STATE OF WISCONSIN

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

DISTRICT II

Case No. 2016AP000866 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DIAMOND J. ARBERRY,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and
an Order Denying Expungement
Entered in the Fond du Lac County Circuit Court,
The Honorable Peter L. Grimm, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

WISCONSIN STATUTES CITED

ISSUES PRESENTED

1. Was the circuit court barred from considering expungement when it was raised in a postconviciton motion given that case law requires the court to consider expungement eligibility at the time of sentencing?

2. Did the circuit court err in its exercise of discretion when it denied expungement eligibility but gave reasons for doing so that could apply to any case?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because it is anticipated that the written briefs will fully set forth the arguments. Publication is not requested because this case can be resolved by the application of settled law.

GOVERNING STATUTE

973.015 Special disposition.

(1m) (a) 1. Subject to subd. 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. This subsection does not apply to information maintained by the department of transportation regarding a conviction that is required to be included in a record kept under s. 343.23 (2) (a).

2. The court shall order at the time of sentencing that the record be expunged upon successful completion of the sentence if the offense was a violation of s. 942.08 (2) (b), (c), or (d) or (3), and the person was under the age of 18 when he or she committed it.

3. No court may order that a record of a conviction for any of the following be expunged:

a. A Class H felony, if the person has, in his or her lifetime, been convicted of a prior felony offense, or if the felony is a violent offense, as defined in s. 301.048 (2) (bm), or is a violation of s. 940.32, 948.03 (2) or (3), or 948.095.

b. A Class I felony, if the person has, in his or her lifetime, been convicted of a prior felony offense, or if the felony is a violent offense, as defined in s. 301.048 (2) (bm), or is a violation of s. 948.23 (1) (a).

(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. 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. If the person has been imprisoned, the detaining authority shall also forward a copy of the certificate of discharge to the department.

…

(3) A special disposition under this section is not a basis for a claim under s. 775.05.

STATEMENT OF THE CASE

On, May 20, 2015, the state filed a five-count complaint charging Diamond Arberry with two counts of retail theft as party to a crime contrary to Wis. Stat. § 943.50(1m)(d), Class I felonies, one count of attempted misdemeanor retail theft as party to a crime, contrary to Wis. Stat. § 943.50(1m)(b), a Class A misdemeanor, one count of obstructing an officer contrary to Wis. Stat. § 946.41(1), a Class A misdemeanor, and one count of resisting an officer contrary to Wis. Stat. § 946.41(1), also a class A misdemeanor. All of the counts charged Ms. Arberry as a repeater pursuant to Wis. Stat. § 939.62(1)(a). (2).

On August 27, 2015, Ms. Arberry pled no contest to one count of retail theft as party to a crime contrary to Wis. Stat. § 943.50(1m)(d), a Class I felony, and one count of attempted misdemeanor retail theft as party to a crime and as a repeater, contrary to Wis. Stat. § 943.50(1m)(b), a Class A misdemeanor. (25; App. 101-105).

The court accepted Ms. Arberry's pleas and proceeded directly to sentencing. On the first count, the court sentenced Ms. Arberry to one year of initial confinement followed by two years of extended supervision. On the second count, the court imposed and stayed a prison sentence and ordered that Ms. Arberry be placed on probation for two years, consecutive to the prison term. (48:24). Neither the parties nor the court discussed Ms. Arberry's potential eligibility for expungement.

Ms. Arberry filed a postconviction motion asking the court to grant her eligibility for expungement. (29). The court held a hearing on the motion (49) and denied Ms. Arberry's request for expungement eligibility. (37). Ms. Arberry now appeals. (39).

STATEMENT OF FACTS

The charges in this case arose from an incident that occurred on May 13, 2015, not long before Ms. Arberry, then 18 years old, was set to graduate from high school. (48:15). On that day, Ms. Arberry's older sister and her sister's friend, Lyeshia Kittler, asked her if she wanted to go for a ride. (2:3). The three young women rode in Ms. Kittler's car and eventually made their way to Forest Mall in Fond du Lac, Wisconsin.

