

RECEIVED

02-04-2016

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

COLLEEN MARION
Assistant State Public Defender
State Bar No.1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	Page
ARGUMENT	1
Expungement Should be Automatically Granted Because Mr. Ozuna was Successfully Discharged from Probation.	1
CONCLUSION	4

CASES CITED

<i>Burgraff v. Menard, Inc.</i> , 2014 WI App 85, 356 Wis. 2d 282, 853 N.W.2d 574	1
<i>Dane County DHS v. Ponn P.</i> , 2005 WI 32, 279 Wis. 2d 169, 694 N.W.2d 344	3
<i>Heine v. Texas Dept. of Public Safety</i> , 92 S.W.3d 642 (Ct. App. TX 2002)	3
<i>State of Ohio v. Saltzer</i> , 471 N.E.2d 872 (Ct. App. OH 1984)	2
<i>State v. Burris</i> , 2004 WI 91, 273 Wis. 2d. 294, 682 N.W.2d 812	2
<i>State v. Hemp</i> , 2014 WI 129, 359 Wis. 2d 320, 856 N.W.2d 811	2, 3

STATUTES CITED

Wisconsin Statutes

328.16(2)(c).....2
973.015(3)(b).....1

OTHER AUTHORITIES CITED

[http://www.merriam-webster.com/ dictionary/](http://www.merriam-webster.com/dictionary/)3

ARGUMENT

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

The issue in this case is whether Mr. Ozuna successfully completed his probationary sentence for purposes of the expungement statute.

Under Wis. Stat. § 973.015(3)(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the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked and the probationer has satisfied the conditions of probation.

The State does not respond to Mr. Ozuna's argument that his unpaid financial obligations to the court and Department of Corrections should not disqualify him from expungement. (Brief-in-chief at 8-10). "Unrefuted arguments are deemed conceded." *Burgraff v. Menard, Inc.*, 2014 WI App 85, 356 Wis. 2d 282, 853 N.W.2d 574.

Instead, the State argues that the allegation that Mr. Ozuna consumed alcohol disqualifies him from expungement because "no alcohol" was a condition of his probation. (State's response brief at 9).¹

The State's position would allow the circuit court to review the details of a defendant's performance on probation,

¹ The State does not dispute, and therefore concedes, Mr. Ozuna's argument that a civil forfeiture (drinking ticket) is not a "subsequent offense."

which is inconsistent with the Wisconsin Supreme Court's recent holding in *Hemp*. Pursuant to *Hemp*, expungement is automatic upon receipt of a discharge certificate. "Once the detaining or probationary authority forwards a certificate of discharge to the court of record, expungement is effectuated." *State v. Hemp*, 2014 WI 129, ¶36, 359 Wis. 2d 320, 856 N.W.2d 811. There is no procedural provision, in the statute or under *Hemp*, for the circuit court to make factual findings. "The successful completion of probation automatically entitled Hemp to expungement." *Id.* ¶ 4.

Under *Hemp*, once the circuit court received notice² from Mr. Ozuna's probation agent that he was successfully discharged from probation, expungement should have been automatically granted.

The State does not respond to Mr. Ozuna's argument that to flatly accept the drinking allegation as true raises due process concerns. (Brief-in-chief at 11). Under the State's reading of the statute, a probation officer would have absolute, unreviewable discretion to declare that a probationer has not "satisfied the conditions of probation" without the probationer having any notice or opportunity to be heard. See *State v. Burris*, 2004 WI 91, ¶24, 273 Wis. 2d. 294, 682 N.W.2d 812. Several states have recognized that individuals have procedural due process rights attendant to expungement proceedings. See e.g., *State of Ohio v. Saltzer*, 471 N.E.2d 872 (Ct. App. OH 1984) (defendant was denied due process of law by failure of trial court to set and hold hearing on his application for expungement of criminal record); *Heine v. Texas Dept. of Public Safety*, 92 S.W.3d 642 (Ct. App. TX

² As Mr. Ozuna explained in his brief-in-chief, "discharge certificates" are only filed in felony cases. (Brief-in-chief at 7, fn. 3). The equivalent in a misdemeanor case is that the department "shall notify the sentencing court" that supervision has ended. Wis. Stat. § 328.16(2)(c).

2002) (defendant had due process right to participate in the expungement hearing). If this Court holds that the circuit court can make factual findings even after the probationer has been successfully discharged from probation, then the probationer should be afforded a hearing to protect his or her due process rights.

However, the expungement statute does not provide for a hearing or any other fact-finding process. Thus, if the State's position is correct, the expungement statute is arguably unconstitutional. And when "given a choice of reasonable interpretations of a statute, [the] court must select the construction which results in constitutionality." *Dane County DHS v. Ponn P.*, 2005 WI 32, ¶17, 279 Wis. 2d 169, 694 N.W.2d 344.

If this Court were to read into the statute a fact-finding process, circuit courts would need to know what it means to "satisfy the conditions of probation." Does a probationer need to be perfect, with no slip-ups, for the entire probationary period? To perform satisfactorily does not require absolute perfection. Merriam-Webster defines "satisfactory" as "good enough for a particular purpose."³ For example, 100% is not the only satisfactory grade one can achieve on a school test. Moreover, who decides whether a probationer has satisfied the conditions of probation? Is it the probationary authority? The circuit court?

These questions can be avoided by simply following the holding in *Hemp*. Once the circuit court received notice from Mr. Ozuna's probation agent that he was successfully discharged from probation, expungement should have been automatically granted.

³ Available at <http://www.merriam-webster.com/dictionary/satisfactory>.

CONCLUSION

For the reasons stated above and in Mr. Ozuna's brief-in-chief, Mr. Ozuna respectfully asks this Court to reverse the circuit court and remand with an order to grant expungement.

Dated this 4th day of February, 2016.

Respectfully submitted,

COLLEEN MARION
Assistant State Public Defender
State Bar No.1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant

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 782 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 4th day of February, 2016.

Signed:

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant