STATE OF WISCONSIN

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

DISTRICT I

Case No. 2015AP002300-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RACHEL M. HELMBRECHT,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Postconviction Relief Entered in the Milwaukee County Circuit Court, the Honorable Clare L. Fiorenza, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

HANNAH SCHIEBER JURSS
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-2201
jurssh@opd.wi.gov
Attorney for Defendant-Appellant

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ISSUE PRESENTED

At sentencing, Ms. Helmbrecht's attorney requested that the circuit court make her conviction eligible for expungement upon successful completion of her probationary sentence. The circuit court denied her request without offering any explanation beyond stating that it could not make the finding that society would not be harmed. Post-conviction, the circuit court offered additional rationale for its decision, but its rationale reflected consideration of the standard sentencing factors, not the factors specifically articulated in the expungement statute.

I. Did the Circuit Court Erroneously Exercise its Discretion When it Denied Ms. Helmbrecht's Request for Expungement of Her Conviction Upon Successful Completion of Her Probationary Sentence?

The circuit court denied her request for expungement eligibility at sentencing, and post-conviction held that it did not erroneously exercise its discretion in so doing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Ms. Helmbrecht would welcome oral argument should this Court find it helpful. Publication is warranted to address how a circuit court properly exercises its discretion when assessing whether to grant a defendant's expungement eligibility request at sentencing.

STATEMENT OF FACTS AND CASE

A. The charge

In October of 2013, Rachel Helmbrecht was twenty-three years old, working as a nurse's aide. (52:24-27;20:6;App.130-131). She had no prior adult criminal convictions.[1] (20:3).

The State on October 22nd 2013, charged her with one count of Possession of Methamphetamine, a Class I Felony.[2] The complaint alleged that employees of a hotel responded to a smoke alarm in a room and smelled the odor of marijuana coming from the room. (2). According to the complaint, Ms. Helmbrecht gave police permission to enter the hotel room and, when asked to turn over any additional marijuana she had, handed police a black case and said "something to the effect of 'it's in here.'" (2).

The complaint further alleged that inside the black case, police found a marijuana pipe, 0.4 grams of marijuana, a bottle containing pills of Clonazepam[3], and seven bags containing a total of 1.2 grams of methamphetamine. (2). According to the complaint, Ms. Helmbrecht told police that the black case was hers—that she found it earlier in the day outside of a restaurant and that she had a prescription for the pills; she later admitted to police that she did not in fact have such a prescription. (2).

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[1] As set forth in the complaint, Ms. Helmbrecht birthdate is November 27, 1989, and the offense occurred on October 22, 2013. Thus, she was 23 years old at the time of the offense. *See* (2).

[2] Wis. Stat. § 961.41(3g)(g).

[3] Clonazepam is a benzodiazepine used to treat seizures and panic attacks. National Library of Medicine, Medline Plus, "Clonazepam," *available online at* https://www.nlm.nih.gov/medlineplus/druginfo/meds/a682279.html (last accessed February 12, 2016).

Ms. Helmbrecht subsequently entered a plea to possession of methamphetamine. (50). In exchange for her plea to this charge, the State agreed to recommend six months in jail and to treat as uncharged read-in offenses possession of the Clonazepam and marijuana referenced in the complaint. (50:2-3).

B. Sentencing

At the sentencing hearing, the circuit court asked why the parties were not able to agree to a deferred prosecution agreement (hereinafter "DPA"). (52:10-17;App.127-129). The court noted that Ms. Helmbrecht's previous attorney had been "fighting so adamantly for her for a DPA and then for drug treatment court." (52:10;App.127).[4] The court indicated that it was "curious" about what happened with regard to the DPA. (52: 10;App.127).

