

RECEIVED

STATE OF WISCONSIN

10-21-2016

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

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT II

Case No. 2016AP866-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DIAMOND J. ARBERRY,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN
ORDER DENYING POSTCONVICTION RELIEF
ENTERED IN THE FOND DU LAC COUNTY CIRCUIT
COURT, THE HONORABLE PETER L. GRIMM,
PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

CHRISTINE A. REMINGTON
Assistant Attorney General
State Bar #1046171

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8943
(608) 266-9594 (Fax)
remingtonca@doj.state.wi.us

TABLE OF CONTENTS

	Page
ISSUES PRESENTED	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	1
SUPPLEMENTAL STATEMENT OF FACTS.....	1
ARGUMENT	2
I. Arberry was barred from requesting that the court make her eligible for expungement in her postconviction motion because she failed to make that request at sentencing.....	2
A. If requested by the defendant, a circuit court shall consider whether the defendant should be afforded the opportunity for expungement.....	2
B. The circuit court was barred from considering Arberry's postconviction expungement request because she did not request it at sentencing.	2
II. If Arberry's claim is not barred by the express terms of the expungement statute, this Court should conclude that the circuit court properly exercised its discretion in ruling that she was not eligible for expungement.....	6

	Page
A. The circuit court has discretion whether to grant or deny a defendant the right to have a conviction expunged.	6
B. The circuit court properly exercised its discretion in refusing to expunge Arberry's conviction.....	7
CONCLUSION.....	9

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Cesar G.</i> , 2004 WI 61, 272 Wis. 2d 22, 682 N.W.2d 1	7
<i>State ex rel. Kalal v. Circuit Court for Dane Cty.</i> , 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110.....	3
<i>State v. Gallion</i> , 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197	7
<i>State v. Hemp</i> , 2014 WI 129, 359 Wis. 2d 320, 856 N.W.2d 811	2, 7
<i>State v. Matasek</i> , 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811	2, 3, 4, 5

Statutes

Wis. Stat. § 973.015(1m).....	6
Wis. Stat. § 973.015(1m)(a)1.	2, 6, 7, 8
Wis. Stat. §§ 973.01(3g), 973.01(3m)	5
Wis. Stat. §§ 809.30 or 973.19	5
Wisconsin Stat. § 973.015.....	2, <i>passim</i>

Other Authorities

Wis. JI-Criminal SM-36 (2013)	6, 7
-------------------------------------	------

ISSUES PRESENTED

1. When the court chooses to make a defendant eligible for expungement, it must do so at the sentencing hearing. Here, Diamond J. Arberry did not ask the court to make her eligible for expungement until after her sentencing and the court did not raise it. Did the circuit court correctly decide that it was barred from considering the question of expungement because it did not consider it at sentencing?

2. In the alternative, if the circuit court can consider expungement post-sentencing, did the circuit court properly exercise its sentencing discretion by refusing to grant Arberry the option of expunging her conviction after her sentence?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

SUPPLEMENTAL STATEMENT OF FACTS

Arberry's statement of facts is sufficient to frame the issues for review. The State will address any disputes or include any additional relevant information where appropriate.

ARGUMENT

- I. Arberry was barred from requesting that the court make her eligible for expungement in her postconviction motion because she failed to make that request at sentencing.**
 - A. If requested by the defendant, a circuit court shall consider whether the defendant should be afforded the opportunity for expungement.**

If a defendant meets other statutory criteria, the circuit court “may order at the time of sentencing that the record be expunged upon successful completion of the sentence.” Wis. Stat. § 973.015(1m)(a)1. The decision about expungement must be made at the sentencing hearing. *State v. Matasek*, 2014 WI 27, ¶ 44, 353 Wis. 2d 601, 846 N.W.2d 811.

The circuit court needs to consider expungement at sentencing to create a meaningful incentive for the offender to avoid reoffending. *Matasek*, 353 Wis. 2d 601, ¶ 43. Wisconsin Stat. § 973.015 does not authorize circuit courts to take a wait-and-see approach. *State v. Hemp*, 2014 WI 129, ¶ 42, 359 Wis. 2d 320, 856 N.W.2d 811.

- B. The circuit court was barred from considering Arberry’s postconviction expungement request because she did not request it at sentencing.**

At sentencing, Arberry did not request expungement under Wis. Stat. § 973.015. By failing to request it at that time, Arberry waived her right to request expungement post-sentencing. The circuit court properly concluded that sentencing was the correct time to make the decision. This Court should affirm the circuit court’s decision.

