STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2014AP002840-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER JOSEPH ALLEN,

Defendant-Appellant-Petitioner.

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 A. Wagner, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

1. In ***State v. Leitner***, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341, this Court held that "an expunged record of conviction cannot be considered at a subsequent sentencing," but that a circuit court may consider the facts underlying an expunged conviction. Did the circuit court in this case violate ***Leitner*** by using a prior expunction as a basis for a harsher sentence, in the absence of any factual nexus between the expunged offense and this case?

   The postconviction court answered no, and the court of appeals affirmed.

2. Was trial counsel ineffective for failing to object to the references to Mr. Allen's expunged conviction in the pre-sentence investigation and at sentencing?

   The postconviction court answered no, and the court of appeals affirmed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has deemed this case appropriate for both oral argument and publication.

STATEMENT OF THE CASE AND FACTS

Twenty-five year old Christopher Joseph Allen's life was moving in the right direction. Charismatic, determined, and dedicated, Mr. Allen spent his time working on political campaigns, social programs, and at his full-time sales job for

Sprint. (54:23; App. 137; 19:8). A frequent recipient of awards at Sprint ranging from "Top Team Member" to "Sales Excellence Award," Mr. Allen's wages plus commissions totaled $53,000. (*See* 19).

On February 3, 2013, Mr. Allen, who describes himself as a social drinker, made an unfortunate "life-changing decision." (54:26, 45; App. 140, 159). After going to a bar to celebrate a birthday and job promotions, Mr. Allen made the mistake of getting into his car with two of his friends and co-workers—K. W. and A. C.—and driving. (2:2-4). Mr. Allen's car, traveling at approximately 97 miles per hour, hit a tree, resulting in injury to passenger K. W. and the death of passenger A. C. (2:2-4; 54:6; App. 120). Mr. Allen had a blood alcohol concentration of .122. (2:3).

The Charges and Plea

The State filed a criminal complaint charging Mr. Allen with four counts: (1) homicide by intoxicated use of a vehicle, contrary to Wis. Stat. § 940.09(1)(a); (2) homicide by intoxicated use of a vehicle with a prohibited alcohol concentration, contrary to Wis. Stat. § 940.09(1)(b); (3) injury by intoxicated use of a vehicle resulting in great bodily harm, contrary to Wis. Stat. § 940.25(1)(a); and (4) injury by intoxicated use of a vehicle resulting in great bodily harm with a prohibited alcohol concentration, contrary to Wis. Stat. § 940.25(1)(b). (2:1-2). Subsequently, the State amended the complaint to include a fifth count, homicide by negligent operation of a vehicle, contrary to Wis. Stat. § 940.10(1). (6).

On June 5, 2013, Mr. Allen pled no contest to count one and count three. (53:2, 10; 17). In exchange for Mr. Allen's plea, the State agreed to make a total recommendation of four years of initial confinement, leaving the amount of extended supervision up to the court. (53:3). Counts two and

four were dismissed by operation of law. (*Id.*). Count five was dismissed and read-in. (53:3, 11).

The Sentencing

A pre-sentence investigation (PSI) was completed without a recommendation.[1] (53:12). The PSI indicated that Mr. Allen had a municipal citation, which had been paid,[2] and a seven-year-old conviction for substantial battery in Milwaukee County Case No. 05-CF-2672 that had been expunged. (19:5-6, 11; App. 170-171, 172). Regarding the expunged conviction, the PSI stated:

> According to the CIB/FBI Criminal Background report, Mr. Allen was arrested for Substantial Battery on 5/11/05. Mr. Allen acknowledges that this incident involved a fight with another boy at high school and he was charged because the other boy lost a tooth in the fight and his mother pursued the case. On 10/07/05, he was given a withheld sentence with conditions that if he pay restitution in the amount of $1139.00, complete anger management classes and successfully completes 9 months of probation, the case shall be expunged. WICS database reveals that the offender successfully completed his term of probation on 07/07/06. This case was officially expunged under SS973.015 on 4/11/11.

(*Id.*).

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[1] In a merit appeal, counsel need not ask any court's permission to reference a PSI in an appellate brief. ***State v. Buchanan***, 2013 WI 31, ¶ 19, 346 Wis. 2d 735, 828 N.W.2d 847.

