STATE OF WISCONSIN

IN SUPREME COURT

No. 2014AP2840-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER JOSEPH ALLEN,

Defendant-Appellant-Petitioner.

REVIEW OF A PUBLISHED DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING A JUDGMENT OF CONVICTION AND THE PARTIAL DENIAL OF POSTCONVICTION 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 Supreme Court sets all cases for argument and publishes all of its decisions. This case should not be an exception.

ISSUES PRESENTED

Does this Court's holding in *State v. Leitner*, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341, require a sentencing court to ignore the fact that a defendant successfully completed probation for an expunged conviction?

Both the circuit court and the court of appeals answered "no."

ARGUMENT

I. THE CIRCUIT COURT DID NOT MISUSE ITS SENTENCING DISCRETION IN REFERRING TO THE FACT OF ALLEN'S SUPERVISION.

Christopher Allen appeals his amended judgment of conviction for homicide by intoxicated use of a vehicle and injury by intoxicated use of a vehicle causing great bodily harm and the partial denial of his post-conviction motion. (42; 43.)[1] The circuit court convicted Allen after his pleas of no contest and sentenced him to concurrent terms totaling

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

five years of initial confinement and four years of extended supervision. (53:10; 43.) The convictions stem from a one car accident in which one passenger died and a second passenger suffered multiple serious injuries. (2:3-4.) Allen, who had a blood alcohol level of 0.122 grams per 100 milliliters of blood, drove at a speed of ninety-seven miles an hour immediately prior to the accident. (54:7; 2:3.)

During its sentencing decision, the circuit court referred to a period of supervision Allen had successfully completed after a conviction later expunged. (54:47-48.) 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.").

Leitner presented this Court with two issues of law turning on the interpretation of Wis. Stat. § 973.015:[2]

> 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,

[2] 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?

Id. ¶ 2. 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 observed the fact that numerous agencies including non-governmental entities might possess records containing various facts surrounding an expunged conviction. *Id.* ¶¶ 28-29. Addressing those circumstances, the *Leitner* Court observed:

> [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 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).

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). The *Leitner* Court concluded that Wis. Stat. § 973.015 did not require destruction of records maintained by agencies outside the circuit court, which might contain facts bearing on expunged convictions. *Id.* ¶ 3.

Turning to 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). The Court observed, "[N]othing in Wis. Stat. § 973.015 states whether, in sentencing for a subsequent offense, a circuit court may consider the facts underlying a record of a conviction expunged under § 973.015." *Id.* ¶ 44.

In Wisconsin a sentencing court must consider all information relevant to a particular defendant, including information pertaining to the defendant's character and patterns of behavior. *See Elias v. State,* 93 Wis. 2d 278, 285, 286 N.W.2d 559 (1980) ("The responsibility of the sentencing court is to acquire full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence."). *See also Wasman v. United States*, 468 U.S. 559, 563 (1984) ("The sentencing court or jury must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed.").

The public policy *Elias* and *Wasman* illustrate, encompasses a sentencing court considering crimes of which a defendant has been acquitted, *State v. Bobbitt*, 178 Wis. 2d 11, 16–17, 503 N.W.2d 11 (Ct. App. 1993), as well as uncharged offenses, unproven offenses, and pending charges, *State v. Frey*, 2012 WI 99, ¶ 35, 343 Wis. 2d 358, 817 N.W.2d 436. Further, "[t]o assure that a circuit court has full information, prosecutors may not keep relevant information from a sentencing court." *Leitner*, 253 Wis. 2d 449, ¶ 45 (citing *State v. Williams*, 2002 WI 1, ¶ 43, 249 Wis. 2d 492, 637 N.W.2d 733).

The *Leitner* Court concluded 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:

> 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.

Leitner, 253 Wis. 2d 449, ¶ 46 (emphasis added). The Court concluded that, "the circuit court may consider, when sentencing an offender, the facts underlying a record of conviction expunged under § 973.015." *Id.* ¶ 48.

Allen contends here that the circuit court went beyond "the facts underlying a record of a conviction expunged under § 973.015." *Id.* According to Allen, the circuit court's

consideration of the fact of his supervision 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 appears to reason that since supervision on probation occurs only after a defendant has been convicted, consideration of a defendant's supervision for an expunged conviction amounts to consideration of the "expunged record of conviction" rather than the underlying facts evidenced in non-court records maintained by other entities. The State understands Allen's position to limit the "underlying facts of the record of conviction" to the factual circumstances forming the basis of the criminal episode for which a defendant stands convicted. Allen argues that the factual circumstances forming the basis of his expunged conviction, a battery, is not "interrelated" to his intoxicated use of a vehicle resulting in a death and a serious injury. He points out that the battery did not involve either alcohol or a vehicle. Allen's Br. 15.

In the State's view, Allen's reading of *Leitner* places too narrow a restriction on sentencing courts. First, Allen shifts the focus from the information about the facts ***underlying the record*** of his conviction to the facts underlying the crime itself or the criminal episode of which it was a part. 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 or even the circumstances surrounding the commission of the crime. Allen does not explain why the facts about his successful completion of probation do not constitute "information about … the record[]" of his conviction. *Leitner*, 253 Wis. 2d 449, ¶ 42.

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.) The author relied on several sources squarely within the *Leitner* Court's holding that § 973.015 does not require destruction of non-court records. The sources of the information upon which the circuit court relied are precisely within the *Leitner* Court's concern about "facts … located in a file of a district attorney or law enforcement agency that is not required to be expunged." *Id.* ¶ 46.

Second, 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. Nevertheless, whether successful completion of probation helped or

hindered Allen under these circumstances was for the sentencing court. The important question here is whether the sentencing court can consider successful completion of probation at all.

Lastly, the *Leitner* Court agreed with the court of appeals' 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). But shielding some of the harsh consequences of criminal convictions does not shield all of the harsh consequences of criminal convictions. Allen does not say where circuit courts should draw the line between underlying facts of a defendant's prior behavior a circuit court can consider because those facts elucidate character and those that it cannot consider because the facts do not elucidate character. The line appears to the State to be a difficult one to draw. As the Tenth Circuit Court of Appeals stated: "In the exercise of the difficult discretionary function of imposing sentence upon a convicted or confessed criminal, the sentencing judge is entitled to all the help he [or she] can get." *United States v. Majors,* 490 F.2d 1321, 1322 (10th Cir. 1974).

The circuit court did not violate *Leitner's* holding here. This Court should affirm the court of appeals.

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

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 postconviction claim. (42.) Moreover, Allen advanced in the circuit court, the court of appeals and renews in this Court, a claim of ineffective assistance of counsel. The court of appeals did not address his ineffective-assistance claim. *State v. Allen*, 2015 WI App 96, ¶ 20, 366 Wis. 2d 299, 873 N.W.2d 92. The State, like the circuit and court of appeals, does not rely on waiver/forfeiture but addresses the merits of his claim.

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 2nd day of June, 2016.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 2,038 words.

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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 2nd day of June, 2016.

_____
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