STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2012AP1582-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREW J. MATASEK,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED IN THE OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE THOMAS R. WOLFGRAM, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

CHRISTINE A. REMINGTON
Assistant Attorney General
State Bar #1046171

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8943
(608) 266-9594 (Fax)
remingtonca@doj.state.wi.us

TABLE OF CONTENTS

Page

Cases

Page

Statutes

Other Authorities

Page

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent State of Wisconsin ("State") does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF FACTS

Defendant-Appellant Andrew J. Matasek's ("Matasek") statement of facts is sufficient to frame the issues for review. The State will address any disputes or

include any additional relevant information where appropriate.

ARGUMENT

THE CIRCUIT COURT PROPERLY CONCLUDED THAT IT COULD NOT WITHHOLD JUDGMENT ON EXPUNGEMENT UNTIL AFTER MATASEK COMPLETED PROBATION.

A. Standard of Review.

Matasek claims that a circuit court can stay its decision on expungement. Matasek's Brief at 5. This requires this court to interpret Wis. Stat. § 973.015 to decide whether it allows a stay of expungement. Statutory interpretation and the application of a statute to specific facts are questions of law that this court reviews *de novo*. *State v. Moran*, 2005 WI 115, ¶ 26, 284 Wis. 2d 24, 700 N.W.2d 884 (citation omitted).

B. Legal Principles.

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. This court begins by examining the language of the statute. *Id.* ¶ 45. If the meaning is plain, then this court ordinarily stops its inquiry. *Id.* The context and structure of the statutory language is important to meaning. *Id.* ¶ 46.

"[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." *Id.* ¶ 47. Extrinsic sources of statutory interpretation can be consulted if the statute is ambiguous. *Id.* ¶ 51.

A plain meaning analysis may look at statutory context and structure. *State v. Soto*, 2012 WI 93, ¶ 20, 343 Wis. 2d 43, 817 N.W.2d 848. The context including language and structure of surrounding or closely related statutes is often highly instructive in determining a term's meaning. *Id.* The purposes underlying a statute are also useful in ascertaining a statute's meaning. *Id.*

C. Relevant Statute.

Wisconsin Stat. § 973.015[1] states:

> **(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.

[1]This language reflects the amendment made by 2009 Wisconsin Act 28, §§ 3384-86. That language was effective on June 29, 2009.

> **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 (1) (a).
>
> **(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.

D. The Circuit Court Properly Concluded That It Must Make Its Expungement Decision At Sentencing.

Matasek argues that the plain language and context of the statute allows a court to delay its decision on expungement until after a defendant successfully completes probation. Matasek's Brief at 9-14. Matasek argues that the phrase, "[T]he court may order at the time of sentencing that the record be expunged," means that the court may make that order after sentencing. *Id.* at 10-11. Matasek frames his argument as an application of the language of the statute when read in context, but his argument is actually one of policy. He seems to believe that it would be better policy for the legislature to have allowed circuit courts to make the decision after probation. His policy argument must fail. The Legislature articulated a clear policy contrary to the one Matasek seeks.

Matasek is correct that the word "may" grants the circuit court discretion over whether to order expungement. *See generally In Interest of Cesar G.*, 2004 WI 61, ¶ 12, 272 Wis. 2d 22, 682 N.W.2d 1. However,

the plain language of the statute states that the decision must be made at sentencing. There is no need to consult extrinsic sources. *See Kalal*, 271 Wis. 2d 633, ¶ 45. The circuit court correctly interpreted the statute. This court should affirm that conclusion.

1. Statutory Language.

The statute reads in relevant part: "[T]he 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." Wis. Stat. § 973.015(1)(a). The language is clear. The court must decide at sentencing whether to make the defendant eligible for a special disposition.

This court previously found this statute unambiguous. *See State v. Anderson*, 160 Wis. 2d 435, 439, 466 N.W.2d 681 (Ct. App. 1991). In that case, this court was examining whether Wis. Stat. §§ (Rule) 906.09 and 973.015 create ambiguity when read together. *Id.* at 437-39. While this court did not directly examine when the decision must be made, it did not find ambiguity on its face in Wis. Stat. § 973.015(1). *Id.* at 439.

Matasek seems to want the statute to read: The court may order at the time of sentencing or at the end of the probationary period that the record be expunged. The Legislature did not include that language. This court should refuse to read it into the text of the statute. Likewise, Matasek's argument could be that the statute should read: The court may order that the record be expunged. This court should also reject this reading of the statute.

