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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2013 AP 1163-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KEARNEY W. HEMP,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION
AND THE DENIAL OF DEFENDANT'S PETITION FOR EXPUNGMENT
ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY,
THE HONORABLE JEAN A. DIMOTTO, PRESIDING
MILWAUKEE COUNTY CIRCUIT COURT CASE NO. 09-CF-4636

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT
KEARNEY W. HEMP

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Statement of the Issues.....	1
Statement on Oral Argument and Publication	1
Statement of the Case.....	1
Statement of the Facts	2
Argument	5
I. The Defendant's Conviction was Expunged Upon the Successful Completion of his Probation.....	5
II. The Defendant Was Not Required to Petition the Court for Expungement Upon Completion of His Sentence.....	9
Conclusion	12
Certification	14
Certification of Electronic Filing	15
Appendix Certification	16
Appendix	A1-A22

TABLE OF AUTHORITIES

Page

WISCONSIN COURT OF APPEALS CASES

<i>Cary v. City of Madison</i> , 303 Wis.2d 261, 551 N.W.2d 596 (1996)	9
<i>Gonzalez v. Teskey</i> , 160 Wis.2d 1, 465 N.W.2d 525 (1990). . .	5
<i>In re Peter B.</i> , 184 Wis.2d 57, 516 N.W.2d 746 (1994) . . .	9

WISCONSIN STATUTES CITED

<i>Wis. Stat. §973.015</i>passim
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Other Sources

<i>Circuit Court Form CR-266</i>	10
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STATEMENT OF THE ISSUES

- I. WAS THE DEFENDANT'S CONVICTION EXPUNGED UPON SUCCESSFUL COMPLETION OF HIS SENTENCE?

Trial court answered: No.

- II. WAS THE DEFENDANT REQUIRED TO PETITION THE CIRCUIT COURT FOR EXPUNGEMENT UPON SUCCESSFUL COMPLETION OF HIS PROBATION?

Trial court answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant believes that the following arguments are consistent with relevant legal authority, the arguments are sound and significantly in line with the present state of the law. The defendant-appellant does not seek to modify or clarify existing law, but rather see that the law is enforced and upheld. For the foregoing reasons, both oral argument and publication may be helpful, but defendant-appellant does not specifically request either for this case.

STATEMENT OF THE CASE

This appeal follows the circuit court's denial of defendant's expungement, entered on March 4, 2013. Kearney W. Hemp, the defendant-appellant, appeared before the Honorable Jean A. DiMotto in Milwaukee County Case Number 09-CF-4636, facing on charge of Possession with Intent to Distribute THC, a Class I Felony. The defendant-appellant

entered a guilty plea to the charge and was placed on probation for 18 months. At the time sentencing, Judge DiMotto granted defendant-appellant expungement once his probation was successfully completed.

Defendant-appellant did successfully complete his probation. However, defendant-appellant picked up new charges approximately eight months later. At that time, defendant-appellant sought verification of the expungement from his Milwaukee County case, but was ordered by Judge DiMotto to complete various other steps first. Judge DiMotto ultimately denied defendant-appellant's expungement, over a year after probation was discharged.

This appeal now follows, as defendant-appellant's expungement took effect automatically once the discharge certificates were forwarded to the circuit court, and Judge DiMotto did not have authority to require the petition process or retroactively deny expungement.

STATEMENT OF THE FACTS

Kearney W. Hemp was charged and convicted in Milwaukee County case number 2009CF4636 for one count of Possession with Intent to Deliver THC, contrary to § 961.41(1m)(h)1, Wis. Stats. (R16:1-2;A12-A13). The underlying facts were never really in dispute, as Mr. Hemp admitted the crime and cooperated with police from the very beginning. (R30:6,8).

In exchange for Mr. Hemp's plea of guilty to the charge, the State agreed to recommend probation with 90 days conditional jail time, other conditions of probation, and take no position on expungement. (R30:2-3).

Mr. Hemp did plead guilty, and a sentencing hearing was held on June 9, 2010, before Judge Jean A. DiMotto. The State upheld its end of the agreement by asking for probation with various conditions. (R30:6-8). Mr. Hemp argued for the conditional jail time to be stayed, but otherwise asked for the same probation. Mr. Hemp also made an argument for expungement of this conviction upon successful completion of his probation. (R30:12).

Judge DiMotto ultimately did go along with the request for probation and ordered 30 days of conditional jail time, with Huber release privileges. (R30:19-22;A7-A10). Judge DiMotto also ordered conditions of probation that included continued treatment with his counselor, costs and surcharges in the action, absolute sobriety, and community service. (Id.) At the close of the hearing, Judge DiMotto finally said the following: "Moreover, I am going to grant expungement upon successful completion of probation." (R30:22; A10).