The State explained that it had "very seriously" considered a DPA, and discussed the matter with the elected district attorney. (52:11-12;App.127). The State asserted that the "consensus" was that a DPA for methamphetamine use generally would not be appropriate unless there was "significantly more intensive supervision involved, way beyond what's—what's for a normal—normal deferred prosecution agreement." (52:11-12;App.127). The State also explained that a condition of the DPA would have been that Ms. Helmbrecht reveal her source for the methamphetamine, and that the State was "informed by Mr. Lockwood [her original attorney] that Ms. Helmbrecht was not willing to give up her source regarding the origin of the methamphetamines." (52:12-13;App.127-128). The State asked for six months in jail pursuant to the plea agreement; defense counsel asked for imposed and stayed jail time and probation. (52:2,26;App.125,131).

[4] Ms. Helmbrecht's original attorney withdrew prior to the plea hearing. (47).

Defense counsel explained that Ms. Helmbrecht had been willing to provide what information she had about the source of the drugs, and that he had tried to "revive" the DPA after becoming her attorney. (52:14;App.128). He further explained that Ms. Helmbrecht indicated that she told her previous attorney that she did not have the actual name of the person who provided the methamphetamine—that he was a "cagey guy" who did not give his name out; however, she was willing to provide his nickname ("Dude") and his telephone number. (52:14-15;App.128). The State noted that it considered this information to be "minimal" and "dated." (52:16-17;App.128-129).

Defense counsel noted that Ms. Helmbrecht had been attending drug treatment weekly since being released from jail, with superb attendance and praise from her counselor (52:20; *see also* 20;App.129). He further explained and presented testing records reflecting that Ms. Helmbrecht had not used drugs since being released from jail for this case. (52:21;20;App.130). Her attorney explained that she is "from a good family," and was employed in the nursing field as a nurse's aide. (52:24-27; 20;App.130-131).

Defense counsel also asked that the court order expungement upon successful completion of the sentence: "the purpose of the statute is to—in situations where it will benefit the defendant and not harm society, to remove that—from public view that conviction, which, as we all know, in a CCAP-happy world, particularly in—where she's in the nursing field, it's going to be a big barrier for her advancement." (52:27;App.131).

The circuit court rejected the State's request for a jail sentence, noting that "the defendant is in treatment" and is "fully employed right now and has made some changes since this case has been pending." (52:42;App.135). The court imposed and stayed a twelve-month jail sentence and placed Ms. Helmbrecht on thirty months of probation with twelve-months of stayed condition time. (52:43-44;App.135).

After imposing sentence and asking counsel to advise Ms. Helmbrecht of her post-conviction rights, the court briefly addressed and rejected the defense request for expungement upon successful completion of probation:

> With respect to expungement—Okay. I did—I have considered this, and I cannot make the finding that society would not be harmed. Clearly, your client would benefit, but I cannot make that—that finding, at this time. I respectfully deny the request for expungement. I have considered the request.

(52:49;App.137).

C. Post-Conviction Litigation

Ms. Helmbrecht filed a post-conviction motion. (30;App.110-124). She argued that the circuit court failed to properly exercise its discretion when denying her attorney's request to make her eligible for expungement, as the court failed to sufficiently explain its considerations and why it denied the request. (30:5-11;App.114-120).[5]

The circuit court denied the motion in a written order. (32;App.104-108). The court noted that unlike other sentencing considerations, "[e]xpungement is unique because unless an expungement is requested at the time of sentencing, the court has *no duty* under section 973.015, Stats., to consider an expungement, *even if the person is statutorily eligible for an expungement*." (32:3;App.106)(emphasis in original). The court further explained:

> If an expungement is requested, the court may grant the request if the court finds that the person will benefit and

[5] Ms. Helmbrecht also moved to vacate the DNA surcharge and to remove erroneous "consecutive" language from the judgment of conviction. (30:11-14;App.120-123). The court granted the motion to vacate the erroneous consecutive language. (32:5;App.108). The court denied her motion to vacate the DNA surcharge. (40;App.109). She does not renew her challenge to the DNA surcharge on appeal.

> that society will not be harmed; however, neither the language of the statute nor any published case imposes upon the court a duty to make any particular findings or to provide a ***Gallion***-type explanation for its decision if it denies an expungement request.

(32:3;App.106).