Matasek notes that the court must determine whether that the defendant will benefit from expungement and that society will not be harmed. Matasek's Brief at 12. He argues that the Legislature, therefore, must have contemplated the court exercising its discretion after

probation ends. *Id.* Matasek asserts that there is no better time to make this determination than after the probationary period ends. *Id.* at 12-13.

Matasek's argument ignores the plain language of the statutes that states, "[T]he court may order at the time of sentencing that the record be expunged upon completion of the sentence." Wis. Stat. § 973.015(1)(a) (emphasis added). If the Legislature felt that after the probationary period ended was the best time to make the expungement determination, then it would not have included the language "at the time of sentencing."

Matasek's reading runs contrary to this court's goal to strive where possible "to give reasonable effect to every word, in order to avoid surplusage." *See Kalal*, 271 Wis. 2d 633, ¶ 46. By including the phrase "at the time of sentencing" the Legislature intended the court to make the decision at the time of sentencing. To read the statute any other way would make that phrase surplusage. This court should avoid reading the statute this way.

The circuit court was obviously frustrated by the text of the statute. It stated that it had contacted a state representative to get the statute changed (33:32). The court wanted to make the expungement determination after the period of probation (33:32). However, the court concluded that was not how the statute is written (33:32). The court felt the language was unambiguous and stated that it could not read it any other way than what the words mean (33:33).

2. Legislative History.

There is no need to consult legislative history because the plain language is clear. *See Kalal*, 271 Wis. 2d 633, ¶ 45. However, legislative history and case law can provide some guidance in interpreting the statutes. *State ex rel. Thomas v. Schwarz*, 2007 WI 57, ¶ 40, 300 Wis. 2d 381, 732 N.W.2d 1. This court does not traditionally resort to legislative history in the absence of a

finding of ambiguity, it has recognized that on occasion it consults legislative history in order to show how that history supports its interpretation of a statute. *Id.*

The Legislature created Wis. Stat. § 973.015 in 1975 as part of that year's budget bill. Laws of 1975, ch. 39, § 711m. The original statute read in part, "[T]he 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." *Id.* The language Matasek asks this court to interpret has remained unchanged since its passage. *See* Wis. Stat. § 973.015(1)(a). The court revised the statute as recently as 2011, and left the relevant language intact. *See* 2011 Wisconsin Act 286.

The act that created Wis. Stat. § 973.015 also created the "Youthful Offenders Act." Laws of 1975, ch. 39, § 429. The intent of the youthful offenders act was to "provide a specialized correctional program for youthful offenders who are found guilty in the criminal court." *Id.* The youthful offenders act was repealed in 1977. *See* Laws of 1977, ch. 418, § 377. However, the Legislature did not repeal Wis. Stat. § 973.015 at the same time.

While this language was enacted 27 years ago and we may never know the exact legislative intent, we do know a little about the ideas of expungement in the United States around that time. Prior to the 1950s, the only mechanism for restoration or rights and reputation after conviction was an executive pardon. 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). In 1956, the National Conference on Parole called for laws empowering a sentencing court to be able to expunge the record of conviction through an order at the time of discharge from a sentence. *Id.* at 765-66. The concept of expungement developed in the 1940s related to juvenile

offenders who were considered easier to rehabilitate than adults. *Id.* at 766.

In 1962, the Model Penal Code rejected the idea of concealment and expungement in favor of making the sentencing court responsible for certifying that the defendant paid his debt to society. Love, *supra*, at 767. Over the next 20 years, some states enacted expungement and sealing statutes to conceal the conviction while others adopted a more transparent set-aside approach of the Model Penal Code. *Id.* at 767-68. Wisconsin was one of the states to go the route of expungement. *See* Laws of 1975, ch. 39, § 711m. Many of the judicial restoration provisions originally adopted or expanded in the 1970s were steadily cut back through the late 80s and 90s. *See* 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, 1723 (2003). Our Legislature has followed this trend amending the statute many times since it passed originally in 1975. However, it has never changed the language requiring the decision be made at sentencing.

3. Context, Placement, and Other Extrinsic Sources.

The placement of the statute is also indicative of the legislative intent behind passing it. *See Kalal*, 271 Wis. 2d 633, ¶ 46 (Statutes should be interpreted in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results). The statute is included in the Wis. Stat. ch. 973, which is entitled "Sentencing." Therefore, it is logical that it intended the statute to apply at sentencing.

