STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP1877-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAZARO OZUNA,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming an Order Denying Expunction Entered in the Walworth County Circuit Court, the Honorable Kristine E. Drettwan, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

Ozuna is Entitled to Expunction because Perfect Compliance with Probationary Conditions is Not Required for Successful Completion of Sentence Under Wis. Stat. § 973.015(1m)(a)1. and (b).

The circuit court improperly denied Ozuna expunction for two main reasons. First, the "satisfied conditions of probation" requirement does not require perfection and ***State v. Hemp,*** 2014 WI 129, 359 Wis. 2d 320, 856 N.W.2d 811, did not hold otherwise. Second, the legislature placed the discretionary determination of whether a probationer successfully completed his or her sentence with the "detaining or probationary authority" rather than the circuit court. *See* Wis. Stat. § 973.015(1m)(b). Ozuna's probation agent determined that he successfully completed his sentence as evidenced by the Verification Form filed in the circuit court. His agent made the correct determination and the expunction statute grants no authority to the circuit court to sua sponte review the agent's decision.

A. ***State v. Hemp*** did not define the meaning of "satisfied the conditions of probation."

The State appears to assert that ***Hemp***, 359 Wis. 2d 320, already interpreted the "satisfied the conditions of probation" requirement as requiring perfect compliance with probationary conditions. (State's Resp. 5, 7, 9, 12). The State relies on this Court's slight rephrasing of the "satisfied *the* conditions of probation" requirement in ***Hemp*** as requiring a probationer to "satisfy '*all the* conditions of probation.'" (State's Resp. 5, 7) (citing ***Hemp***, 359 Wis. 2d 320, ¶22) (emphasis added). The State places too much

weight on this Court's slight rephrasing of the requirement considering this requirement was not at issue in ***Hemp*** and the Court engaged in no statutory interpretation of this requirement.

Rather, ***Hemp*** addressed the role of the defendant, the supervising authority, and the circuit court in the expunction process when it was undisputed that the defendant had successfully discharged from probation and had fulfilled each of the Wis. Stat. § 973.015(1m)(b) requirements to complete his sentence.[1] ***Id.***, ¶¶3, 24.

Additionally, in ***Hemp***, this Court did not engage in any statutory interpretation of the "satisfied the conditions of probation" requirement and it did not grapple with the meaning of "satisfied" in the statutory language. Whether a probationer must satisfy "the" or "all the" conditions of probation does not address the issue here—the meaning of "satisfied" within the "satisfied the conditions of probation" requirement. To be clear, Ozuna's argument that "satisfied" means sufficient or satisfactory compliance rather than perfect compliance requires no modification of ***Hemp.***

B. The meaning of "satisfied the conditions of probation" is not clear from the plain language of the statute.

Wisconsin Stat. § 973.015(1m)(b) contains three requirements for a probationer to successfully complete his or her sentence: (1) "the person has not been convicted of a subsequent offense," (2) "probation has not been revoked,"

[1] The record in ***Hemp*** indicates Hemp had not met all monetary conditions of probation prior to his discharge, but neither party appears to have alerted this Court to this fact. (*See* Brief-in-Chief 29-30; App. 119-22).

and (3) "the probationer has satisfied the conditions of probation."

The State asserts that when these three requirements are read together the meaning of "satisfied the conditions of probation" plainly requires perfect compliance because the first two requirements refer to singular events. (State's Resp. 6). However, that the first two statutory requirements unambiguously refer to singular events—"a subsequent offense" and revocation[2]—cannot be grafted onto the third requirement to somehow indicate that conditions of probation cannot be satisfied if a single probation violation occurs. The State cites no cannon of statutory interpretation to support this method of textual analysis and offers no support for the type of inference that the State's analysis relies upon.

Under the plain language of § 973.015, once proof of discharge is forwarded to the circuit court "expungement is effectuated." ***Hemp***, 359 Wis. 2d 320, ¶27. Certificates of discharge are issued in felony cases at the expiration of the probationary period and they give no indication of the probationer's performance during probation. *See* Wis. Stat. § 973.09(5)(a). That the legislature chose certificates of discharge as the means by which to effectuate expunction indicates that perfect compliance with probationary conditions is not required.

