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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Case No.: 2016 AP 97
Trial Court Case No.: 2010 CF 141

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MATTHEW W. ARMSTRONG,
Defendant-Appellant.

APPEAL TO REVIEW DENIAL OF EXPUNCTION
IN FOND DU LAC COUNTY CIRCUIT COURT,
HONORABLE PETER L. GRIMM PRESIDING

BRIEF-IN-CHIEF OF DEFENDANT-APPELLANT

ROBINSON LAW FIRM

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ISSUES PRESENTED

1. Did the trial court abuse its discretion when it denied this mentally challenged defendant's request for expunction under sec. 973.015(1)(a) Stats. after his convictions for 3 misdemeanor counts of sex with one 16 or older and 2 counts of disorderly conduct by ruling society's right to know of the defendant's convictions was high and the detriment to the defendant was low?

Answer by the trial court: No

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant believes that both oral argument and publication are necessary due to the importance of the issues presented. Publication is necessary because resolution of the issue concerning the trial court judge's discretion involves an application of existing law to an uncommon factual situation, i.e. expunction to a mentally challenged defendant.

STATEMENT OF THE CASE

On or about May 26, 2010, a summons and complaint was filed charging the defendant with repeated sexual assault of a child contrary to sec. 948.025(1)(a) Stats. (1:1-2) The defendant's date of birth is August 24, 1989. The dates of the allegations were from March 2010 through April 2010. The defendant appeared in court as summoned on June 15, 2010 and a signature bond was set. The defendant waived his preliminary hearing, was arraigned and the case was set for trial. Prior to trial, the State and defendant agreed to a plea bargain. Based upon that plea bargain, the case was scheduled for a plea/sentencing hearing.

On December 9, 2010, a plea and sentencing hearing was held before the Honorable Peter L. Grimm – Fond du Lac County Circuit Court Judge – Br. II.(App. 1) At that hearing, the State moved the court to amend the charges to 3 counts of misdemeanor sex with a child age 16 or older contrary to sec. 948.09 Stats. and 2 counts of disorderly conduct contrary to sec. 947.01 Stats.(43:p.2 l.24-25 and p.3 l. 1-2) The Court inquired of the parties it's rational for the amendment. The State told the Court that the alleged victim had no objection to the defendant receiving a lesser sentence like probation or even a deferred prosecution agreement or no convictions.(43:p.4 l.5-17) The State told the court the reason for the number of convictions

will allow the Court to impose as much probation as it can allow (4 years) so that the defendant could get the counseling that he needs. The State said that in reviewing the assessments on the defendant, it is clear that the defendant is a young man with challenges, has a supportive family, operates at a functioning level much younger than his actual age, that the alleged victim was the aggressor toward the defendant, has a very good chance to succeed on extended term of probation, is unlikely to re-offend and does not need a felony.(43:p4 l.23-25, p.5 l.1-25, p.6 l. 1-3) Lastly, the State said that given the defendant's mental health challenges and misdemeanors, he will have issues getting employment but with a felony would be much worse.

The defendant told the court that the defendant had a neuropsychological evaluation done in 2007 by Dr. Suesser (23:1) and another in 2009 by Dr. Kaplan.(43:p.6 l.9-14) Those evaluations showed the mental health difficulties the defendant has, including an IQ of 75 or 76 and pervasive developmental disorder.(43:p.6 l.14-18) The defendant told the court that he will qualify for guardianship by his parents who will oversee the defendant's day-to-day living, including living at home with them.(43:p.6 l.19-25, p.7 l.1-2) Further, the defendant's mental age is around 13 to 16, that the girl was more sophisticated for her age while the defendant was naïve and unsophisticated for his age.(43:p.7 l.18-24) The court was told that the defendant had counseled with Mark Reich, was currently seeing Dr.

