STATE OF WISCONSIN

COURT OF APPEALS

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

REPLY BRIEF OF DEFENDANT-APPELLANT

ELLEN J. KRAHN
Assistant State Public Defender
State Bar No. 1085024

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 261-0626
krahne@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

WISCONSIN STATUTE CITED

OTHER AUTHORITIES

ARGUMENT

I. 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.

In a postconviction motion on direct appeal, Ms. Arberry argued that the parties unknowingly overlooked her eligibility for expungement. The circuit court should have considered her eligibility for expungement at the postconviction hearing because even issues that are required to be resolved at the time of sentencing are still subject to motions for sentence modification. When exercising its discretion to determine whether Ms. Arberry's record should be expunged, the circuit court should have applied the legal standard to the specific facts of Ms. Arberry's case in order to properly exercise its discretion.

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

In its brief, the state is critical of Ms. Arberry's reference to the state's brief in ***State v. Matasek***. 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811[1]. Ms. Arberry pointed out that the state argued in ***Matasek*** that despite asking for a ruling that requires circuit courts to decide expungement eligibility at sentencing, defendants would still retain their right to move for sentence modification based on a new

[1]Available at: https://acefiling.wicourts.gov/documents/show_any_doc?appId=wscca&docSource=EFile&p%5bcaseNo%5d=2012AP001582&p%5bdocId%5d=106105&p%5beventSeqNo%5d=48&p%5bsectionNo%5d=1

factor. The state contends that this argument was limited to the specific facts presented in ***Matasek***. (State's brief at 5). On the contrary, the state argued in general that defendants retain their right to challenge their sentences, including expungement eligibility, based on a new factor. (State's brief in ***Matasek*** at 12). That is just what Ms. Arberry did in this case. The argument the state made in ***Matasek*** and the request Ms. Arberry made in this case are reasonable and in line with existing case law for the reasons explained below.

The state begins its brief by citing the two recent cases, ***State v. Hemp***, 2014 WI 129, 359 Wis. 2d 535, 678 N.W.2d 197 and ***Matasek***, 2014 WI 27, which helped to clarify that eligibility for expungement is to be decided at the time of sentencing. The state specifically cites ***Hemp***, 2014 WI 129, for the proposition that the court is not to take a wait-and-see approach. (State's brief at 2).

Ms. Arberry's argument is not in conflict with those cases nor is she asking the circuit court to take a wait-and-see approach. Ms. Arberry acknowledges that expungement decisions are to be made at the time of sentencing. However, issues that should be ruled on at the time of sentencing are still subject to postconviction proceedings and can be ruled on when they are unknowingly overlooked at sentencing. *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").

Ms. Arberry's request in her postconviction motion does not ask the court to wait and see how she does during her sentence before deciding on expunction. It simply asks the court to rule on a matter that was overlooked at sentencing. Nor did Ms. Arberry attempt to have the court

hear any facts that were not part of the record at the time of sentencing. Because Ms. Arberry did not attempt to have the court delay its expungement decision so that the court could review her performance during her sentence, her request is not in conflict with the rationales outlined in ***Matasek*** or ***Hemp***. For the same reason, it is in no way advantageous to her or any defendant to wait to raise the issue postconviction. This is a simple motion for sentence modification, not a case that requires the court to modify or defy existing law nor would a ruling in favor of Ms. Arberry create a loophole.

The state next argues that Ms. Arberry's claim that her eligibility for expungement was properly raised in a postconviction motion reads words into the expungement statute. (State's brief at 3). The state argues that in order for Ms. Arberry to have the court address her motion, the expungement statute, Wis. Stat. § 973.015, would have to read: The Court may order at the time of sentencing or postconviction that the record be expunged. (State's brief at 3).

The state's argument on this point is undermined by looking to the statutes that address when the court should consider eligibility for ERP and CIP programming. For example, the statute that sets out the criteria that courts must consider when determining eligibility for the ERP makes clear that program eligibility is to be considered at sentencing by stating, "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). By the state's logic, eligibility for ERP could never be raised as a new factor that was overlooked by the parties because the statute does not read, "When imposing a bifurcated sentence or postconviction…"

That is not how the statute operates in practice as ERP eligibility is often addressed in sentence modification motions.

The state attempts to distinguish this example by pointing to the mandatory language of the ERP statute. The ERP statute does require the court to exercise its discretion regarding eligibility by using the mandatory language "shall." This mandatory language makes it easy for courts to see that the issue has been overlooked when it is brought before the court in a postconviction motion. If the statute requires that the court consider it and it was not considered, there can be little dispute that it was overlooked and is thus a new factor.

Therefore, to the extent that the use of the word "shall" in the ERP statute is relevant to this case, it is to show when the parties have overlooked an issue at sentencing, not whether an issue can be considered at a postconviction hearing. The word "shall" in the ERP statute does not change the fact that the legislature used the phrase "when imposing a bifurcated sentence" to explain when the decision should be made. Despite this pronouncement the decision should be made at sentencing, courts still consider the issue during postconviction proceedings when the issue has been overlooked at sentencing.

Here, the issue of Ms. Arberry's eligibility for expungement was unknowingly overlooked at her sentencing hearing. The parties did not discuss it. When the postconviction hearing was held, the state did not allege that it had been rejected as part of plea negotiations or give any other reason to show that it had been considered. The court also acknowledged that it had not considered expungement eligibility at the time of sentencing by stating "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 didn't bring it up." (48:7; App. 112). Courts are allowed to grant or deny expungement even when it has not been raised by either party. Wis. JI-Criminal SM-36. Thus, it was overlooked by the parties and should have been considered at postconviction hearing.

B. 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 court did not properly exercise its discretion in this case, because the court's stated reasons for denying expungement did not make reference to the facts of Ms. Arberry's case and were so generalized that they could have been stated in any case. 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.

In response, the state makes the general assertions that the circuit court's ruling was sufficient and its exercise of discretion was proper. (State's brief at 8-9). However, the state does little to explain how the court's statements amounted to a proper exercise of discretion. The state cannot point to any portions of the court's ruling that discuss the specific facts of Ms. Arberry's case and how they relate to the

standards the court was required to consider because the court did not refer to Ms. Arberry's circumstances or the facts of her case.

Instead, the state argues that although the court did not make reference to the facts of Ms. Arberry's case, "it made these statements in the context of considering whether Ms. Arberry's convictions should be expunged…" (State's brief at 9). Whenever the court is asked to exercise its discretion, it will always be doing so in an individual's case. Simply because the court was asked to rule in Ms. Arberry's case, does not cure the generalized language and reasoning that could apply in any case. *See* ***State v. Cherry*** 2008 WI App 80, ¶8, 312 Wis. 2d 203, 752 N.W.2d 393 (holding exercise of discretion improper because reasoning could be used in every case).

CONCLUSION

For the reasons set forth above, as well as those in the brief-in-chief, Ms. Arberry respectfully requests that this court reverse the circuit court and remand the case so that the court can exercise its discretion and grant eligibility for expungement.

Dated this 4th day of November, 2016.

Respectfully submitted,

ELLEN J. KRAHN
Assistant State Public Defender
State Bar No. 1085024

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 261-0626
krahne@opd.wi.gov

Attorney for Defendant-Appellant

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 1,654 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 4th day of November, 2016.

Signed:

ELLEN J. KRAHN
Assistant State Public Defender
State Bar No. 1085024

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 261-0626
krahne@opd.wi.gov

Attorney for Defendant-Appellant