[2] The PSI indicated that the municipal citation was for "resisting and obstructing." (19:6; App. 171). However, at sentencing, the State and trial counsel agreed that it was a "traffic ticket" for speeding. (54:8, 27; App. 121, 141).

On July 25, 2013, a sentencing hearing was held. (54; App. 115-169). Trial counsel, Bridget Boyle, and Mr. Allen both stated that there were no additions or corrections to the PSI. (54:2; App. 116). Trial counsel indicated that she had obtained the PSI the day before and Mr. Allen had come in and reviewed it in its entirety. (*Id.*).

Pursuant to the plea agreement, the State recommended four years of initial confinement with the amount of supervision left to the court. (54:2-3; App. 116-117). During its sentencing comments, the State informed the court in pertinent part that "Mr. Allen has a substantial battery which was expunged, the State will grant that, back in '05." (54:8; App. 122). A. C.'s sister and mother spoke. (54:10-18; App. 124-132). K. W. also spoke. (54:18-20; App. 132-134).

Defense counsel asked the court to impose two years of initial confinement. (54:33; App. 147). Counsel did not address Mr. Allen's expunged battery conviction. During his allocution, Mr. Allen expressed remorse for his actions. (54:33-45; App. 147-159). Reverend Willie F. Dockery, Jr., spoke on Mr. Allen's behalf and asked for leniency in sentencing. (54:21-22; App. 135-136). Additionally, Muhid Dyer, who works for the "I Will Not Die Young Campaign," and had known Mr. Allen for 15 years, stated that Mr. Allen was not a threat to the community and would be better served participating in community service and paying restitution. (54:23-25; App. 137-139).

In its sentencing remarks, the court, the Honorable Jeffrey A. Wagner, stated that it was looking at "any record of any undesirable behavior" and explicitly discussed Mr. Allen's expunged conviction. The court commented:

THE COURT: The court looks at any record of – any record of any undesirable behavior – behavior problems or any history of other contacts.

…

THE COURT: Now, I know that you've had something expunged, a traffic ticket. Individuals, everybody gets – not – I wouldn't say everybody, but a lot of people get traffic tickets. I know that.

I don't give that a lot of serious consideration just so you know, but what I do give serious consideration for is that you – you were on supervision before, right, and that was expunged.

MR. ALLEN: Yes.

THE COURT: And you had every opportunity to go through that – that period of supervision with the understanding that – you know, you've got to comply with certain things, certainly the rules of law making sure that you don't do bad things because you can be punished for them if you do.

Having gone through that you would think that that would be a learning experience for yourself like I never want to be back in the criminal justice system.

I don't know anything about – quite frankly, about the case except for what it says in the presentence investigation report, but the message is – is that I should this with me [sic], it was expunged which is a good thing because I do that myself when the appropriate case comes to the Court, expunged so that wouldn't be wrapped around somebody's neck for the rest of their lives, especially a felony conviction, but you had an opportunity to learn something from that.

> That's what the Court's concerned about. I don't know what was going through your mind going 97 miles an hour on a city street….

(54:47-49; App. 161-163).

The court exceeded the State's recommendation of four years of initial confinement and sentenced Mr. Allen to a total prison sentence of nine years (five years of initial confinement and four years of extended supervision). (54:52-53; App. 166-167). In addition, the court ordered Mr. Allen to pay the stipulated amount of restitution, $16,320.08, and the $250 DNA surcharge. (54:52; App. 166).

The Postconviction Decision

Mr. Allen filed a postconviction motion. The postconviction motion asserted that he was entitled to a new sentencing hearing on the grounds that: (1) the circuit court erred when it considered his expunged conviction at sentencing; and (2) trial counsel was ineffective for failing to object to the references to the expunged conviction in the PSI and at sentencing. (36:1). In addition, Mr. Allen moved the court for an order vacating the $250 DNA surcharge imposed. (*Id.*).

Briefing was ordered. (37). The State argued in pertinent part that the court did not consider the expunged offense as a "conviction," but "simply considered the fact that the defendant did not learn from his prior supervision that he should not commit further crimes." (38:3).

