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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

Court of Appeals Case No. 2014AP000006

KENOSHA COUNTY,

Plaintiff-Respondent,

v.

BLAIRE A. FRETT,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

**On Appeal from the Circuit Court for Kenosha County, the Honorable
S. Michael Wilk, Presiding
Circuit Court Case No. 2012FO000958**

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STATEMENT OF THE ISSUE

- I. Under Wis. Stat. § 973.015(1)(a), can a circuit court judge expunge a forfeiture conviction after a disposition hearing presided over by a court commissioner?

Circuit Court Answer: No.

STATEMENT ON ORAL ARGUMENT

Pursuant to Wis. Stat. § 809.22, oral argument is unnecessary because the briefs will fully develop and explain the issues and relevant legal authorities.

STATEMENT ON PUBLICATION

Pursuant to the criteria of Wis. Stat. § 809.23, publication of the opinion in this case is unnecessary.

STATEMENT OF THE CASE

Frett is asking this Court to reverse a circuit court order denying her motion to expunge her forfeiture conviction. The issue is whether a circuit court judge has discretion under Wis. Stat. § 973.015(1)(a) to order

expunction of a forfeiture conviction after the dispositional hearing when a court commissioner presided over that hearing.

Frett received a citation in the summer of 2012 for consumption or possession of alcohol while underage, a violation of Kenosha County Ordinance 9.125.07. (R. at 1). She appeared at the initial appearance before Court Commissioner John C. Plous and entered into a plea agreement. (Circuit Court Record (docket entries), “Notice of Hearing,” August 1, 2012). That agreement required her to complete a class and provide proof to the court or District Attorney. (R. at 3). After providing that proof, the charge would be amended to a charge of violating Kenosha County’s littering ordinance, and the commissioner would order that she pay a forfeiture. *Id.*

The court commissioner approved the agreement on August 6, (Circuit Court Record (docket entries), “Plea Agreement,” August 6, 2012), and Frett completed the program, (Circuit Court Record (docket entries), “Non-Appearance,” October 3, 2012). On October 3 the commissioner found Frett guilty of Littering and ordered the forfeiture. *Id.* The plea agreement did not include or exclude expunction, (R. at 3), and the court

commissioner neither granted nor denied it, (Circuit Court Record (docket entries), “Non-Appearance,” October 3, 2012).

In August of 2013 Frett filed a motion to expunge. (R. at 4). The circuit court, the Honorable S. Michael Wilk presiding, held a hearing on October 17. (R. at 9; App. at 1-9). Frett cited *State v. Melody P.M.*, No. 2009AP2994, 2010 WL 2303318, Wis. Ct. App. June 10, 2010 (unpublished), to contend that § 973.015(1)(a) allows expunction of forfeitures, (R. 9 at 2-3; App. at 2-3). The County did not argue that point, (R. 9 at 4-5; App. at 4-5), and the circuit court based its ruling on other grounds.

The circuit court said it wished it had authority to consider Frett’s expunction request on the merits. (R. 9 at 7; App. at 7). But it held that it could not because § 973.015(1)(a) allows expunction only at the time of sentencing, and the court commissioner had already held the dispositional hearing. (R. 9 at 6-8; App. at 6-8). The court issued a written order denying Frett’s motion for the reasons it stated at the motion hearing. (R. at 7; App. at 10).

Frett asks this Court to reverse that order and remand the matter so that the circuit court can exercise its discretion in deciding whether to grant or deny expunction.

ARGUMENT

I. Under Wis. Stat. § 973.015, a circuit court can expunge forfeiture convictions and does not forfeit that power by allowing a court commissioner to preside over disposition hearings in forfeiture cases.

The circuit court said that it wished it had discretion to consider Frett's expunction request; this Court should grant that wish. The Court should hold that the plain language of Wis. Stat. § 973.015(1)(a) allows circuit courts to expunge forfeiture convictions in this situation.

Section 973.015(1)(a) provides for expunction of certain violations by young offenders. It states, in relevant part:

973.015 Special disposition. (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...

Wis. Stat. 973.015(1)(a)¹.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise indicated.

Whether § 973.015(1)(a) allows a circuit court to order expunction of a forfeiture conviction in this situation is a question of statutory interpretation. The interpretation of a statute and its application to specific facts are questions of law that this Court reviews de novo. *Currier v. Dept. of Revenue*, 2006 WI App 12, ¶ 9, 288 Wis. 2d 693, 709 N.W.2d 520.

