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DISTRICT I

**11-06-2013**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

Case No. 2013 AP 1163-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KEARNEY W. HEMP,

Defendant-Appellant.

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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

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REPLY BRIEF OF DEFENDANT-APPELLANT  
KEARNEY W. HEMP

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JAMES B. DUQUETTE  
(State Bar No. 1061916)

SEYMOUR KREMER KOCH LOCHOWICZ & DUQUETTE LLP  
Attorneys for Defendant-Appellant

23 N. Wisconsin Street  
P.O. Box 470  
Elkhorn, WI 53121-0470  
(262) 723-5003

## ARGUMENT

### **I. EXPUNGEMENT OF THE DEFENDANT'S CONVICTION WAS EFFECTED PRIOR TO JUDGE DIMOTTO'S DENIAL OF DEFENDANT'S PETITION TO EXPUNGE COURT RECORD.**

The State argues that there are a total of three (3) requirements in § 973.015(2), Wis. Stats., that must be met in order for an expungement to be "effected." Those elements include (1) the defendant's successful completion of his sentence, (2) the controlling authority's issuance of a "certificate discharge," and (3) the "forward[ing]" of the "certificate of discharge" to "the court of record." State's Brief at 3. Assuming for the moment that the controlling statute does encompass each of these requirements, the State has not established that any of these three requirements was not met in Mr. Hemp's case. Indeed, they were met in this case, as shown by reviewing the Judgement Roll from the circuit court. There, it shows that the circuit court updated its records on January 24, 2012, to show "Notice of case status change" and lists "Probation/Extended Supervision Status: Discharged," with the "Effective date: 12-18-2011." (R1:4; A4.) This should be seen as evidence that the circuit court received the appropriate certificate of discharge; why else would the court's record reflect that disposition? If this is the case, then all three of the requirements identified by the

State as existing within § 973.015(2), Wis. Stats., were satisfied by January 24, 2012. The circuit court's later requirement for Mr. Hemp to use the petition in Form CR-266, and later denial of the expungement, occurred too late in this case and were improper.

Further, the State agrees that expungement of a conviction under § 973.015(2), Wis. Stats., may not actually require the use of form CR-266. State's Brief at 5. The State argues that the "reasonable time" requirement noted by the circuit court in its denial was the real reason for not granting expungement. This argument is flawed in a similar way as the first one noted above: there was no delay in the "ripening" of Mr. Hemp's "desire for expungement" as described by the circuit court and the State (see State's Brief at 5, citing Judge DiMotto's Decision and Order Denying Petition to Expunge Court Record of Conviction); rather, Mr. Hemp did what he needed to do by January 24, 2012, when the court received its verification that Mr. Hemp's probation was discharged.

Finally, the State failed to address Mr. Hemp's concern that Judge DiMotto's denial of the petition for expungement is tantamount to a *sua sponte* sentence modification. The court *granted* expungement at Mr. Hemp's sentencing hearing. Since the State agrees with the rule at § 807.001(3) that "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 (...)," the State has not shown how the court was then able to modify its own order. Mr. Hemp upheld his end of the bargain, and then the court pulled to rug out from underneath Mr. Hemp for failure to file form CR-266 within a reasonable time.

### **CONCLUSION**

Based on the foregoing, this court should find that the expungement of Mr. Hemp's 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. This court should further determine that the circuit court improperly and erroneously denied Mr. Hemp's expungement, even though it had already been in effect.

Dated this 4th day of November, 2013.

**SEYMOUR, KREMER, KOCH, OCHOWICZ & DUQUETTE LLP**

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James B. Duquette  
Attorney for Defendant-Appellant  
State Bar No. 1061916

23 N. Wisconsin Street  
P.O. Box 470  
Elkhorn, WI 53121  
262-723-5003  
Fax: 262-723-6003

## **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 3 pages.

Dated this 4<sup>th</sup> day of November, 2013.

**SEYMOUR, KREMER, KOCH, LOCHOWICZ & DUQUETTE LLP**

By:\_\_\_\_\_

James B. Duquette  
State Bar No. 1061916

**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 4<sup>th</sup> day of November, 2013.

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By:\_\_\_\_\_

James B. Duquette  
State Bar No. 1061916