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STATE OF WISCONSIN **07-11-2014**

IN SUPREME COURT **CLERK OF SUPREME COURT
OF WISCONSIN**

Case No. 2013 AP 1163-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KEARNEY W. HEMP,

Defendant-Appellant-Petitioner.

ON APPEAL FROM A JUDGMENT AND ORDER ENTERED IN THE CIRCUIT
COURT OF MILWAUKEE COUNTY, THE HONORABLE JEAN A. DIMOTTO,
PRESIDING AND ON PETITION FOR REVIEW FROM THE DISTRICT ONE
WISCONSIN COURT OF APPEALS ORDER AFFIRMING THE CIRCUIT COURT

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

- I. Whether the defendant's conviction was expunged upon his successful completion of probation.

Trial court answered: No.

Court of Appeals answered: No.

- II. Whether Wisconsin Statute § 973.015 places any burden upon an individual defendant to petition the circuit court in order to effectuate an expungement that had been granted and earned.

Trial court answered: Yes.

Court of Appeals answered: Yes.

- I. Whether the circuit court may revoke a defendant's expungement that was granted at the sentencing hearing and subsequently earned by successfully completing probation.

Trial court answered, by implication: Yes.

Court of Appeals answered, by implication: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Hemp believes that both oral argument and publication are appropriate in this case, as this case presents an issue of first impression in Wisconsin which will impact virtually all defendants who are granted expungement in this state.

STATEMENT OF THE CASE

Kearney W. Hemp, the defendant-appellant-petitioner, appeared before the Honorable Jean A. DiMotto in Milwaukee

County Case Number 09-CF-4636. Mr. Hemp faced one charge of Possession with Intent to Distribute THC, a Class I Felony. Mr. Hemp entered a guilty plea to the charge and was placed on probation for 18 months. At the time of sentencing, Judge DiMotto granted Mr. Hemp expungement once his probation was successfully completed.

Mr. Hemp did successfully complete his probation. However, Mr. Hemp picked up new charges in a different county approximately eight months after being discharged from probation, which new charges utilized Mr. Hemp's 2009 Milwaukee County conviction as a basis for enhanced penalties. At that time, Mr. Hemp sought simply the processing of the expungement from his Milwaukee County case, but was ordered by Judge DiMotto to complete various other steps first. Judge DiMotto ultimately denied Mr. Hemp's expungement, over a year after probation was successfully completed and Mr. Hemp was discharged.

Mr. Hemp appealed to the District One Court of Appeals, arguing that his expungement took effect automatically once the discharge certificates were forwarded to the circuit court, and that Judge DiMotto did not have authority to require the petition process or retroactively deny expungement. In a two-to-one decision dated and filed on February 4, 2014, the Court of Appeals affirmed the circuit

court's order.

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;A25-A26). 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;A20-A23). 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;A23).

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;A17). In that entry, the court record shows "Probation/Extended Supervision status: Discharged." (R1:4;A17). 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;A29-A30).

Approximately eight months later, Mr. Hemp submitted the standard circuit court form Petition to Expunge Court Record of Conviction (Form CR-266). (R17:1;A27). Judge DiMotto responded by noting that Mr. Hemp had new charges pending in Walworth County at that time (possession of THC, second and subsequent, in Walworth County Case No. 12CF446, and OWI-2nd in Walworth County Case No. 12CT706). (R21:1-2;A32-A33). 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;A34-A35). 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;A34-A35). 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;A35).

ARGUMENT

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

A. Standard of Review.

This case involves the application and interpretation 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. *State v. Moran*, 2005 WI 115, ¶26, 284 Wis.2d 24, 700 N.W.2d 884 (citation omitted).

B. Relevant Statute.

Wisconsin Statute § 973.015 states 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.

Wis. Stat. § 973.015.

C. The Court of Appeals Improperly Decided that Mr. Hemp's Successful Completion of Probation was not Enough to Entitle him to Expungement.