Statutory interpretation begins with the language of the statute. *State ex. rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. The goal is to find the meaning of the statutory language. *Id.* To find that meaning, courts interpret statutory language in the context in which it is used, in relation to surrounding language, and in a manner that avoids unreasonable or absurd results. *Id.*, ¶ 46.

This Court should hold that circuit courts can expunge forfeiture convictions, and that they retain that power after a dispositional hearing if a court commissioner presided over that hearing. There are two necessary elements for that holding, both of which are supported by the plain language of § 973.015(1)(a). First, because of recent amendments, the statute now provides for expunction of forfeiture convictions. Second, the phrase “at the time of sentencing,” in the context it is used, means a sentencing or dispositional hearing before a circuit court judge; thus, circuit

courts retain the discretionary power to order expunction in cases where a court commissioner presides at the disposition hearing. For these reasons, the Court should reverse the circuit court order and remand the matter so the circuit court can consider Frett's motion on its merits.

A. Under Wis. Stat. § 973.015(1)(a), a circuit court can expunge forfeiture convictions because 2009 Act 28 removed the language that previously limited expunction to misdemeanors.

Nothing in the plain language of § 973.015(1)(a) prohibits expunction of forfeiture convictions. *State v. Melody P.M.*, No. 2009AP2994, 2010 WL 2303318, at 2, Wis. Ct. App. June 10, 2010 (unpublished); App. at 12. This is a change from the previous version of that section. *See State v. Michaels*, 142 Wis. 2d 172, 417 N.W.2d 415 (Ct. App. 1987). However, the 2009 amendment to that section, specifically to the title of that section, cleared the way for expunction of forfeitures. *See Melody P.M.*, 2010 WL 2303318 at 1-2; App. at 11-12.

In *Michaels*, the court of appeals found that the previous version of § 973.015(1)(a) did not permit expunction of civil forfeitures. When the court decided that case, § 973.015(1)(a) provided:

973.015 Misdemeanors, special disposition. (1) When a person under the age of 21 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 penalty is imprisonment for one year or less in the county

jail, 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.

See Michaels, 142 Wis. 2d at 176. The court focused on the statute's title, which it said "can be persuasive of the statute's interpretation." *Id.* at 177. The court held that the word "Misdemeanors" in the title prevented expunction of other convictions, including forfeitures. *Id.*

However, the legislature removed "Misdemeanors" from the title in 2009 Wis. Act 28. The current title is "Special Disposition." Wis. Stat. § 973.015(1)(a).

With that change, nothing in § 973.015(1)(a) limits expunction to only misdemeanor offenses. *Melody P.M.*, 2010 WL 2303318 at 2; App. at 12. In *Melody P.M.*, the court upheld a circuit court order that expunged Melody P.M.'s forfeiture conviction. *Id.* at 1-2; App. at 11-12. The court deviated from *Michels* because that holding relied on a title that no longer exists, and it found nothing in the current language that prohibits expunction of forfeitures. *Id.* Thus, the court held that § 973.015(1)(a) gives a circuit court discretion to expunge forfeiture convictions. *Id.*

This Court should follow that holding. The court in *Melody P.M.* was correct; nothing in the statute's current language restricts expunction to

criminal offenses. Instead, the section includes language inclusive enough to include forfeitures within its scope. Most importantly, it provides that courts can expunge a conviction for a “violation of a law.” Wis. Stat. § 973.015(1)(a). Civil ordinance violations and other forfeitures are violations of a law. Thus, the plain language of the statute provides for expunction of forfeiture convictions.

Moreover, § 973.015(1)(c) specifically addresses which “violations of law” are not eligible for expunction. That section provides:

(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(1)(a).

Wis. Stat. § 973.015(1)(c). When two statutes relate to the same subject matter, the more specific statute controls over the general statute. *See Estate of Gonwa v. DHFS*, 2003 WI App 152, ¶ 32, 265 Wis.2d 913, 668 N.W.2d 122. While subsections (a) and (c) of § 973.015(1) are different sections rather than different statutes, the specific-controls-general doctrine also applies to subsections within a single statute. *See In re Sykes’ Estate*,

27 Wis. 2d 211, 217, 133 N.W.2d 805 (1965). Thus, § 973.015(1)(c), as the subsection specifically addressing which offenses are ineligible for expunction, controls over § 973.015(1)(a). Therefore, all convictions other than those that § 973.015(1)(c) excludes are eligible for expunction at the circuit courts' discretion.

