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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 2013AP1163-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEARNEY W. HEMP,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION
AND DENIAL OF PETITION FOR EXPUNGEMENT
ENTERED IN THE CIRCUIT COURT FOR
MILWAUKEE COUNTY, THE HONORABLE
JEAN A. DIMOTTO PRESIDING

BRIEF AND APPENDIX
OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND
PUBLICATION

Oral argument is unnecessary because the issue presented is fully briefed and may be resolved by applying law to undisputed facts. Publication is requested because the issue presented may recur in future cases.

ARGUMENT

THE CIRCUIT COURT'S DENIAL OF HEMP'S EXPUNGEMENT PETITION SHOULD BE AFFIRMED.

Wisconsin Stat. §973.015(1)(a) provides that, when sentencing certain offenders under the age of twenty-five, the circuit court “may order ... 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.”

Where expungement has been ordered, the following procedure must be followed:

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the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked and the probationer has satisfied the conditions of probation.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....

Wis. Stat. § 973.015(2).

The last sentence quoted is written in the passive voice. Significantly, it does not identify *who* shall “forward[] to the court of record” the “certificate of discharge.” *Id.* Also, the statute does not specify *when* the certificate of discharge must be forwarded to the circuit court. *See id.*

Pursuant to Wis. Stat. §§ 971.025 and 758.18, the Judicial Conference adopted form CR-266, “Petition to Expunge Court Record of Conviction” (R-Ap. 101). CR-266 is a form affidavit in which the petitioner (*i.e.*, the defendant) is directed to supply all pertinent information, including the circumstances of his conviction, the court’s order “that the record be expunged upon completion of the sentence,” and copies of the “certificate of discharge”

from the “detaining or probationary authority” Wis. Stat. § 973.015(1)(a) and 973.015(2) This form is to be filled in and filed by the defendant seeking expungement; it is not the responsibility of the Department of Corrections to file the form (*id.*). Only when the “certificate of discharge” has been “forwarded to the court of record” will the expungement be “effect[ed].” Wis. Stat. § 973.015(2).

“If a statute imposes a duty but is silent as to when it is to be performed, a reasonable time is implied.” 2B N. Singer & J. Singer, *Sutherland Statutory Construction*, § 55.3 at 457 (7th ed. 2012); *see also McQuestion v. Crawford*, 2009 WI App 35, ¶14, 316 Wis. 2d 494, 765 N.W.2d 822; *Watton v. Hegerty*, 2007 WI App 267, ¶36, 306 Wis. 2d 542, 744 N.W.2d 619, *rev’d on other grounds*, 2008 WI 74, 311 Wis. 2d 52, 751 N.W.2d 369. The word “upon,” used in its temporal sense, connotes a requirement of immediate action. *See Webster’s Third New Int’l Dictionary of the English Language* (Unabridged) 2518 (1986) (“upon” defined as “immediately following on : very soon after”; “on the occasion of : at the time of”).

Hemp “maintains that expungement of his Milwaukee conviction took effect upon successful completion of his sentence.” Hemp’s Brief at 9. He contends that the statute admits of no other interpretation. *See id.* at 6-7. The State disagrees. The statute says that “expung[ement]” will be “effect[ed]” after (1) the defendant’s successful completion of his sentence, (2) the controlling authority’s issuance of a “certificate of discharge,” and (3) the “forward[ing]” of the “certificate of discharge” to “the court of record.” Wis. Stat. § 973.015(2). *All* those steps must be completed before the record will be expunged.

