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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II

**06-19-2014**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

CASE NO. 2014AP000006

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KENOSHA COUNTY,

Plaintiff-Respondent,

v.

Blaire A. Frett,

Defendant-Appellant.

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ON APPEAL FROM THE CIRCUIT COURT FOR KENOSHA COUNTY, THE  
HONORABLE S. MICHAEL WILK, PRESIDING  
CIRCUIT COURT CASE NO. 2012FO000958

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BRIEF OF PLAINTIFF-RESPONDENT

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SUBMITTED BY:

TRACEY L. BRAUN  
ASSISTANT DISTRICT ATTORNEY  
STATE BAR NO. 1043147  
OFFICE OF THE DISTRICT ATTORNEY  
912 56<sup>TH</sup> STREET  
MOLINARO BUILDING  
KENOSHA, WI 53140  
(262) 653-2400

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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II  
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KENOSHA COUNTY,

Petitioner-Respondent,

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**ISSUE**

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?

Trial Court Answer: No.

**STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The Kenosha County District Attorney's Office is not requesting oral argument or publication as the issue before the court can be resolved through the application of existing law to the facts of this case.

## ARGUMENT

I. Wisconsin Statute §973.015, allows a Court to expunge a conviction punishable by less than six years imprisonment at the time of sentencing, if certain criteria are met.

A. Standard of Review.

A trial court's determination as to whether facts fulfill a particular legal standard is a question of law. Moua v. Northern States Power Co., 157 Wis.2d 177, 184; 458 N.W.2d 836, 838 (Ct.App.1990). The Court of Appeals determines a question of law under a de novo review. Id.

In the present case, only the determination of the application of §973.015 and its application to the issue of expunction is at issue. For that reason the State believes a de novo review is appropriate.

B. The Expunction statute applies only to criminal convictions.

The Circuit Court has discretion to expunge a defendants record pursuant to §973.015(1) Wis.Stats. In 2009 Wis. Act 28 the Wisconsin legislature changed §973.015 Wis.Stats., removing the term "Misdemeanors" from the title. The legislative intent in removing the term "Misdemeanors" from the title of that statute, was simply to broaden its applicability to selected Class H and Class I felony convictions. The clear legislative intent is evidenced by the fact that statutory language was added to

the statute clarifying when a Class I and Class H felony can be expunged. 2009 Wis. Act 28 never addresses ordinances, nor does §973.015 Wis.Stats.

The expunction statute is found at §973.015 Wis.Stats. The expunction statute is located within the "Criminal Code."

**967.01 Title and effective date.** Chapters 967 and 979 may be referred to as the criminal procedure code and shall be interpreted as a unit. Chapters 967 to 979 shall govern all criminal proceedings and is effective on July 1, 1970. Chapters 967 and 979 apply in all prosecutions commenced on or after that date.

Ordinance/municipal citations are not "criminal convictions" and are matters that are generally governed by Chapter 800 of the Wisconsin Statutes. Nothing in the expunction statute, §973.015, states that it has any applicability outside of the criminal code. The specific and intentional placement in the criminal code provides evidence of the clear intent of the legislature to limit its applicability to criminal matters. In cases where the legislature intended for expunction to apply in non-criminal matters they specifically did so. For example, in non-criminal juvenile matters the legislature specifically set forth rules for expunction in that context. Section 938.355(4m) allows juveniles who have attained the age of 17 to petition to have the court expunge prior adjudication

of delinquency. The legislature has simply not acted to allow expunction of non-criminal ordinance matters.

Littering is not a criminal offense, nor is it covered in the Wisconsin Statutes that contain the criminal code.

The defendant was remiss in not mentioning to the Court that §800.115 Wis.Stats. allows for the possibility of "Relief from Judgment," due to mistake, inadvertence, surprise or excusable neglect. That particular statute, that governs ordinances in Municipal Court, allows a defendant relief from judgment within six months of a conviction. §800.115 Wis.Stats. The defendant in this case didn't attempt to challenge this action until shortly before the hearing that was scheduled on October 17, 2013, more than a year after entering into a stipulated agreement.