The expungement statute in Wisconsin indicates that "the court may order at the time of sentencing that the record be expunged *upon successful completion of the sentence*". Wis. Stat. § 973.015(1) (emphasis added). The statute also explains what it means for a person to successfully complete probation. The law states at § 973.015(2) that "[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." Id. These three steps - (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 - are the only requirements that Wis. Stat. §
973.015 places on an individual defendant to successfully
complete probation.

If the legislature intended a defendant to do anything
other than the above three requirements to "successfully
complete probation," it could have added such language to
the statute. The court "should not read into the statute
language that the legislature did not put in." *Brauneis v.*
LIRC, 2000 WI 69, ¶27, 236 Wis.2d 27, 612 N.W.2d 635. To
give meaning to the legislature's words, then, the
expungement statute means as follows: the court may order at
the time of sentencing that the record be expunged *upon the*
defendant not being convicted of a subsequent offense and,
if on probation, the probation has not been revoked and the
probationer has satisfied the conditions of probation.

The Court of Appeals has improperly combined the
statutory requirements for *earning* expungement with the
statutory process for *effectuating* expungement. In *State v.*
Hemp, 2014 WI App 34, ¶9, 353 Wis.2d 146, 844 N.W.2d 421,
the appellate court said:

[T]he plain language of the statute clearly
states that a defendant is not entitled to
expungement of his record unless (1) he

successfully completes his sentence; (2) the controlling authority issues a certificate of discharge; and (3) that certificate is forwarded to the circuit court. *All three* of these steps must be completed before a record will be expunged. The successful completion of probation was only the first step Hemp needed to complete. Therefore, Hemp's record was not immediately expunged upon completion of his sentence.

(Emphasis original.) This interpretation of the statute ignores the difference between a defendant actually earning expungement and the clerical process of effectuating he expungement.

Mr. Hemp does not dispute that there are additional steps to effectuate the actual expungement that he was granted at the time of his sentencing. Practically speaking, the actual physical court file must be expunged in some manner to remove all references from the record. However, Hemp earned the expungement when he was discharged from probation having satisfied all conditions, having not been convicted of a subsequent offense, and having not been revoked. The record contains no evidence to the contrary; rather, the record contains two discharge certificates issued by the Department of Corrections. (R20:2-3;A29-A30). The circuit court also received proof that all financial obligations had been satisfied by Mr. Hemp. (R20:4;A31). The undisputed facts establish that Mr. Hemp did successfully complete probation. For these reasons, the only

logical conclusion is that Mr. Hemp's expungement was indeed earned, contrary to the Court of Appeals' finding. To uphold the Court of Appeals' decision in this case is to ignore the plain language of the controlling statute.

II. WISCONSIN STATUTE § 973.015 DOES NOT REQUIRE THAT A DEFENDANT PETITION THE COURT TO EFFECTUATE EXPUNGEMENT.

A. Standard of Review.

This court is required to interpret Wis. Stat. § 973.015 in order to clarify the law regarding how a defendant's expungement is effectuated once it has been earned. This application of the statute to the facts of the case is a question of law that this court reviews de novo. See *Moran*, *Id.*

Several legal principles guide this court in completing this statutory interpretation. These principles have recently been summarized as follows:

We interpret a statute by looking at the text of the statute. The statutory language is examined within the context in which it is used. Words are ordinarily interpreted according to their common and approved usage; technical words and phrases and others that have a particular meaning in the law are ordinarily interpreted according to their technical meaning. Statutes are interpreted to give effect to each word and to avoid surplusage. The definition of a word or phrase can vary in different statutes or under different circumstances. When a word is used multiple times in the same enactment, we attribute the same meaning to the word each time.

Statutes are interpreted in view of the purpose of the statute. Moreover, words are given meaning to avoid absurd, unreasonable, or implausible results and results that are clearly at odds with the legislature's purpose.

State v. Matasek, 2014 WI 27, ¶¶12-13, 353 Wis.2d 601, 846 N.W.2d 811 (internal citations omitted).

B. The Court of Appeals has Improperly Created Additional Requirements Without any Statutory Basis for a Expungement to be Effectuated.

