STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2015AP001517CR

MUSTAFA ABDEL-HAMID,

Defendant-Appellant.

APPEAL FROM THE CONVICTION IN CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE BONNIE L. GORDON, PRESIDING, AND ORDER DENYING POST-CONVICTION MOTION WITHOUT A HEARING ENTERED, THE HONORABLE MICHAEL D. GUOLEE PRESIDING

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Statement of Issue Presented

1. Did the circuit court abuse its discretion when it denied the defendant's request for expunction?

TRIAL COURT ANSWER: Yes.

Position on Oral Argument and Publication

Counsel believes this is an issue of first impression in Wisconsin and publication would be beneficial. However, the case applies well established cannons of statutory interpretation and counsel believes oral argument would be unnecessary.

Statement of Facts

On October 30, 2013, 17-year-old Mustafa Abdel-Hamid was in South Milwaukee with 17-year-old fellow classmate Hashem Dudin, 16-year-old A.B., and another boy, J.S., who was not charged. R2:2. After stopping at McDonald's and dropping the other boys off at school, Mr. Dudin drove the defendant-appellant and himself to the YMCA "to hang out until the others got out of school." Id. At 3:30 pm, they picked up the other two boys from school and all four went to the movies. Id. After the film, the four boys drove around town with Mr. Dudin in the passenger seat, the defendant-appellant behind the wheel, A.B. and J.S. in the backseat. *See* Id. A.B. had a bb gun and aimed it in the direction of a parked car, breaking the parked, unoccupied car's window. Id. From Mr. Dudin's statement to the police, it was learned that A.B. hit three other cars and another boy in the chest who was walking down the street carrying a box. Id. The police also learned from Mr. Dudin that he fired the bb gun, striking three car windows. Id. Later, Mr. Dudin admitted to striking five cars. Id. at 3. The defendant-appellant and J.S. did not fire the bb gun. Id.

The defendant-appellant admitted to the police officer from South Milwaukee to driving the other boys while they shot the bb gun not only on October 30, 2013, but also two weeks earlier in Oak Creek. Id.

Statement of the Case

Sixteen-year-old A.B. was prosecuted in juvenile court. J.S. was not charged. The two seventeen-year-olds, Mr. Dudin and the defendant-appellant, were charged as adults in this case.

Mr. Dudin and the defendant-appellant were charged with two counts of Criminal Damage to Property Less than $2500 as a party to a crime and one count of misdemeanor Battery as party to a crime. R2.

On August 13, 2014, both defendants plead guilty to Counts 1 and 2 (two counts of Criminal Damage to Property as a party to a crime), and the prosecutor dismissed and read in Count 3: Battery as party to a crime. R27:3-4 & 9. The assistant district attorney recommended that the two be sentenced to 24 months of probation. Id. at pp. 3-4. Restitution was part of the plea bargain. Id. Both defendants stipulated to restitution in writing prior to the sentencing hearing. R7. Restitution is joint and several between the codefendants and A.B. who was prosecuted as a juvenile. R27:28. The total amount was $1,957.21. R7. The restitution has been paid in full per a review of both defendant's cases on the Wisconsin Circuit Court Access Page.

The court held one sentencing hearing for both defendants. *See* R28; App. 101-149. The prosecutor characterized this as a "very odd case" in that the defendants had no prior criminal contacts, they presented themselves as intelligent and were well dressed. Id. at p. 5; App. 105.

Defense counsel noted that the defendant-appellant was not 18 years old at the time of these offenses and explained to the court that he had a very stable home life with parents that owned businesses in Racine County, two brothers, very good school records, steady employment, and

solid plans for his future. Id. at pp. 10-12; App. 110-112. Defense counsel's statements mirrored those made by the assistant district attorney – there was no "rhyme or reason" for the destructive behavior. Id. at p. 13; App. 113. Defense counsel further noted that the defendant-appellant never fired the bb gun. Id. at p. 14; App. 114. She concluded by asking the court to follow the prosecutor's recommendation of probation for a period of one to two years. Id. at pp. 15-16; App 115-116.

The defendant-appellant briefly addressed the court. He apologized and acknowledged the poor decision making that went into the incidents, the disappointment to his family, as well as the impact on the victims. Id. at p. 18; App. 118. He also reiterated his plans to attend college. Id.