After the completion of briefing, the circuit court issued a decision and order granting Mr. Allen's request to vacate the DNA surcharge, but denying the request for a new sentencing hearing. (42:2; App. 114). Regarding Mr. Allen's request for a new sentencing hearing, the circuit court stated

that it did not consider Mr. Allen's expunged "prior conviction," but considered his "prior supervision and his opportunity to learn from that experience." (42:1; App. 113). The circuit court stated:

> The court does not read ***Leitner*** to preclude a court from considering the *fact* of an offender's prior supervision and failure to learn from that experience as part of its duty at sentencing to acquire full knowledge of the character and behavior of the defendant. *See* ***State v. Hubert***, 181 Wis. 2d 333 (Ct. App. 1993).[3] In fact, that is the *only* fact the court assigned any significant weight to regarding the defendant's prior expunged conviction, and therefore, the court perceives no violation under ***Leitner***, and consequently no ineffective assistance on the part of the trial counsel for failing to raise an objection.

(42:2; App. 114).

The Court of Appeals Decision

The court of appeals affirmed in a published decision. ***State v. Allen***, 2015 WI App 96, 366 Wis. 2d 299, 873 N.W.2d 92. The majority opinion found that "[h]ere, the circuit court used the fact of Allen's prior supervision to 'elucidate his character'—particularly his failure to learn of the consequences of breaking the law." ***Id.***, ¶ 18 (App. 109). The majority concluded that ***Leitner*** permits sentencing courts to consider "the facts surrounding the entire underlying expunged criminal record," not just the facts of the underlying crime. ***Id.***, ¶¶ 15, 18 (App. 108, 109). In addition,

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[3] In ***State v. Hubert***, 181 Wis. 2d 333, 345-46, 510 N.W.2d 799 (Ct. App. 1993), the court of appeals examined whether a circuit court erroneously exercised its discretion in considering eleven uncharged offenses, *not* a conviction that was expunged after the successful completion of probation.

the majority found that trial counsel could not have been ineffective for failing to make meritless arguments. ***Id.***, ¶ 20 (App. 109-110).

The concurring opinion agreed with the result, but concluded that "the Majority has extended ***Leitner*** beyond what is necessary to decide the appeal before us." ***Id.***, ¶ 21 (Kessler, J., concurring) (App. 111). The opinion explained:

> [A]ll that is before us in this appeal is the trial court's consideration of Allen's *behavior*—namely that he successfully completed probation in the expunged case. We have no *documents* which comprise any part of the record of the expunged case. The presentence investigation report (PSI) prepared for *this* case refers to the sentence imposed in the expunged case. Allen's successful completion of probation in the expunged case is the *behavior* which the sentencing court considered. Whether the court learned of the successful probation from the PSI or otherwise is immaterial. Allen's *behavior* in successfully completing probation was evidence of his character.

Id., ¶ 23 (internal citation omitted) (App. 111-112).

Mr. Allen filed a petition for review of the decision of the court of appeals, which this Court granted on April 6, 2016.

ARGUMENT

I. The Circuit Court Improperly Considered Mr. Allen's Expunged Conviction When Imposing His Sentence.

A. Introduction.

Wis. Stat. § 973.015 (2005-2006)[4] authorizes the expunction of the record of a misdemeanor conviction if a person is under the age of twenty-one at the time of the commission of the offense and if the circuit court determines that the person will benefit and society will be not be harmed.[5]

Expunction "provides a means by which trial courts may, in appropriate cases, shield youthful offenders from some of the harsh consequences of criminal convictions." ***State v. Anderson***, 160 Wis. 2d 435, 440, 466 N.W.2d 681 (Ct. App. 1991); *see also* ***State v. Leitner***, 2002 WI 77, ¶ 38, 253 Wis. 2d 449, 646 N.W.2d 341. This allows an offender an opportunity to have a "fresh start without the burden of a criminal record and a second chance at becoming a law-abiding and productive member of the community." ***State v. Hemp***, 2014 WI 129, ¶¶ 18-20, 359 Wis. 2d 320, 856 N.W.2d 811.

At issue in this case is the extent to which a circuit court can utilize a previously expunged conviction in a subsequent case when imposing sentence.

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[4] The underlying offense for Mr. Allen's expunged conviction occurred in May 2005. (19:5-6; App. 170-171).

