STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

CASE NO. 2014AP2840-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER JOSEPH ALLEN,

DEFENDANT-APPELLANT.

APPEAL FROM AN AMENDED JUDGMENT OF CONVICTION AND AN ORDER DENYING, IN PART, A MOTION FOR POST-CONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. WAGNER PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not believe that oral argument is warranted in this case. The briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side.

Publication is warranted. No published Wisconsin case explains the nature or extent a sentencing court may consider information "relating to an expunged record of a conviction"[1] in formulating a sentence on a subsequent conviction. The issue is of statewide concern and is likely to recur until finally resolved by a published decision.

ARGUMENT

I. THE CIRCUIT COURT DID NOT MISUSE ITS SENTENCING DISCRETION IN REFERRING TO THE FACT OF ALLEN'S SUPERVISION WHICH RESULTED FROM AN EXPUNGED CONVICTION.

Christopher Allen appeals his amended judgment of conviction of homicide by intoxicated use of a vehicle and injury by intoxicated use of a vehicle causing great bodily harm and the denial of his post-conviction motion in part (42; 43).[2] The circuit court convicted Allen after his pleas of no contest (53:10) and sentenced him to concurrent terms totaling five years of initial confinement and four years of extended supervision (43). The convictions stem from a one car accident in which Aaron Calvin died and Keyon White suffered multiple serious injuries (2:3-4). Allen, the driver of the car, drove at a speed of ninety-seven miles an hour while he had a blood alcohol level of 0.122 grams (54:7; 2:3).

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[1] *State v. Leitner*, 2002 WI 77, ¶ 38, 253 Wis. 2d 449, 646 N.W.2d 341.

[2] The circuit court granted Allen's motion to vacate the DNA surcharge and amended his judgment of conviction (42:2; 43).

During its sentencing decision, the circuit court referred to a period of supervision Allen had successfully served resulting from a conviction later expunged (54:47-48).[3] Allen's brief at 10-11. Appellate courts review sentencing decisions under the erroneous exercise of discretion standard. *State v. Matasek*, 2014 WI 27, ¶ 37, 353 Wis. 2d 601, 846 N.W.2d 811. Allen claims he is entitled to resentencing because the circuit court relied on his period of supervision which, in his view, constitutes reliance upon an improper factor. *See State v. Leitner*, 2002 WI 77, ¶ 42, 253 Wis. 2d 449, 646 N.W.2d 341 ("A defendant is entitled to resentencing when a sentence is affected by a circuit court's reliance on an improper factor.").

Allen relies on *Leitner*, where the Wisconsin Supreme Court considered two issues of law turning on the interpretation of Wis. Stat. § 973.015:[4]

> Does Wis. Stat. § 973.015 (1999–2000) require district attorneys and law enforcement agencies to expunge their records documenting the facts underlying an expunged record of a conviction? (2) May a circuit court consider,

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[3] Allen's trial attorney did not object to the circuit court's reference to Allen's period of supervision during its sentencing remarks (54:45-53). The circuit court addressed the merits in its decision denying Allen's post-conviction claim (42). Moreover, he advanced in the circuit court and renews in this court, a claim of ineffective assistance of counsel. Therefore, like the circuit court, the State addresses the merits of his claim and does not rely on waiver/forfeiture.

[4] The legislature has amended the language of Wis. Stat. § 973.015 since the *Leitner* Court's decision. *See* Wis. Stat. § 973.015 (2013-14). The amendments do not affect Allen's argument.

> when sentencing an offender, the facts underlying a record of a conviction expunged under § 973.015?

Leitner, 253 Wis. 2d 449, ¶ 2. Agreeing with this court, the Court answered the first question "no" and second question "yes." *Id.*, ¶ 3.

Allen contends that despite the *Leitner* Court's holding that a circuit court may consider "the facts underlying a record of a conviction expunged under § 973.015," *id.*, ¶¶ 2-3, the circuit court's consideration of the fact of Allen's supervision here ran afoul of the *Leitner* Court's later admonition that "[a]n expunged record of a conviction cannot be considered at a subsequent sentencing." *Id.*, ¶ 39.