The court decided not to follow the joint recommendation for probation. Id. at pp. 26-27; App. 126-127. The judge explained her reasoning for doing so as these crimes were more than "a simple destruction of property," but rather "an unlawful, personal intrusion which greatly diminishes or destroys the sense of security" in the community. Id. Even though no one was in the damaged cars, the court explained that when A.B. shot bbs at car windows, they did not consider the possibility that someone could have been inside the cars. Id. at p. 31; App. 131. The court also stated that the boy, hit with a bb in the chest, could have been blinded if he had been hit in the eye. Id. at p. 32; App. 132. Despite coming from good backgrounds with stable environments and a good educational history, the court noted it was repeated, destructive behavior and they were heard laughing about it on Mr. Dudin's cell phone recording taken at the time of the incident. Id. at p. 34; App. 134. When considering the protection of the community, the judge felt that incarceration was warranted. Id. at p. 35; App. 135.

Both defendants were sentenced to eight months in the House of Correction with Huber privileges for work and school on Count 1. Id. at p. 36; App. 136. On Count 2, the court imposed and stayed the maximum sentence of nine months for 18 months of probation consecutive to Count 1. Id. at p. 37; App. 137.

Defense counsel requested expunction. Id. at p. 16; App. 116. The assistant district attorney took no position on expunction. Id. at p. 20; App. 120. The court denied the request. Id. at p. 46; App. 146.

On May 22, 2015, Defendant's Postconviction Motion for Expunction was filed, requesting that the circuit court reconsider its decision based upon Abuse of Discretion and a New Factor. R19. No hearing was held on the motion. *See* R1. On June 3, 2015, the Honorable Michael Guolee denied the defendant's motion by written order. R20; App. 166-168.

The defendant-appellant has no violations of the probationary rules, new offenses or arrests. R19:8; App. 157. During his jail sentence imposed on Count 1, he attended college and worked part-time. Id. He received good time credit on his sentence. Id. At the time the postconviction motion was filed on May 22, 2015, the defendant-appellant had completed 32 hours of community service, as community service was a condition of his probation. Id. at pp. 8 & 16; App. 157 & 165. On March 8, 2015, he paid $1,000 towards the total restitution of $1,957.21 owed joint and several by all three boys according to a conversation with his probation officer. R9:8; App. 157. Based upon the information provided above, the defendant-appellant is on track to successfully complete his probation in February of 2016.

Argument

I. The circuit court abused its discretion when it denied the defendant's request for expunction.

Expunction is a special disposition created by statue for individuals under the age of 25 years old at the time of the offense who the circuit court determines would benefit from expunction and society would not be harmed by having his or her conviction expunged. Wis. Stat. §973.015(1m)(a)(1). This is part of sentencing. Sentencing decisions are discretionary and appellate courts review only whether the trial court erroneously exercised its discretion. State v. Spears, 227 Wis.2d 495, 506, 596 N.W.2d 375 (1999). For a discretionary determination to be upheld, it must "be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law." Hartung v. Hartung, 102 Wis.2d 58, 66, 306 N.W.2d 16 (Wis. 1981). Most importantly, it "must be the product of a rational mental process by which the facts of the record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." Id. The analysis starts with the presumption that the court has acted reasonably and the defendant-appellant has the burden to show unreasonableness from the record. State v. Haskins, 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct.App.1987); *See also* State v. Harris, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984).

A. Benefit to the Defendant Criterion

To determine if the circuit court abused its discretion when denying expunction eligibility, we look first to the facts relied upon and law applied by the circuit court in each ruling when the court found the defendant-appellant would not benefit from expunction. Both judges held that the defendant-appellant failed to meet the first criteria – a defendant must

benefit from expunction. Both rulings were an abuse of discretion as both were not based upon facts in the Record. Simply put, all facts in the Record indicate the defendant-appellant would benefit from expunction.