Despite this plain language in support of Ozuna's position, Ozuna maintains the meaning of "satisfied the conditions of probation" is ambiguous because it can be reasonably interpreted as requiring either (1) perfect compliance or (2) sufficient or satisfactory compliance.

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[2] Revocation under Wis. Stat. § 973.10(2)(a)-(b) can occur only once per case. *See* ***State v. Balgie***, 76 Wis. 2d 206, 208, 251 N.W.2d 36 (1977).

The legislative policy and legislative history underlying Wis. Stat. § 973.015 resolves the ambiguous statutory language in favor of Ozuna's reasonable interpretation.

There is no dispute that "[t]he 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 to '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. (quoting ***State v. Leitner,*** 2002 WI 77, ¶38, 253 Wis. 2d 449, 646 N.W.2d 341. There can also be no dispute that the legislature amended Wis. Stat. § 973.015 to expand the availability of expunction. *Compare* Wis. Stat. § 973.015 (1975-76) (permitting expunction for individuals under age 21 found guilty of offenses punishable by a maximum of one year or less in jail) *with* Wis. Stat. § 973.015 (2013-14) (permitting expunction for individuals under age 25 convicted of offenses, including some non-violent felonies, punishable by a maximum of 6 years or less of imprisonment).

The State's bright-line interpretation requiring perfect compliance with probationary conditions goes beyond the legislative purpose of the expunction statute in such a way as to stymie expunction in probationary cases. This is because not all violations of probationary conditions demonstrate an inability to comply with the law. For example, under the State's bright-line rule, a probationer who misses a single appointment[3] or who fails to fulfill all monetary conditions

[3] The State suggests that circuit court review would benefit probationers in this situation; however, under the State's bright-line rule of perfect compliance, circuit court review would never benefit a

during probation cannot successfully complete his or her sentence for expunction. Considering the number of conditions placed on probationers, the State's interpretation makes § 973.015 expunction practically unattainable, which is in direct conflict with the legislature's willingness to expand its availability.

In addition, the legislative history supports Ozuna's position that "satisfied the conditions of probation" does not require perfection. First, the drafting file in 1983 Wis. Act 519, which added the "satisfied the conditions of probation" requirement, contains a crossed out portion of analysis indicating that the added language should not be interpreted as requiring perfect compliance. (*See* Brief-in-Chief 20-21). The State did not refute Ozuna's interpretation of the stuck analysis in the drafting file. "Unrefuted arguments are deemed admitted." ***State v. Chu***, 2002 WI App 98, ¶41, 253 Wis. 2d 666, 643 N.W.2d 878.

Second, contrary to the State's assertion, the legislature's decision to remove the "or extended" language during the drafting process supports Ozuna interpretation. (*See* State's Resp. 8). Probation may be extended "for cause and by order" of the circuit court. Wis. Stat. § 973.09(3)(a). However, the State's suggestion that probation may be extended for a reason unrelated to an unmet condition of probation is incorrect. (*See* State's Resp. 9). This is because "cause" for probation extension is limited by statute to (1) a lack of "good faith effort to discharge court-ordered payment obligations" or supervision fees, (2) an inability to "make required restitution payments" where an agreement to complete community service in lieu of restitution is reached

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probationer who violates any condition of probation. (*See* State's Resp. 10).

and additional time is needed to complete the community service, and (3) when the defendant stipulates to an extension and "the court finds that extension would serve the purposes for which probation was imposed." Wis. Stat. § 973.09(3)(c)1.-3. Each of the three ways to show cause for probation extension contemplate a failure to meet the conditions of probation and the need for an additional period of supervision to allow completion of conditions.

Finally, Ozuna's interpretation—sufficient or satisfactory compliance—is both reasonable and workable. Section 973.015(1m)(b) places the determination of whether an individual has completed his or her sentence with the supervising authority rather than the circuit court. To ask Ozuna's probation agent to consider his performance during probation and determine whether he satisfied the conditions of his probation in a satisfactory or sufficient manner is within his agent's expertise. Probation agents frequently engage in discretionary decisionmaking concerning the supervision of probationers including determinations of how to respond to probation violations. *See* Wis. Admin. Code DOC § 331.03(2)(b)-(c). To quell the State's concerns, this Court could certainly enumerate a non-exhaustive set of factors for probation agents to consider when determining whether the conditions of probation have been satisfied for § 973.015. These factors could include consideration of the type, severity, and frequency of any violation as well as the probationer's behavior both in response to the violation and following the violation.[4]

[4] Further guidance from this Court as to whether unmet monetary conditions of probation prevent expunction where a probationer has made a good faith effort to meet such conditions may also be warranted.