There, an employee of the Buckle Store saw three women trying to place merchandise in a purse in order to leave without paying for it. Police responded, confronted the women, and searched Ms. Kittler's vehicle where they found additional merchandise from retail stores in Green Bay and Oshkosh, Wisconsin. (2:3).

The state charged Ms. Arberry with five crimes in Fond du Lac County Case Number 15CF294. (2). Three of the charges alleged that Ms. Arberry was party to the crime of theft or attempted theft. (2). The state noted at the preliminary hearing that it was "not alleged that [Ms. Arberry] fully participated as a sole actor." (46:7).

The parties reached a plea agreement and the case proceeded to sentencing. Both the defense and the state recommended county jail time as well as probation. (48:12). The state explained that it was not requesting a prison sentence because the offense was not drug-related and the items recovered were purses and clothing. (48:12). The state noted that this was not Ms. Arberry's first criminal conviction.

The defense explained that Ms. Arberry was a high school senior at the time of the offense. (48: 15). Despite her

youth, Ms. Arberry had a strong work history and had worked at McDonald's, Fed Ex and done temp work. (48:13). Most recently, she had been a healthcare assistant at a nursing home. (48:13).

During her senior year, Ms. Arberry became pregnant. She returned to school two weeks after giving birth in order to stay on track with her schoolwork and work toward graduating with her class. (48:13). At the time of the offenses, Ms. Arberry did not have money to pay the $95 fee required to obtain a cap and gown for her graduation ceremony. Therefore, the defense argued that although not planned, Ms. Arberry's crime was economically motivated. (48:15).

At sentencing, the court acknowledged Ms. Arberry's youth and impulsivity, but was also concerned about her repeater status and the fact that items were taken from more than one store. (48:21-22). The court declined to impose a jail sentence, citing concerns that, given the other sentences she was serving, she would "hopscotch" to various county jails. (48:23). Ultimately, the court imposed a prison sentence noting, "I don't want to bury her in prison at all, but I want to give her the tools and abilities for long-term success and outcomes." (48:24).

The parties did not discuss whether Ms. Arberry should be made eligible for expungement. Ms. Arberry filed a postconviction motion seeking a determination that her record could be expunged upon the successful completion of her sentences. (29). Ms. Arberry argued that the parties overlooked making the eligibility determination at the time of sentencing. Ms. Arberry's postconviction motion suggested that this may have been because of the recent clarification by the Wisconsin Supreme Court in ***State v. Matasek***[1] that a

[1] 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811

determination of eligibility for expungement is to be made at the time of sentencing.

The court denied the motion and stated the following:

> All Right. Thank you. The Court appreciates that the extent of the question has now been interrupted (sic) and ruled upon. While there are various efforts to amend the statute or propose new language to amend the statute, that doesn't seem to be going very far in the Legislature. And I have taken an interest in that but the Court nonetheless is constrained by the statute. It does require the matter to be granted at the time of the sentencing.
>
> If somebody would have asked me about it, I would have said, well, no, she's not getting expungement. Granted, no one brought it up. I don't think as a judge, I have to say no when no one has asked me to say no or asked me to grant it. So I think technically the motion is barred by the case law that's been rendered.
>
> And my second ruling would be that, on the merits, even if I were to consider or think about it – and I can be honest and I can tell you that if you would have asked me at sentencing, I would have said no. And I'm also going to say no today for the reason that convictions have consequences and they are of public record so that the public can protect themselves. The public has the right to know who commits what crimes so that they can make decisions to decide how to best interact with an individual for their own mutual decisions of mutual benefit of commerce or trade or employment or otherwise.
>
> We have laws that prevent discrimination for these convictions. And I'm all for rehabilitation and people paying their debts back to society. And I know many employers who hire people with records. So I think the merits of the motion as addressed nonetheless with the statute and the case law, I would in my discretion deny the motion on the merits. This also I think is blocked or

> barred per the statute and the case law that has interpreted the statute. So either way, it's the same result. Motion denied.

(48:6-8; App. 106-114). Ms. Arberry appeals. (39).

ARGUMENT

The Circuit Court Was Not Barred from Considering Expungement When it Was Raised in a Postconviction Motion and the Court Did Not Properly Exercise Its Discretion When It Gave Reasons for Denying Expungement That Could Apply in Any Case.