As noted above, the expungement statute does not explicitly state *who* must “forward[]” the “certificate of discharge” to the circuit court. However, a common sense reading of the statute compels the conclusion that this duty belongs to the defendant. After all, it is the defendant who

seeks a benefit from the certificate of discharge in the form of the expungement of his record. *Cf.* Wis. Stat. § 165.77(4) (person must petition for expungement of his DNA profile from DNA databank); Wis. Stat. § 938.355(4m) (juvenile must petition for expungement of juvenile adjudication).¹ Accordingly, the Judicial Conference adopted a form for the *defendant*, as petitioner, to use to alert the circuit court that (as here) the probationary authority had issued certificates of discharge. The petitioner's filing of form CR-266 is the necessary prerequisite to initiating the expungement proceeding, and "effect[ing]" the expungement. Wis. Stat. § 973.015(2).

The statute is also silent, as noted above, about *when* the petitioner must forward the certificate of discharge to the circuit court. As Sutherland recommends, this court should imply a "reasonable time" requirement. And, as Webster's teaches, the legislature's choice of the phrase "[u]pon successful completion" signals a requirement of immediate action. Wis. Stat. § 973.015(2). The application of that standard to this case is straightforward. The Department of Corrections issued discharge certificates to Hemp on December 15, 2011 (20:2-3). However, Hemp did not file (*i.e.*, "forward") those certificates to the circuit court until December 17, 2012, a full year later (20:1). When he did file them, he had already been charged with new offenses in Walworth County (21:1).

The circuit court concluded that Hemp's one-year delay in forwarding the discharge certificates was "tardy" (24:2). The circuit court emphasized the fact that Hemp waited until he had new criminal charges filed against him to pursue expungement of his prior conviction. It saw a significant connection between the time delay and the new

¹Arguably, the last sentence of subsection (2) supports Hemp's interpretation: "If a person has been imprisoned, the detaining authority shall *also* forward a copy of the certificate of discharge to the department." Although unclear, the phrase "shall *also* forward" may indicate that the authority is responsible for forwarding the certificate to the court of record.

charges: “Had the defendant applied for an expungement a year ago, his petition probably would have been granted. But now the circumstances are such that he is asking the court to ignore his recent behavior and to assist him in the defense of his new charges by ordering an expungement in this case” (21:1).

Hemp failed to file his expungement petition within a “reasonable time” in two respects. First, in terms of the time that passed between the issuance of the discharge certificates and their forwarding to the circuit court, the twelve-month delay was patently unreasonable, and Hemp offered no explanation for it. Second, the twelve-month delay was unreasonable because of the change in Hemp’s personal circumstances. Expungement is a partial reprieve from the full consequences of a defendant’s earlier criminal acts conditioned upon his subsequent good and lawful behavior. Hemp waited until *after* he had committed and been charged with new crimes to seek expungement of his earlier conviction (24:1-2). Thus, the mitigation of the consequences of his earlier conviction was no longer appropriate. Yes, he fulfilled the conditions of his initial probation (20:2-3). But, in less than a year, he was back on the path of crime and drug abuse (22:1). With that change in his circumstances, expungement of Hemp’s prior conviction ceased to be appropriate.

Hemp contends that § 973.015 does not require the use of form CR-266. Hemp’s Brief at 11. The State assumes that Hemp is correct about this. *See* Wis. Stat. § 807.001(3) (“A court may not dismiss a case, refuse a filing or strike a pleading for failure of a party to use a standard court form under sub. (1) or to follow the format rules but shall require the party to submit, within 10 days, a corrected form and may impose statutory fees or costs or both.”). But the point is irrelevant. The court did not deny Hemp’s expungement petition because he failed to use the form. The court denied the petition because it was not filed within a reasonable time:

[Hemp’s] desire for expungement did not ripen until he was charged with new offenses in Walworth

County. The 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.

(24:1-2).

The court's ruling was correct and should be affirmed.

CONCLUSION

For the reasons stated herein, the State of Wisconsin respectfully requests that this court affirm the judgment and order from which this appeal is taken.

Dated this 16th day of October, 2013.

Respectfully submitted,

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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 1,345 words.

Dated this 16th day of October, 2013.

Maura FJ Whelan
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 16th day of October, 2013.

Maura FJ Whelan
Assistant Attorney General