STATE OF WISCONSIN

COURT OF APPEALS

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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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.

The State asks this Court to interpret the expungement statute in a manner which is both contradictory to the plain language of the statute and confusing. The State does so based on dicta from an earlier decision from this Court which does not compel this Court to adopt the problematic interpretation the State suggests. The State further chooses not to respond to—and thereby foregoes its opportunity to respond to—Ms. Helmbrecht's arguments concerning the applicability of ***Gallion***[1] to expungement decisions.

A. The State's proposed interpretation of the expungement statute contradicts the plain language of the statute.

The State proposes that the discretionary criteria set forth in Wisconsin Statute § 973.015(1m)(a)1—whether "the person will benefit and society will not be harmed" by expungement—are instead prerequisite "factual findings" which a court must make before it may then exercise its discretion. *See* (Response at 4). In essence, the State suggests that a court's determination of whether the person will benefit and society will not be harmed by expungement are

[1] ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.

step one in a two-step expungement process: only if the court makes the required findings in step one, can it proceed to the second step of exercising its discretion.

The State's interpretation is flawed for multiple reasons. First, contrary to the State's claim, such an interpretation is *not* consistent with the plain language of the statute. Consider again the language of the statute, provided here in relevant part:

> 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).

The plain language of the statute does contemplate a two-step process, but not the one the State proposes. The statute explains that two requisite factual conditions must be present before a court may exercise its discretion and order expungement of a record upon successful completion of the sentence: (1) the person must be under twenty-five years old at the time of the offense; and (2) the offense must have a maximum period of imprisonment of six years or less. *See* ***id.***

If both of these factual requirements apply, then the statute provides that a court "*may*" order expungement if "the court *determines* [that] the person will benefit and society will not be harmed by this disposition." ***Id.*** (emphasis added). The words "may" and "determines" suggest an exercise of discretion, guided by the factors which the Legislature

provided. *See e.g.* ***In the Matter of the Estate of Warner***, 161 Wis. 2d 644, 652, 468 N.W.2d 736 (explaining that the use of the term "may" in a statute is generally construed as "permissive"—an "action that a Wisconsin court is empowered to take in its exercise of its discretion").

To adopt the State's interpretation would require this Court to read a *third* step into the statute: first, the court would have to ensure that the person was under twenty-five years old and the offense had a maximum period of imprisonment of six years or less; if step one is met, second, the court would have to determine whether the person will benefit and society will not be harmed; if step two is met, third, the court would have to exercise its discretion. But, under the State's interpretation, the statute does not provide any grounds or criteria a court should use to exercise this third-step discretion. The statute does not say because the Legislature did not contemplate such a step.

B. The State's proposed interpretation of the expungement statute would cause unnecessary confusion in application.

Not only does the State's proposed interpretation thus contravene the plain language of the statute, it would also lead to confusion in application: Under the State's proposed interpretation, what criteria would a circuit court use to properly exercise its discretion? What, if anything, would a court have to explain on the record to properly exercise its discretion? Would it simply be enough for a court to make the "findings" that the person would benefit and community would not be harmed by expungement and then simply say "I do not believe expungement is appropriate"? Or would a court need to offer additional explanation? Indeed, how can Ms. Helmbrecht address whether, under the State's

interpretation, the court's rationale was sufficient, given that it is unclear what *would* be sufficient under the State's proposed interpretation?

This Court need not and should not address these questions, as the Legislature has already told us what factors a court should use in exercising its discretion: consideration of whether the person will benefit from expungement, and whether society will be harmed by the expungement. These considerations are not "factual findings" as the State proposes. These considerations do not involve findings of fact—they do not ask, for example, how many prior adult criminal offenses the defendant has on his record. Instead, as the plain language of the statute provides and Ms. Helmbrecht argues, they are "determinations"—factors a court must consider as part of its exercise of discretion to determine whether it chooses to order expungement upon successful completion of the sentence. *See also* ***State v. Jackson***, 2012 WI App 76, 343 Wis. 2d 602, 819 N.W.2d 288 (addressing a court's exercise of its discretion to order a defendant register as a sex offender under Wisconsin Statute § 973.048(1m)(a)).[2]

[2] Wisconsin Statute §973.048(1m)(a) provides similar language to that of the expungement statute. It states that if a court imposes sentence for certain statutory offenses, the court "may" require the person to register as a sex offender "if the court determines that the underlying conduct was sexually motivated, as defined in s. 980.01(5), and that it would be in the interest of public protection to have the person report under s.301.15." ***Jackson*** provides an example of this Court discussing that exercise of discretion with the two statutorily-provided criteria (whether the offense was sexually motivated and whether it would be in the public interest) as components of this exercise of discretion.