A. Introduction

Wisconsin Statute § 973.015 allows circuit courts to "shield youthful offenders from some of the harsh consequences of criminal convictions" ***State v. Leitner***, 2002 WI 77, ¶38, 253 Wis. 2d 449, 646 N.W.2d 341, citing ***State v. Anderson***, 160 Wis. 2d 435, 440, 446 N.W.2d 681 (Ct. App. 1991), by expunging the record of their conviction.

The Wisconsin Supreme Court recently construed § 973.015, the "expungement statute," in ***State v. Matasek***, 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811. There, the court resolved the issue of when a circuit court must exercise its discretion regarding whether a defendant is eligible for expunction, noting that some counties had been handling it differently than others. ***Id.*** at ¶5. In ***Matasek***, the court held that a decision on whether or not to grant expungement must be made at the time of sentencing. The court agreed that there were policy reasons for permitting the circuit court to decide on expunction after the offender completes his or her sentence rather than at the time of sentencing. 353 Wis. 2d 601, ¶41. However, the plain language of the statute requires that "if a

circuit court is going to exercise its discretion to expunge a record, the discretion must be exercised at the sentencing proceeding." ***Id.*** ¶45.

This case presents two questions: (1) whether the court had the authority to consider Ms. Arberry's eligibility for expugement on direct appeal when it was overlooked at sentencing, and (2) whether the court properly exercised its discretion in denying expungement.

As argued below, the first question should be answered "yes" because even issues that are required to be resolved at sentencing are still subject to motions for sentence modification. The second question asks this court to review the circuit court's discretionary decision to deny expungement. This Court should conclude that the circuit court erred in its exercise of discretion when it did not apply the law to the facts of Ms. Arberry's case and instead provided reasons that could be used to deny expungement in any case.

B. The circuit court has the authority to grant eligibility for expungement at a postconviction hearing when it was overlooked at sentencing.

At the postconviction hearing in this case, the circuit court ruled that it could not grant Ms. Arberry eligibility for expungement because the case law interpreting the expungement statute requires "the matter to be granted at the time of sentencing." (49:7; App. 112).[2]

[2] There was no dispute that Ms. Arberry met the other statutory requirements for expungement. Ms. Arberry was convicted of a Class I felony and a Class A Misdemeanor, both offenses that carry a maximum penalty of less than six years of imprisonment. Ms. Arberry was under 25 at the time of the offense. Therefore, it is clear that Ms. Arberry was in fact eligible for expunction. *See* Wis. Stat. § 973.015(1)(a). Ms. Arberry's date of birth is September 21, 1996. (25:App. 101).

While it is correct that the supreme court recently clarified in ***Matasek*** that expungement is to be addressed at the time of sentencing, this case does not bar Ms. Arberry from raising the issue in a motion for sentence modification. In ***Matasek***, the court placed Mr. Matasek on probation and defense counsel requested that the court delay its decision on whether or not to grant expungement until Mr. Matasek had successfully completed his probationary term. 2014 WI 27, ¶8. The circuit court discussed the benefits of having a defendant return to court after a number of years, having completed his or her sentence, so that the court could evaluate his or her progress and determine eligibility for expungement at that point. ***Id.*** at ¶9. Nonetheless, the court concluded that the language in the expungement statute prevented it from waiting until the sentence was complete. Specifically, the statute reads in part: "A circuit court may order at the time of sentencing the expunction of a record upon the offender's successful completion of a sentence." Wis. Stat. § 973.015(1)(a).

Because this question requires the court to interpret a statute it is a question of law that this Court reviews *de novo*. ***State v. Johnson***, 2009 WI 57, ¶63, 318 Wis. 2d 21, 767 N.W.2d 207

Ms. Arberry's request for a finding of eligibility for expungement is not in conflict with ***Matasek***. Ms. Arberry is not attempting to revisit an expungement decision after having completed her sentence nor is she asking the court to delay its decision until she has done so. Rather, she acknowledges that the proper time for the circuit court to make this determination is at sentencing. However, if it is overlooked at sentencing, the proper vehicle to allow the court to exercise its discretion is through a motion for sentence modification.