Neunaber, was assigned a social worker, Louise Percival, and was going to get a guardianship ordered.(43:p.10 1.3-20)

The Court granted the amendment noting that the alleged victim said in a victim impact statement that the case has not affected her at all, it was her idea for everything and that the defendant should not get in any trouble at all reiterating that it was all her idea.(43:p.11 1.2-16) The court then proceeded to question the defendant on the plea questionnaire waiver of rights form. The defendant had difficulty understanding the procedures such as not knowing the total maximum penalties of the offenses were and not knowing what disorderly conduct was. Ultimately, the defendant pled “no contest” to and was convicted of all 5 misdemeanor counts as contained in the amended charges. The Court accepted the pleas, found the defendant guilty and went right to sentencing.

At the sentencing portion of the hearing, the State and defendant jointly recommended a withheld sentence, 4 years probation with various conditions including counseling. The State explained that the reason for the recommendation was that the defendant has very good high character, no history of any illegal problems, has an amazing family that’s very supportive, the case is serious but very unique given who the defendant is, the need to protect the public is not high with family involvement, treatment and probation, no pedophilia issues, that it was an age appropriate decision given the defendant’s challenges,

and doesn't foresee any future concerns.(43:p.27 1.23-25, p.28 1.1-25)

The State took no position on expunction (emphasis added).(App. 2)

The defendant argued that the defendant has a very supportive family with an older sister as a teacher and brother at West Point Military Academy, did volunteer and occasionally work at the YMCA but hasn't since the charges surfaced, helps keep score at high school sporting events, the defendant has mental health issues, the defendant understands what happened was wrong and the defendant's parents restrict the defendant's internet use.(43:p.29 1.19-25, p.30 1.1-13, p.31 1.1-20) The defendant requested expunction pursuant to sec. 973.015 Stats. The basis for that request is the difficulties the defendant will have finding employment with these convictions, does not want to burden him for the rest of his life, there would be a guardianship in place soon so the defendant will be supervised by the parents, social worker and probation agent.(43:p.29 1.8-18, p.32 1.13-25)

The Court then ordered a withheld sentence, 4 years probation with various conditions including counseling (basically following the joint recommendation of the parties). The basis for this was the defendant's mental health issues, all the structure the defendant will have with parents and probation rules, and due to this structure, the defendant is a low risk to re-offend.(43:p.37 1.3-7) As to expungement, the court left that issue open for future motion, saying it

will require a hearing and showing of cause or reason to do so upon successful on probation.(43:p39 l.14-22)

On December 11, 2014, the Department of Corrections, Agent John Gosar, filed with the court a letter stating that the defendant will successfully complete probation on December 9, 2014.(App. 3) Also enclosed with that letter were a DOC 2678 Form – Verification of Satisfaction of Probation Conditions for Expungement and form confirming all fees/costs were paid. The Court scheduled a hearing on expungement for January 14, 2015.

At the January 14, 2015 expungement hearing, the State opposed expungement, despite knowing the defendant did considerably well on probation, due to the public's interest to know.(App. 4) In addition, the State argued that the issue of expungement must be affirmatively decided at sentencing due to recent case law. The defendant argued that the issue of expungement is properly before the court for at the time of sentencing, it was permissible for the court to rule on future motion the issue of expungement. The court ruled the expungement issue is properly before the court.(44:p.8 l.5-11)

The defendant argued that expungement is appropriate for the defendant has cognitive disabilities, mild mental retardation, the defendant's mother has been granted full guardianship, the defendant did extremely well on probation which could be verified through the probation agent who was in court, the case was negotiated the way it

was for the one purpose of expungement, that having any sort of conviction is extremely detrimental especially this defendant given his cognitive disabilities, it would not harm society for any employment the defendant intends to pursue has to be extremely structured, supervised and focused given his cognitive disability.(44:p.4 l.24-24, p.5 l.1-25, p.6 l.1-5)

The court inquired of the defendant the detrimental impact on the defendant. The court said for other cases it's heard that employment issues arise such as licenses or regulations or educational grants or loans. The defendant reiterated that given the cognitive disability of the defendant and his limited range of employment, not granting expungement is extremely detrimental to the defendant.

