STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP6

KENOSHA COUNTY,

Plaintiff-Respondent,

v.

BLAIRE A. FRETT,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING EXPUNCTION ENTERED IN THE KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE S. MICHAEL WILK, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF WISCONSIN ATTORNEY GENERAL

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Attorney General agrees with the parties that oral argument is unnecessary because the briefs thoroughly address the issue.

The Attorney General asks that the opinion be published because it will clarify that Wis. Stat. § 973.015(1)(a) applies only to criminal convictions and not to forfeitures. Publication is also desirable because the unpublished opinion in *State v. Melody P.M.*, No. 2009AP2994 (Wis. Ct. App. June 10, 2010), which is currently citable for its persuasive value, erroneously holds that the statute applies to forfeitures. A published decision will prevent future reliance on the erroneous reasoning of *Melody P.M.* *See* A-Ap. 11-12.

STATEMENT OF FACTS

Defendant-Appellant Blaire A. Frett's ("Frett") statement of the case is sufficient to frame the issue for review. The Attorney General will include additional relevant facts in the argument section of this brief.

ARGUMENT

FRETT'S FORFEITURE CANNOT BE EXPUNGED UNDER WIS. STAT. § 973.015. [1]

A. Standard of Review.

Frett claims that Wis. Stat. § 973.015 applies to forfeitures. Frett's Brief at 6. This court must interpret Wis. Stat. § 973.015 to decide whether it applies to civil forfeitures. Statutory interpretation and the application of a statute to specific facts are questions of law that this court reviews independently but benefitting from the analysis of the circuit court and court of appeals. *State v. Matasek*, 2014 WI 27, ¶ 10, 353 Wis. 2d 601, 846 N.W.2d 811.

B. Legal Principles.

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. This court examines the language of the statute. *Matasek*, 353 Wis. 2d 601, ¶ 12. The context and structure of the statutory language is important to meaning. *Id.* This court interprets words according to their common and approved usage, and interprets technical words and phrases according to their technical meaning. *Id.*

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

This court gives effect to each word in order to avoid surplusage, and to avoid absurd, unreasonable, or implausible results. *Id.* ¶ 13. It also considers the purpose of the statute, and avoids results that are clearly at odds with the legislature's purpose. *Id.*

C. Relevant Statute.

Wisconsin Stat. § 973.015[2] states:

> **(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

[2] This language does not reflect the amendment made by 2013 Wisconsin Act 362, § 49. That act was enacted after Frett's forfeiture.

> 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).
>
> **(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.

D. The Circuit Court Cannot Expunge Any Civil Forfeiture Under Wis. Stat. § 973.015.

Wisconsin Stat. § 973.015(1)(a) applies only to criminal convictions. Examining the statutory language, its context and placement, the legislative history, the legislative purpose, and other extrinsic sources confirms that the legislature intended it to only apply to criminal convictions and not to civil forfeitures.

1. The statute's plain language excludes forfeitures from expunction.

The relevant language states, "[W]hen 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 . . . ." Wis. Stat. § 973.015(1)(a). Frett argues that the words "offense" and "violation of law" expand the plain language of the statute to encompass ordinance violations. Frett's Reply Brief at 2. The legislature's choice of those words does not expand

the statute's reach to ordinance violations. Based on the plain language the statute applies only to crimes with punishment of imprisonment. Forfeitures are not crimes punishable by imprisonment.

Likewise, a civil forfeiture does not involve a "sentence." Wisconsin Stat. § 973.015(1)(b) says, "The court shall order at the time of sentencing . . . ." In a civil forfeiture case, a court commissioner does not issue a sentence. The circuit court commissioner's powers articulated in Wis. Stat. § 757.69 do not include sentencing a person. A court commissioner may "receive noncontested forfeiture pleas, order the revocation or suspension of operating privileges and impose monetary penalties . . . ." Wis. Stat. § 757.69(1)(c).

Frett acknowledges that she was not sentenced within the meaning of Wis. Stat. § 973.015. *See* Frett's Brief at 9-10. In Frett's case, the court commissioner received Frett's plea and imposed a monetary penalty. By following this procedure, the court commissioner complied with Wis. Stat. § 66.0113(3)(b) (the court shall impose a forfeiture). The court commissioner did not sentence Frett, but imposed a forfeiture. Frett is not eligible for expunction of her forfeiture.

Frett disagrees and argues that the plain reading of the statute allows for expunction of civil forfeitures at any time. To the extent that the statutory language is ambiguous, extrinsic sources support the conclusion that forfeitures are not covered by Wis. Stat. § 973.015 and Frett cannot get her littering ticket expunged from her record.

