STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP001877-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAZARO OZUNA,

Defendant-Appellant.

On Appeal from an order Denying Expungement Entered
in the Walworth County Circuit Court,
the Honorable Kristine E. Drettwan Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

Wisconsin Statutes

OTHER AUTHORITIES CITED

ISSUES PRESENTED

1. Is Mr. Ozuna entitled to automatic expungement, pursuant to ***State v. Hemp***, 2014 WI 129, 359 Wis. 2d 320, 856 N.W.2d 811, because he was successfully discharged from probation?

2. If expungement is not automatically granted and the court instead may review the details of Mr. Ozuna's performance on probation, do Mr. Ozuna's alleged shortcomings disqualify him from expungment?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because it is anticipated that the written briefs will fully set forth the arguments. This case does not qualify for publication because it is a misdemeanor appeal. *See* Wis. Stat. §§ 809.23(1)(b)4 and 751.31(2)(f).

GOVERNING STATUTE

973.015 Special disposition.

(1m) (a) 1. Subject to subd. 2. and except as provided in subd. 3., when a person is under the age of 25 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law for which the maximum period of imprisonment is 6 years or less, the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition. This subsection does not apply to

information maintained by the department of transportation regarding a conviction that is required to be included in a record kept under s. 343.23 (2) (a).

2. The court shall order at the time of sentencing that the record be expunged upon successful completion of the sentence if the offense was a violation of s. 942.08 (2) (b), (c), or (d) or (3), and the person was under the age of 18 when he or she committed it.

3. No court may order that a record of a conviction for any of the following be expunged:

a. A Class H felony, if the person has, in his or her lifetime, been convicted of a prior felony offense, or if the felony is a violent offense, as defined in s. 301.048 (2) (bm), or is a violation of s. 940.32, 948.03 (2) or (3), or 948.095.

b. A Class I felony, if the person has, in his or her lifetime, been convicted of a prior felony offense, or if the felony is a violent offense, as defined in s. 301.048 (2) (bm), or is a violation of s. 948.23 (1) (a).

(b) A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked and the probationer has satisfied the conditions of probation. Upon successful completion of the sentence the detaining or probationary authority shall issue a certificate of discharge which shall be forwarded to the court of record and which shall have the effect of expunging the record. If the person has been imprisoned, the detaining authority shall also forward a copy of the certificate of discharge to the department.

…

(3) A special disposition under this section is not a basis for a claim under s. 775.05.

STATEMENT OF THE CASE AND FACTS

On May 27, 2014, Mr. Ozuna pled guilty in this case to count 1, criminal damage to property, contrary to Wis. Stat. § 943.01(1) and count 2, disorderly conduct, contrary to Wis. Stat. § 947.01(1). The court accepted Mr. Ozuna's guilty pleas and ordered one year of probation on each count. The court imposed but stayed a jail sentence of 120 days on count 1 and 30 days on count 2. (13).

At sentencing, the State suggested that, upon successful completion of the probationary term, the case should be expunged from Mr. Ozuna's record stating, "the State agrees to special disposition or expungement, if no violations of probation and no law enforcement contacts rising to the level of probable cause." (24:3).

The court so ordered. (24:10; App. 110, 13).[1]

One year later, the Department of Corrections (DOC) discharged Mr. Ozuna from probation. On June 5, 2015, Mr. Ozuna's Department of Corrections (DOC) probation agent filed a document in the circuit court entitled "Verification of Satisfaction of Probation Conditions for Expungement." (14; App. 112-114).

The form indicated that "the offender has successfully completed his/her probation." (14; App. 112). It also noted that Mr. Ozuna still owed toward his financial obligations, and also asserted that Mr. Ozuna was cited for underage drinking in December of 2014. (14; App. 112).

[1] Both counts are misdemeanors and Mr. Ozuna is under 25; therefore, it is clear that Mr. Ozuna was in fact eligible for expungement. *See* § 972.015(1)(a). Mr. Ozuna's date of birth is August 7, 1996. (14).

Without holding a hearing, the circuit court denied expungement in a two-word, handwritten order written on the "Verification" form stating, "Expungement DENIED KED 6-12-15."[2] (14; App. 112).

ARGUMENT

I. Expungement Should be Automatically Granted because Mr. Ozuna was Successfully Discharged from Probation.

A. Standard of review.

This case calls for the interpretation of the "expungement statute," Wis. Stat. § 973.015. Statutory interpretation presents a question of law that this Court reviews *de novo*. ***State v. Johnson***, 2009 WI 57, ¶63, 318 Wis. 2d 21, 767 N.W.2d 207.