In fact, this was the remedy the state advocated for when this scenario was presented in ***Matasek***. In ***Matasek***, the court acknowledged that some counties had been making expungement decisions at the time of sentencing while others had been delaying the decision until the completion of the sentence. 2014 WI 27, ¶5. The defense raised concerns about defendants who had been sentenced in counties believing the circuit court could defer its decision on expungement. ***Id.*** The state responded that those defendants would have the right "after this decision to challenge his sentence, including the circuit court's expunction decision." Therefore, while the state was arguing for a holding in ***Matasek*** that stated expunction must be considered at sentencing and not after the completion of the sentence, it still acknowledged that the expungement decision could be considered as part of an appeal. In its brief, the state made it even more clear, stating that defendants may move for sentence modification under 809.30 or 973.19 and that "[s]imply because a circuit court must make the decision about expungement at the time of sentencing, does not eliminate a defendant's right to challenge his sentence, including the expungement decision." State's Brief in ***State v. Matasek*** p.12.

The state's argument in ***Matasek*** directly contradicts the position the circuit court took here. The circuit court is not barred from considering its expungement decision when it was overlooked at the time of sentencing and brought before the court in a motion for sentence modification.

If the circuit court's logic were correct, then numerous other items that the court is required to address at sentencing such as fines, conditions of supervision, and eligibility for ERP or CIP could not be addressed or amended on appeal. In reality, these items are routinely addressed in motions for sentence modification.

For instance, the statute governing eligibility for ERP states that "When imposing a bifurcated sentence…the court shall, as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible to participate in the earned release program…" Wis. Stat. § 973.01(3g). This statute clearly makes ERP eligibility something that the court must consider at the time of sentencing. This does not, however, mean it cannot be addressed after sentencing when it has been overlooked. In fact, the circuit courts even provide a form, CR-263, allowing defendants to petition the court after sentencing to declare them eligible for the program.[3]

In this case, Ms. Arberry's eligibility for expungement was overlooked at sentencing. It was not addressed by the defense, the state, or the court. (48). Nor did any of the parties explain that it had been considered and rejected at the postconviciton hearing. (49; App. 106-115). Thus it is appropriate for review on direct appeal. *See* ***State v. Harbor,*** 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828 (stating a new factor for sentence modification purposes can be facts highly relevant to the sentence, in existence at the time of the sentence, but "unknowingly overlooked by all of the parties").

Therefore, this court should reverse the order denying the postconviction motion and remand the case so that the circuit court can exercise its discretion and determine whether Ms. Arberry is eligible for expungement.

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[3] Available at: https://www.wicourts.gov/formdisplay/CR-263.pdf?formNumber=CR263&formType=Form&formatId=2&language=en .

C. The circuit court's denial of eligibility for expungement was not a proper exercise of discretion because the reasoning could be applied to any case.

The plain language of the expungement statute reflects that when considering expungement, a circuit court must determine whether the person will benefit and whether society will not be harmed by expungement. Wisconsin Statute § 973.015(1m)(a)1. This language requires the court to consider the two factors and make a discretionary decision regarding eligibility for expungement.

While deference is given to a circuit court's exercise of discretion, 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). When the circuit court creates a record of exercising its discretion, that record "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 the "magic words." ***State v. Gallion***, 2004 WI 42, ¶37, 270 Wis. 2d 535, 678 N.W.2d 197.

During the circuit court's ruling at the postconviction motion, it stated that even if it did not believe it was barred from considering expungement, it still would not grant Ms. Arberry eligibility for expungement. The court stated the following in denying eligibility for expungement:

> And my second ruling would be that, on the merits, even if I were to consider or think about it – and I can be honest and I can tell you that if you would have asked me at sentencing, I would have said no. And I'm also going to say no today for the reason that convictions

> have consequences and they are of public record so that the public can protect themselves. The public has the right to know who commits what crimes so that they can make decisions to decide how to best interact with an individual for their own mutual decisions of mutual benefit of commerce or trade or employment or otherwise.
>
> We have laws that prevent discrimination for these convictions. And I'm all for rehabilitation and people paying their debts back to society. And I know many employers who hire people with records. So I think the merits of the motion as addressed nonetheless with the statute and the case law, I would in my discretion deny the motion on the merits.
>
> (49:7-8; App. 112-113).