2. Examining the placement of this statute and related statutes shows legislative intent to exclude forfeitures.

The context and placement of the statute also supports the conclusion that it does not apply to forfeitures. The placement of the statute is indicative of the legislative intent behind passing it. *See Kalal*, 271 Wis. 2d 633, ¶ 46 (Statutes should be interpreted in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.). The legislature placed Wis. Stat. § 973.015 within the criminal code. *See* Wis. Stat. § 967.01. Citations issued in violation of an ordinance are not "criminal convictions." Based on the placement of Wis. Stat. § 973.015 in the criminal code, the legislature indicated clear intent to apply expunction to criminal convictions and not to ordinance violations.

Frett argues that by allowing expunction of certain juvenile delinquency adjudications, the legislature's placement within the criminal code does not limit its applicability to criminal cases. Frett's Reply Brief at 1. Frett cites to the new language in Wis. Stat. § 973.015 effective April 25, 2014. 2013 Wisconsin Act 362, § 49. However, she does not cite to the version of Wis. Stat. § 973.015 that applies to her civil forfeiture action that occurred on July 20, 2012. The fact that the legislature later expanded Wis. Stat. § 973.015 to allow for expunction in human trafficking cases does not support Frett's argument that the statute applies to her civil forfeiture for littering. It does not. Placement in the criminal code shows legislative intent to apply expunction to criminal convictions only.

The different procedure for expunction in the juvenile code also supports this interpretation. The legislature explicitly set forth a procedure to allow

juveniles to petition to have non-criminal adjudications expunged from the record. Wis. Stat. § 938.355(4m). If Wis. Stat. § 973.015 applied to more than criminal convictions, there would be no need for § 938.355(4m). The legislative choice to articulate a different procedure in juvenile adjudications supports the plain interpretation that § 973.015 applies only to criminal convictions.

Likewise, the legislature made violations of county ordinances eligible for conditional discharge. *See* Wis. Stat. § 961.47(1). An individual is eligible for conditional discharge "If an individual has never been convicted of any offense or any ordinance violation relating to controlled substances, and if that individual pleads or is found guilty of possession or attempted possession of a controlled substance, the court may defer further proceedings and place the individual on probation." 9 Wiseman and Tobin, *Wisconsin Practice: Criminal Practice & Procedure* § 12:15 (2d ed. 2008). The legislature granted eligibility for conditional release to people who violate ordinances. The legislature did not include county ordinance violations in the language of Wis. Stat. § 973.015. The choice to include it in Wis. Stat. § 961.47 indicates a conscious choice to exclude it in Wis. Stat. § 973.015.

The legislature also allows for relief from judgments in civil forfeitures in Wis. Stat. § 800.115. In that statute, the legislature permitted people to seek relief from judgment entered in municipal court because of mistake, inadvertence, surprise, or excusable neglect. Wis. Stat. § 800.115(1). Expunction is not relief articulated by the legislature. Wisconsin Stat. § 800.115 provides people who violate ordinances a different kind of relief and offers that relief under different circumstances than those contemplated by Wis. Stat. § 973.015.

When the legislature articulated procedures for relief from forfeitures entered in municipal court and for relief from delinquency adjudications in juvenile court, by inference it did not intend for relief in the form of

expunction from forfeitures entered by court commissioners. If it did intend expunction for forfeitures, it would have done so explicitly. It did not. The related statutes provide context and affirm the plain reading of the statute: that expunction under Wis. Stat. § 973.015 is only available for criminal convictions and not for civil forfeitures.

3. Other sources state that forfeitures are not included in Wis. Stat. § 973.015.

Courts can also look to other extrinsic sources when a statute is ambiguous. *Kalal*, 271 Wis. 2d 633, ¶ 50. Prior case law indicates that Wis. Stat. § 973.015 applies only to criminal convictions. *See State v. Michaels*, 142 Wis. 2d 172, 417 N.W.2d 415 (Ct. App. 1987). In *Michaels*, the defendant made the same argument Frett makes in her brief. She argued that Wis. Stat. § 973.015 allowed courts to expunge civil forfeitures. *Michaels*, 142 Wis. 2d at 176. The court determined that the title of the statute, "Misdemeanors, special disposition," indicated a clear intent to have the statute only apply to criminal convictions. *Id.* at 176-77.

The court noted that a misdemeanor is a crime other than one punishable by imprisonment in the state prisons. *Id.* at 177 (citing Wis. Stat. § 939.60). The court noted that "conduct punishable only by a forfeiture is not a crime." *Id.* (citing Wis. Stat. § 939.12). Therefore, under *Michaels*, expunction of a civil forfeiture is not authorized.