Further, the Court never addresses the issue of expunction of ordinances in relation to making a decision in the current case. Since this issue is never properly explored, it isn't a valid issue to be decided on appeal. Further, the defense in their argument attempts to rely on State v. Melody P.M., however this case law is unpublished thus, there has been no clear precedent set in reference to expunction of ordinance violation. 327 Wis.2d 800 (Wis.App. 2010).

C. **Wisconsin Statute §973.015 clearly states that a defendant must request expunction at the time of sentencing.**

The Wisconsin Supreme Court just addressed the validity of the language, "At the time of sentencing," contained in §973.015 Wis.Stats. State v. Matasek, 2014 WI 27. The Wisconsin Supreme Court upheld the decision of the Court of Appeals holding that the phrase, "At the time of sentencing," means that "If a circuit court is going to exercise its discretion to expunge a record, the discretion must be exercised at the time of the sentencing proceeding. Id. at ¶6. Further, the Wisconsin Supreme Court indicated that they look at the text of a statute, interpreting the statute in a way to give effect to each word and to avoid surplusage. Id. at ¶12.

Section §973.015 Wis.Stats., the statute governing expunction in criminal cases,<sup>1</sup> states in relevant part as follows:

...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 the disposition...

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<sup>1</sup> Those punishable by less than six years imprisonment.

The statute then goes on to include/detail which felony type offenses are appropriate for expunction and any limitations assigned to the ability to expunge a defendants record.

If the Court were to ignore the plain language of the statute and disregard the words, "At the time of sentencing," it would in effect be rendering that phrase within the statute as meaningless. Id. at ¶19. Further, if the Court allows expunction to be granted by a Circuit Court after successful completion of a sentence, it simply adds language to the statute that isn't there. Id. at ¶20. The Wisconsin Supreme Court held that the legislative purpose can be met by requiring expunction decisions to be made at the time of sentencing. Id. at ¶43. Further, the Supreme Court of Wisconsin indicates that the, "Legislative purpose of §973.015 Wis.Stats is "to provide a break to young offenders who demonstrate the ability to comply with the law" and to "provide a means by which a trial court may, in appropriate cases, shield youthful offenders from some of the harsh consequences of a criminal conviction. Id. at ¶42.

In the present case, the defendant does not address the issue of expunction with the Court until August 28, 2013, more than a year after this defendant entered into

the Littering stipulation. The defendant had every opportunity to broach the subject of expunction at the time the agreement was entered in to before the Court Commissioner. However, the defendant would have had to be proactive and make a request to appear before the Court. No such request was made until over a year later.

Also, if the defendant had truly been interested in the option of expunction she could have requested a hearing before the Judge immediately after noticing a Court Commissioner verified the plea agreement. Regardless of the options that this defendant could have taken to see if expunction was even available to her, she chose to do nothing for over a year. To allow this defendant the opportunity to then get the benefit of expunction without following the proper procedure would render the legislative intent of §973.015 Wis.Stats. meaningless. Further to allow expunction of an ordinance violation adds language to the statute that doesn't presently exist. State v. Matesek deals with the expunction of criminal convictions, interpreting the legislative intent of §973.015 Wis.Stats. to be a buffer that is afforded under the criminal code to shield youthful offenders from some of the harsh consequences of a criminal conviction. Id. at ¶42.

**CONCLUSION**

The decision of the Circuit Court made on October 17, 2013 should be upheld as the defendant did not timely make a request for expunction nor does she have a legal right to expunction.

Dated at Kenosha, Wisconsin, this 19<sup>th</sup> day of June, 2014.

Respectfully submitted,

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

Tracey L. Braun  
Assistant District Attorney  
State Bar No. 1043147

Kenosha County  
District Attorney's Office  
912 56<sup>th</sup> Street  
Molinaro Building  
Kenosha, Wisconsin 53140  
(262) 653-2400

**CERTIFICATION AS TO FORM AND LENGTH**

I hereby certify that this brief conforms to the rules contained within Section 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 8 pages.

Dated this 19<sup>th</sup> day of June, 2014.

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Tracey L. Braun  
Assistant District Attorney  
State Bar No. 1043147  
Attorney for Plaintiff-Respondent

**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. 809.12(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 19<sup>th</sup> day of June, 2014.

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Tracey L. Braun  
Assistant District Attorney  
State Bar No. 1043147  
Attorney for Plaintiff-Respondent