B. Following the Wisconsin Supreme Court's decision in ***State v. Hemp***, the circuit court lacks the discretion to deny expungement once the defendant successfully discharges from probation.

The issue presented here is whether Mr. Ozuna "successfully completed" his sentence such that he is entitled to automatic expungement. Wis. Stat. § 973.015(1m)(b) provides that:

> A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked and the probationer has satisfied the conditions of probation. Upon successful completion of the sentence

[2] KED are the initials for the Honorable Kristine E. Drettwan.

> the detaining or probationary authority shall issue a certificate of discharge which shall be forwarded to the court of record and which shall have the effect of expunging the record. If the person has been imprisoned, the detaining authority shall also forward a copy of the certificate of discharge to the department.

The Wisconsin Supreme Court recently construed this subsection in ***State v. Matasek***, 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811 and ***State v. Hemp***, 2014 WI 129, 359 Wis. 2d 320, 856 N.W.2d 811.

In ***Matasek***, the court held that a decision on whether or not to grant expungement must be made at the time of sentencing. The court agreed that there were policy reasons for permitting the circuit court to decide on expunction after the offender completes his or her sentence rather than at the time of sentencing. 353 Wis. 2d 601, ¶41. However, the plain language of the statute requires that "if a circuit court is going to exercise its discretion to expunge a record, the discretion must be exercised at the sentencing proceeding." ***Id.*** ¶45.

In ***Hemp***, the court considered, among other questions, whether Hemp's successful completion of probation automatically entitled him to expungement—and concluded that it did. At Hemp's sentencing, the circuit court found Hemp eligible for expungement conditioned upon his successful completion of probation. ***Id.*** ¶5. Hemp petitioned for expungement one year after he successfully completed probation. ***Id.*** ¶6. The circuit court denied his petition, concluding that Hemp failed file the petition in a timely manner. ***Id.*** ¶8. Notably, at the time Hemp petitioned for expungement, he had been charged with new offenses. The circuit court stated that Hemp's "desire for expungement did not ripen until he was charged with new offenses." ***Id.*** ¶8. The court of appeals affirmed, concluding that it was Hemp's

responsibility to petition for expungement and that he had failed to do so in a timely manner. ***Id.*** ¶9

The Wisconsin Supreme Court reversed. The court considered three issues:

> 1) whether Hemp's successful completion of probation automatically entitled him to expungement; 2) whether Wis. Stat. 973.015 places any burden on Hemp to petition the circuit court within a certain period of time in order to effectuate expungement; and 3) whether the circuit court could reverse the decision it made at sentencing to find Hemp eligible for expungement conditioned upon the successful completion of his sentence.

First, the court held that Hemp's successful completion of probation "automatically entitled" him to expungement. ***Id.*** ¶23. The court also explained what it means to successfully complete probation.

> Thus, an individual defendant like Hemp who is on probation successfully completes probation is (1) he has not been convicted of a subsequent offense; (2) his probation has not been revoked; and (3) he has satisfied all the conditions of probation. These (and these alone) are the only requirements Wis. Stat. 973.015(2) places on an individual defendant like Hemp to successfully complete probation.

Id. ¶22.

Next, the court held that it was the probationary authority's responsibility to forward the discharge petition to the circuit court and Hemp bore no responsibility to take affirmative action to effectuate expungement. "Once an individual defendant successfully completes his sentence, the plain language of the expungement statute mandates a self-

executing process." ***Id.*** ¶27. The probationary authority shall issue a certificate of discharge and forward it to the court.[3] "When this process is completed, expungement is effectuated." ***Id.*** ¶27.

The ***Hemp*** court made it clear that the circuit court did not play a role in approving expungement once probation was complete.

> The court of appeals also erroneously concluded that the certificate of discharge must be approved by the circuit court. *Once the detaining or probationary authority forwards a certificate of discharge to the court of record, expungement is effectuated*. By inferring the necessity of court approval, the court of appeals' construction of the statute imposes additional requirement that are contrary to the statute's plain language.

Id. ¶36. (emphasis added).

Finally, the court held that the circuit court was not authorized to reverse its decision made at sentencing to find Hemp ineligible for expungement. ***Id.*** ¶15. "If a circuit court is going to exercise its discretion to expunge a record, the discretion must be exercised at the sentencing proceeding." ***Id.*** ¶17 (citing ***State v. Matasek***, 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811). "Once Hemp successfully completed probation the circuit court did not have the discretion to refuse to expunge Hemp's record." ***Id.*** ¶39.

