STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

STATE OF WISCONSIN

Plaintiff-Respondent,

Case No. 2012-AP-1582-CR

v.

ANDREW MATASEK,

Defendant-Appellant

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION ENTERED IN THE OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE THOMAS WOLFGRAM, PRESIDING

BRIEF AND APPENDIX OF APPELLANT

JEFFREY J. GUERARD
STATE BAR NO. 1064335
ATTORNEY FOR DEFENDANT-APPELLANT
MR. ANDREW MATASEK

AHMAD & GUERARD, LLP
4915 S. HOWELL AVE.
SUITE 300
MILWAUKEE, WI 53207
414-455-7707

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ISSUES PRESENTED

I. WHETHER THE CIRCUIT COURT HAS THE DISCRETION TO WITHHOLD ITS JUDGMENT ON EXPUNGEMENT UNDER WIS. STAT. § 973.015 UNTIL AFTER A DEFENDANT SUCCESSFULLY COMPLETES PROBATION.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel believes this is an issue of first impression in Wisconsin and publication would be beneficial. However, the case applies well established cannons of statutory interpretation and counsel believes oral argument would be unnecessary.

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 appellant. *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 up 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 are 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 terms 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.

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 appellant is challenging the Court's ruling that the circuit court has no authority to withhold its ruling

on expungement until the Court has proof of successful completion of probation. The 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 there "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).

The Supreme 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*, the Supreme 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]

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

[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. The Court disagreed with the State's argument. *Dinkins*, 2012 WI 24 at ¶ 3.

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.

Considering the Court's decision in *Dinkins* and the relating cannons of statutory interpretation in Wisconsin, it is evident that § 973.015 provides the circuit court with wide discretion over expungement orders. Viewing the statute as a whole, it is apparent that the legislature intended to allow the sentencing court to consider expungement after it determined that the defendant successfully completed probation.

§ 973.015(1)(a) provides that a criminal defendant's record may be expunged if: (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; (4) the Court determines that the defendant will benefit from expungement and that society will not be harmed.

§ 973.015(2) states that if a person has been placed on probation, that person has completed his sentence if the probation has not been revoked, and the probationer has satisfied all the conditions of the probation.

The key language in § 973.015(1)(a) for the purposes of this case is "the court may order at the time of sentencing that the record be expunged . . .". The use of the term "may" in the statute indicates that the

legislature provided the sentencing judge with a large amount of discretion when deciding whether to order expungement.

Moreover, two of the criteria the sentencing court is required to consider before ordering expungement are whether the defendant will benefit from expungement and whether society will be harmed by the expungement. The legislature did not provide the sentencing court with criteria that must be used to or considered to establish whether the defendant will benefit or society will be harmed. Rather, the legislature left those questions to the discretion of the court.

Leaving such decisions to the sound discretion of the circuit court at sentencing has a strong foundation 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).

The only limitations the legislature placed on the sentencing court with regard to expungement are the limitations listed in *sub. (c)*, the 25 year old age limit and that the maximum period of incarceration must be six years or less. Consequently, the sentencing court has an

enormous amount of discretion to expunge a vast number of misdemeanor or felony offenses.

Looking at the entirety of *Wis. Stat. § 973.015*, one can see that the legislature's intent was for the sentencing court to determine whether an individual was worthy of expungement and, if so, to insure that society would not be harmed by not being aware of the defendant's conviction. It is unreasonable to take the position that a sentencing court cannot stay its ruling on expungement in order to see how a defendant performs on probation.

Typically, felony probation lasts for over a year and may last several years. In Mr. Matasek's case, he was ordered to be on probation for three years. At the time of sentencing Mr. Matasek was only 21 years old. Clearly, in the next three years Mr. Matasek will be a different person, perhaps going on to school or employed in a profession.

The "person will benefit" and "society will not be harmed" language of § 973.015(1)(a) indicates that the legislature intended for the sentencing court to look to several factors and make a determination as to whether expungement is appropriate.

There is no better time (including during the sentencing hearing) to determine if society than after a

defendant completes probation to determine if society will not be harmed by expungement. Waiting until the end of the probationary period enhances the legislative purpose of the statute. A court is in a much better position to determine whether a defendant will benefit and society will not be harmed after the defendant has completed probation.

The statute does indicate that a person on probation can only successfully complete his or her sentence by successfully completing probation without getting revoked and complies with all the terms of probation. A probationer could successfully complete probation as defined by the statute, and still engage in less than ideal activities that may make expungement less desirable. Conversely, a probationer who, at the time he or she was placed on probation may not have been a good candidate for expungement, may do certain activities on probation to demonstrate to the sentencing court that he or she is worthy of expungement. These are some of the scenarios that the legislature intended the sentencing court to consider when determining if expungement is appropriate.

The Court in *Dinkins,* explained that context is important when interpreting a statute. To simply state, as the Court did in this case, that expungement must be ordered at the time the person is placed on probation and

cannot be stayed until probation is completed, undermines the context of the expungement statute.

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 even then 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's interpretation of the expungement statute in this case undermines the purpose of the statute.

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 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 requests this case be remanded back to the trial court for a new sentencing hearing based solely on the expungement issue.

Dated: October 16, 2012

AHMAD & GUERARD, LLP
Attorneys for Defendant-Appellant

Jeffrey J. Guerard
State Bar No. 1064335

Cc: Gregory Weber – State of Wisconsin
Adam Gerol – District Attorney – Ozaukee County
Andrew Matasek

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

Monospaced font: 10 characters per inch; double-spaced; 1.5 inch margin on the left side and 1-inch margins on the other 3 sides. The length of this brief is 16 pages.

Dated this 16th date of October 2012 at Milwaukee, Wisconsin

Jeffrey J. Guerard
Attorney for Defendant-Appellant

Ahmad & Guerard LLP
4915 S. Howell Ave
Suite 300
Milwaukee, WI 53207
State Bar. No. 1064335

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

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

The electronic brief is identical in content and format to the printed form of the brief filed as of 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.

Jeffrey J. Guerard
Attorney for Defendant-Appellant