This reasoning does not reflect an exercise of discretion that is based on the facts of the record. While the statement "convictions have consequences and they are of public record so the public can protect themselves" (49:7; App. 112) makes reference to the public, it does not demonstrate a process of reasoning that applies the facts of Ms. Arberry's case to the factor that society will not be harmed by the expungement statute. The court discusses no facts specific to Ms. Arberry. The court does not explain why or how society would be harmed if her record in this case was expunged.

Nor did the court discuss whether Ms. Arberry would benefit from eligibility for expungement. The court did not discuss Ms. Arberry's young age and potential for employment given her work history, especially in light of the need to support her young daughter. Nor did the court explain that the opportunity for expungement could provide an incentive for her to complete her sentences successfully,

specifically, the "rehabilitation and opportunities for self-improvement and self-treatment classes in Taycheedah" (48:24) that the court hoped she would have.

In fact, the circuit court's reasoning in this case could be recited in response to any request for expungement. This Court has previously rejected such one-size-fits-all reasoning. In ***State v. Cherry***, decided prior to January 1, 2014, when a circuit court exercised its discretion in deciding whether to impose the DNA surcharge in most felony cases, the court stated that the statute authorizing DNA surcharges "clearly contemplates the exercise of discretion by the trial court. 2008 WI App 80, ¶8, 312 Wis. 2d 203, 752 N.W.2d 393.

This Court concluded that to properly exercise its discretion, the court must do something more than "stating that it is imposing the DNA surcharge because it can," and instead must "consider any and all factors pertinent to the case before it" and "set forth in the record the factors it considered and the rationale underlying its decision." ***Id.***, ¶¶9-10. Importantly, this Court rejected the rationale that the DNA surcharge was being imposed to support the costs of the DNA databank because "[t]o reach such a conclusion would eliminate the discretionary function of the statute as a DNA surcharge could be imposed in every single felony case using such reasoning." ***Id.***, ¶10.

Like the rationale used to justify the imposition of the surcharge in ***Cherry***, the reasoning set forth for denying eligibility for expungement in this case could apply in any case. It could always be stated that "convictions have consequences." Even the statement "The public has the right to know who commits what crimes so that they can make decisions to decide how to best interact with an individual for their own mutual decisions of mutual benefit of commerce or

trade or employment or otherwise" while more lengthy is no less generalized. It does not discuss any facts relevant to Ms. Arberry.

To the extent that the court's statements are simply statements evincing a general policy of not granting expungement, that too is not a proper exercise of discretion. Trial courts may not have preconceived policies that are closed to individual mitigating factors. ***State v. Ogden***, 199 Wis. 2d 566, 572, 544 N.W.2d 574 (1996). In ***Ogden***, the trial court denied the defendant's request to grant Huber release for child care, stating it never granted Huber privileges for child care unless it was absolutely necessary. The Wisconsin Supreme Court reversed, noting that "one 'unreasonable and unjustifiable basis' for a sentence is a trial judge's employment of a preconceived policy of sentencing that 'is closed to individual mitigating factors.'" (citing ***State v. Martin***, 100 Wis.2d 326, 327 302 N.W.2d 58 (Ct. App. 1981)). The court found that an inflexible preconceived policy is "unacceptable." ***State v. Ogden***, 199 Wis.2d at 571.

So too is the rationale used here. This court should reverse and remand the case so that the court can consider the individual facts of Ms. Arberry's case and the two factors set out in the expungement statute in order to exercise its discretion regarding her eligibility for expungement.

CONCLUSION

For the reasons set forth above, Ms. Arberry respectfully requests that the court reverse the circuit court's order and remand the case so that the court can exercise its discretion and grant eligibility for expungement.

Dated this 8th day of August, 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 4,253 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 8th day of August, 2016.

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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 s. 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 8th day of August, 2016.

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