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[3] ***Hemp*** and § 973.015 discuss a "discharge certificate," but there is no discharge certificate in this case. This is because the charges are misdemeanors. The DOC administrative code provides for a discharge certificate if the offense is a felony. § 328.16(2)(a). For misdemeanors, the individual must be "notified" that supervision has ended. § 328.16(2)(b). For probationers, the department "shall notify the sentencing court" that supervision has ended. § 328.16(2)(c).

The holdings of ***Matasek*** and ***Hemp***, when applied to the facts of Mr. Ozuna's case, show that the circuit court was without the authority to deny expungement after Mr. Ozuna successfully completed his probation.

The circuit court decided at the time of sentencing to make Mr. Ozuna eligible for expungement conditioned on his successful completion of one year of probation. (24:10; App. 110). One year later, Mr. Ozuna's probation agent, Deanna Weber, submitted a form numbered DOC-2678 to the court entitled "Verification of Satisfaction of Probation Conditions for Expungement."[4] (14; App. 112-114). The form contained several boxes. One of them stated, "[t]he offender has successfully completed his/her probation." This box was checked. (14; App. 112). Upon receiving this form, the expungement process was complete. The circuit court had no further role to play, and did not have the authority to re-exercise its discretion to deny expungement.

II. Even if Expungement is not Automatically Granted, and the Court may Instead Review the Details of Mr. Ozuna's Performance on Supervision, Mr. Ozuna Should Still Prevail Because Neither of His Alleged Shortcomings Disqualifies Him from Expungement.

The State may argue that Mr. Ozuna did not successfully complete his sentence because probation agent Deanna Weber noted some shortcomings on the "Verification of Satisfaction of Probation Conditions for Expungement" form.

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[4]According to a DOC memo released on April 17, 2015, form DOC-2678 was created after the ***Hemp*** decision to trigger expunction in probation cases. *Available at*, https://www.wicourts.gov/formdisplay/CR266_summary.pdf?formNumber=CR-266&formType=Summary&formatId=2&language=en.

First, Mr. Ozuna apparently did not pay all of his court costs and supervision fees. In ***Hemp***, the defendant *did* fully pay his supervision fees. ¶24. However, the ***Hemp*** court did not hold that had Hemp not paid the fees, that expungement would have been denied. ***Hemp*** does not hold that a probationer must be perfect in order to obtain expungement. Ms. Weber did not determine that the outstanding balance precluded Mr. Ozuna from successful discharge from probation. It is probable that she felt that Mr. Ozuna was making a good-faith effort to pay. Mr. Ozuna had made payments in the amount of $700 ($600 in court costs and $100 in supervision fees). (14:3; App. 114).

Supposing, only for argument that the probation agent believed Mr. Ozuna was *willfully* failing to pay, her recourse was to seek an extension of probation. The DOC has the authority to move the circuit court for an extension of probation if the probationer has not made a "good faith effort" to discharge financial obligations. Wis. Stat. § 973.09(3)(a) and (c). And the court may grant an extension on these grounds. However, if the court does not extend probation, the court "shall" instead issue a civil judgment for the fees. 973.09(3)(bm)(4).[5] Failure to pay financial obligations on probation is grounds for an extension only if the defendant has the ability to pay. ***Huggett v. State***, 83 Wis. 2d 790, 804, 266 N.W.2d 403 (1978); ***State v. Davis***, 127 Wis. 2d 486, 497, 381 N.W.2d 333.

[5] "(4) If the court does not extend or modify the terms of probation under subd. 3., it shall issue a judgment for the unpaid fees and direct the clerk of circuit court to file and enter the judgment in the judgment and lien docket, without fee. If the court issues a judgment for the unpaid fees, the court shall send to the department a written notification that a civil judgment has been issued for the unpaid fees. The judgment has the same force and effect as judgments entered under s. 806.10."

Mr. Ozuna should not be penalized because his probation agent did not seek an extension for him to pay his court costs and supervision fees. Without an extension, the proper resolution of the outstanding financial obligations was the issuance of a civil judgment.