There are many other items that the circuit courts must address at sentencing including: fines (Wis. Stat. § 973.05), costs, fees, and surcharges (Wis. Stat. § 973.06), conditions of extended supervision (Wis. Stat. § 973.01(5)), eligibility for the challenge incarceration

program ("CIP") (Wis. Stat. § 973.01(3m)), and eligibility for the earned release program ("ERP") (Wis. Stat. § 973.01(3g)).

An argument could be made that each of these decisions could be made at a later date when the court would have more information. Matasek argues that "there is no better time" than after probation to decide about expungement. Matasek's Brief at 12-13. The argument could be made about each of the above subsections that the decision would be best after sentencing However, the legislature has decided that the circuit court must address these things at sentencing. Reading the expungement statute to apply only at sentencing is consistent with that legislative policy.

Another indication that the Legislature intended to make the decision on expungement part of the sentencing process is this court's decision in *State v. Meinardt*, 2012 WI App 82, 343 Wis. 2d 588, 819 N.W.2d 347. The defendant was convicted in 2008 when he was 24 years old. *Id.* ¶ 1. While he was on probation, the Legislature amended Wis. Stat. § 973.015 to apply to defendants under the age of 25 rather than 21 as previously written. *Id.* The defendant sought consideration for expungement after completing his probation period arguing that he would have been a candidate for expungement if he had committed his crime two years later. *Id.* ¶ 2. The circuit court denied the request concluding that it did not have the authority to expunge the defendant's conviction under the amended statute. *Id.*

This court affirmed the circuit court's decision concluding that the statute cannot be applied retroactively. *Meinardt*, 343 Wis. 2d 588, ¶ 5. The question in that case dealt with whether a statute can be applied retroactively. *Id.* ¶ 3. That is not the question in Matasek's appeal. However, this court's reasoning seems to indicate that this court assumed that the decision about expungement could not come at the time a defendant completed probation, but

instead at sentencing. This assumption is consistent with the language of the statute.

The jury instruction committee also concludes that the expungement decision be made at sentencing. *See* Wis. JI-Criminal SM-36 (2010). The instruction discusses what a sentencing judge should state on the record when it has been asked to consider whether a special disposition under Wis. Stat. § 973.015 has been considered. *Id.* It does not leave open an option to defer the decision under after the probationary period. The only options for the sentencing judge articulated in the instruction are to order a special disposition or reject the special disposition. *Id.* This supports the conclusion that the expungement decision must be made at sentencing.

4. Sentencing Policy.

In 1975, Wisconsin had an indeterminate sentencing policy. *See* Wis. Stat. § 973.01 (1975). The sentence was to be for the maximum term fixed by the court, subject to the power of actual release from confinement by parole. *Id.* In 1984, the Legislature passed the "New Law" indeterminate sentencing scheme. Brenda R. Mayrack, *The Implications of State ex rel. Thomas v. Schwarz for Wisconsin Sentencing Policy After Truth-in-Sentencing II*, 2008 Wis. L. Rev. 181, 187. In June 1998, the Legislature passed truth-in-sentencing ("TIS"), a determinate-sentencing regime. *Id.* at 191. TIS went into effect for offenses committed on or after December 31, 1999.

Sentencing policy in Wisconsin has evolved since 2000. *See* Michael B. Brennan, *The Pendulum Swings: No More Early Release*, Wisconsin Lawyer, September, 2011 at 4. Prior to 2000, an inmate was eligible for parole where the parole board could consider the inmate's rehabilitation. *Id.* In 2000, TIS eliminated parole for new offenders. *Id.* This signaled an intention to move away

from the mid-sentence evaluation and place almost all the discretion in the hands of the circuit court.[2]

In 2011, the Legislature passed 2011 Act 38, and early release largely ended. Brennan, *supra*, at 7, 60. With the passage of Act 38, the Legislature again returned the decision about when an inmate is released to the sentencing court. *Id.* at 61. "The tension between the policy behind truth-in-sentencing and providing a 'mid-course correction' or 'second look' at a sentence lawfully imposed is on display in Wisconsin's sentencing laws enacted over the last 15 years." *Id.*

Currently, this tension has been resolved to favor of giving authority for the decisions on sentencing to the circuit court at the time of sentencing.[3] The language of Wis. Stat. § 973.015 is consistent with this policy. The Legislature intended to require the circuit court make a decision about expungement at the sentencing hearing rather than allowing for a mid-course correction or second look. This is completely consistent with the Legislature's truth-in-sentencing policy.

Matasek's argument runs contrary to the policy behind truth-in-sentencing. The Legislature has purposefully moved away from allowing a mid-course correction or second-look at sentences. Matasek's reading of the statute conflicts with this purposeful policy shift. This result should be avoided.