C. The State relies on dicta from ***State v. Sobonya*** which is not binding on this Court.

The State rests its argument concerning the expungement statute on dicta from this Court's decision in ***State v. Sobonya***, 2015 WI App 86, 365 Wis. 2d 559, 872 N.W.2d 134. In that case, the circuit court denied the defendant's sentencing request for expungement; it determined that society would be harmed by the expungement because to expunge the record would undermine the general deterrent purpose of its sentence. ***Id.***, ¶¶1-2. The defendant filed a "new factor" motion for sentence modification based on an expert report concluding that expungement, contrary to the court's conclusion, would not undermine the deterrent effect of the court's sentence. ***Id.***, ¶1.

This Court concluded that Sobonya had not in fact presented a "new factor." ***Id.*** This Court explained that the "postsentencing report [was] an expert's opinion based on previously known or knowable facts" and was therefore not a "fact or set of facts" that were not in existence at the time of sentencing or unknowingly overlooked by the parties at sentencing; rather, it simply offered a different opinion. ***Id.***, ¶7.

Thus, the holding of ***Sobonya*** is that an expert report based on information available at the time of sentencing which simply reaches a different conclusion of that of the sentencing court does not constitute a "new factor" warranting sentence modification. In further elaborating on this holding, this Court noted that what the defendant cast as a "new factor" was really an attempt at reconsideration. This Court continued on to note that it grants "substantial deference" to a sentencing court's exercise of discretion and

that it found no basis to not give that deference to the circuit court's determination of the deterrent effect of its sentence, as that deterrence is a "legitimate objective for a trial court to consider and articulate as part of its sentencing decision, ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197, especially given that the legislature requires that the court find that 'society will not be harmed' by the expungement of a criminal record before exercising its discretion." ***Id.***, ¶8.

The State hangs its hat on this Court's language that the "legislature requires that the court find that 'society will not be harmed'" "*before* exercising its discretion." (Response at 5)(emphasis added). The State suggests that this Court "must" follow this language and accordingly its interpretation based on this one sentence from ***Sobonya*.** (Response at 5).

But this Court need not do so, as this Court is not bound by its own dicta. *See, e.g.,* ***State v. Grawien***, 123 Wis. 2d 428, 436, 367 N.W.2d 816 (Ct. App.1985) ("[w]e are not bound by the *Verhagen* language [language in a prior Court of Appeals' opinion] because it was dicta and was not necessary to the opinion in that case"). The question in ***Sobonya*** was not whether and how the requirements of ***Gallion*** should apply to the expungement criteria; the question was whether a post-sentencing expert's report relying on information available at the time of sentencing to reach a different conclusion about the effect on the deterrent value of a court's sentence constitutes a new factor. This Court is thus not bound to follow dicta from a previous decision which, if adopted, would contravene the plain language of the statute.

D. The State has forfeited its opportunity to respond to Ms. Helmbrecht's arguments concerning the applicability of ***Gallion*** to an expungement determination.

In advancing its problematic interpretation of the expungement statute, the State does not even attempt to respond to whether or how ***Gallion*** applies to a circuit court's decision on expungement; instead, it proposes that if this Court agrees with Ms. Helmbrecht that this case presents this Court with the opportunity to address the applicability of ***Gallion*** to a court's exercise of discretion when considering expungement, this Court should provide it with an "opportunity to file a short supplemental brief on that issue." (Response at 10).

The State had its opportunity. The very issue which it chose not to respond to is the central issue Ms. Helmbrecht raised in her Initial Brief: the applicability of ***Gallion*** to expungement determinations. The State has thus forfeited its opportunity to dispute Ms. Helmbrecht's arguments concerning whether and how ***Gallion*** applies to expungement determinations. *See e.g.* ***State v. Alexander***, 2005 WI App 231, ¶15, 287 Wis. 2d 645, 706 N.W.2d 191 ("[t]he State has neglected to respond to this argument. *Arguments not refuted are deemed admitted*")(emphasis added).

This Court should not encourage a practice by which the State may choose to not respond to a central argument raised by an appellant and then be permitted to respond in supplemental briefing should this Court find the appellant's argument persuasive. Such a practice would run counter to both longstanding case law concerning a respondent's obligations to address arguments in its response brief and principles of judicial efficiency.

E. The circuit court must exercise its discretion with proper consideration of the factors set forth in the expungement statute.

Given the Legislature's requirement that a circuit court consider specific criteria when exercising its discretion concerning expungement, this Court should hold that a circuit court considering expungement offer specific explanation of its conclusions concerning expungement beyond simply stating the "magic words" of the expungement criteria. ***State v. Gallion***, 2004 WI 42, ¶ 37, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court failed to do so at sentencing, and post-conviction offered a supplemental explanation reflective of consideration of the standard sentencing factors—not the expungement factors. The State in its response tries to add supplemental justifications involving the expungement criteria, but it is the circuit court, not the State, which must properly exercise this discretion.

CONCLUSION

For these reasons, and those set forth in her Initial Brief, Ms. Helmbrecht 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.

Dated this 19th day of April, 2016.

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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 2,123 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 19th day of April, 2016.

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