C. The legislature placed the determination of successful completion of sentence with the supervising authority.

Wisconsin Stat. § 973.015(1m)(b) states: "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." This Court recently held this statutory language requires the detaining or probationary authority to issue the certificate and forward it to the circuit court upon successful completion of sentence. ***Hemp***, 359 Wis. 2d 320, ¶27. It follows that the legislature placed the determination of whether an individual has completed his or her sentence with the supervising authority rather than the circuit court. Ozuna's probation agent correctly determined that a single alleged underage drinking citation coupled with unpaid monetary conditions does not prevent him from successful completion of his sentence for § 973.015 expunction.[5]

The State asserts that "a circuit court may independently review a probation agent's determination as to whether a defendant is legally entitled to expunction." (State's Resp. 14). The State's conclusion appears to stem from the fact that circuit courts are tasked with applying factual findings to legal standards in other situations, such as whether a traffic stop meets Fourth Amendment requirements.[6] (*Id.*).

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[5] The State asserts that the circuit court reversed the agent's determination based on the alleged underage drinking citation. (State's Resp. 14). However, it is impossible from the court's "Expungement DENIED" order to know the reason for denial.

[6] In making this argument, the State incorrectly asserts that courts "defer" to testimony of police officers. (State's Resp. 14). In fact,

The State's assertion, however, is completely divorced from the language of § 973.015. This Court has already explained the legislature chose an expunction process that requires the circuit court to exercise its discretion at the time of sentencing. ***Hemp***, 359 Wis. 2d 320, ¶39; ***Matasek***, 353 Wis. 2d 601, ¶¶6, 45. This Court stated: "The only point in time at which a circuit court may make an expungement decision is at the sentencing hearing. ***Hemp***, 359 Wis. 2d 320, ¶40. Furthermore, this Court has already rejected the argument that certificates of discharge must be reviewed and approved by the circuit court before expunction occurs. ***Id.***, ¶36.

This Court has also recognized that policy reasons may support an expunction process that allows circuit court determinations at the culmination of a probationer's supervision; however, this is not the process the legislature enacted. *See* ***Matasek***, 353 Wis. 2d 601, ¶41. The legislature did enact this type of expunction process in the juvenile expunction statute, Wis. Stat. § 938.355(4m). Although the juvenile expunction statute and § 973.015 expunction utilize different processes, the statutes are similar as each address the same relief—expunction—and both require a circuit court to determine whether expunction is proper considering the benefit to the individual and harm to society. Wis. Stats. §§ 938.355(4m)(a); 973.015(1m)(a). Furthermore, when interpreting § 973.015, this Court has found it useful to look to the language of the juvenile expunction statute. *See* ***Matasek***, 353 Wis. 2d 601, ¶¶21-22; ***Leitner***, 253 Wis. 2d 449, ¶33.

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a circuit court makes factual findings based on all of the evidence presented. *See* ***State v. Trecroci***, 2001 WI App 126, ¶2, 246 Wis. 2d 261, 630 N.W.2d 555 (citing Wis. Stat. § 805.17(2)).

Finally, Ozuna's interpretation of § 973.015 does not result in serious due process concerns. (State's Resp. 14-16).[7] These due process concerns are not present when the DOC, the supervising authority, makes discretionary determinations related to expunction because DOC administrative code provides for administrative review of department decisions. *See* Wis. Admin. Code DOC § 328.12. The DOC is required to inform probationers about this process. Wis. Admin. Code DOC § 328.04(2)(g). As a result, a probationer who is unhappy with his or her agent's determination on completion of sentence could utilize the administrative review process.[8]

D. Ozuna's interpretation of "satisfied the conditions of probation" avoids unconstitutional results.

If this Court agrees with Ozuna's interpretation of § 973.015, it need not address either constitutional argument because Ozuna's interpretation of § 973.015 avoids unconstitutional results.