Another supporting extrinsic source is the circuit court's criminal form entitled "Petition to Expunge Court Record of Conviction." *See* AG-Ap. 101. On that form a defendant must check boxes to meet the requirements of conviction. One of the boxes required states:

I was

- ☐ a. under the age of 25 at the time of the commission of the offense, and
  - was convicted of a misdemeanor,
  - was never previously convicted of a felony,
    - was convicted of a Class H felony that was not a violent offense as defined under §301.048(2)(bm) and was not a violation of §940.32, §948.03(2) or (3), or §948.095, Wis. Stats.,
    - was convicted of a Class I felony that was not a violent offense as defined under §301.048(2)(bm), Wis. Stats. and was not a violation of §948.23, Wis. Stats.
- ☐ b. under the age of 18 at the time of the commission of the offense and was convicted of a violation of §942.08(2)(b), (c), or (d), Wis. Stats..

Id. There is no spot on this form to indicate that the defendant had been ordered to pay a civil forfeiture. This further supports the interpretation that forfeitures are not subject to expunction under Wis. Stat. § 973.015.

4. Legislative history requires the conclusion that expunction is not eligible for civil forfeitures.

Legislative history can provide some guidance in interpreting the statutes. *State ex rel. Thomas v. Schwarz*, 2007 WI 57, ¶ 40, 300 Wis. 2d 381, 732 N.W.2d 1. Frett argues that the legislative history supports her conclusion that Wis. Stat. § 973.015 applies to ordinance violations and the resulting forfeitures. Frett's Brief at 6-7. The legislative history supports the opposite conclusion: that an ordinance violation is not eligible for expunction. In 2009, the legislature amended Wis. Stat. § 973.015 to allow expunction of felony convictions. 2009 Wisconsin Act 28.

Prior to 2009, Wis. Stat. § 973.015 read:

> **Misdemeanors, special disposition.**
>
> **(1)(a)** Subject to par. (b), when a person is 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. 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.
>
> **(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 (2007-08).

In the 2009 budget bill, the legislature erased the word "Misdemeanors" in the title of the statute and expanded the maximum period of imprisonment from one year or less to 6 years or less. 2009 Wisconsin Act 28, §§ 3384-3385. At the same time it created a class of

felony convictions that are not eligible for expunction. *Id.* at § 3386. The legislature intended to expand the statute to apply to certain felonies. It did not intend to expand it to forfeitures.

Prior to its amendment in 2009, the legislature allowed expunction of criminal convictions "when a person is 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." Wis. Stat. § 973.015(1)(a) (2007-08). Prior to that amendment, expunction was not available for cases involving forfeitures. *Michaels*, 142 Wis. 2d at 176-77. The continued use of those terms does not support Frett's argument that the statute applies to forfeitures.

The unpublished decision in *Melody P.M.* erroneously interpreted Wis. Stat. § 973.015. This court in *Melody P.M.* held that this change meant that by removing the word "Misdemeanors" from the title, the statute could now apply to forfeitures. A-Ap. 12. This court is not bound by the unpublished decision in *Melody P.M.* and should reject its reasoning. This court is bound by the published decision in *Michaels* concluding that civil forfeitures are not eligible for expunction. *See* 142 Wis. 2d at 177.

Nothing in the legislative history surrounding the adoption of 2009 Wisconsin Act 28 indicates an intention to open up Wis. Stat. § 973.015 to civil forfeitures. Instead, by expanding the maximum period of incarceration and removing the title "Misdemeanors" indicates intent to expand expunction eligibility to certain felonies. This court should reject Frett's argument that it shows an intention to open civil forfeitures up to expunction.

5. The legislature intended to protect certain criminal defendants from some consequences of their conviction.

Additionally, the legislative purpose indicates that only crimes and not civil forfeitures are eligible for expunction. The purpose of Wis. Stat. § 973.015 is to '"provide a means by which trial courts may, in appropriate cases, shield youthful offenders from some of the harsh consequences of criminal convictions.'" *State v. Leitner*, 2002 WI 77, ¶ 38, 253 Wis. 2d 449, 646 N.W.2d 341 (quoting *State v. Anderson*, 160 Wis. 2d 435, 440, 466 N.W.2d 681 (Ct. App. 1991)). The established purpose of Wis. Stat. § 973.015 applies only to criminal convictions and not civil forfeitures.

The legislature made a policy choice to allow expunction for certain criminal convictions, but not for forfeitures. The consequences stemming from a misdemeanor criminal conviction are much greater than those stemming from a civil forfeiture.

> A criminal conviction, whether the individual is in fact innocent or not, scars an individual for life. It is very difficult to move beyond the stigmatizing effects of having a criminal record. Research consistently shows that having a criminal record has negative consequences that continue long after a sentence has been served. Not only does a criminal record often lead to stigmatization and community isolation, it can hinder future success.

Amy Shlosberg et. al., *The Expungement Myth*, 75 Alb. L. Rev. 1229, 1237 (2012) (footnotes omitted).

The legislature made the policy choice to shield some offenders from the consequences of a criminal conviction. It allows courts the option of expunging criminal convictions of certain defendants. The

consequences are less severe in forfeiture cases. By excluding forfeitures the legislature made the choice not to shield those offenders from the lesser consequences of their actions. This policy choice was rational.

This policy purpose is especially evident here where Frett has already obtained some relief when the district attorney amended her underage drinking ticket to a littering ticket. In light of the ability of defendants in Frett's position to obtain that measure of relief, the legislature's policy choice to be less concerned about the consequences of ordinance violations is rational.

Based on the plain language of Wis. Stat. § 973.015, the context and placement of the statute, its legislative history, its legislative purpose and other extrinsic sources, Wis. Stat. § 973.015 does not apply to civil forfeitures. Therefore, the circuit court properly denied Frett's request for expunction. Wisconsin Stat. § 973.015 does not grant authority to allow courts to expunge non-criminal forfeitures.

E. The Circuit Court Properly Concluded That It Cannot Grant Expunction After Sentencing.

In addition to not having authority to grant expunction of a civil forfeiture, the circuit court lacks authority to grant any expunction after sentencing. If the court commissioner's imposition of monetary penalties can be considered sentencing, Frett's motion for expunction is untimely. If a circuit court chooses to exercise its discretion to grant expunction upon completion of a sentence, the court must make that decision at the time of sentencing. *Matasek*, 353 Wis. 2d 601, ¶ 6.

Frett received a citation for underage drinking on July 20, 2012 (1). On October 3, 2012, a court commissioner amended the citation to a violation of the

ordinance banning littering and ordered Frett to pay a forfeiture for littering (6). On August 28, 2013, Frett moved the circuit court for expunction of the civil forfeiture of littering (4).

Frett's motion for expunction was untimely. A circuit court cannot consider a request for expunction after sentencing. *Matasek*, 353 Wis. 2d 601, ¶ 6.

Frett argues that since she was not sentenced by a circuit court, that she was still eligible for expunction over a year later. Frett's Brief at 9-10. This is a similar argument to the one made by Matasek when he argued that because he was placed on probation, he was never sentenced. *See Matasek,* 353 Wis. 2d 601, ¶ 24. The supreme court found that Matasek's interpretation would lead to absurd results. *Id.* ¶ 36. Likewise, Frett's interpretation would lead to absurd results.

Requiring the decision about expunction at sentencing is consistent with the legislative purpose of the statute because it creates a meaningful incentive for the offender to avoid reoffending. *Id.* ¶ 43.

Under Frett's interpretation, she was never sentenced and would theoretically be able to petition the court for expunction at any time. Therefore, Wis. Stat. § 973.015 would grant greater rights to defendants in forfeiture actions than to criminal defendants. This interpretation should be avoided.

Frett argues that a court commissioner cannot sentence her within the meaning of Wis. Stat. § 973.015. Her argument demonstrates another example of why forfeitures are not eligible for expunction. Because a forfeiture is not a crime, she was never sentenced by a circuit court. Since she was never sentenced, she is not eligible for expunction. The circuit court cannot grant expunction after a court commissioner ordered a forfeiture without violating the provision of Wis. Stat. § 973.015

that requires the expunction decision to be made at sentencing.

Frett also argues that the circuit court retains authority to review the sentencing decision of the court commissioner. Frett's Brief at 15. Therefore, she asserts that the circuit court could review the court commissioner's decision not to order expunction. Frett's argument must fail. There would never be finality if circuit courts could review a court commissioner's decision at any point in the future.

Frett also claims it is irrelevant that she did not request expunction until over a year after the court commissioner ordered her forfeiture. Frett's Reply Brief at 4. It is true that a court *can* consider expunction at sentencing regardless of whether a defendant requests that consideration. Wis. Stat. § 973.015(1)(a). However, a circuit court *must* exercise its discretion regarding expunction at sentencing when a defendant requests it. Wis. JI-Criminal SM-36 (2013). Frett needed to request a sentencing hearing in front of the circuit court and request that court consider expunction rather than allow the court commissioner enter the forfeiture judgment.

The court commissioner did not sentence Frett. The court commissioner did not consider the possibility of expunction at the time it imposed the monetary penalty. The circuit court cannot review a discretionary determination that was never made. Frett is not asking the circuit court to review the court commissioner's determination and come to a different result. Instead, she asks the court to do something the court commissioner did not do and did not have authority to do. The circuit court cannot consider expunction of a forfeiture.

CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests this court affirm the circuit court's order denying Frett's motion for expunction.

Dated this 25th day of September, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,044 words.

Dated this 25th day of September, 2014.

_____
CHRISTINE A. REMINGTON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 25th day of September, 2014.

_____
CHRISTINE A. REMINGTON
Assistant Attorney General