Moreover, flatly denying expungement based on failure to pay court costs and supervision fees would violate equal protection. The legislature is presumed to have drafted a law in a constitutional manner. ***State v. Cole***, 2003 WI 112, ¶11, 264 Wis. 2d 520, 665 N.W.2d 328. Consider an indigent defendant versus a wealthy defendant. Without some finding that the indigent defendant is willfully refusing to pay instead of succumbing to unfortunate circumstances beyond his control, the result is a penalty based on poverty.

This issue is comparable to a situation in which a circuit court imposes a jail commitment on a defendant for failure to pay court costs. ***In State ex rel. Pedersen v. Blessinger***, 56 Wis. 2d 286, 296, 201 N.W.2d 778 (1972), the Wisconsin Supreme Court held that before imposing jail time for failure to pay, the court must hold a hearing to determine a person's ability to pay in order to avoid an unconstitutional application of the statutes. The court stated:

> If the defendant has ability to pay the fine and will not, then imprisonment is a proper means of enforcement. In such case, the defendant has a key to his imprisonment and it is only his contumacy which keeps him from enjoying his liberty. *But what about the person unable in fact and in truth to pay a fine? In such a case, we hold it would be discriminatory to imprison him to coerce a performance he is unable to give. Under such conditions he is imprisoned because of his poverty.*

Id. at 293 (emphasis added).

The State may also argue that Mr. Ozuna's alleged drinking citation renders probation unsuccessful. Under Wis. Stat. § 973.015(1m)(b), a person has successfully completed the sentence "if the person has *not been convicted of a subsequent offense* and, if on probation, the probation has not been revoked and the probationer has satisfied the conditions of probation." (emphasis added).[6]

The "Verification of Satisfaction of Probation Conditions for Expungement" form in Mr. Ozuna's case alleges that the "Lake Geneva PD went to Harbor Shores Hotel for noise complaint Mr. Ozaro [sic] cited for underage drinking (102 pbt) and marijuana odor in the halls." (14; App. 112). There is no assertion that the marijuana odor was tied to Mr. Ozuna; it was simply "in the halls." No police report or other documentation was provided.

To blindly accept these assertions as true raises due process concerns. This is akin to a situation in which the DOC moves to revoke a probationer. The probationer has due process rights that include the right to: written notice of the claimed violations of probation; disclosure to the probationer of the evidence against him; the opportunity to be heard in person and to present witnesses and documentary evidence; the right to confront and cross-examine adverse witnesses; a neutral and detached hearing body; and a written statement by the fact finder as to the evidence relied on and reasons for revocation. ***State v. Burris***, 2004 WI 91, ¶24, 273 Wis. 2d. 294, 682 N.W.2d 812. It would be unfair, and likely unconstitutional, to deny Mr. Ozuna expungement based on an untested assertion from the probation agent.

[6] The circuit court also stated there should be no police contacts rising to the level of probable cause. Again, this implies a criminal act.

Assuming only for the sake of argument that the assertion about the drinking ticket is true, an underage drinking ticket is not an "offense" for purposes of expungement. Underage drinking is a civil forfeiture. *See* Walworth County Code of Ordinances, section 38-34.[7] The expungement statute does not define "offense;" however, the term is used consistently throughout the expungement statute to mean *criminal* offense. Section 973.015 uses the term "offense" when discussing the crime of conviction that is subject to expungement. Moreover, this Court has specifically interpreted this use of "offense" to mean a criminal violation.

> The language of sub. (1) (a) [now sub. (1m) (a) 1.] indicates that law violations for which expunction is available relate to laws that include some 'period of imprisonment.' Thus, where there is no period of imprisonment associated with a law, that law is not one to which this section applies.

Kenosha County v. Frett, 2014 WI App 127, 359 Wis. 2d 246, 858 N.W.2d 39 (holding that expungement section does not apply to civil forfeiture violations). The term "offense" in the context of the expungement statute means a *criminal* offense. A drinking ticket is a civil forfeiture.

Mr. Ozuna maintains that the court is not authorized to review the details of his performance on probation pursuant to ***Hemp***. *Supra* section I. However, if this Court disagrees, Mr. Ozuna is still entitled to expungement because neither of his alleged shortcomings while on probation disqualifies him from expungement.

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[7] The penalty for underage drinking is a forfeiture of $500 or less. § 38-34.

CONCLUSION

For the reasons stated above, Mr. Ozuna respectfully asks this Court to reverse the circuit court and to direct the court to expunge the case record.

Dated this 21st day of December, 2015.

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 2,727words.

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 21st day of December, 2015.

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Page

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 s. 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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Dated this 21st day of December, 2015.

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