose: to provide "a means by which trial courts may, in appropriate cases, shield youthful offenders from some of the harsh consequences of criminal convictions." ***State v. Anderson***, 160 Wis. 2d 435, 440, 466 N.W.2d 681 (Ct. App. 1991). *See also*, ***Leitner***, 253 Wis. 2d at ¶38. Interpreting § 973.015(1)(a) to give circuit courts the discretion to decide when to make the final call on expunction serves this purpose. Construing the statute to restrict the circuit court's options or discretion undermines the purpose. It forces the circuit court to decide the point before it knows how a young offender behaves on probation, and it thereby limits the number of people the court can help.

Third, regardless of what § 973.015(1)(a) says, a circuit court has inherent authority to ensure that it "functions efficiently and effectively to provide the fair administration of justice." ***City of Sun Prairie v. Davis***, 226 Wis. 2d 738, 749-750, 595 N.W.2d 635 (1999). This includes the inherent authority to control when and how to dispose of the causes on its docket. ***Id.*** Interpreting § 973.015(1)(a)'s use of the word "may" to convey discretion recognizes this inherent authority. That is, a circuit court may order expunction at the time of sentencing. Or it may order the lesser benefit of considering expunction later after it has more information about whether the defendant successfully completed probation or extended supervision and whether expunction will benefit the defendant or harm society. In some cases, the most efficient

and effective way for a circuit court to manage a case and administer § 973.015 fairly may be to defer its decision. Doing so is consistent with both the circuit court's inherent authority and with the plain language of § 973.015, which is permissive and, again, nowhere prohibits a court from taking a "wait and see" approach to expunction.[1]

III. There Is Little Support for the State's Interpretation of § 973.015(1)(a).

While the SPD has the plain language, the title, purpose of § 973.015 and inherent authority on its side, there is little to support the State's interpretation. Let's start with real-world, circuit court practice around Wisconsin. Numerous circuit courts believe they have the discretion to order expunction either at the time of sentencing or later after the offender files a "petition" for expunction—a procedural step that § 973.015 does not mention anywhere. Consider these examples:

> **Milwaukee County**, *State v. Richard W. Littlejohn*, Case No. 2013CM1116: "If the defendant pays restitution in full and has no further arrests, the Court will consider expungement." (App. 114-15).
>
> **Eau Claire County**, *State v. Maxell K. Brenizer*, Case No. 2012CF0225, "I will make a preliminary finding that society will not be harmed, and you will benefit by having your record expunged. That's only preliminary in that you understand, of course, that [the State] said that [it] reserves the right to object, but you should know that in order for you to have any

[1] Note: The SPD is pointing out that the circuit court has inherent authority to control when and how it decides issues in a case before it. It is not arguing that a circuit court has inherent authority to expunge a conviction.

> chance of having your record expunged, this isn't going to happen automatically; you have to bring a formal motion…. You have to ask for a hearing date. We'll set up a hearing date for you. You have to personally appear . . ." (App. 118-19).
>
> **Adams County**, *State v. Kenneth D. Hyde*, Case No. 2012CF0127: "If defendant successfully completes the 1 year probation, it is ordered that the defendant may, within 6 months of discharge, petition the Court to expunge the record of conviction pursuant to Section 973.015(1) of the Wisconsin Statutes." (App. 121).
>
> **Calumet County**, *State v. Cody M. Griffith*, Case No. 2013CM0082: "[Defendant] may petition the Court for expungement upon successful completion of probation." (App. 123).
>
> **Dodge County**, *State v. Seanna L. Kenevan*, Case No. 2013CF0024: "May petition the court for expungement after 1 year." (App. 124).
>
> **Waukesha County**, *State v. Napoleon A. Jones*, Case No. 2013CM0180: "Court will reserve the right for expungement if restitution [is] paid and no further law violations." (App. 125).

The State's arguments that legislative history, sentencing policy, and jury instructions support its interpretation do not withstand careful scrutiny.

First, relying exclusively on two law review articles, the State recites of the history of pardons, vacatur, and expunction nationally, notes that Wisconsin enacted an expunction law in 1975[2], and concludes: "This choice supports the interpretation that the court must decide at sentencing whether a defendant will have his conviction expunged." State Br. at 10 (citing Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 How. L. J. 753, 764 (2011) and Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 Fordham Urb. L.J. 1705, 1710 (2003)). Neither article mentions § 973.015 or the Wisconsin Legislature's decision to enact it. The only reference to Wisconsin is that it was one of only a handful of states to adopt laws protecting against automatic disqualification for employment and licensing based solely on a criminal conviction. This hardly helps the State. It underscores Wisconsin's willingness to help people who are convicted of crimes get back on their feet and contribute to society. Furthermore, the State ignores the fact that expunction statutes vary from state-to-state. *See Paying their Debt to Society* at 766 n.49. In short, the history of pardons, vacatur and expunction sheds no light on what the phrase "may order at the time of sentencing" in § 973.015(1)(a) means.

Second, the State is wrong to suggest that the legislative history of § 973.015 shows that a court must decide expunction at the time of sentencing. Specifically, the fact that the precise phrase at issue here has remained unchanged since 1975 says nothing about its meaning. State's Br. at 9-10.

On the other hand, the State ignores the legislature's repeated expansion of the statute. It now extends to persons

[2] Laws of 1975 ch. 39, § 711m.

25 or younger at the commission of an offense (rather than the original 21 years or younger), to certain felonies as well as to misdemeanors, and to crimes for which the maximum period of imprisonment is 6 years or less (rather than the original 1 year or less). And, as the State concedes, a pending bill proposes to amend § 973.015 further by adding § 973.015(1)(bg), which (using "shall") will also mandate expunction for young offenders who are the victims of certain crimes. State's Br. at 12. The bottom line is that the statutory history of § 973.015 shows a steady, determined legislative effort to give more and more young offenders the benefit of expunction. The SPD's interpretation of § 973.015(1)(a) preserves the circuit court's discretion to effectuate this intent.

Third, the State's argument regarding "sentencing policy" goes like this: 25 years after the passage of § 973.015, the legislature passed truth-in-sentencing and 10 years after that it largely ended early release. The legislature's current sentencing policy is to prevent "mid-sentence evaluations," "mid-course corrections or "second looks" at a defendant's sentence. Therefore, § 973.015 should be interpreted consistent with this *current* policy. State's Br. at 14-15.

This argument defies the canons of statutory construction, which strive to discern intent of the legislature that passed the statute, not the legislature elected 25-35 years after the fact. ***Fisher Flouring Mills v. U.S.***, 270 F.2d 27, 32-33 (2nd Cir. 1958)(if it is possible to reinterpret statutory language to fit current policy, then a new method of amending the law has been discovered). If anything, the legislature's decision to leave § 973.015(1)(a) alone when it eliminated early release shows it wanted to preserve the benefit of expunction. More importantly, § 973.015 is not about "mid-sentence" corrections. It is about the successful *completion* of probation. Young offenders who achieve this goal receive a chance to start over without the stain of a criminal conviction.

Finally, according to the State, "[t]he jury instruction committee also concludes that the expunction decision *must* be made at the sentencing hearing." State's Br. at 12. (Emphasis supplied). Actually, the Committee merely "suggests a framework" for deciding whether a young offender should receive an alternative disposition under § 973.015. Wis. JI-Criminal SM-36 (2010). It does not address the timing issue debated in this case. In any event, the Jury Instructions Committee's work is persuasive, but not binding, authority as to the meaning of a statute. ***State v. Sobkowiak***, 173 Wis. 2d 327, 337, 496 N.W.2d 620 (Ct. App. 1992).

IV. The State's Interpretation Yields Absurd Results.

Courts are to construe statutes "reasonably to avoid absurd or unreasonable results." ***Kalal***, ¶46. This is where the State's interpretation is most problematic.

After the court of appeals issued ***Matasek***, SPD trial lawyers asked what they were to do about cases where circuit courts took a "wait and see" approach to expunction—telling defendants to apply for it after they complete probation and the court will address and decide it then. In some cases, expunction was negotiated as part of a plea bargain. The court of appeals' interpretation of § 973.015 changed the ground rules after the fact. Now, in cases where circuit courts deferred the final call on expunction until after the completion of probation, expunction is no longer an option, under ***Matasek***.

The State seems untroubled by this result. The affected defendants can just file motions for sentence modification based upon a new factor in lieu of an expunction petition, it argues. State's Br. at 17 (citing ***State v. Norton***, 2001 WI App 245, ¶9, 248 Wis. 2d 162, 635 N.W.2d 656). But this pulls the rug out from under the young offender who strove to complete probation and to prove that he would benefit and that society would not be harmed by an expunction of his

conviction. Under the State's "work around" that same defendant will now also have to meet the "new factor" test, giving the circuit court the option of ruling that his misunderstanding of § 973.015 was not "highly relevant" to the sentence. *See* ***State v. Harbor***, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 797 N.W.2d 828.

Moreover, where expunction was negotiated as part of a plea bargain, then adopting the State's interpretation § 973.015(1)(a) could also prompt motions for plea withdrawal, which require evidentiary hearings, and, if successful, new trials. The point is, the State's interpretation, if adopted, will provoke more litigation and undermine the credibility of the justice system. After telling a young offender it would consider expunction later, the circuit court now says in effect: "Oops. My mistake."

CONCLUSION

For the reasons stated above, the Wisconsin State Public Defender respectfully requests that the Wisconsin Supreme Court reverse the court of appeals' decision in this case and instead hold that § 973.015(1)(a) gives circuit courts the discretion to order expunction at the time of sentencing but does not prohibit them from ordering it later.

Dated this 7th day of February, 2014.

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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 2,816 words.

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 7th day of February, 2014.

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