[5] In 2009, the legislature expanded Wis. Stat. § 973.015 to include certain felonies. *See* 2009 Wis. Act 28 §§ 3384-86.

B. Standard of review.

When sentencing a defendant, a circuit court is required to explain its reasoning for imposing a particular sentence. ***State v. Gallion***, 2004 WI 42, ¶ 39, 270 Wis. 2d 535, 678 N.W.2d 197. "Individualized sentencing…has long been a cornerstone to Wisconsin's criminal justice jurisprudence." ***Id.***, ¶ 48.

A court must consider three primary factors in determining an appropriate sentence: the gravity of the offense, the character of the defendant, and the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). Courts may also consider other mitigating or aggravating factors. ***Gallion***, 270 Wis. 2d 535, ¶ 43.

On appeal, a circuit court's sentencing decision is reviewed for an erroneous exercise of discretion. ***Id.***, ¶ 17. An error of law is automatically an erroneous exercise of discretion. ***Harris***, 119 Wis. 2d at 625. Whether the circuit court made an error of law is reviewed *de novo*. *See generally*, ***Ambrose v. Cont'l Ins. Co.***, 208 Wis. 2d 346, 356, 560 N.W.2d 309 (Ct. App. 1997).

C. Wisconsin law establishes that an expunged record of conviction cannot be considered at a subsequent sentencing, but a circuit court may consider the facts underlying an expunged conviction.

In 2002, in ***Leitner***, this Court addressed the consequences of expunging a conviction under Wis. Stat. § 973.015. ***Leitner***, 253 Wis. 2d 449, ¶ 2.

In ***Leitner***, the defendant entered a no contest plea to one count of reckless driving causing great bodily harm. ***Id.***, ¶ 4. The circuit court ordered a PSI. ***Id.***, ¶ 6. The PSI indicated that the defendant was previously convicted of a misdemeanor hit and run and operating a motor vehicle while intoxicated causing injury, both of which related to an incident that had occurred on October 28, 1997. ***Id.*** This information about the prior convictions in the PSI came from the district attorney's case files. ***Id.*** The PSI did not mention that the records of the 1997 convictions had been expunged. ***Id.***

During sentencing, the prosecutor agreed that it was inappropriate to refer to the defendant's 1997 convictions because the court records had been expunged. ***Id.***, ¶ 7. The prosecutor went on, however, to recount the facts underlying the expunged records of the defendant's 1997 convictions by relying on information in the police reports and the district attorney's case files. ***Id.***

Defense counsel objected to the circuit court's consideration of the expunged records of the convictions, but did not object to the State's recitation of the underlying facts. ***Id.***, ¶ 8. Defense counsel used the underlying facts of the 1997 convictions to emphasize the minor nature of the injury involved in the prior incident. ***Id.***

In its sentencing remarks, 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:

> 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, this Court held that Wis. § 973.015 does not require district attorneys or law enforcement agencies to expunge their records documenting the facts underlying an expunged record of a conviction. ***Id.***, ¶ 48.

This Court explained that "[e]xpunction of a court record of conviction enables an offender to have a clean start so far as the prior conviction is concerned." ***Id.***, ¶ 39. Expunging the record provides three advantages to the offender:

> An expunged record of a conviction cannot be considered at a subsequent sentencing; an expunged record of a conviction cannot be used for impeachment at trial under § 906.09(1); and an expunged record of a conviction is not available for repeater sentence enhancement.

Id. (footnotes omitted).

In addition, this Court held that "[a]lthough court records of expunged convictions cannot be considered by sentencing courts…a circuit court may consider the facts underlying a record of a conviction expunged under Wis. Stat. § 973.015." ***Id.***, ¶ 44. This Court then concluded that in ***Leitner***, "[t]he facts underlying the record of a conviction expunged under § 973.015 are significant to sentencing this defendant because the facts of his prior behavior elucidate his character, including the escalating harms caused by his interrelated intoxication and hit and run accidents." ***Id.***

In sum, ***Leitner*** establishes that "an expunged record of conviction cannot be considered at a subsequent sentencing." ***Id.***, ¶ 39. This makes sense because, as the State in ***Leitner*** conceded, "the record of conviction is, when expunged, a nullity." ***Id.***, ¶ 43. After a record of conviction is expunged, a defendant receives "a clean start so far as the prior conviction is concerned." ***Id.***, ¶ 39. Therefore, at a subsequent sentencing, ***Leitner*** mandates that a circuit court may *only* consider the facts underlying an expunged record of conviction, or in other words, the behaviors that led to the expunged conviction.