Arberry seems to want the statute to read: The court may order at the time of sentencing or postconviction that the record be expunged. The legislature did not include that language. This Court should refuse to read it into the text of the statute. This Court should refuse to read Wis. Stat. § 973.015 to allow defendants to refrain from asking for expungement at sentencing and then ask for it postconviction.

Arberry's reading also runs contrary to this Court's goal to strive where possible "to give reasonable effect to every word, in order to avoid surplusage." *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. By including the phrase "at the time of sentencing" the Legislature intended to require the circuit court make the decision at the time of sentencing. To read the statute any other way would make that phrase surplusage.

Arberry waited until her postconviction motion to ask for expungement. In that motion, Arberry did not explain why she did not ask for expungement at sentencing, but simply stated that it was overlooked. (29:3.) Arberry implies that the reason it was overlooked is that either the court or Arberry believed that the decision could wait until after she served her sentence. (Arberry's Br. 5-6, 10.) The record rebuts this implication.

The supreme court decided *Matasek* on May 23, 2014. *Matasek*, 353 Wis. 2d 601. Arberry was sentenced on August 27, 2015. (48:1.) The circuit court sentenced Arberry more than one year after the supreme court decided *Matasek*. Not only was there sufficient time between the decision and the sentencing hearing, but the court did not

make the error that other courts made prior to the *Matasek* decision. It did not defer considering expungement until after Arberry served her sentence. Instead, the court never considered expungement at all. There is no support for Arberry's implication that the circuit court misunderstood the law.

Arberry also argues that courts can consider expungement postconviction when a defendant files a sentence modification motion. (Arberry's Br. 10-11.) If this Court interprets Wis. Stat. § 973.015 to allow defendants to refrain from asking for expungement at sentencing and instead ask for it in a postconviction motion, then it would create a loophole that undermines the intent of the law. Generally, defendants granted the option of expungement serve shorter sentences than others. Given the amount of time that passes from the filing of a postconviction motion until a decision from this Court, Arberry's claim essentially would allow courts to consider expungement after a defendant serves a sentence contrary to the legislative purpose of the expungement statute.

Arberry cites the State's brief in *Matasek* as support for the argument that circuit courts can consider expungement in a postconviction motion. (Arberry's Br. 10.) Arberry mischaracterizes the argument presented there. Prior to the *Matasek* decision, some circuit courts in Wisconsin delayed expungement decisions until after the sentence was completed. In *Matasek*, the State argued that in those cases where the circuit court erroneously interpreted the law, defendants could bring sentence modification on the grounds that the circuit court considered inaccurate information at sentencing. See State's Br. 17,

Matasek, 353 Wis. 2d 601 (No. 2012AP1582-CR).¹ But the State argued that the sentence modification option was only available in cases where the circuit court erroneously believed it could delay its decision on expungement. *Id.* Here, the circuit court did not erroneously believe that it could delay its decision until after Arberry served her sentence. Arberry cannot request expungement in a postconviction motion when she failed to request it at sentencing.

Of course, defendants retain the option of challenging the circuit court's failure to order expungement eligibility as an erroneous exercise of its sentencing discretion under Wis. Stat. §§ 809.30 or 973.19, but only when the defendant requests expungement at sentencing. A postconviction motion is appropriate to challenge the circuit court's decision to deny expungement and whether that constituted a proper exercise of discretion, but only when the defendant requested it at sentencing. It is not appropriate for defendant's to wait to raise the issue postconviction. To allow defendants to stay silent on expungement at sentencing only to bring it up in a postconviction motion would run contrary to the language and legislative purpose of Wis. Stat. § 973.015. *See Matasek*, 353 Wis. 2d 601, ¶ 44.

Arberry also asserts that the circuit court can consider expungement in a postconviction motion because it can consider CIP or ERP in postconviction motions. (Arberry's Br. 10-11.) Expungement is different from CIP and ERP. The circuit court must consider both CIP and ERP eligibility at sentencing. *See* Wis. Stat. §§ 973.01(3g), 973.01(3m).

¹ Found at: https://acefiling.wicourts.gov/documents/show_any_doc?appId=wscca&docSource=EFile&p%5bcaseNo%5d=2012AP001582&p%5bdocId%5d=106881&p%5beventSeqNo%5d=55&p%5bsectionNo%5d=1

Therefore, postconviction a defendant can challenge the court's failure to comply with a mandatory duty.

Considering eligibility for expungement is not a mandatory duty of the circuit court at sentencing. If the court wants to consider expungement, it must do so at sentencing. *See* Wis. Stat. § 973.015(1m). But the circuit court is not required to consider expungement at sentencing in every case. Arberry's argument fails. She cannot fail to ask for expungement at sentencing and then raise it in a postconviction motion.