i. Sentencing

The sentencing judge ruled that the defendant-appellant would not benefit from having the conviction expunged upon successful completion of his sentence. First, no fact on the Record supports the court's finding that expunction would not benefit the defendant-appellant. *See* R28; App. 101-149. Inversely, there is no fact in the Record to support the conclusion that keeping this conviction on the defendant-appellant's record would in some way benefit him or have no consequence. The court did not cite to any facts that it considered. *See* Id. The court instead stated "Furthermore, given the types of actions – conduct that you had – and I should indicate that I think, notwithstanding the fact that neither of you have a criminal record, nonetheless you would not benefit from expungement, either of you." Id. at p. 46; App. 146. Nothing in Wis. Stat. §973.015 states that a circuit court can disregard facts, perhaps one of the most important facts, when determining whether a defendant would benefit from being found eligible – that being the defendant has no prior record. If "given the types of actions – conduct you had" is determined to be a fact by this Court, the Record still lacks a rational explanation as to how these "type of actions" results in the defendant-appellant not benefiting from expunction. These "type of actions" could be interpreted as the actions taken by any defendant in the commission of Criminal Damage to Property as party to a crime.

The Record contains ample facts to support a finding that the defendant-appellant would benefit from expunction, in addition to this being

the defendant-appellant's only criminal offense. The court was told by defense counsel that he was an "A/B honor roll" high-school student, he was "enrolled at UWM for the upcoming semester," was "...going to be studying biomedical science there with his goal ultimately [of] ultimately going to apply for the very well respected pharmacy program UWM runs and it is his goal to secure employment in that field," and that he has a good employment history for someone so young as he worked "...part-time for most of his high school career."R28:11-12; App. 111-112. The defendant-appellant's comments demonstrate his remorse, which is another fact the court did not consider. At Sentencing, the defendant-appellant stated:

> First, I'd like to say that that was like the worst decision I've ever made to say the least and that I apologize to, you know, all the people who were effected. Obviously, this was a huge inconvenience to them. They did nothing to deserve this. It was completely stupid. It was against what my parents have always taught me and they were completely disappointed because I was raised my whole life with high expectations and this is – and this was just a huge disappointment. And the guilt that followed was, you – is one of those things that you wish to you could take back, Your Honor. As you know this is a lesson I expect to learn from. I have high plans for the future, education wise, and I hope this – that this will be a lesson learned, you know. I don't plan on coming back to court, but that's – I apologize for everything that happened. Id. at 18; App. 118.

ii. Postconviction Ruling

The postconviction motion was denied by written order based upon a finding that the defendant-appellant would not benefit from expunction. Judge Guolee wrote: "Ultimately, the court determined that the defendant would not benefit by having this case expunged and that the community

has an interest in having these convictions remain on his record. This court will not disturb those determinations." R20:2; App. 162. Just as at Sentencing, the facts on the Record were not analyzed to determine whether or not the defendant would benefit from having the conviction expunged. Instead, the court relies on the previous ruling.

The court had more facts available to it than at the time of Sentencing by way of attachments to the defendant-appellant's postconviction motion. *See* R19; App.158-165. The Court did not consider the defendant-appellant's attached UW-Milwaukee transcript showing he followed through with becoming a full-time college student, as he had told the sentencing court he would, and obtained a 4.0 GPA while being incarcerated on this case. The court stated in a footnote that while the defendant-appellant was granted a probationary EMT license, there was nothing to say he would be prevented from obtaining a regular EMT license upon completion of his probation, "[b]ut if he is not, it is yet another consequence of the defendant's particularly poor decision-making in this case." R20:3; App. 168. While it is true that the defendant-appellant may be able to obtain a regular EMT license in the future, the fact that the defendant-appellant was only allowed a probationary EMT license shows that it is untrue that he would not benefit from expunction. The consequence of having this conviction on his record have already started and will become more significant as he moves toward becoming a doctor.

The facts of this case are not that of a defendant who tells a sentencing court that he or she wants to some day be a professional or attend college some day. Here, the facts are specific and concrete. The defendant-appellant has a perfect college GPA, has taken science classes needed to apply to medical school, and has obtained his probationary EMT

license to gain hands-on experience in the medical field, all with the goal of becoming a doctor.