The court denied expungement. The basis for denial was that society's right to know of the convictions was high.(44:p.9 l.4-8) The court said that if the defendant were to volunteer in agencies or service related organizations or charities, the facility has a right to know of the convictions to take whatever steps they find prudent to ensure safety and be apprised that the defendant may not be well equipped to handle advances from others.(44:p.8 l.14-25, p.9 l.1-3) In addition, the detriment to the defendant is low for there is no clear showing of detriment for the defendant is not pursuing a career that requires any licensing or other practicum's or course work or teachings.(44:p.9 l.12-25) Lastly, the court also ruled that since it did not order

expungement at the time of sentencing, it cannot order expungement now.(44:p.10 l.2-5)

On April 30, 2015, the defendant filed what was in essence a post-conviction motion for the Court to re-consider its denial for expunction for the defendant.(App. 5)(31:p.1-10) The defendant's motion argued that the Court abused its discretion by ruling that the detriment for the conviction to remain to this mentally challenged defendant was low. The motion argued that it is common sense that a mentally challenged person will have limited employment opportunities and without expungement, those opportunities are even more limited. Ruling that the detriment of no expungement to this mentally challenged defendant is low, common-sense wise, is an abuse of discretion. In addition, the motion argued that the Court showed an inflexible made-up mind against expunction for the defendant had not shown he had sought any sort of licenses that prevent employment. This amounted to an unreasonable, unjustifiable and fundamentally unfair abuse of discretion.

Next, the motion argued that the Court abused its discretion by ruling that society's right to know of the convictions is very high despite fact that the defendant will be heavily monitored in all aspects of his life due to his mental disability. The motion argued that the defendant has a social worker and a guardian that will monitor all his behaviors and that any employment the defendant has will need to be

strictly supervised due the his mental disabilities. The Court ignored these safe guards by ruling the right to know in case someone makes advances on the defendant again. This, argued the motion, is an abuse of discretion.

Third, the motion argued that denying expunction is equivalent to an excessive sentence for it is unduly harsh and shocking that expunction is not granted for a mentally challenged person who was taken advantage of by a far more socially sophisticated, biologically younger person. The motion argued that there were no ill effects to the victim, that the victim admitted the situation was her fault and that she wanted nothing to happen to the defendant. The motion further argued that no body opposed expungment yet the Court denied it. This was an abuse of discretion.

Lastly, the motion argued that the Court unduly emphasized that the defendant may have opportunities to re-offend despite all safe guards that are in place. The defendant, due to his mental issues, will have every aspect of his life strictly supervised, especially his work. The Court abused its discretion by ignoring this.

The post conviction motion was heard on August 5, 2015.(App. 6)(45:p1-12) The Court was told that the defendant's mother is now officially his full guardian, that the defendant had a job coach but is having difficulties finding a job largely due to the convictions, and that the defendant had an opportunity to work at a

healthcare facility but was denied due to his convictions.(45:p2 1.20-25, p.3 1.1-22) The Court at first stated that the victim's mother, in a impact statement to the Court, took a harsh view of the case.(45:p.6 1.16-20 The defendant corrected the Court by reading verbatim from the sentencing transcript that the mother changed her view and was in favor of a deferred prosecution agreement or no conviction.(45:p.6 1.21-25, p.7 1.1-18) The Court acknowledged that the defendant's probation agent was no opposing expungment and that the defendant's psychologist has significant barriers for employment.(45:p.8 1.12-14, p.9 1.23-25, p.10 1.1-3) Despite this, the Court denied expungment. The basis for denial was the public's right to protect itself outweighs the individual pursuits of the defendant; the previous ruling was made so there is no right to rehear the matter; since expungment wasn't granted that sentencing the issue is foreclosed; and that the prosecutor is not agreeing.(45:p.10 1.4-25 p.11 1.8-11)

ARUGMENT

I. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED THIS MENTALLY CHALLENGED DEFENDANT'S REQUEST FOR EXPUNCTION UNDER SEC. 973.015(1)(A) STATS. AFTER HIS CONVICTION FOR 3 MISDEMEANOR COUNTS OF SEX WITH ONE 16 OR OLDER AND 2 COUNTS OF DISORDERLY CONDUCT BY RULING SOCIETY'S RIGHT TO KNOW OF THE DEFENDANT'S CONVICTONS WAS HIGH AND THE DETERIMENT TO THE DEFENDANT WAS LOW?