As conceded by Hemp previously, the question of when a defendant *earns* expungement and the question of how that expungement is ultimately *effectuated* are separate inquiries. Yet both answers are found within Wis. Stat. § 973.015 in plain language. The relevant statutory language is found in subsection (2), and states:

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.

Wis. Stat. § 973.015(2).

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 in Hemp's case 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;A17). The court's receipt of that discharge, then, is what gave Hemp 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. Yet the circuit court and the court of appeals disagree.

1. Wis. Stat. § 973.015 Does Not Require Any Additional Action on the Part of a Person Who has Earned Expungement.

The circuit court and the Court of Appeals committed error when they determined that any action beyond the forwarding of the discharge certificate is necessary to effectuate a defendant's expungement. The trial court in this case required the use of Form CR-266, "Petition to Expunge Record of Conviction," and also required Hemp to submit a personal statement in support of his expungement. The trial court required these things of Hemp even though it had already granted expungement at Hemp's sentencing, and even after Hemp successfully completed probation, and after discharge certificates had been forwarded to the clerk of court. (It is almost as if the sentencing judge forgot that she had already granted the expungement, as reflected in the transcript and on the judgment roll.) The court of appeals found these practices to be appropriate, as it indicated

"expungement is only effected when the certificate of discharge has been forwarded to, *and approved by*, the circuit court." *Hemp, Id.* at ¶13 (emphasis added).

By using the three words "and approved by," the Court of Appeals has created more questions than answers. The Court of Appeals has provided no explanation for what specifically must be approved, what standards should be applied to determine whether to grant said approval, or whether a hearing is required. This new requirement created by the Court of Appeals does not come from the legislature, as the language of the expungement statute does not include the word "approve" at all. The Court of Appeals decision does not comport with the rule that the court should not read into the statute language that the legislature did not put in. *See Brauneis, Id.*

The trial court's request that a form affidavit (CR-266) be used is also not founded in Wis. Stat. § 973.015. Neither is the requirement that a defendant submit a personal statement found anywhere in the expungement statute. In fact, the statutory procedure does not authorize - or require, as the Court of Appeals has now said - that the trial court approve anything in order to have expungement effectuated for a person who has successfully completed probation.

2. Wis. Stat. § 973.015 Does Not Include any Time Limitation for Expungement to be Effectuated.

The next manner in which the trial court and Court of Appeals have created confusion regarding expungement is by creating, out of thin air, a "time element" for effectuating expungement. In denying 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 reasons stated for the denial of expungement is a valid one, as neither basis is found in Wis. Stat. § 973.015. This lack of authority did not stop the Court of Appeals from adopting the same finding, however.

In its decision, the Court of Appeals concluded that Wis. Stat. § 973.015 "requires a petitioner to forward his discharge certificate as soon [as] practicable." *Hemp, Id.* at ¶15. Aside from Hemp's previous objection about a petitioner having any obligation to forward anything at all, the use of "practicable" as a new deadline is extremely unhelpful. What length of time is "practicable" for a non-attorney defendant to be able to look at the plain language of Wis. Stat. § 973.015 and understand that he or she has any obligation to forward something to the circuit court? How long is "practicable" for a person to navigate

Department of Corrections records requests to get the various forms and the Wisconsin Court System Forms database to figure out what to send, and where to send it? Worse yet, how will a non-attorney know to search for a case like Hemp's to decipher court-imposed requirements to effectuate his or her expungement?

Just as there is no requirement in Wis. Stat. § 973.015 for the use of Form CR-266, there is no indication that the timing of the expungement is in the defendant's or probationer's control whatsoever. Wis. Stat. § 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." Wis. Stats. § 973.015(2).

Therefore, it flies in the face of fundamental fairness and justice to deny Hemp, or any defendant, expungement for the failure of the detaining or probationary authority to follow an arbitrary deadline, a rule that does not actually exist.

Lastly, it should be noted that this case does not even involve tardiness in the forwarding of the discharge certificate. 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. The Criminal Court Record minutes 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;A17). The court's receipt of that discharge, then, is what has the effect of expungement, according to the statute. The facts are undisputed that Hemp's discharge certificates were issued, and the court received the discharge notice.