The circuit court is barred from considering expungement in a postconviction motion when the defendant failed to request it at sentencing. Arberry failed to ask the circuit court to make her eligible for expungement. She had the opportunity to ask for expungement at sentencing, but did not do so. This Court should affirm the circuit court's decision that it could not consider expungement after Arberry's sentencing hearing.

II. If Arberry's claim is not barred by the express terms of the expungement statute, this Court should conclude that the circuit court properly exercised its discretion in ruling that she was not eligible for expungement.

A. The circuit court has discretion whether to grant or deny a defendant the right to have a conviction expunged.

To be eligible for expungement an offender must be under 25 at the time the offense was committed. Wis. Stat. § 973.015(1m)(a)1. The offense may be a class H or class I felony if the person has not previously been convicted of a felony, and the felony is not a violent offense. Wis. JI-Criminal SM-36 (2013).

When requested by a defendant, the court shall determine whether the defendant should be eligible for expungement. Wis. JI-Criminal SM-36. If the court rejects expungement, the court should state on the record that it considered expungement and state the reasons for rejecting it. Wis. JI-Criminal SM-36.

Expungement grants an alternative to the sentencing procedures. *Hemp*, 359 Wis. 2d 320, ¶ 18. The expungement statute intends “to provide a break to young offenders’ who demonstrate the ability to comply with the law by successfully completing and being discharged from their sentences.” *Id.* (citation omitted).

At sentencing, the circuit court may order 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 expungement. Wis. Stat. § 973.015(1m)(a)1. By including the word “may” the legislature granted the circuit court discretion to refuse to order expungement even if the criteria of Wis. Stat. § 973.015 are otherwise satisfied. *See In re Cesar G.*, 2004 WI 61, ¶ 12, 272 Wis. 2d 22, 682 N.W.2d 1.

There is a strong public policy against interference with the sentencing discretion of the circuit court, and sentences are afforded the presumption that the circuit court acted reasonably. *State v. Gallion*, 2004 WI 42, ¶ 18, 270 Wis. 2d 535, 678 N.W.2d 197.

B. The circuit court properly exercised its discretion in refusing to expunge Arberry’s conviction.

Arberry challenges the circuit court’s sentencing discretion on the grounds that its decision denying

expungement was not sufficiently specific to the facts of her case. (Arberry's Br. 13-14.) The State has argued that by not raising the issue of expungement at sentencing, the circuit court cannot consider it post-sentencing. In the alternative, this Court should affirm the circuit court's exercise of discretion in denying her eligibility for expungement when it concluded that society would be harmed if Arberry could expunge her record.

At the postconviction hearing, the circuit court said that "convictions have consequences" and that "they are [part] of [the] public record so that the public can protect themselves." (49:7.) The court held that "[t]he public has the right to know who commits what crimes so 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." (49:7-8.)

Arberry asserts that the circuit court did not properly exercise its discretion because it did not discuss whether she would benefit from expungement. (Arberry's Br. 13.) To grant a defendant eligibility for expungement, a court must find that the defendant will benefit and that society will not be harmed. Wis. Stat. § 973.015(1m)(a)1. After the circuit court concluded that society would be harmed, it did not need to address whether Arberry would benefit because both criteria need to be met. Arberry's claim fails.

Arberry also argues that the statements about the potential harm to society are insufficient because the court did not specifically apply its explanation to the facts in her case. (Arberry's Br. 13-14.) The circuit court's ruling on the merits of Arberry's claim is sufficient. The circuit court stated that, as a general matter, convictions are part of the public record so that the public can protect itself. (48:7.) The court did not specifically state that the public needs to know

about Arberry's convictions in particular, but it made these statements in the context of considering whether Arberry's convictions should be expunged. Arberry reads the sentence as general and not applicable to her. She misreads the circuit court's intent. The circuit court properly exercised its discretion.

The circuit court properly exercised its discretion in making the expungement decision. It weighed the factors and discussed each on the record. It found that society would be harmed if it made the decision to allow expungement of Arberry's conviction. This Court should affirm the circuit court's exercise of discretion.

CONCLUSION

The State respectfully requests that this Court affirm Arberry's judgment of conviction and the circuit court's order denying postconviction relief.

Dated this 21st day of October, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

CHRISTINE A. REMINGTON
Assistant Attorney General
State Bar #1046171
Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8943
(608) 266-9594 (Fax)
remingtonca@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,119 words.

Dated this 21st day of October, 2016.

CHRISTINE A. REMINGTON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 21st day of October, 2016.

CHRISTINE A. REMINGTON
Assistant Attorney General