Allen reasons that since supervision on probation occurs only after a defendant has been convicted, consideration of his or her supervision amounts to consideration of the "expunged record of conviction" rather than the underlying facts of the record of conviction. The State understands Allen's position to limit the "underlying facts of the record of conviction" to the facts from which a fact finder could find the elements of the crime for which a defendant stands convicted.

Allen reads *Leitner* too broadly. Under a correct analysis of *Leitner*, the Court's rationale does not require resentencing in this case. The decision does not support Allen's broad reading of the Court's admonition to circuit courts against considering a prior expunged conviction. The

sentencing court may consider the fact of and a defendant's behavior on supervision as well as the facts supporting the prior expunged conviction.

To answer the question presented to the *Leitner* Court, that Court had to determine whether Wis. Stat. § 973.015 required destruction of records in the possession of entities other than the circuit courts. In concluding the statute did not reach records in the possession of the district attorney, the Department of Corrections and other entities, the Court necessarily focused on the records those entities kept. Thus in rejecting Leitner's arguments that the term "record" in Wis. Stat. § 973.015 could be read to include records beyond circuit court records, the Court focused on the fact that numerous agencies including non-governmental entities could possess records containing various facts surrounding an expunged conviction. *Id.*, ¶¶ 28-29.

In addressing the purpose of Wis. Stat. § 973.015,[5] the Court likewise focused on information contained in records of conviction which went beyond circuit court records.

> [N]othing in the language or history of § 973.015 indicates that the legislature intended record expunction under § 973.015 to wipe away ***all information relating***

[5] The *Leitner* Court agreed with this court's statement in *State v. Anderson*, 160 Wis. 2d 435, 440, 466 N.W.2d 681 (Ct. App. 1991), that Wis. Stat. § 973.015 "provides a means by which trial courts may, in appropriate cases, shield youthful offenders from some of the harsh consequences of criminal convictions." *Leitner,* 253 Wis. 2d 449, ¶ 38 (internal quotation marks omitted).

> ***to an expunged record of a conviction*** or to shield a [defendant] from all of the future consequences of the ***facts underlying a record of a conviction*** expunged under § 973.015.

Id., ¶ 38 (emphasis added).[6]

The Court stressed that

> district attorneys and law enforcement agencies have significant ongoing interests in maintaining ***case information***, even when a court record of a conviction has been expunged under Wis. Stat. § 973.015. ***Case information*** may assist in identifying suspects, determining whether a suspect might present a threat to officer safety, investigating and solving similar crimes, anticipating and disrupting future criminal actions, informing decisions about arrest or pressing charges, making decisions about bail and pre-trial release, making decisions about repeater charges, and making recommendations about sentencing.

Id., ¶ 40 (emphasis added).

In answering the second question presented, the *Leitner* Court focused on "***information about the facts underlying the records*** of [Leitner's] 1997 convictions expunged under Wis. Stat. § 973.015." *Id.*, ¶ 42 (emphasis added). In reaching its conclusion that the Legislature did not intend to deprive the circuit courts of relevant information regarding an offender when it adopted Wis. Stat. § 973.015, the *Leitner* Court observed:

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[6] The version of Wis. Stat. § 973.015 applicable to Allen no longer limits expunction to misdemeanants under the age of twenty-one. *See* Wis. Stat. § 973.015 (2013-14).

> It does not make sense to read Wis. Stat. § 973.015 to prohibit a circuit court from considering the ***underlying facts of an expunged record of conviction if those facts are located in a file of a district attorney or law enforcement agency that is not required to be expunged***, but nonetheless permit a circuit court to consider the same underlying facts supplied by another source.

Id.,¶ 46 (emphasis added). Here, the PSI writer included the information regarding Allen's probation "[a]ccording to NCIC/CIB and FBI criminal background check, the Department of Corrections — Corrections Account Cashiers Unit and a review of CCAP …." (19:5).[7]

By arguing *Leitner* limits circuit courts to the "'underlying facts' of [his] expunged battery conviction," Allen's brief at 13, Allen shifts the focus from the information about the facts ***underlying the record*** of his conviction to the facts underlying the crime itself. But that is not what *Leitner* holds. The facts underlying the record of conviction encompass more than merely the facts establishing the elements of the crime of conviction. Allen does not explain why facts about his successful completion of probation do not constitute "information about … the record[]" of his conviction. *Leitner*, 253 Wis. 2d 449, ¶ 42.