For these reasons, this court should follow *Melody P.M.* and hold that § 973.015(1)(a) allows courts to expunge forfeiture convictions. The remaining issue is whether the phrase “at the time of sentencing” prevents a circuit court from expunging a forfeiture conviction after a dispositional hearing when a court commissioner presided over that hearing.

B. Under Wis. Stat. § 973.015(1)(a), circuit courts retain the discretionary power to expunge forfeiture convictions after a court commissioner, rather than a circuit court, presides over a disposition hearing.

Section 973.015(1)(a) provides that “the court may order [expunction] at the time of sentencing.” The language “at the time of sentencing” means that a circuit court must decide whether to order expunction at the time it sentences a defendant, it cannot delay the decision to a later date. *State v. Matasek*, 2013 WI App 63, 348 Wis. 2d 243, 831 N.W.2d 450. However, the circuit court did not sentence Frett; it delegated her case to a court commissioner. A court commissioner is not a “court.”

State ex. rel. Perry v. Wolke, 71 Wis. 2d 100, 106, 237 N.W.2d 638 (1976).

Moreover, court commissioners lack authority to order expunction.

Michaels, 142 Wis. 2d at 175-176 (holding that court commissioners may not order expunction because Wis. Stat. § 757.69 does not include that power in its description of the powers of commissioners). Therefore, the issue is whether the phrase “at the time of sentencing” means that a circuit court loses its discretion to order expunction when it delegates a dispositional hearing to a court commissioner, even though commissioners lack authority to order expunction.

The most reasonable interpretation of that phrase is that a circuit court, although it may delegate its authority to impose a forfeiture, retains jurisdiction to review sentencing and dispositional issues, including expunction, at its discretion. That interpretation makes the most sense in the context in which the language is used, because the surrounding language requires that circuit court judges, not commissioners, make expunction decisions. Moreover, the Wisconsin Constitution grants the circuit courts discretionary power to change court commissioner orders; if the legislature intended to limit that power in this situation it would have done so in unmistakable language.

1. In the context in which the phrase “at the time of sentencing” appears, it means sentencing and disposition hearings in front of circuit courts.

The language surrounding the phrase “at the time of sentencing” requires that circuit court judges make expunction decisions. Wis. Stat. § 973.015(1)(a). It also requires that the courts make those decisions by considering whether the person will benefit and if society will be harmed. *Id.* However, the circuit court’s interpretation of that phrase led to neither of those requirements being fulfilled. Considering that those two requirements surround the phrase “at the time of sentencing,” the only reasonable interpretation of that phrase is that it means a sentencing or disposition hearing presided over by a circuit court judge.

Context is an important clue to finding the meaning of statutory language. *Kalal*, 271 Wis. 2d 633, ¶ 46. In *Kalal*, our supreme court explained the importance of context in statutory interpretation:

[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.

Id. Thus, the Court should interpret the phrase “at the time of sentencing” by considering the context in which the language appears, and in such a

way that it fits with the surrounding language to form a coherent whole that supports the purpose of the statute. *Id.*, ¶¶ 46, 49.

In the context in which the phrase is used, “at the time of sentencing” means a sentencing or disposition hearing where a circuit court judge presides. The surrounding language provides that circuit court judges must make all expunction decisions; only “the court” may order expunction at the time of sentencing. *See* Wis. Stat. § 973.015(1)(a). In chapters 967 to 979, the word “court” means a circuit court. Wis. Stat. § 967.02(7). A court commissioner does not constitute a court. *State ex. rel. Perry v. Wolke*, 71 Wis. 2d 100, 106, 237 N.W.2d 638 (1976) (stating that the “uninterrupted uniform interpretation” of the word “court” has, for well over a hundred years, excluded a court commissioner). Thus, the plain language of section 973.015(1)(a) requires that circuit court judges make expunction decisions. Frett’s interpretation is the only reasonable one in that context; it puts expunction decisions in the hands of circuit court judges as the language requires.