B. Harm to Society Criterion

i. Sentencing Court

At Sentencing, the court found society would be harmed by granting expunction. The court stated that it did not consider the bb gun or the dismissed and read in Battery party to a crime when reaching the conclusion that society would be harmed. R28:45; App. 145. The Battery party to a crime was charged because 16-year-old A.B. fired the bb gun at a 15-year-old boy, hitting him in the chest. *See* R2. The court specifically stated:

> ...these actions were extremely disruptive to members of our community and a young 15 old was – received minor injuries from the result of a BB gun shot at him. So, I believe the community would be harmed by expungement. Not because of the BB gun or the battery that was dismissed and read in, but the totality of the events. R28:45; App. 145.
>
> ....
>
> I believe that these are acts in a way that frighten members of our community, rob them of their sense of security, are disruptive to neighbors, neighborhoods and therefore, it would harm the community for expungement. Id. at p. 46; App. 146.

This writer is unaware of any published case law that has interpreted the statutory criterion of harm to society under Wis. Stat. §973.015(1m)(a)(1). Such a question would be reviewed de novo, as it presents a question of law. Village of Shorewood v. Steinberg, 174 Wis.2d 191, 201, 496 N.W.2d 57 (1993). It would begin with the language of the statute (Id), examined within the context in which it is used (Alberte v. Anew Health Care Servs., Inc., 2000 WI 7, ¶10, 232 Wis.2d 587, 605 N.W.2d 515).

> ...[S]cope, context, and purpose are perfectly relevant to a plain-meaning interpretation of an unambiguous statute as long as the scope, context, and purpose are ascertainable from the text and structure of the statute itself, rather than extrinsic sources, such as legislative history. State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶48, 271 Wis.2d 633, 681 N.W.2d 110.

As expunction only goes into effect upon the successfully completion of a sentence, in this case probation, whether society would be harmed requires the courts to look to the future after the expunction occurs. The defendant-appellant asserts this criterion calls for courts to make a determination as to whether a particular defendant, based upon specific facts known to the court, will pose harm to society by reoffending in the future. This interpretation is in keeping with the purpose of the statute as described in Matasek.

> The legislative purpose of Wis. Stat. 973.015 is 'to provide a break to young offenders who demonstrate the ability to comply with the law' and 'provide [ ] a means by which trial courts may, in appropriate cases, shield youthful offenders from some of the harsh consequences of criminal convictions. State v. Matasek, 2014 WI 27, ¶42, 353 Wis.2d 601,846 N.W.2d 811.

Applying this interpretation to this case, we find no facts that would lead one to believe the defendant-appellant would reoffend.

Further search of the Record for facts to support the court's finding that expunction would harm society shows vague statements were used to support the finding. The "totality of the events" is not a fact. If it were, that is the only phrase sentencing courts would need to repeat to deny expunction requests regardless of the charge or facts of the case. The court also erred when relying upon language about these acts being

frightening, disruptive and robbing community members of their sense of security. This is what crime does. Again, these are not facts. These are conclusions about the impact of crime in general. If these conclusions were taken as facts, sentencing courts could repeat frightening, disruptive and robbing community members of their sense of security in every criminal case as a basis to find harm to the community and, thus, deny expunction.

ii. Posconviction Ruling

The circuit court also did not analyze the second criterion – whether society would be harmed – when it denied the defendant-appellant's postconviction motion. The court ruled that the sentencing judge's

> ...ruling directly addressed the statutory requirements the court is supposed to consider when deciding the issue of expungement. Ultimately, the court determined that the defendant would not benefit by having this case expunged and that the community has an interest in having these convictions remain on his record. This court will not disturb those determinations. R20:1-2; App. 166-167.

Neither court considered that society would be harmed by not making the defendant-appellant eligible for expunction. The defendant-appellant is on track to attend medical school and become a doctor – if a medical school will accept him. Expunction will help the defendant-appellant to be accepted into medical school. Attached to the postconviction motion was the Association of American Medical Colleges' Group on Student Affairs Recommendations regarding Criminal Background Checks for Medical School Applicants. R19; App. 160. Neither court considered the impact this conviction would have on the defendant-appellant being accepted into medical school. The news is filled with stories about how we need more doctors in this country.