Mr. Hemp did successfully complete the probation from his Milwaukee County case, as the circuit court judgement

roll includes a January 24, 2012 entry titled "Notice of case status change." (R1:4;A4). In that entry, the court record shows "Probation/Extended Supervision status: Discharged." (R1:4;A4). The Department of Corrections had also issued discharge certificates on December 15, 2011, showing discharge from probation in Milwaukee County Case 09CF4636. (R20:2-3;A16-A17).

Approximately eight months later, Mr. Hemp submitted the standard circuit court form Petition to Expunge Court Record of Conviction (Form CR-266). (R17:1;A14). Judge DiMotto responded by noting that Mr. Hemp had new charges pending in Walworth County at that time (possession of THC 2nd+ in Walworth County Case No. 12CF446, and OWI-2nd in Walworth County Case No. 12CT706). (R21:1-2;A19-A20). Judge DiMotto noted that the new offenses were alleged to have been committed after the Milwaukee County probation was completed, but expungement had not been requested before probable cause was found on the new charges. (Id.) Judge DiMotto suggested that if Mr. Hemp requested expungement earlier, it would likely have been granted. (Id.) She then ordered that Mr. Hemp submit a personal statement as to why he believed the court should order an expungement, and also gave the State an opportunity to respond. (Id.) Each party did so.

On March 4, 2013, Judge DiMotto filed a Decision and Order Denying Petition to Expunge Court Record of Conviction. (R24:1-2;A21-A22). Judge DiMotto indicated that she had reviewed Mr. Hemp's personal statement and also reviewed the State's response, which objected to the court granting expungement. (R24:1-2;A21-A22) Judge DiMotto stated that "[t]he implied time element in the expungement statute as argued by the State coupled with the defendant's tardy action in seeking expungement leads the court to deny his petition." (R24:2;A22).

ARGUMENT

I. THE DEFENDANT'S CONVICTION WAS EXPUNGED UPON THE SUCCESSFUL COMPLETION OF HIS PROBATION.

This case involves the application of Wisconsin Statute § 973.015 (2009-10). The application of a statute to a particular set of facts is a question of law which this court reviews de novo. See *Gonzalez v. Teskey*, 160 Wis.2d 1, 7-8, 465 N.W.2d 525 (Ct. App. 1990).

Section 973.015, Wis. Stat., provides as follows:

(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.

Upon examination of this statute, it is difficult to see why or how this case has proceeded to the appellate

level. The court ordered expungement upon successful completion of Mr. Hemp's probation. (R30:22;A10). That fact is not disputable. It even appears in the Criminal Court Record minutes maintained by the clerk of courts. (R1:4;A4). There it states "Upon successful completion of probation, the court GRANTS expungement." (Id.) (Emphasis original.) Whether the defendant-appellant "successfully completed" his probation would be the next question, then.

Section 973.015(2), Wis. Stats., explains what it means to successfully complete probation. The requirements for a person to be considered as having successfully completed probation appear to be three-fold: (1) the person must not have been convicted of a subsequent offense; (2) the person must not have been revoked off probation; and (3) the probationer must have satisfied the conditions of probation. These three requirements are the only requirements in the expungement statute.

In this case, and in review of the statutory requirements for "successful completion of probation," Mr. Hemp is not in violation of the statute at all. At the time of his discharge from Department of Corrections supervision, Mr. Hemp had no subsequent convictions, had not been revoked off of probation, and had satisfied the conditions of probation. The record contains no evidence to the contrary;

rather, the record contains two discharge certificates issued by the Department of Corrections. (R20:2-3;A16-A17). The court also received proof that all financial obligations had been satisfied by Mr. Hemp. (R20:4;A18). The undisputed facts establish that Mr. Hemp did successfully complete probation.

The statute provides, then, that the forwarding of the discharge certificate to the court "shall have the effect of expunging the record." § 973.015(2), Wis. Stats. The Criminal Court Record minutes again reflect that the court received, on January 24, 2012, the "Notice of case status change," showing that probation was discharged with an effective date of December 18, 2011. (R1:4;A4). The court's receipt of that discharge, then, is what has the effect of expungement, according to the statute. Here again, the facts are undisputed that discharge certificates were issued, and the court received the discharge notice.

Wisconsin case law does not provide any further description or procedural explanation for a better understanding of when or how an expungement takes effect. In fact, there are only three cases contained in the notes following the expungement statute, none of which relate to this issue that is substantive and procedural at the same time. Yet additional case law is not necessary when the law

is as clear as this one.