As discussed below, unlike in ***Leitner***, here, the circuit court improperly considered the expunged record of conviction.

D. The circuit court improperly considered Mr. Allen's expunged record of conviction when imposing his sentence and he is entitled to a new sentencing hearing.

In this case, the circuit court improperly considered Mr. Allen's expunged record of conviction when sentencing him. The circuit court stated in pertinent part:

> THE COURT: The court looks at any record of – any record of any undesirable behavior – behavior problems or any history of other contacts.
>
> …
>
> THE COURT: Now, I know that you've had something expunged, a traffic ticket. Individuals, everybody gets – not – I wouldn't say everybody, but a lot of people get traffic tickets. I know that.
>
> I don't give that a lot of serious consideration just so you know, but what I do give serious consideration for is that

> you – you were on supervision before, right, and that was expunged.
>
> MR. ALLEN: Yes.
>
> THE COURT: And you had every opportunity to go through that – that period of supervision with the understanding that – you know, you've got to comply with certain things, certainly the rules of law making sure that you don't do bad things because you can be punished for them if you do.
>
> Having gone through that you would think that that would be a learning experience for yourself like I never want to be back in the criminal justice system.
>
> I don't know anything about – quite frankly, about the case except for what it says in the presentence investigation report, but the message is – is that I should this with me [sic], it was expunged which is a good thing because I do that myself when the appropriate case comes to the Court, expunged so that wouldn't be wrapped around somebody's neck for the rest of their lives, especially a felony conviction, but you had an opportunity to learn something from that.
>
> That's what the Court's concerned about. I don't know what was going through your mind going 97 miles an hour on a city street….

(54:47-49; App. 161-163) (emphasis added).

Unlike in ***Leitner***, here, the circuit court did *not* take into consideration the underlying facts or behaviors that led to the expunged battery conviction. The circuit court did not discuss or consider the information regarding the underlying offense, i.e., that approximately seven years ago, when Mr. Allen was in high school, he got in a fight with another boy. (*See* 19:5-6; App. 170-171). Rather, the circuit court

specifically considered that Mr. Allen had a previous criminal conviction and it had been expunged. Significantly, the circuit court stated that "I know that you've had something expunged," and "I do give serious consideration…that you – you were on supervision before, right, and that was expunged." (54:47-48; App. 161-162). In effect, the circuit court negatively viewed Mr. Allen as repeat offender with a prior conviction, thus justifying, in the court's view, a harsher sentence, despite ***Leitner's*** clear holding that "[e]xpunction of a court record of a conviction enables an offender to have a clean start so far as the prior conviction is concerned." 253 Wis. 2d 449, ¶ 39.

Moreover, unlike ***Leitner***, the underlying facts of Mr. Allen's expunged battery conviction are not "interrelated" to the offenses to which Mr. Allen pled. In ***Leitner***, the expunged 1997 convictions and the offense at issue both involved alcohol and the use of a motor vehicle. *See* ***id.***, ¶¶ 4, 6, 9. ***Leitner*** stated that the facts underlying the expunged 1997 convictions "are significant to sentencing *this defendant* because the facts of his prior behavior elucidate his character, including the escalating harms caused by his interrelated intoxication and hit and run accidents." ***Id.***, ¶ 44 (emphasis added).

In contrast to ***Leitner***, here the facts of the expunged high school battery conviction as set forth in the PSI are not "interrelated" to the offenses in this case—homicide by intoxicated use of a vehicle and injury by intoxicated use of a vehicle. There is no indication in the record that the expunged battery involved alcohol or a motor vehicle. (19:6; App. 171). The facts underlying the expunged battery when considered in conjunction with this case fail to present a pattern of behavior that sheds light on Mr. Allen's character. Thus, in

this case, the circuit court improperly considered Mr. Allen's expunged battery conviction when imposing his sentence.