Moreover, because “the court” immediately precedes the phrase “at the time of sentencing,” it follows that the time of sentencing must be a hearing before a circuit court. Thus, the plain language of 973.015(1)(a)

provides that a disposition hearing in front of a court commissioner is not the time of sentencing.

Other surrounding language provides additional support for this interpretation. The surrounding language provides the standard by which circuit courts should judge expunction requests. The test is whether the person will benefit from expunction and whether society will be harmed. Wis. Stat. § 973.015(1)(a). Frett's interpretation makes sense in that context. Her interpretation guarantees the application of this standard in all expunction decisions.

In contrast, the alternative interpretation adopted by the circuit court prevented it from ever having a chance to consider this statutory standard. Under that interpretation, expunction would be denied in all cases assigned to a court commissioner without any circuit court ever having an opportunity to consider the statutory standard. Thus, Frett's interpretation allows the statute to operate as a coherent whole whereas the alternative does not.

Moreover, the alternative interpretation creates unreasonable and absurd results. For example, in Frett's case the circuit court did not consider expunction because expunction was not ordered by a subordinate court that

had no power to order expunction. This doesn't just strip the circuit court of all power to ever consider expunction; it denies any possibility of expunction for many defendants merely because of an administrative decision to assign certain cases to court commissioners. It is absurd that expunction could be determined by administrative decisions instead of the merits of each expunction request. And it is absurd that a circuit court would never have a chance to consider expunction at any point in a case.

2. Circuit courts can order expunction after a court commissioner enters a disposition because Wis. Stat. § 973.015(1)(a) fails to state in unmistakable language that courts forfeit their discretionary power to order expunction when they assign cases to court commissioners.

The Wisconsin Constitution provides that, “[e]xcept as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state and such appellate jurisdiction as the legislature may prescribe by law.” Wis. Const. art. VII, § 8. A statute limits this original jurisdiction only when the statute does so in unmistakable language. *State v. Fischer*, 175 Wis. 69, 72, 184 N.W. 774 (1921); *Jezo v. Jezo*, 19 Wis. 2d 78, 81-82, 119 N.W.2d 471 (1963).

Unless a statute provides otherwise, a circuit court loses none of its powers when it delegates cases to a court commissioner. *See In re Commitment of Louise M.*, 205 Wis. 2d 162, 555 N.W.2d 807 (1996). Because circuit courts retain original jurisdiction even after delegating authority to a court commissioner, they can, at their discretion, review a commissioner's dispositional orders. *See id.* at 173 (holding that, in probable cause determinations under Chapter 51, a circuit court retains original jurisdiction and thus can review probable cause findings of court commissioners at its discretion). In *Louise M.*, the supreme court equated a circuit court's power to review court commissioner orders with a federal district court's power to review magistrate decisions. *Id.* at 174-175. Those federal district courts have discretion to review magistrate orders at the request of a party or *sua sponte*. *Thomas v. Arn*, 474 U.S. 140, 154-155 (1985). Thus, unless the statute provides otherwise, the circuit courts have authority to consider whether it is appropriate to make any changes to the dispositions entered by court commissioners.

Section 973.015(1)(a) does not unmistakably provide that a circuit court forfeits its power to order expunction when it allows a court commissioner to handle certain cases. The phrase that limits the circuit

court's power is "the court may order [expunction] at the time of sentencing." In the present case, the circuit court believed that the time of sentencing includes a dispositional hearing before a court commissioner. But the use of the word "court" excludes any hearing before a court commissioner. Thus, the section does not unmistakably limit a circuit court's power in this situation; instead, it provides the circuit court with sole power to order expunction.

In sum, this court should find that the plain language of § 973.015(1)(a) permits circuit courts to consider, at their discretion, expunction of forfeiture convictions after a dispositional hearing when a court commissioner presided over that hearing.

CONCLUSION

For all of these reasons, Frett respectfully requests that this Court reverse the circuit court order denying her motion to expunge and remand the matter so that the circuit court can consider her motion on the merits.

Dated this 14th day of April, 2014.

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) and that it is proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading a minimum of 2 points and maximum of 60 characters per line of body text. The length of this brief is 3,171 words.

Dated this 14th day of April, 2014.

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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, which complies with the requirements of Rule 809.19(12). I further certify that the electronic brief is identical in content and format to the printed form of the brief filed on or after 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 April, 2014.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of the brief, is an appendix that complies with Rule 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 14th day of April, 2014.

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