1. Equal protection

Ozuna maintains there is no rational basis to deny expunction to probationers who cannot afford to satisfy monetary conditions during supervision. (Brief-in-Chief 27-30). If this Court holds that § 973.015 requires perfect compliance with probationary conditions then it should reach

[7] The State inconsistently asserts that Ozuna's interpretation of § 973.015 results in a potential due process violation while also arguing that Ozuna cannot establish a protected interest, a prerequisite to establishing a due process violation. (*See* State's Resp. 14-15, 19-26).

[8] Whether a circuit court could review a final administrative decision is not at issue.

Ozuna's equal protection argument and determine if unsatisfied monetary conditions prevent a probationer from satisfying the conditions of probation for expunction purposes.

Ozuna raised his equal protection argument before the court of appeals and in his petition to this court. The State did not respond to the equal protection argument at the court of appeals and did not file a formal response to the petition for review. This Court is not prohibited from addressing issues of statewide importance not first raised in the circuit court. *See* ***Mack v. State***, 93 Wis. 2d 287, 296-97, 286 N.W.2d 563 (1980).

Furthermore, a decision from this Court on whether a probationer satisfies the conditions of probation for § 973.015 expunction if unable to meet all monetary conditions during probation will provide much needed guidance. This issue will continue to arise and guidance from this Court will prevent additional costly litigation. At least one case involving denial of expunction based entirely on failure to pay supervision fees is currently pending in the court of appeals.[9]

2. Procedural due process

If this Court determines the circuit court has authority to review Ozuna's agent's determination then procedural due process affords him meaningful notice and an opportunity to be heard.

To establish state action affected Ozuna's liberty interest in his reputation, he must show (1) damage to reputation and (2) tangible harm "such that a 'right or status

[9] ***State v. Colbert***, 2015AP1880-CR.

previously recognized under state law' that he previously possessed has been altered or eliminated." ***Teague v. Van Hollen***, 2016 WI App 20, ¶65, 367 Wis. 2d 547, 877 N.W.2d 379 (quoting ***Stipetich v. Grosshans***, 2000 WI App 100, ¶24, 235 Wis. 2d 69, 612 N.W.2d 346).

First, absent expunction, the criminal convictions forever remain on Ozuna's easily accessed criminal record. Criminal convictions are absolutely damaging to an individual's reputation. Second, once Ozuna's agent forwarded the Verification Form to the circuit court expunction was effectuated. ***Hemp***, 359 Wis. 2d 320, ¶27. The circuit court's denial of expunction constitutes the tangible harm of altering Ozuna's right to expunction under § 973.015.

"Generally, due process requires that notice and an opportunity to be heard be provided before a constitutional deprivation occurs; this is to prevent wrongful deprivations." ***Collins v. City of Kenosha Hous. Auth.***, 2010 WI App 110, ¶6, 328 Wis. 2d 798, 789 N.W.2d 342.

Under ***Mathews v. Eldridge***, 424 U.S. 319, 335 (1976), postconviction relief does not adequately protect Ozuna's liberty interest. First, Ozuna has a substantial interest in record expunction. Unlike the temporary suspension of a driver's license in ***Mackey v. Montrym***, 443 U.S. 1, 11-12 (1979), the circuit court's denial of expunction, unless reversed, permanently bars expunction. Even if the circuit court's expunction decision is reversed, Ozuna cannot be made whole for the period when the criminal convictions erroneously appeared on his record. This was not the case in ***Eldridge***, 424 U.S. at 340, where an erroneous determination would be corrected by retroactive disability payments. Furthermore, unlike immediate review

available in ***Mackey***, 443 U.S. at 12, correction of a circuit court's denial of expunction through postconviction proceedings is time-consuming.

Second, this Court must consider the "fairness and reliability of the existing pretermination procedures . . .". ***Eldridge***, 424 U.S. at 343. This factor is concerned with the risk of an erroneous determination. ***Id.*** at 335. Here, there are no pretermination procedures in place. Whether Ozuna satisfied the conditions of probation is not easily discerned from review of minimal information contained on a form. Here, the risk of error is especially present because the circuit court reversed the agent's determination without explanation.

Third, the cost of providing a hearing before denial does not outweigh Ozuna's substantial interest and the risk of error. Additionally, expunction is conditionally ordered in a limited number of criminal cases.

CONCLUSION

Lazaro Ozuna requests that this Court reverse the decision of the court of appeals and remand to the circuit court with instructions to expunge his record.

Dated this 1st day of December, 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 2,997 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 1st day of December, 2016.

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