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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

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF AUTHORITIES

Cases

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C O U R T O F A P P E A L S

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The State took no position on expunction at Sentencing (R28:16, App. 116); now, it opposes expunction in its Brief (*See* State's Brief). The State asked the circuit court to give the defendant and co-defendant "an opportunity to be supervised in the community with a good amount of time hanging over their heads will hopefully give them that chance to show the community itself that they are ready to be serious and be adults and be mature about this and not get themselves in trouble. " R28:8, App. 108. Now, the State argues that denial of expunction was appropriate

punishment in addition to the jail sentence given on one count and probation on the other count. State's Brief at p. 17.

Clarification of Facts

The question of whether the circuit court abused its discretion when denying the defendant-appellant expunction starts with a review of the facts found in the Record. McCleary v. State, 49 WIs.2d 263, 277, 182 N.W.2d. 512 (1971). Therefore, this Reply Brief starts by clarifying the State's representations of the facts.

The State wrote that the MPD "began an extensive search of the area for the shooters." State's Brief at p. 5. This statement of fact is not in the Complaint or anywhere else in the Record. The Complaint does state that a partial license plate and a description of the car were called into the police and the defendant-appellant was pulled over by the police. R2:2.

While it may seem like a small point, the State refers to the defendant-appellant and the co-actors as "men" at the time of the offense. Id. at p. 5. To be clear all four boys were under the age of 18 years old at the time of the offense. No adult men were involved. The defendant-appellant and co-defendant were 17 years old and the boy using the Daisy BB gun who was charged as a juvenile was 15 years old at the time of the offense. *See* R2.

The extent of the physical injuries caused by A.B. shooting another 15-year-old with the Daisy BB gun was not explained in either parties' brief. In the State's words at Sentencing: "…you can see from the picture there's a red spot on his chest where he was shot" by a BB. R28:7, App. 107.

The State's timeline of events is incorrect in a way that seems to increase the defendant-appellant's role in these criminal offenses. The State points out that the two 17-year olds skipped school on October 30, 2013, which is true. State's Brief at p. 5. It does not explain that the two boys spent the day at the YMCA as stated in the Complaint. *See* R2:2. Then, the State skips to "According to Dudin, when he entered Abdel-Hamid's vehicle, he observed the Daisy BB gun rifle. After school ended, Abdel-Hamid and Dudin went to school and picked up two juvenile classmates, A.B. and J.S." State's Brief at p. 5 *citing* R2:2. The Complaint explained that the co-defendant, Mr. Dudin, drove all four boys to McDonald's in the morning, droved of A.B. and J.S. at school, and drove the defendant-appellant to the Y.M.C.A. R2:2. At 3:30 pm, the co-defendant drove with the defendant-appellant as a passenger to pick up A.B. and J.S. from school. Id. All four went to the movies and after the movies the boys switched cars and the defendant-appellant was behind the wheel. Id. The State's recitation of the facts implies the Daisy BB gun was brought into the equation by the defendant-appellant when it stated "According to Dudin, when he entered Abdel-Hamid's vehicle, he observed the Daisy BB gun rifle." State's Brief at p. 5 *citing* R2:2. However, it is undisputed that the Daisy BB gun belonged to 15-year-old A.B. Defense counsel informed the Court at Sentencing that "The BB gun is one that's owned by the juvenile actor. Apparently, that's the information that was provided to the police by all three of them." R28:13, App. 113. The State did not dispute this fact at Sentencing or on appeal. *See* R28 and State's Brief.

The State's recitation of the facts also includes "[f]inally, A.B. admitted that the men shot at several persons during the October 13,

2013, incident…" State's Brief at p. 7. A.B. did not admit they shot at several persons on October 13th. He admitted he shot at one and missed and Mr. Dudin shot at one on Howell Ave. & missed. R2:4. This is not pointed out simply because two is not several by definition, but because the defendant-appellant did not fire the BB gun at any time. *See* R2; R27; R28. The defendant-appellant, while equally responsible as party to a crime, contributed to these crimes through the action of driving the car. *See* id.

The State wrote that "[t]he court felt Abdel-Hamid needed to learn a valuable life lesson that actions have consequences." State's Brief at p. 8, *citing* R28:44, App. 144. The judge never used the words "valuable life lesson."

Argument

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

A. Benefit the Defendant

The state argues that adopting the defendant-appellant's argument that he would benefit from expunction would mean "almost every youthful offender would automatically qualify for expunction because they would benefit from having their criminal record reduced." State's Brief at p. 16. To clarify the defendant-appellant's never argued that this Court should gut the circuit court's discretion in determining whether a defendant would benefit and replace it with an automatic finding that a defendant would benefit from expunction in all cases. Had that been the Legislature's intent, it would have removed "if the court determines the person will benefit" language from Wis. Stat. 973.015 (1m)(a)(1).

The defendant-appellant can envision defendants under the age of twenty-five (25) at the time of the offense who would not appear to benefit from expunction at the time of sentencing, such as those with extensive criminal records for more serious offenses committed around the time of the offense for which they are sentenced or those who will never need to pass a background check because they will never work. There are surely other situations in which a defendant would not benefit. These are merely two examples. The point is that the defendant-appellant is not in a situation where he would not benefit.