The court noted that even assuming that ***Gallion*** would apply to expungement decisions, it declined to alter its decision denying the request for expungement. (32:3-4;App.106-107). It explained that given the type of drugs found on Ms. Helmbrecht in this case, Ms. Helmbrecht having a juvenile drug offense[6], Ms. Helmbrecht being a regular user of methamphetamines despite "her training in the health field," and the dangers of methamphetamine being brought into Milwaukee, expungement was inappropriate. (32:3-4;App.106-107). The court stated: "society has a compelling and overriding interest in not only deterring people from using this drug but also in punishing people who bring this drug into this county, which historically has not seen a significant methamphetamine problem." (32:4;App.107). It found that "those interests would be compromised if this matter were expunged." (32:4;App.107). It recognized her "prosocial accomplishments and her relatively positive adjustment to probation,"[7] but did not find reason to change its prior decision. (32:4;App.107).

Ms. Helmbrecht now appeals.

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[6] As explained in the defense sentencing memorandum, Ms. Helmbrecht received a civil forfeiture for marijuana possession. (20:3).

[7] The court noted that she "has had one positive test for methamphetamines while on supervision." (32:4;App.107).

ARGUMENT

I. The Circuit Court Erroneously Exercised its Discretion at Sentencing When it Denied Ms. Helmbrecht's Request for Expungement of Her Conviction Upon Successful Completion of Her Probation.

A. A circuit court has discretion at sentencing to make a defendant's conviction eligible for expungement in certain statutorily-defined cases.

The purpose of the expungement statute 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)(internal quotations omitted).

Wisconsin Statute § 973.015 gives a circuit court authority to order expungement upon successful completion of a sentence in certain limited circumstances:

> Subject to sub. 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.

Wis. Stat. § 973.015(1m)(a)1 (provided in relevant part). Thus, the plain language of the statute reflects that a circuit court may order expungement *if* the court makes two

determinations: (1) the person will benefit from expungement and (2) society will not be harmed by expungement. [8]

While case law is clear that a circuit court exercises its discretion when deciding whether to order expungement of a conviction where a defendant is eligible, and that this discretion must be exercised at sentencing, *see*, *e.g.*, ***Matasek***, 2014 WI 27, ¶ 6, no Wisconsin published case law exists addressing *how* a circuit court properly exercises this discretion.

B. Wisconsin Statute § 973.015 requires a sentencing court, when deciding whether to grant expungement, to consider specific factors unique to expungement. The requirements of ***Gallion*** should apply to this exercise of discretion.

The plain language of the expungement statute reflects that when considering expungement at sentencing, a circuit court must "*determine[]*" whether the person will benefit and whether society will not be harmed by expungement eligibility. Wisconsin Statute § 973.015(1m)(a)1(emphasis added). Pursuant to the statute, a court must consider two factors: (1) whether "the person will benefit" from the expungement eligibility, and (2) whether "society will not be harmed" by expungement eligibility. Wis. Stat. § 973.015(1m)(a)1; *see also* ***Matasek***, 2014 WI 27, ¶ 12 ("[w]e interpret a statute by looking at the text of the statute").

Importantly, these factors are *different* than the three primary sentencing factors a circuit court must always

[8] The expungement statute further states that a court may *not* order a conviction expunged if the person is convicted of a Class I felony and the person has previously been convicted of a prior felony offense, or if the felony is a "violent offense" or for concealed a deceased child. Wis. Stat. § 973.015(1m)(a)2-3. This exception did not apply here, as Ms. Helmbrecht was convicted of a non-violent Class I Felony, and, as discussed at sentencing, had no prior felony convictions. (52:5-7;20:3).

consider when exercising its discretion in imposing sentence: the gravity of the offense, the character of the offender, and the need to protect the public. ***McCleary v. State***, 49 Wis. 2d. 263, 274-76, 182 N.W.2d 512 (1971). The expungement statute asks a court to go a step further and consider how expungement eligibility itself will affect both the defendant and the public.