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[2]The Legislature did allow some opportunities for early release with Wis. Stat. § 973.195 allowing a petition for sentence adjustment, the earned release program, among others. Brennan, *supra*, at 6-7.

[3]The State acknowledges that the language in Wis. Stat. § 973.015 was created in 1975 by Laws of 1975, ch. 39, § 711m and that the Legislature's policy on parole was different then than it is today. However, the current policy on sentencing is relevant to this court as it interprets the statutory provision because the Legislature retained the language since 1975 including as recently as 2011 when it revised this statutory section. *See* 2011 Wisconsin Act 268.

Matasek also asserts that the purpose of shielding youthful offenders from some of the harsh consequences of criminal conviction is undermined if a court is not allowed to stay its decision. Matasek's Brief at 14. Matasek may believe that staying the decision is better policy, but the Legislature disagrees. The plain language of the statute that requires the decision to be made "at the time of sentencing" and absence of a statute allowing for a stay indicate that the decision may not be stayed. Additionally, the Legislature's policy toward truth-in-sentencing supports the plain reading of the statute indicating that the court must make its decision at the time of sentencing.

5. The Statute Requires the Circuit Court to Make a Decision Regarding Expunge-ment at Sentencing, and Not After Probation Ends.

The decision about whether to allow a conviction to be expunged must be made by the circuit court at the time of sentencing. The plain language of Wis. Stat. § 973.015 allows the circuit court discretion in whether it wants to allow expungement by stating that the court "may order" the record be expunged at the end of the sentence. However, the statute by its language does not contemplate the court making the decision at any time other than at sentencing. Wis. Stat. § 973.015(1)(a) ("the court may order at the time of sentencing").

This language is consistent with the other items that a circuit court must address at sentencing including fines, fees, surcharges, conditions of extended supervision, and eligibility for the ERP and the CIP. This language is consistent with this court's decision in *Meinhardt*, the jury instruction, and the Legislative policy behind truth-in-sentencing.

Matasek asserts that the circuit court could stay its ruling on expungement. Matasek's Brief at 12. The circuit court is explicitly allowed to stay execution of a sentence for legal cause, if it orders probation, or for 60 days in some cases. Wis. Stat. § 973.15(8)(a).[4] There is no similar statute allowing a stay of any portion of a sentence for any other reason. This court should refuse to grant authority for staying the decision on expungement because the Legislature has not granted that authority to the circuit courts.

Matasek articulates some examples of situations where a circuit court may want to revisit or delay its decision on expungement until after the defendant completes probation. Matasek's Brief at 13. As discussed in more detail above, the Legislature has purposefully moved away from allowing this sort of second-guessing on sentencing decision in favor of finality. Additionally, there might be circumstances where a second look or mid-course correction might be appropriate. Defendants retain the option of challenging the circuit court's sentencing discretion under Wis. Stat. §§ 809.30 or 973.19. If a new factor justifying sentence modification arises, a defendant may move for sentence modification on that ground at any time. *See State v. Scaccio*, 2000 WI App 265, ¶ 13, 240 Wis. 2d 95, 622 N.W.2d 449. Simply because a circuit court must make the decision about expungement at the time of sentencing, does not eliminate a defendant's right to challenge his sentence, including the expungement decision.

The circuit court properly concluded that it could not stay its decision on whether to make Matasek eligible for expungement. Matasek does not challenge the circuit court's exercise of sentencing discretion. The circuit court properly exercised its discretion in not making Matasek

[4]The supreme court has interpreted "Legal Cause" to encompass not guilty by reason of mental disease or defect pleas, *see State v. Szulczewski*, 216 Wis. 2d 495, ¶ 31, 574 N.W.2d 660 (1998), and this court extended it to chapter 980 commitments, *see State v. White*, 2000 WI App 147, ¶ 11, 237 Wis. 2d 699, 615 N.W.2d 667.

eligible for expungement after his probationary period. The court found that Matasek would benefit from expungement, but concluded that society would be harmed (33:33). This court should affirm the circuit court's decision.

CONCLUSION

For the foregoing reasons, the State respectfully requests this court affirm Matasek's judgment of conviction.

Dated this 11th day of January, 2013.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

CHRISTINE A. REMINGTON
Assistant Attorney General
State Bar #1046171

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8943
(608) 266-9594 (Fax)
remingtonca@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,763 words.

Dated this 11th day of January, 2013.

_____
Christine A. Remington
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This 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.

Dated this 11th day of January, 2013.

_____
Christine A. Remington
Assistant Attorney General