Most specific to this case, the State argues that the judge was teaching the defendant-appellant a "valuable life lesson." State's Brief at p. 8, *citing* R28:44, App. 144. The problem with this argument is the circuit court never said "valuable life lesson" at Sentencing. *See* R28. The State may merely be opining that the circuit court telling the defendant-appellant that expunction was denied to him because there are consequences for his actions is a valuable life lesson. This argument raises the question why the jail sentence on one count and probation sentence on the other count that the court imposed on the defendant-appellant were not enough to teach the defendant-appellant that there are consequences. There is no answer to that question in the Record. See R28. This teaching-a-lesson argument is commonly and more appropriately used for defendants who show no remorse and are therefore more likely to reoffend. The defendant-appellant showed remorse at Sentencing (R28:18, App. 118) and the circuit court did not find it insincere, nor did the circuit court mention the defendant-appellant's statement and apology to the victims at all. *See* R28.

The State's and defendant-appellant's vast difference in interpretation of the sentencing court's brief expunction comments

demonstrate the need for clarification from this Court as to what it means for a defendant to benefit from expunction.

B. Harm to Society

When reading both parties' briefs, application of expunction case law to the harm to society factor is notably missing, because there is no case law to cite. The State claims the defendant-appellant "incorrectly interprets the standard for harm to society." State's Brief at p. 17. The defendant-appellant also asserts the State incorrectly interprets the harm to society factor on appeal. Both parties' arguments prove that the circuit court and parties need guidance in applying this factor.

The State's argument that society would be harmed by the defendant-appellant being found eligible for expunction because his actions were extremely disruptive to members of the community fails as rationale to support the finding of harm to society. The State points to the sentencing court's statement that the offenses "greatly diminishes or destroys the sense of security that each person has the right to expect." State's Brief at p. 17 *citing* R28:6-27, 45. Statutory construction requires us to first look at the expunction statute as a whole. State ex. rel. Kala v. Circuit Court for Dane County, 2004 WI 58, ¶38, 271 Wis.2d 633, 681 N.W.2d 110 (*citing* Student Ass'n v. Baum, 74 Wis.2d 283, 294–95, 246 N.W.2d 622 (1976): "… the cardinal rule in interpreting statutes is that the purpose of the whole act is to be sought and is favored over a construction which will defeat the manifest object of the act. *Statutory Construction, supra,* at pp. 56–57, sec. 46.05."). It is clear the Legislature did not intend to deny expunction for offenses that diminish or destroy victim's sense of

security. The Legislature requires the circuit court grant expunction for any defendant convicted of Invasion of Privacy under Wis. Stat. 942.08(2)(b), (c) or (d) upon successful competition of the sentence if the person was under the age of 18 at the time of the offense. Wis. Stat. 973.015(1m)(a)(2). Few other crimes rob victims of their sense of security in their own home as a defendant peering into their home for sexual gratification. However, the Legislature still mandates expunction.

The State argues that society would be harmed because the defendant-appellant had sixteen victims. The Complaint lists property damage to fifteen cars and physical pain to one boy by A.B. shooting hitting him with a BB. R2. This was never disputed by the boys. The defendant-appellant and his co-actors took responsibility for everything they did when the police questioned them. The State acknowledged this was part of the reason that the State's offer was for probation only at the time of Sentencing: "…I think given their cooperative nature and once they were located by police, given the fact that they don't have records, I do think that this is a probation case." R28:8, App. 108. The State is now arguing that a mathematical calculation should supplant the circuit court's discretion when it says that society is harmed because there were sixteen victims. Reading the statute as a whole, the number of victims is irrelevant. There is no provision in the expunction statute stating that after a certain number of victims or offenses that expunction should be denied. *See* id. There is no case law on this point either.

The State asserts denying expunction based on a finding that society would be harmed "does not come from a fear that the Defendant-Appellant will reoffend but from the fact that "the community has an interest

in having these convictions remain on his record.'" State's Brief at p. 17 *citing* R20;1, 2. No authority is cited for the position that a community has an interest in having convictions remain on a defendant's criminal record. What is the community's interest in a defendant's criminal record? The State goes on to argue "[t]he community has a vested interest in holding criminals accountable for their conduct and deterring future violent acts by punishing violators." State's Brief at p. 17. Again the State cites no authority. This argument contradicts the State's prior argument premised on their being no fear of the defendant-appellant reoffending. No facts in the Record can be used to reasonably and logically infer that the defendant-appellant would reoffend. It also begs the question, why was jail on one count and probation on the other count not enough to punish the defendant-appellant when the State itself did not feel jail was necessary and took no position on expunction? It also raises a larger question, is denial of expunction eligibly intended to be a punishment? A reading of Wisconsin Statute sec. 973.015 as a whole clearly shows that punishment was not a factor the Legislature intended the circuit courts to consider when deciding whether or not to grant expunction eligibility.

Finally, the State did not address the defendant-appellant's argument that society would benefit from the defendant-appellant being found eligible for expunction upon the successful completion of his sentence. *See* State's Brief. No new arguments are raised in this Reply Brief regarding New Factors Analysis. The defendant-appellant requests the Court rely upon his arguments found in the post-conviction motion and brief-in-chief.

Conclusion

While this Court should 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 also 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 16th day of November, 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 2,213 words.

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Katie Babe

ELECTRONIC FILING BRIEF CERTIFICATION – RULE 809.19(12)(f)

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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Katie Babe

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.

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Katie Babe

CERTIFICATE OF MAILING - RULE 809.80(4)

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 16th day of November, 2015, I caused 10 copies of the Reply Brief 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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