The court of appeals' majority opinion and the concurring opinion in this case effectively overrule ***Leitner***. Both opinions erroneously engraft additional language onto ***Leitner's*** holding. The majority opinion interprets ***Leitner*** to permit a sentencing court to consider "the facts surrounding the *entire* underlying expunged criminal record," such as a defendant's prior supervision. ***Allen***, 366 Wis. 2d at ¶ 15 (App. 107-108) (emphasis added). The concurring opinion suggests that a circuit court can consider a defendant's prior supervision so long as the *documents* of the court record are not involved. ***Id.***, ¶ 23 (Kessler, J., concurring) (App. 111-112). However, nothing in ***Leitner*** suggests that a circuit court may consider the facts surrounding the entire underlying expunged criminal record or that a defendant's prior supervision may be considered, so long as the court record documents are not utilized. ***Leitner*** unequivocally states that "an expunged record of conviction cannot be considered at a subsequent sentencing" and that expunction "enables an offender to have a clean start so far as the prior conviction is concerned." 253 Wis. 2d 449, ¶ 39.

Allowing a circuit court, as in this case, to consider that a defendant was previously on probation for an expunged conviction completely disregards ***Leitner's*** holding that expunction enables an offender to have a clean state so far as the prior conviction is concerned. ***Id.***

By considering that Mr. Allen was previously on probation, the court is in effect considering the expunged record of conviction. Probation is the direct result of a criminal conviction, and thus an individual would not serve a probation term unless convicted of a crime. *See generally,*

Wis. Stat. § 973.09(1)(a)(stating that if a person is convicted of a crime, other than a crime punishable by life imprisonment or prohibited for a particular offense by statute, the court may place a person on probation); Wis. Stat. § 972.13(7) (a judgment of conviction lists probation or extended supervision). Moreover, probation is particularly intertwined with expunction, as in order for a conviction to be expunged, a pern must first successfully complete probation. *See* Wis. Stat. § 973.015(2). Thus, given the intrinsic connection between probation and a conviction, allowing a sentencing court to consider a defendant's probation term for an expunged conviction as an aggravating factor is contrary to the rationale of ***Leitner***, as this plainly takes into consideration the expunged prior conviction.

Moreover, the simple fact of Mr. Allen's prior supervision for an expunged conviction (or any other defendant's prior supervision for that matter), does not elucidate individual character. In an ordinary criminal case, a past criminal conviction could be considered at a subsequent sentencing hearing as well as other factors, including probation history. In such cases, specific facts about an individual's compliance with supervision might indeed elucidate individual character, providing information relevant to an individualized weighing of factors that can legitimately be considered when imposing punishment. *See* ***Leitner***, ¶ 45 ("In Wisconsin, sentencing courts are obliged to acquire the 'full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence.'").

In contrast, the fact that a defendant was on prior supervision for an expunged conviction does not elucidate individual character. Expunction requires the successful completion of a sentence or probation in every case. *See* Wis. Stat. § 973.015.

And, here, the circuit court at sentencing did not consider any specific behaviors that led to Mr. Allen's eventually expunged conviction, any particulars about his supervision that should have educated him in relation to his current offense, or any other facts relevant to his individual character. The court relied instead on one generic fact—that, as part of satisfying the requirements for expunction, Mr. Allen had to satisfy the conditions of probation and supervision. This reasoning is problematic as it is equally applicable to every sentencing in which a defendant has a prior expunged conviction.

Consequently, if the court of appeals' decision in this case is upheld, the mere fact of an expunged conviction will always be a negative factor for sentencing purposes without consideration of any individual particulars or. Thus, contrary to the court of appeals decision, a circuit court should only be permitted to consider the facts or circumstances surrounding the expunged charge or offense.

Therefore, in this case, the circuit court improperly considered Mr. Allen's expunged record of conviction when imposing his sentence, and he is entitled to a new sentencing hearing. *See* ***Leitner***, 253 Wis. 2d 449, ¶ 42 (a defendant is entitled to resentencing when a sentence is affected by a circuit court's reliance on an improper factor).

II. 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.

A. Introduction.

This Court need not address whether trial counsel was ineffective unless it determines that Mr. Allen forfeited his challenge to the circuit court's consideration of his expunged conviction.