The statutory language of the expungement statute thus suggests that a circuit court does *not* properly exercise its discretion when considering expungement by simply analyzing the standard three primary sentencing factors. Indeed, if a circuit court did not have to make a separate determination based on the expungement factors, then the statutory language articulating those factors specific to expungement would be superfluous. *See* ***Matasek***, 2004 WI 27, ¶ 18 ("We read statutes to avoid surplusage. We are to assume that the legislature used all words in a statute for a reason").

While deference is given to a circuit court's exercise of its discretion at sentencing, the exercise of discretion "contemplates a process of reasoning which depends on facts in the record or reasonably derived by inference from the record that yield a conclusion based on logic and founded on proper legal standards." *See* ***State v. Delgado***, 223 Wis. 2d 270, 280, 588 N.W.2d 1 (1999). As such, the record created by the circuit court in exercising this discretion "must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts of the case." *See* ***id.*** at 281. A circuit court must do more than state "magic words." ***State v. Gallion***, 2004 WI 42, ¶ 37, 270 Wis. 2d 535, 678 N.W.2d 197.

This Court has extended the rationale of ***Gallion*** to other components of a court's exercise of discretion at sentencing beyond the sentence itself. Prior to January 1, 2014, a circuit court exercised its discretion in deciding whether to impose the DNA surcharge in most felony cases.

See 2013 Wis. Act 20, §§ 2355, 9426; Wis. Stat. § 973.046(1g) (2011-2012)("Except as provided in sub. (1r), if a court imposes a sentence or places a person on probation for a felony conviction, the court *may* impose a deoxyribonucleic acid analysis surcharge")(emphasis added).

In ***State v. Cherry***, this Court held that the requirements of ***Gallion*** extended to the discretion exercised in deciding whether to impose the DNA surcharge. 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393. It noted that the statute "clearly contemplates the exercise of discretion by the trial court." ***Id.***, ¶ 8. Importantly, this Court concluded that to properly exercise its discretion, the court must do something more than "stating that it is imposing the DNA surcharge simply because it can," and instead must "consider any and all factors to the case before it" and "set forth in the record the factors it considered and the rationale underlying its decision." ***Id.***, ¶¶ 9-10.

Here too, the expungement statute contemplates the exercise of judicial discretion. Further, even more than in the former DNA surcharge statute, the expungement statute sets forth specific factors for a court to consider when exercising that discretion. As such, there is no reason why the requirements of ***Gallion*** should not equally apply when a court considers whether to make a defendant eligible for expungement.

The circuit court here noted that it "did not necessarily agree that ***Gallion***" would apply to an expungement determination, because unlike the sentence itself, and the DNA surcharge as it existed at the time of ***Cherry***, the court has no duty to consider expungement "even if the person is statutorily eligible." (32:3;App.106)(emphasis removed).

But how does the fact that a court will not have to analyze the question of expungement in every case negate or alter the court's responsibility to exercise its discretion in a way that may be understood by both the defendant and

reviewing courts when it *is* considering expungement? Indeed, the language of the former DNA surcharge statute and current expungement statute both provide that a court *may* impose the surcharge or make the defendant's conviction eligible for expungement, respectively. *Compare* Wis. Stat. § 973.046(1g) (2011-2012)("Except as provided in sub. (1r), if a court imposes a sentence or places a person on probation for a felony conviction, the court *may* impose a deoxyribonucleic acid analysis surcharge")(emphasis added) *with* Wis. Stat. § 973.015(1m)(a)1 ("…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…")(emphasis added). Both contemplate an exercise of discretion, and ***Gallion***'s requirement that a circuit court must do more than state "magic words" to properly exercise its discretion should equally apply to the determination of expungement eligibility.

C. The circuit court erroneously exercised its discretion at sentencing when it denied Ms. Helmbrecht's request for expungement eligibility. The court's supplemental rationale post-conviction did not remedy this error.

Here, the circuit court failed both at sentencing and in denying the post-conviction motion to properly exercise its discretion when Ms. Helmbrecht's request for expungement eligibility.