Sec. 973.015 (1)(a) Stats. reads, in relevant part, that when a person is under the age of 25 at the time of a 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 the successful completion of the sentence if the court determines that the person will benefit and society will not be harmed by this disposition. Sentencing is within the circuit court's discretion. McCleary v. State, 49 Wis.2d 263, 277-278, 182 N.W.2d 512, 519-520, (1971). An abuse of discretion occurs when the trial court employs the wrong factors or irrelevant factors. Id. at 278, 182 N.W.2d at 520. The defendant bears the burden of showing that there was some unreasonable or unjustifiable basis for the sentence imposed. State v. Mosley, 201 Wis.2d 36, 43, 547 N.W.2d 806, 809 (Ct. App. 1996). Fundamental principals of fairness and due process require that the trial court base its sentencing decision on legitimate considerations. State v. Halbert, 147 Wis.2d 123, 127, 432 N.W.2d 633, 635 (Ct. App. 1988). A trial court may not approach a sentencing decision with an inflexibility that bespeaks a made-up mind. Id. at 128, 432 N.W.2d at 635.

The defendant qualifies for expungement under sec. 973.015 Stats. The defendant was under the age of 25 at the time of the offense and the offenses he was convicted of were all misdemeanors. The defendant has no prior criminal convictions and successfully completed all terms of probation ordered by the court. At the time of sentencing,

the defendant argued for expungement. The court allowed the defendant to file a motion for expungement upon successful completion of probation. Thus, the issue of expungement is properly before the court.

The court abused its discretion in denying expungement by believing the detriment to this mentally challenged defendant is low. The parties made it clear to the court that the defendant is mentally challenged and due to that, any conviction will be difficult for the defendant to find employment. The Court was aware that the defendant was employed at the YMCA but was terminated due to the criminal charges. The Court was aware that the defendant has not been employed and cannot find employment due largely to these convictions. It is common sense that a mentally challenged person has limited employment opportunities and, adding criminal convictions, will be a great detriment to the person. Not only is it common sense, it has been proven because the defendant can't find a job. No one will hire a mentally challenged person with *5 criminal convictions*.(emphasis added) The Court at the first hearing for expungement emphasized the detriment was low for the defendant was not pursuing employment that requires a license or certificate. So, the defendant attempted employment at a licensed facility but was denied *due to his convictions*.(emphasis added) The Court didn't believe that these convictions are having a significant impact on the defendant finding

employment at the post conviction hearing. This finding is absurd to the point of abusing discretion. Again, it is common sense that mentally challenged people have a harder time in life. It is obvious that the Court is using the defendant's mental issues against the defendant by denying expungement by find that the public's right to know outweighs the individual pursuits of the defendant. This basis for denying expungement is unreasonable, unjustifiable, and illegitimate that flies in the face of fundamental fairness. It also shows that the court is inflexible with a preconceived made up mind in that any person with a mental challenge will be treated unfairly because the mental challenge makes that person more of a risk. This is clearly abusing discretion. Therefore, the court abused its discretion in denying expungement.

The court abused its discretion in denying expungement in ruling that society's right know is high and the public's protection despite the very strict structure the defendant will have in all forms of his life, including employment. The court relied heavily on the premise that if the defendant were to volunteer or work in a service related organization, that facility has a right to know the defendant's conviction to take the necessary steps to ensure safety and that the defendant may not be well equipped to handle others advancements. What the court failed to consider is that the defendant was counseled on how to handle situations such as this, understands it is wrong, the

facts of this case were not in an employment setting and, most importantly, the strict structure the defendant will have in all aspects of his life due to the guardianship. The court ignored that the defendant still has a social worker and parents that are guardians and that any form of employment/volunteer will require strict supervision due to his cognitive disabilities. Society's need to know is very low for the defendant will have little to no alone access to anyone in such a setting. Due to this strict supervision, it is unreasonable and unjustifiable to deny expungement on a "what if someone makes advances on him again" basis. There is no basis that the public is at risk. Even the State argued at the original sentencing that the need to protect the public is high given the family involvement and treatment and did not foresee any future concerns.(43:p.28 l.14-25). In fact, the Court acknowledged at the original sentencing that the defendant is a low risk to re-offend with the plan in place for the defendant.(43:p.37 l.3-7) Given all the structure this defendant has in a job coach, his guardian, social worker and need for strict supervision at work makes him the least risk to the public there can be. By ruling at the post conviction motion hearing that the public's right to know and it's right to protection outweighs the defendant's individual pursuits with all that is in place for the defendant contradicts what was ruled on at the original sentencing is an abuse of discretion. It is fundamentally unfair for the court to deny expungement because the defendant has mental health

difficulties when all safe guards are in place. Thus, the court abused its discretion in denying expungement.