B. Legal principles.

An accused's right to effective assistance of counsel derives from the Sixth and Fourteenth Amendments to the United States Constitution, and art. I, sec. 7 of the Wisconsin Constitution. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

In assessing whether counsel's performance satisfied this constitutional standard, Wisconsin applies the two-part test outlined in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Smith***, 207 Wis. 2d at 273. To establish a deprivation of effective representation, a defendant must demonstrate both that: (1) counsel's performance was deficient, and (2) counsel's errors or omissions prejudiced the defendant. ***Id.***

To prove deficient performance, the defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** (citations omitted). The prejudice prong requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to

undermine confidence in the outcome." ***Id.*** at 276 (citations omitted). The defendant need only demonstrate to the court that the outcome is suspect, but need not establish that the final result of the proceeding would have been different. ***Id.***

In this case, as discussed below, 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's postconviction motion alleged sufficient facts entitling him to an evidentiary hearing.

C. Standard of review.

When a postconviction motion alleges sufficient material facts that, if true, would entitle the defendant to relief, the circuit court *must* hold an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50; ***State v. Allen***, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted). Whether a postconviction motion meets this standard is a question of law which this Court reviews *de novo*. ***Bentley***, 201 Wis. 2d 303 at 310.

A circuit court may, in its discretion, deny a motion without a hearing if the motion does not raise a question of fact, presents only conclusory allegations, or if a review of the record conclusively demonstrates that the defendant is not entitled to relief. ***Allen***, 274 Wis. 2d 568, ¶¶ 9, 12. This discretionary decision is subject to deferential review under the erroneous exercise of discretion standard. ***Id.***, ¶ 9. A proper exercise of discretion requires the court to examine relevant facts, apply proper legal standards and engage in rational decision process. ***Bentley***, 201 Wis. 2d at 318.

An ineffective assistance of counsel claim presents a mixed question of fact and law. ***State v. Thiel***, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. A circuit court's

findings of fact are upheld unless clearly erroneous. ***Id.*** Whether counsel was ineffective is a question of law that is reviewed *de novo*. ***Id.***

D. Trial counsel was ineffective for failing to object to the references to Mr. Allen's expunged conviction in the PSI and at sentencing.

In this case, trial counsel performed deficiently by failing to object to the references to Mr. Allen's expunged conviction in the PSI and at sentencing. (36:9). Given ***Leitner's*** explicit holding that a circuit court cannot consider an expunged record of conviction, a reasonably competent attorney would have objected and sought to exclude Mr. Allen's expunged conviction from consideration at sentencing. *See* ***Strickland***, 466 U.S. at 687-88 (to establish deficient performance, the defendant must show that counsel's representation fell below the objective standard of "reasonably effective assistance"). There can no reasonable strategic reason for failing to object in light of ***Leitner***. Trial counsel made no reference to and did not utilize the expunged conviction in the defense's sentencing argument. *Compare generally with* ***Leitner***, 253 Wis. 2d 449, ¶ 8 (noting that defense counsel used the underlying facts of the expunged convictions to emphasize the minor nature of the injury involved in the prior incident).

Moreover, trial counsel's failure to object was prejudicial. (36:9). The circuit court explicitly took into consideration the expunged record of conviction when sentencing Mr. Allen despite ***Leitner's*** clear holding that "[e]xpunction of a court record of a conviction enables an offender to have a clean start so far as the prior conviction is concerned." ***Id.***, ¶ 39. The court stated that "I do give serious consideration for is [sic] that you – you were on supervision

before, right, and that was expunged." (54:47-48; App. 161-162). The court also emphasized that Mr. Allen "had an opportunity to learn something" from the expunged conviction, but now was back in the criminal justice system. (*See id.*). The circuit court's comments reflect that it viewed the expunged conviction as an aggravating or negative factor in the case, imposing a confinement term that exceeded the State's recommendation. Thus, trial counsel's failure to object was prejudicial and undermines confidence in the outcome of the proceeding.

As a result, Mr. Allen was deprived of effective assistance of counsel, and this Court should remand for an evidentiary hearing. Mr. Allen's postconviction motion alleged sufficient facts, which if true, entitle him to relief.

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 13th day of May, 2016.

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 5,347 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 13th day of May, 2016.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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