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STATE OF WISCONSIN **08-14-2014**

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

REPLY BRIEF OF
DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

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

Wisconsin's expungement statute states 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) (2009-10) (emphasis added). The statute also explains 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the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked and the probationer has satisfied the conditions of probation." Wis. Stat. § 973.015(2). These are the requirements, then, for a defendant to earn expunction.

The Respondent has argued that Hemp "makes a distinction without meaning" when noting the difference between earning expunction and effectuating the expunction. (Resp. Br. p.7). However, this distinction is important as there appears to be no dispute by any of the parties at any of the levels of review in this case that Hemp actually did successfully complete his sentence. The Court of Appeals even acknowledged this to be the case. *State v. Hemp*, 2014 WI App 34, ¶9, 353 Wis.2d 146, 844 N.W.2d 421. The court of appeals then unfortunately went on to place additional

burdens on a defendant who seeks to effectuate the expungement that was earned by successfully completing his or her sentence. *Id.* This difference between a defendant actually earning expungement and the clerical process of effectuating the expungement certainly does have meaning, since there has obviously been considerable confusion about how the expungement is in fact effectuated. This Court has acknowledged that it is important for offenders to have certainty about whether their convictions will be expunged, in order to provide greater incentive for offenders to successfully complete their sentences. *State v. Matasek*, 2014 WI 27, ¶43, 353 Wis.2d 601, 846 N.W.2d 811. The “earning” versus “effectuating” distinction therefore has meaning, and is at the heart of this case.

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 and that he subsequently earned. However, to uphold the Court of Appeals’ decision in this case is to allow the unreasonable and improper combination and confusion of the requirements for earning and effectuating expunction under the statute.

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

It remains Hemp’s position that Wis. Stat. § 973.015(2) does not require a defendant to take additional action in

order to effectuate expungement after successfully completing his or her sentence. The Respondent first argues that the legislature used the passive voice in § 973.015(2), leaving the "the identity of the statutory actor indeterminate." (Resp. Br. p.9). Hemp does not concede that the voice is passive.

The relevant statutory sentence reads: "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." § 973.015(2), Wis. Stats. Imagine, for the moment, that the sentence instead read: (...) the detaining or probationary authority shall issue a certificate of discharge which shall *be printed on white paper with black type* and which shall have the effect of expunging the record. The sentence structure does not change; would it then be a defendant's burden to make sure that the probationary authority prints the certificate on white paper, with black type, in order to effectuate expungement? The duty to forward the certificate of discharge to the court is, by statute, the detaining or probationary authority's duty.

The Respondent also argues that because the legislature was specific in other statutes where it requires a defendant

to take additional action for obtaining expungement-related relief, then the same must be true in § 973.015(2). (Resp. Br. p. 10-11). This argument does not comport with the rule that 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. Since the legislature was clearly aware of the option or ability to require defendants to take additional action to effectuate expungement (e.g., requiring a defendant to petition for expunction of his DNA profile from the DNA database in Wis. Stat. § 165.77(4), and requiring a juvenile to petition for expunction of an adjudication of delinquency in Wis. Stat. § 938.355(4m)), this Court should determine the *absence* of such language in § 973.015(2) to mean that there is no such duty on the part of a defendant.

Next, the Respondent argues that Wisconsin Supreme Court rules and state statutes authorize and require the use of standard court forms for certain actions; in this case, the relevant one is Form CR-266. (Resp. Br. p. 12-13). The Respondent essentially asks this Court to look to the form to determine the legislative intent, as an extrinsic source. Yet Form CR-266 was created by the Wisconsin Judicial Conference, not by the legislature. The form also simply restates the language in § 973.015, Wis. Stats., providing

no further evidence as to what the legislature intended. Form CR-266 therefore does not prove that a defendant has any duty to forward the certificate of discharge. Even assuming that Hemp was in fact required to use Form CR-266, the record in this case shows that Hemp *did* use the required form, and *did* forward the certificate of discharge. The only remaining justification for a denial of Hemp's expungement is the timeliness of the request, which again the Court of Appeals and the Respondent incorrectly rely upon.

The Respondent's first argument related to Hemp's "tardy" petition for expungement is simply temporal: it was not filed until "a full year later," and "the twelve-month delay (...) was patently unreasonable." (Resp. Br. p. 15-16). Yet § 973.015(2) does not specify any time period in which the discharge certificate must be forwarded to the circuit court. Also, Form CR-267, the court form for deciding on a defendant's petition for expungement (R-Ap 103) also includes a list of the permissible reasons that a petition may be denied. Notably absent from the list is a "timeliness" or "tardiness" basis for the denial.

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.

This leaves open the question of when it was practicable for Hemp to forward the certificate of discharge. In this case, and really in any case, it is certainly not practicable until a defendant is aware of the fact that the department may have not forwarded the certificate. A denial of Hemp's petition for being tardy was therefore improper.

The Respondent's second argument relating to "timeliness" is actually an argument about whether Hemp deserves the expungement. The Respondent argues that "the twelve-month delay was unreasonable because of the change in Hemp's personal circumstances." (Resp. Br. p.16). This basis for a denial of expunction muddies the waters further, as it seems to relate back to what it means to "successfully complete the sentence" in order to earn expungement. The Respondent argues that even though Hemp fulfilled the conditions of probation in his underlying case, "in less than a year, he was back on the path of crime and drug abuse." (Resp. Br. p.16). Wis. Stat. § 973.015(2) defines what it means to "successfully complete the sentence" and it does not require a defendant to remain free of all law violations for the rest of his or her life, or a decade, or even a year. Additionally, Hemp has never asked the circuit court to "assist him in the defense of his new charges by ordering expungement in his case" as suggested by the

Respondent. (Resp. Br. p.17). Hemp has only requested that the circuit court honor and enact its original order, given that Hemp held up his end of the bargain by successfully completing probation.

The Court of Appeals created new requirements for expungement which do not appear in, or have a basis in, the controlling statute. The plain language of the 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.

Hemp reminds this Court of its recent decision in *Matasek, Id.* There 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 to "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.

Hemp's position is that when Judge DiMotto reconsidered

and revoked the expungement she had previously granted at the time of sentencing, she exceeded the scope of her authority. The Respondent suggests that Hemp has no authority for this claim, but *Matasek* supports this exact claim. 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. In essence, Judge DiMotto did exactly what the defendant wanted to do in *Matasek*, which is to take a wait-and-see approach to decide after sentencing whether a defendant should receive expungement. *Matasek* says the *only* time at which a judge may decide whether to grant expungement is at the time of sentencing. The process that the court put Hemp through violated the Court's ruling in *Matasek*, and should be reversed.

CONCLUSION

Mr. Hemp met all of his probation conditions and successfully completed his sentence in this case. Expungement was granted at the time of Hemp's sentencing hearing by the circuit court judge, and he therefore earned his expungement. The circuit court's subsequent reversal of its decision and the additional creation of new rules for the expungement process by the Court of Appeals have created confusion regarding the expungement procedure and resulted

in substantial injustice to Mr. Hemp. 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 14th day of August, 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 9 pages.

Dated this 14th day of August, 2014.

SEYMOUR, KREMER, KOCH, LOCHOWICZ & DUQUETTE LLP

By: _____
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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 14th day of August, 2014.

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