At sentencing, the circuit court did no more than state "magic words": "I have considered this, and I cannot make the finding that society would not be harmed. Clearly, your client would benefit, but I cannot make that—that finding, at this time. I respectfully deny the request for expungement. I have considered the request." (52:49;App.137). This explanation would seemingly apply to every eligible defendant who requested expungement; stated differently, it

offered no insight into *why* the court reached these determinations in Ms. Helmbrecht's case.

And while the circuit court's decision denying Ms. Helmbrecht's post-conviction motion offered a more detailed explanation for its denial of her request, the court's supplemental explanation reflects that it still did not consider the proper factors as set forth in the statute.

With regard to concern for Ms. Helmbrecht herself, though the court acknowledged post-conviction her "prosocial accomplishments and her relatively positive adjustment to probation supervision," the court articulated the following as grounds for its decision denying expungement eligibility: that she had Clonazepam pills, a "small amount of marijuana," and methamphetamine, (32:3;App.106); that she falsely told police that she had a prescription for the pills and, with regard to the methamphetamine, "cavalierly" told police, "[y]ou can't bash it until you tried it", (32:3;App.106); that she had a juvenile drug case; that she had been using methamphetamine regularly since 2011, (32:4;App.107); that the prosecutor noted that that it was "particularly disconcerting" that she "would subject herself to this particular drug given her training in the health field", (32:4;App.107); and that she brought methamphetamine into Milwaukee from outside of the county. (32:4;App.107).

With regard to concern for the public, the court noted that "society has a compelling and overriding interest in not only deterring people from using this drug but also in punishing people who bring this drug into this county, which historically has not seen a significant methamphetamine problem." (32:4;App.107).

But this supplemental explanation simply reflects consideration of the standard factors a court uses to impose *sentence* (gravity of the offense, character of the defendant, and need to protect the public); it does not reflect true consideration of how Ms. Helmbrecht would benefit or

society would be harmed from *making her conviction eligible for expungement.* The fact that the court ended its supplemental analysis by providing that the interests it discussed "would be compromised if this matter were expunged," does not remedy this failure. *See* (32:4;App.107).

For example, how does the fact that Milwaukee has not had a "significant methamphetamine problem" relate to whether society would be harmed from the possibility of Ms. Helmbrecht's conviction being expunged should she successfully complete probation? All defendants would seemingly benefit from having a conviction expunged, but how, if at all, would Ms. Helmbrecht in particular? How does the fact that she had been using methamphetamine regularly for a period of time relate to whether or not she would benefit from expungement should she successfully complete her probation? How is the fact that she told police "[y]ou can't bash it until you tried it" relevant to whether she should be eligible for expungement?

Ultimately, the circuit court failed offer more than "magic words" at sentencing, and post-conviction added a supplemental analysis of the standard sentencing factors—not an analysis of the requisite expungement factors. A valid exercise of discretion requires more than simply uttering key words or providing any reason at all. The circuit court failed both at sentencing and in its post-conviction decision to provide the necessary "reasoned application of the appropriate legal standard to the relevant facts of the case". *See* ***Delgado***, 223 Wis. 2d at 281. As such, it erroneously exercised its discretion when denying Ms. Helmbrecht's request for expungement.

CONCLUSION

Ms. Helmbrecht therefore asks that this Court enter an order reversing the circuit court's denial of her motion to modify its prior order denying her request for expungement, remanding this matter, and ordering the circuit court to exercise its discretion on the question of expungement eligibility in the proper manner as prescribed by this Court.[9]

Dated this 15th day of February, 2016.

HANNAH SCHIEBER JURSS
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-2201
jurssh@opd.wi.gov

Attorney for Defendant-Appellant

[9] Ms. Helmbrecht only seeks reversal of the court's order denying her request for expungement; she does not seek resentencing.

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 3,641words.

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 15th day of February, 2016.

HANNAH SCHIEBER JURSS
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-2201
jurssh@opd.wi.gov

Attorney for Defendant-Appellant

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 § 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.

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.

Dated this 15th day of February, 2016.

HANNAH SCHIEBER JURSS
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-2201
jurssh@opd.wi.gov

Attorney for Defendant-Appellant

A P P E N D I X

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