The purpose of this court's statutory construction is to try to determine the legislature's intent. The court's first step is always to examine the language of the statute. See *Cary v. City of Madison*, 303 Wis.2d 261, 264-65, 551 N.W.2d 596, 597 (Ct. App. 1996). If the court determines that the statute is clear on its face, then the inquiry ends there. In *re Peter B.*, 184 Wis.2d 57, 70-71, 516 N.W.2d 746, 752 (Ct. App. 1994). When a statute is clear on its face, the court does not look beyond the plain and unambiguous language of the legislation. *Id.*

This court is to apply § 973.015, Wis. Stats., to the undisputed facts in Mr. Hemp's case. Doing so results in but one possible conclusion: Mr. Hemp's conviction from Milwaukee County Case No. 09CF4636 was expunged when he successfully completed probation. To decide otherwise is to ignore the plain language of the statute, and is a misapplication of the law.

II. THE DEFENDANT WAS NOT REQUIRED TO PETITION THE CIRCUIT COURT FOR EXPUNGEMENT UPON COMPLETION OF HIS SENTENCE.

The defendant-appellant maintains that expungement of his Milwaukee conviction took effect upon successful completion of his sentence, as outlined in Section I. However, it is also important to show how the circuit court lacked the authority to make the findings included in its

final court order. In denying Mr. Hemp's petition for expungement in this case, Judge DiMotto cited "the implied time element in the expungement statute" and the defendant's "tardy action in seeking expungement." Neither one of these stated reasons for the denial of expungement is a valid one, as neither basis is found in statute or case law.

Wisconsin circuit court form number CR-266, Petition to Expunge Court Record of Conviction, was requested and required by the circuit court in this case. CR-266 simply cites to § 973.015, Wis. Stats., as the statutory basis for the form. A review of § 973.015 reveals no such petition or form required to be prepared or filed by the probationer - or any other party - in order for expungement to take effect. Rather, the expungement takes effect when probation is successfully completed and the circuit court receives such notice of the discharge from supervision.

Just as there is no requirement for CR-266 found in statute or in case law, there is no indication that the timing of the expungement is in the defendant or probationer's control whatsoever. Section 973.015 puts the burden on the Department of Corrections. The statute states that "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." § 973.015(2), Wis. Stats. Therefore, it is not in accordance with the law or justice to deny Mr. Hemp, or any defendant, expungement for failure to follow a rule that does not actually exist. If there was a failure to issue a certificate of discharge or to timely forward the same, the controlling statute places that responsibility on the probationary authority. *Id.* Even so, this case does not involve those facts, as the record contains verification of successful completion of probation, received by the circuit court approximately one month after the effective date of Mr. Hemp's discharge.

Further, Judge DiMotto never put Mr. Hemp on notice that any petition was required before expungement would be effective. Rather, her statement at the sentencing hearing was that "I am going to grant expungement upon successful completion of probation." Nowhere in the record does the court admonish the defendant-appellant that a Petition form would be required.

The court's requirement for submitting form CR-266, and finding that the request was not timely, do not appear to be within the framework of § 973.015, Wis. Stats. As such, these requirements and findings from Judge DiMotto should be considered to have been issued without any authority, and deemed void. The plain language of the controlling statute

applies in this case, so that no petition for expungement or time requirement should apply to Mr. Hemp's facts. To deny the expungement after it took effect would be to modify the sentence, *sua sponte*, and do so without proper authority.

CONCLUSION

Based on the foregoing, Mr. Hemp is entitled to various forms of relief. Primarily, this court should find that the expungement of his conviction from Milwaukee County Case No. 09CF4636 was effective, and took effect upon successful completion of his sentence, as the Department of Corrections did submit the notice of discharge to the circuit court.

Further, this court should determine that the circuit court lacked the authority to require Mr. Hemp to submit a Petition to Expunge Court Record of Conviction, or to do so within a specific time period, as no authority exists in the controlling statute for such an order. This court improperly and erroneously denied Mr. Hemp's expungement, even though it had already been in effect.

Dated this 3rd day of September, 2013.

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CERTIFICATION

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

Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 4 pages.

Dated this 3rd day of September, 2013.

SEYMOUR, KREMER, KOCH, LOCHOWICZ & DUQUETTE LLP

By:_____

James B. Duquette
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CERTIFICATION 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 s. 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 _3rd_ day of September, 2013.

SEYMOUR, KREMER, KOCH, LOCHOWICZ & DUQUETTE LLP

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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 s. 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
- (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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