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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2014AP002840-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER JOSEPH ALLEN,

Defendant-Appellant.

On Appeal from a Judgment of Conviction, and an Order
Denying in Part a Postconviction Motion, Entered in
Milwaukee County Circuit Court, the Honorable Jeffrey
Wagner, Presiding.

REPLY BRIEF

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ARGUMENT

I. The Circuit Court Improperly Considered Mr. Allen's Expunged Conviction and He Is Entitled to a New Sentencing Hearing.

In *State v. Leitner*, 2002 WI 77, ¶ 6, 253 Wis. 2d 449, 646 N.W.2d 341, the defendant was convicted of misdemeanor hit and run and operating a motor while intoxicated causing injury, both of which related to an incident that occurred in 1997. The two “1997 convictions” were expunged. *Id.*, ¶¶ 6-7.

Subsequently, the defendant was convicted of reckless driving causing great bodily harm. *Id.*, ¶ 4. At the sentencing hearing on the reckless driving case, the circuit court “did not consider the 1997 convictions,” but “considered the facts underlying the expunged records of the 1997 convictions.” *Id.*, ¶ 9. The circuit court stated at sentencing:

You say you have no problem with alcohol and yet this is the second incident that you have been involved in that has resulted in your being charged with an alcohol-related offense, although it was not charged in this particular case, but certainly alcohol was involved.

Id. On appeal, the Wisconsin Supreme Court held that the circuit court did not err. The Court stated that a circuit court may *not* consider an “expunged record of conviction” at sentencing, but may consider “the facts underlying a record of conviction.” *Id.*, ¶¶ 39, 48.

Based on *Leitner*, Mr. Allen asserts that in this case the circuit court improperly considered his expunged record of conviction. At sentencing, the circuit court's comments included that “I know that you've had something expunged,” “what I do give serious consideration for is that you – you were on supervision before, right, and that was expunged,” and “you had an opportunity to learn something from that.”

(See Def.'s Br. at 10-12). Unlike in *Leitner*, the circuit court was not taking into consideration the facts underlying Mr. Allen's expunged battery conviction, but that he had a prior conviction and that conviction was expunged. (See Def.'s Br. at 11).

In response, the State argues that Mr. Allen is not entitled to resentencing because "a circuit court may consider the fact of and a defendant's behavior on supervision." (State's Br. 4-5).

However, as discussed in Mr. Allen's initial brief (at 12-13), considering that a defendant was previously on *probation or supervision*, as the circuit court did in this case, *is* taking into consideration that he or she has a prior expunged record of conviction and violates *Leitner*.

Leitner clearly states that "[a]n expunged record of a conviction cannot be considered at a subsequent sentencing; an expunged record of conviction cannot be used for impeachment at trial under § 906.09(1); and an expunged record of conviction is not available for repeater sentence enhancement." *Id.*, ¶ 39 (emphasis added).

If a circuit court, as in this case, can specifically consider the fact that a defendant had "something expunged" and was previously "on supervision," what then did the Court in *Leitner* mean when it stated that "[a]n expunged record of a conviction cannot be considered at a subsequent sentencing"? The State does not provide an answer to this question.

Lastly, as the State notes, here, the circuit court "counted" Mr. Allen's successful completion of probation and expunction as a "negative." (State's Br. at 8). This seems to violate the spirit of the recent Wisconsin Supreme Court case, *State v. Hemp*, 2014 WI 129, 359 Wis. 2d 320, 856 N.W.2d 811.

In *Hemp*, at sentencing, the circuit court found the defendant eligible for expunction conditioned upon the successful completion of probation. *Id.*, ¶ 5. After completing probation, the defendant petitioned to expunge his record of conviction. *Id.*, ¶¶ 7-8. The circuit court denied the petition citing pending charges in another county based on a similar alleged drug offense. *Id.*, ¶ 8. The Wisconsin Supreme Court reversed holding in part that the circuit court improperly exercised its discretion when it denied the defendant expunction. *Id.*, ¶ 39. The Court stated that “[n]othing in the expungement statute grants the circuit court the authority to revisit an expungement decision.” *Id.*, ¶ 40.

Similar to *Hemp*, here, the circuit court appears to be “revisiting” or looking back and denying Mr. Allen the opportunity to take advantage of the expunction he earned because the circuit court did not like that Mr. Allen committed another offense.

Therefore, in this case, the circuit court improperly took into consideration Mr. Allen’s expunged conviction at sentencing, and he is entitled to a new sentencing hearing.

II Alternatively, Trial Counsel Was Ineffective for Failing to Object to the References to Mr. Allen’s Expunged Conviction in the PSI and at Sentencing, and Mr. Allen Is Entitled to an Evidentiary Hearing.

The State does not rely on waiver/forfeiture and asserts that this Court need not address Mr. Allen’s ineffective assistance of counsel claim. (State’s Br. at 10).

However, if this Court finds that Mr. Allen’s argument was waived/forfeited, as discussed in Mr. Allen’s initial brief (at 14-17), this Court should remand for an evidentiary hearing on ineffective assistance of counsel.

CONCLUSION

For the reasons stated, Christopher Joseph Allen respectfully requests that this Court direct the circuit court to grant a new sentencing hearing, or in the alternative, an evidentiary hearing.

Dated this 19th day of May, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in 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 of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 866 words.

CERTIFICATE 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 § 809.19(12). I further certify that:

This 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 19th day of May, 2015.

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