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

Court of Appeals Case No. 2014AP000006

KENOSHA COUNTY,

Plaintiff-Respondent,

v.

BLAIRE A. FRETT,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

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

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ARGUMENT

I. The inclusion of Wis. Stat. § 973.015 in the Criminal Procedure Code does not limit its application to criminal cases because the text directly addresses some non-criminal cases.

The County argues that Wis. Stat. § 973.015(1m)(a)1 applies only to criminal cases because the statute is part of the Criminal Procedure Code. Respondent's Brief at 3-4. However, while the legislature placed § 973.015 in the Criminal Procedure Code, some of the statute's text directly addresses non-criminal cases. Wis. Stat. § 973.015(2m). Thus its placement in the Criminal Procedure Code is not an indication that the statute applies only in criminal cases.

Section 973.015(2m) provides for vacating or expunging certain juvenile delinquency adjudications. Delinquency adjudications are not criminal, *State v. Hezzie R.*, 219 Wis. 2d 848, 580 N.W.2d 660 (1998), and fall within the Juvenile Justice Code, rather than the Criminal Procedure Code, Wis. Stat. §§ 938.01 and 938.12. Since the text addresses non-criminal matters, the statute's placement within the Criminal Procedure Code does not limit its application to criminal cases.

Moreover, statute and section titles should not be used to create doubt when the language of a statute is clear. *See Brennan v. WERC*, 112

Wis. 2d 38, 41, 331 N.W.2d 667 (Ct. App. 1983) (holding that titles are useful tools when the statutory language is unclear, but should not be used to create doubt where none would otherwise exist). The language in § 973.015(1m)(a)1 is clear. The terms “offense” and “violation of a law” clearly encompass more than just crimes. Littering is an offense, a violation of a law. Had the legislature intended for expunction to apply only to criminal convictions, it would have used the term “crime” instead of the phrase “violation of a law.” In addition, other language limits expunction to violations of law for which the “maximum period of imprisonment is 6 years or less.” Wis. Stat. § 973.015(1m)(a)1. The maximum period of imprisonment for forfeitures is zero years; therefore, forfeitures fit within this language.

For these reasons, the statute’s inclusion in the criminal procedure code does not limit its application to criminal matters. As the Court held in *State v. Melody P.M.*, since the legislature amended the statute, there “is nothing in the plain language of § 973.015 limiting its application to only misdemeanor offenses.” 2010 WI App 100, ¶7, 327 Wis. 2d 800, 788 N.W.2d 385 (Ct. App 2010) (unpublished decision, copy provided in Frett’s initial Brief and Appendix) (citing *State ex rel. Kalal v. Circuit Court for*

Dane County, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110

(holding that statutory interpretation begins with the language of the statute, the inquiry stops if plain meaning is found in the statutory language).

Moreover, despite the County's claim that the legislative intent in removing the term "misdemeanors" from the title was only to expand expunction to certain felony convictions, the statute's text does not support that argument. *See id.*, ¶¶ 49-51 (holding that a statute's purpose should be determined by referencing the statute's language rather than extrinsic sources). Despite the County's argument, Resp. Brief at 2-3, it is not apparent how making certain felony convictions ineligible for expunction shows the legislature's intent to limit expunction to misdemeanors and certain felonies. It merely indicates that certain felony convictions that would otherwise come within the statute's scope are ineligible for expunction. In sum, § 973.015(1m)(a)1 allows a circuit court to expunge forfeiture convictions.

II. It is irrelevant that Frett did not request expunction before the hearing in front of the court commissioner because, under Wis. Stat. § 973.015(1m)(a)1, a circuit court can order expunction regardless of whether a defendant makes a request.

The issue is whether the circuit court had the power to order expunction after the court commissioner held a dispositional hearing. On that issue, it is irrelevant that Frett did not request expunction before the dispositional hearing or shortly thereafter. Of course, that issue only arises in non-criminal cases handled by court commissioners; in criminal cases, where sentencing is in front of a circuit court judge, a court could not address a defendant's request after sentencing without violating the "at the time of sentencing" restriction, Wis. Stat. § 973.015(1m)(a)1. In the present case, the circuit court's power to review court commissioner dispositional orders means it could order expunction without violating that requirement, in the same way that courts can order expunction at a resentencing hearing after an appeal or postconviction motion. In sum, as long as a court complies with the "time of sentencing" restriction, it has the power to order expunction regardless of whether or when a defendant makes a request.

Wis. Stat. § 973.015(1m)(a)1 authorizes courts to order expunction regardless of whether a defendant requests it. Nothing in the language

requires a defendant to request expunction. *See* Wis. Stat. § 973.015(1m)(a)1. While it is probably wise for a defendant desiring expunction to request it, the statute does not condition the court's power on such a request. *Id.* Thus, the plain language provides that a circuit court can order expunction despite the lack of a prompt request.

As to the timing of Frett's request, her delay relates to whether the circuit court should order expunction, not whether it can. Whether a court should order expunction in that circumstance falls within that court's discretion. A court could decide, in the exercise of its discretion, not to order expunction because the defendant did not address the issue in plea negotiations, failed to raise the issue before a court commissioner's disposition hearing, or waited too long after that hearing to make a request. But these considerations relate to whether a court should order expunction at its discretion, not whether it has the power to do so. In sum, the timing of Frett's request is irrelevant to the issue of whether the circuit court had the power to order expunction.

CONCLUSION

For all of these reasons, along with those stated in Frett's original brief, she respectfully requests that the Court reverse the circuit court order

denying her motion to expunge and remand the matter so that the circuit court can exercise its discretion in deciding whether to order expunction.

Dated this 24th day of July, 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 973 words.

Dated this 24th day of July, 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 24th day of July, 2014.

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