The Court of Appeals' requirement for a defendant to submit form CR-266, and finding that it must be done "as soon as practicable", do not appear to be within the framework of Wis. Stats. § 973.015. Accordingly, these newly created requirements should be considered to have been issued without any authority, and reversed. The plain language of the controlling statute applies in this case, so that no petition for expungement or time requirement should be imposed on Hemp or any other defendant that was granted expungement and then actually earned it.

III. THE CIRCUIT COURT MAY NOT UNILATERALLY MODIFY THE DEFENDANT'S SENTENCE TO REVOKE EXPUNGEMENT THAT HAS ALREADY BEEN GRANTED AND EARNED.

This court was recently called upon to determine *when* a circuit court may exercise its discretion to expunge a defendant's conviction. In *State v. Matasek, Id.*, it was decided that Wis. Stat. § 973.015 limits the point in time

at which a circuit court is to make a decision about expungement, and that point is "at the time of sentencing." *Matasek, Id.* at ¶44. The phrase "at the time of sentencing" was determined to mean that "if a circuit court is going to exercise its discretion to expunge a record, the discretion must be exercised at the sentencing proceeding." *Id.* at ¶45.

The record in this case establishes that Hemp appeared at a sentencing hearing in the underlying case. Judge DiMotto said at that sentencing hearing, "I am going to grant expungement upon successful completion of probation." (R30:22;A23). The criminal court record minutes entries from the sentencing hearing also reflect: "Upon successful completion of probation, the court GRANTS expungement." (Emphasis original.) (R1:4;A17). Expungement was clearly granted in accordance with the requirements of Wis. Stat. § 973.015 and in accordance with *Matasek*.

By revisiting her decision on expungement, Judge DiMotto exceeded the scope of her authority. Asking Hemp to submit a personal statement and then considering input from the State of Wisconsin as well was tantamount to exercising her discretion a second time. Yet according to *Matasek*, the *only* time at which a judge may decide whether to grant expungement is at the time of sentencing. The inverse must

follow as well: if the circuit court may not wait until after probation is over to decide whether to grant expungement, there can be no waiting to decide whether to revoke expungement either.

This court has indicated that by deciding on expungement at the time of sentencing, the court creates a "meaningful incentive for the offender to avoid reoffending." *Matasek*, at ¶43. Similarly, defendants have a legitimate expectation of finality in the sentences they are given. See *State v. Gruetzmacher*, 2004 WI 55, ¶33, 271 Wis.2d 585, 679 N.W.2d 533 (quoting *State v. Jones*, 2002 WI App 208, ¶10, 257 Wis.2d 163, 650 N.W.2d 844). In other words, defendants and the courts prefer finality in the judgments that are handed down. Allowing the expungement that was granted to Hemp to be ripped away at a later date is contrary to these legitimate, recognized interests.

Given the limitation on a circuit court's authority made clear by *Matasek*, the trial court did not have the ability to "deny" Hemp's expungement months after the successful completion of his probation, or any time after the sentencing hearing, for that matter.

CONCLUSION

Mr. Hemp was granted expungement at the time of his sentencing hearing, and he successfully completed his

probation. He therefore earned his expungement, and the subsequent denial by the circuit court was improper. Additionally, the Court of Appeals has interpreted the expungement statute in a manner that has created confusion regarding the expungement procedure, and has crafted new rules that have no basis in the relevant statute. Finally, the trial court in this case improperly modified Mr. Hemp's sentence without the appropriate authority to do so.

For the foregoing reasons, the defendant-appellant-petitioner requests that this court reverse the Court of Appeals and remand the case back to the Circuit Court with an order that Mr. Hemp's expungement be effectuated.

Dated this 11th day of July, 2014.

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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 19 pages.

Dated this 11th day of July, 2014.

SEYMOUR, KREMER, KOCH, LOCHOWICZ & DUQUETTE LLP

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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 11th day of July, 2014.

SEYMOUR, KREMER, KOCH, LOCHOWICZ & DUQUETTE LLP

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CERTIFICATION

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.

Dated this 11th day of July, 2014.

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