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.

REPLY BRIEF

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ARGUMENT

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

The State's brief (at 2), indicates that the circuit court "relied on [Mr. Allen's] period of supervision." To be clear, the circuit court specifically considered the fact that Mr. Allen was previously on supervision *and* that he had a prior conviction that was expunged. The circuit court stated in pertinent part:

> 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 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.

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

The circuit court's comments in this case are directly contrary to ***State v. Leitner***, which held that "an expunged record of a conviction *cannot* be considered at a subsequent sentencing" and 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." 2002 WI 77, ¶ 39, 253 Wis. 2d 449, 646 N.W.2d 341 (emphasis added). Moreover, unlike in ***Leitner***, here, the facts underlying Mr. Allen's expunged high school battery conviction were not specifically discussed by the circuit court nor were the facts "interrelated" to the offenses to which Mr. Allen pled. (*See* Allen Br. at 14-16). Thus, the circuit court improperly considered Mr. Allen's expunged conviction and he is entitled to a new sentencing hearing.

In response, the State argues that "[t]he 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." (State's Br. at 6-7). However, the State fails to provide any citation or quotation in support of this assertion that the record of conviction "encompass[es] more." Nor does the State explain what "more" includes.

The State then asserts that "Allen does not explain why the facts about his successful completion of probation do not constitute 'information about … the record[]'" of his conviction." (State's Br. at 7).

First, at no point does the circuit court characterize Mr. Allen's completion of probation as "successful." Rather, the circuit court blandly states that Mr. Allen was "on supervision" and "had every opportunity to go through that – that period of supervision." (54:47-49; Allen Br. App. 161-163).

Second, as explicitly discussed in Mr. Allen's initial brief (at 16-17), probation and an expunged conviction are intertwined. By considering that a defendant was previously on probation for an expunged conviction, the court is in effect considering the expunged record of conviction in violation of ***Leitner***. If a circuit court *can* rely on the sole fact that a defendant served probation on his expunged conviction as suggested by the State, what does ***Leitner's*** holding that "an expunged record of a conviction *cannot* be considered at a subsequent sentencing" mean? 2002 WI 77, ¶ 39. Can a court consider if the defendant went to trial or entered a plea? What about the details of a plea agreement? Is there anything left that a court cannot consider? The State provides no answer to these questions. Thus, holding that a circuit court can consider the sole fact that the defendant served a term of probation on his expunged conviction seems to effectively overrule ***Leitner's*** holding that "an expunged record of a conviction cannot be considered at a subsequent sentencing."

The State emphasizes that the presentence investigation (PSI) writer in this case relied on sources of information that were not required to be expunged or destroyed. (State's Br. at 7). However, Mr. Allen makes no claim that the PSI writer possessed information that should have been destroyed. At issue in this case is the extent to which a circuit court can consider and utilize such information. A district attorney's or law enforcement agency's possession of certain information, does not

automatically establish such information is relevant or permissible to consider when determining a defendant's sentence.

Contrary to the State's argument (at 7-8), the fact that a defendant has completed a period of probation does not elucidate individual character. Expunction necessarily requires the completion of probation in every case. *See* Wis. Stat. § 973.015. Moreover, here the circuit court did not consider any specific behaviors that led to Mr. Allen's 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 State provides no argument as to why the simple fact of Mr. Allen's completion of probation is any different from any other individual who has completed probation resulting in expunction.

The State also notes that "[o]ne 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." (State's Br. at 7). However, as discussed above, here the circuit court did not characterize Mr. Allen's probation as "successful" or discuss any particulars about his probation. Rather, the circuit court merely referred to the fact of Mr. Allen's probation, which does not elucidate individual character.

Lastly, the State indicates that "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." (State's Br. at 8). It is unclear what the State means by this. Precisely what facts or behaviors elucidate

character will depend on the particulars and circumstances of each case.

Here, simply considering that Mr. Allen previously served probation for an expunged conviction violates ***Leitner***, and Mr. Allen is entitled to a new sentencing hearing.

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.

The State does not rely on forfeiture and asserts that this Court need not address Mr. Allen's ineffective assistance of counsel claim. (State's Br. at 9). However, if this Court finds that Mr. Allen's argument was forfeited, as discussed in Mr. Allen's initial brief (at 21-22), 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 22nd day of June, 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 1,265 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 22nd day of June, 2016.

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