> With a growing, aging population, the demand for physicians has intensified, and communities around the country are already experiencing doctor shortages. A 2015 study conducted for the AAMC by IHS Inc., predicts that by the year 2025 the United States will face a shortage of between 46,000-90,000 physicians. There will be shortages in both primary and specialty care, and specialty shortages will be particularly large. American Association of Medical Colleges, *GME Funding: How to Fix the Doctor Shortage,* https://www.aamc.org/advocacy/campaigns_and_coalitions/fixdocshortage/

C. Statutory Interpretation

Most unsettling, in both rulings, is the use of language that alludes to the denial of expunction eligibility as punishment intended to follow the defendant-appellant throughout his lifetime. The circuit court ruled: "With regard to Mr. Abdel-Hamid, life is a series of choices. Sometimes we make poor choices and sometimes we need to learn that there are consequences for our actions and that they follow us." R28:45; App. 145. The Decision and Order Denying Motion for Expunction read:

> The [sentencing] court expressed to the defendant that in an ordered society there are consequences for our actions and that the decisions we make can follow us throughout our lives. It's a tough but important lesson to learn, and it's unfortunate that it had to come to this defendant in the context of a criminal prosecution. R20:2-3; App. 167-168.

Wisconsin Statute §973.015 does not state that requests for expunction eligibility should be denied to further punish a defendant. No law states that the text of two expunction criteria should be mentioned but the true application of those criteria set aside when a circuit court feels the consequences of a conviction should last a lifetime. Aside from usurping the application of the criteria listed in Wis. Stat. §973.015(1m)(a)(1), the circuit court's reasoning must be rejected by this Court as it could be

applied to any criminal case as a basis to deny expunction eligibility under subsection (1). In every criminal case a defendant could be told "in an ordered society there are consequences for our actions and that the decisions we make can follow us throughout our lives." This application, not of law, but of an overarching positive social concept is so broad that it fits every criminal case.

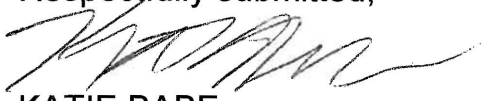
Conclusion

While this Court can grant relief based on the Record being absent of facts to support the circuit court's conclusion that the defendant-appellant would not benefit and society would be harmed from the defendant-appellant being made eligible for expunction, this case presents the Court the opportunity to provide the circuit court with guidance in the statutory interpretation of when a defendant would benefit from expunction and when expunction of a case harms society.

For the above reasons, the defendant-appellant requests this Court find him eligible for expunction. In the alternative, the defendant-appellant requests the Court remand this case to the circuit court for a hearing on expunction with instruction as to how the two prongs of Wis. Stat. §973.015(1m)(a)(1) – benefit to the defendant and harm to society – are to be applied in this case.

Dated at Pewaukee, Wisconsin this 30th day of September, 2015.

Respectfully submitted,



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FORM AND LENGTH CERTIFICATION – RULE 809.19(8)(d)

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. The text is 13 point type and the length of the appeal is 3,780 words.

Katie Babe

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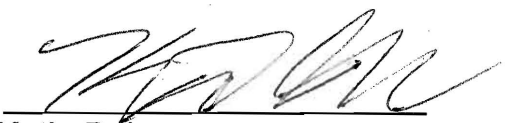

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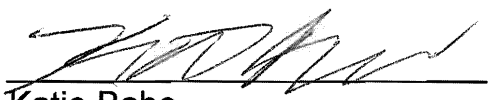
APPENDIX CERTIFICATION – RULE 809.19(2)(b)

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 s.

809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.



Katie Babe

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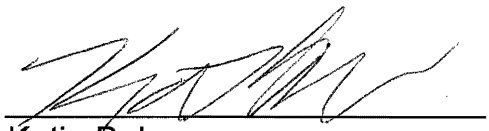
I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of s. 809.19(13). I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

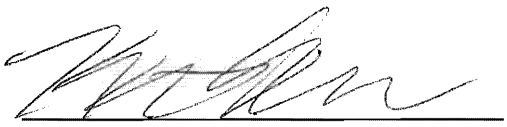
A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.



Katie Babe

CERTIFICATE OF MAILING - RULE 809.80(4)

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 30th day of September, 2015, I caused 10 copies of the Brief and Appendix of the Defendant-Appellant Mustafa Abdel-Hamid to be delivered, properly to the Wisconsin Court of Appeals, 110 E. Main Street, Suite 215, Madison, Wisconsin 53703.



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