Allen claims that an interpretation of *Leitner* that distinguishes the fact of supervision from the record of

[7] The Attorney General and his or her assistants need not ask any court's permission to cite a PSI in a merits appellate brief. *State v. Buchanan,* 2013 WI 31, ¶ 24 & n.5, 346 Wis. 2d 735, 828 N.W.2d 847.

conviction itself "makes no sense." Allen's brief at 12. Not so. The sentencing court still may not use the record of conviction itself to enhance a sentence. The expunged record of conviction still may not form the basis of repeater allegations.[8] And the expunged record of conviction still may not be used to impeach a witness on cross-examination.

As the *Leitner* Court noted, Wisconsin law obliges sentencing courts "to acquire the 'full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence.'" *Leitner*, 253 Wis. 2d 449, ¶ 45 (quoting *Elias v. State*, 93 Wis. 2d 278, 285, 286 N.W.2d 559 (1980)); *see also State v. Prineas*, 2009 WI App 28, ¶ 28, 316 Wis. 2d 414, 766 N.W.2d 206. The fact that a defendant has successfully served a period of probation is a fact reflecting on the "character and behavior pattern" of a convicted defendant. One would think that prohibiting circuit courts from taking successful completion of probation into account at sentencing would not, as a general rule, be in defendants' best interest. The State is mildly surprised that the circuit court here counted Allen's successful probation as a negative in the calculus of his character and behavior.

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[8] The Legislature added a sentence referencing the Department of Transportation's records of OWI convictions kept pursuant to Wis. Stat. § 343.23(2)(a). *See* Wis. Stat. § 973.015 (2013-14). The effect of this new language on repeat violations of OWI is an open question not involved here.

Because the circuit court did not contravene the *Leitner* Court's admonition against considering an expunged record of conviction, it did not rely on an improper factor. Allen is not entitled to resentencing.

II. THIS COURT NEED NOT ADDRESS ALLEN'S INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIM.

Allen raises a companion claim alleging his trial attorney provided constitutionally ineffective assistance when she did not object to the sentencing court's reference to his period of supervision resulting from an expunged conviction. Allen's brief at 14-17.

To establish his trial attorney provided ineffective assistance of counsel, Allen must demonstrate both that his attorney's performance was deficient and that her performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Ziebart*, 2003 WI App 258, ¶ 15, 268 Wis. 2d 468, 673 N.W.2d 369. Allen bears the burden of proving both deficient performance and that the deficiency prejudiced his defense. *Strickland*, 466 U.S. at 687; *State v. Milanes*, 2006 WI App 259, ¶ 14, 297 Wis. 2d 684, 727 N.W.2d 94. To show deficient performance, a defendant must show that counsel's conduct was not objectively reasonable. *Strickland,* 466 U.S. at 687; *State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719.

Trial counsel does not perform deficiently when he or she fails to bring meritless challenges. *State v. Adamczak*, 2013 WI App 150, ¶ 23, 352 Wis. 2d 34, 841 N.W.2d 311 (citing *State v. Berggren,* 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110).

This court need not address Allen's ineffective-assistance claim. If as the trial court held and as argued in point I, the sentencing court did not misuse its discretion, *Adamczak* and *Berggren* dictate the failure of Allen's claim. If, on the other hand, the sentencing court did misuse its discretion, Allen prevails on the merits of that claim, given the State does not rely on waiver/forfeiture.

CONCLUSION

For the reasons given above, this court should affirm the amended judgment of conviction and the order denying Allen's claims for post-conviction relief.

Dated this 14th day of April, 2015.

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 2,082 words.

Dated this 14th day of April, 2015.

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WARREN D. WEINSTEIN
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 14th day of April, 2015.

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