This court's denial of expungement to this defendant is equivalent to an excessive sentence. A trial court exceeds its discretion as to the length of the sentence imposed only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. Ocanas v. State, 70 Wis.2d 179, 185, 233 N.W.2d 457 (1975). In addition, a trial court abuses its sentencing discretion when it fails to state relevant and material factors that influenced its decision, relies on immaterial factors, or gives too much weight to one sentencing factors in the face of other contravening considerations. Id., at 185, 233 N.W.2d at 461 (1975).

It was unduly harsh and shocking under all the facts of this case for the court to deny expungement to this mentally challenged defendant. From a fact standpoint, the victim of this case admittedly was the aggressor toward the defendant, even using a friend's cell phone to contact the defendant and paying for a cab ride for the defendant to meet with her. The victim has no ill effects of the situation, admitted it was her fault and wanted nothing to happen to the defendant. The defendant and the victim were intellectually the same age with the victim being more "socially sophisticated". The defendant

completed probation perfectly. Everything has been done to prevent a re-offense is in place with the defendant's guardianship, job coach, social worker and strict job supervision. Despite all the facts of the case and all the strict supervision rules put in place, the court shockingly denied expungement. Nobody opposed expungement yet the court denied it. This in and of itself is shocking. Denying expungement given all the facts of the case and who the defendant is disproportionate and that reasonable people would feel what is right and proper is expungement. Therefore, the court abused its discretion.

The court unduly emphasized the defendant having an opportunity to re-offend despite the facts that all safe guards were in place. This undue emphasis flies in the face of the contravening considerations that the defendant is under a guardianship and any employment/volunteer work will be highly supervised. This is especially true due to the defendant's cognitive disabilities for he cannot function on chores without significant guidance. Yet, the Court did not grant expungement fearing an opportunity to re-offend. This is an abuse of discretion.

The Court abused its discretion in ruling that the State opposed expungement. The State was not supposed to take a position on expungement. However, the Court still ruled that without the agreement of the prosecutor, it's hard for the Court to say it knows better. Not one person was opposed to this request. The probation

agent took no position but clearly seemed to favor it with its unsolicited, positive report to the Court; the State officially and legally took no position; the defendant was in favor of the request; and most importantly, the victim was in favor of a deferred prosecution agreement or no conviction, i.e. in favor of expungment. Despite all of this, the Court said it's hard for him to know better. The Court knew better but abused its discretion by denying expungment to this mentally challenged person for no legitimate, legal reason.

CONCLUSION

The defendant respectfully requests the court to grant expungment. Under sec. 973.015(1)(a) Stats., the defendant's criminal conviction's (misdemeanors) and age (21) qualifies him for expungment. The Court abused its discretion by ruling the detriment to this mentally challenged defendant is low despite the fact that the defendant has proven he cannot get a job due to these convictions. In addition, the Court abused its discretion by ruling society's right to know of the conviction and to be protected outweighs the defendant's individual pursuit in the face of numerous safe guards like the defendant's guardian (his mother), social worker and strict job supervision. The denial of expungment is shocking, unduly harsh, and bespeaks an inflexible and made-up mind for this defendant given his mental challenges and that no one involved in the case opposed expungment. The Court's denial of expungment is contrary to statute,

case law and fundamental fairness. Therefore, the defendant requests this Court to grant expungment.

Respectfully submitted this 4th of March, 2016.

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**CERTIFICATION OF COMPLIANCE WITH RULE
809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 7th day of March, 2016.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 19 pages, 4,038 words.

Dated this 7th day of March, 2016.

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