STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP000866-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DIAMOND J. ARBERRY,

Defendant-Appellant-Petitioner.

On Review from a Decision of the Court of Appeals
Affirming a Judgment of Conviction and an Order Denying a
Postconviction Motion Requesting Expungement
Entered in the Fond du Lac County Circuit Court, the
Honorable Peter L. Grimm, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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-Petitioner

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ARGUMENT

I. When the Parties and the Court Overlooked Expungement at Her Sentencing Hearing, Ms. Arberry Should Have Had an Opportunity to Bring This Issue before the Court, Either through a Sentence Modification Motion Based on a New Factor, or Because Courts Should Be Required to Address Expungement at Sentencing Whenever a Defendant is Eligible.

A. Ms. Arberry met her burden to show that her eligibility for expungement was unknowingly overlooked and highly relevant to her sentence.

The state argues that the parties' silence on the issue of expungement, without more, is not evidence that the parties overlooked the issue. (State's Brief at 8). Of course, when something is overlooked, the parties have "fail[ed] to notice, perceive, or consider" it. *See* Overlook, https: www.dictionary.com/browse/overlook (last visited September 19, 2017). By definition, when something is overlooked it is not discussed. The state cites no case supporting the argument that when the parties are silent on a factor, it cannot have been overlooked. Nor does the state attempt to distinguish the court of appeals decision in ***State v. Ralph***, 156 Wis.2d 433, 456 N.W.2d 657 (Ct. App. 1990). There, the court determined that a codefendant's prior jail term was a new factor because "[n]o party mentioned that factor at the sentencing hearing. All parties overlooked that factor." ***Id.***, 438.

Instead the state posits a number of hypothetical reasons that the parties could have silently considered and

rejected expungement at Ms. Arberry's sentencing hearing.[1] (State's Brief at 8). However, if any of these scenarios had, in fact, taken place, then the parties had an opportunity to say so at the postconviction hearing. No party did so. (49).

State v. Boyden, 2012 WI App 38, 340 Wis. 2d 155, 814 N.W.2d 505, demonstrates that a court can explain postconviction that a factor was considered at sentencing, even if it was not stated on the record. In ***Boyden***, one of the issues presented as a new factor was Boyden's assistance to law enforcement that took place prior to his sentencing hearing. The circuit court judge explained that although Boyden's assistance to law enforcement was not discussed at sentencing, "'everybody knew Boyden was cooperating with federal authorities.'" ***Id.***, ¶10. Thus, the circuit court determined that Boyden's assistance to law enforcement was not a new factor because it was not overlooked. ***Id***. The circuit court in Ms. Arberry's case could have explained at the postconviction hearing that it had considered and rejected expungement at sentencing without saying so on the record, if, in fact, it had made that consideration.

Just the opposite occurred. The circuit court judge stated at the postconviction hearing, "*If* someone had asked me about [expungement,] I would have said, well, no, she's not getting expungement. Granted, *no one brought it up*…" (48:7(emphasis added)). The fact that the transcript shows no consideration of expungement at the sentencing hearing,

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[1] Two of the state's examples involve not seeking expungement as part of a plea agreement and not informing the court that this was part of the agreement. These examples would run counter to this court's requirement that "a record of the nature of the [plea] bargain should be made." ***State ex rel. White v. Gray***, 57 Wis. 2d 17, 22, 203 N.W.2d 638 (1973). This requirement ensures that the plea bargaining process is open to judicial scrutiny. ***Id.***

combined with the trial court's comments at the postconviction hearing acknowledging no one brought it up, and no explanation that the trial court had somehow silently considered expungement amounts to clear and convincing evidence that Ms. Arberry's eligibility for expungement was unknowingly overlooked.

B. Ms. Arberry's statutory eligibility is a set of facts and meets the standard for a new factor.

Next, the state contends that Ms. Arberry's eligibility for expungement cannot be a new factor because it is not a fact or set of facts. (State's Brief at 9-10). Ms. Arberry is statutorily eligible for expungement because of 1) her age at the time of the offense; 2) the maximum penalties for her convictions; and 3) her prior record. Wis. Stat. § 973.015. These are clearly "piece[s] of information presented as having an objective reality." (State's Brief at 9).

The state goes on to argue that because the circuit court must make a discretionary decision based on Ms. Arberry's statutory eligibility for expungement before it can be granted, that her eligibility is not a fact. (State's Brief at 10). Ms. Arberry has never contended that she can be made eligible for expungement without a discretionary decision from the court. Her argument is that the parties overlooked her statutory eligibility for expungement that would allow a circuit court to make a discretionary decision about whether or not expungement should be granted. That is exactly the relief she is seeking – to have the circuit court exercise its discretion on the issue of expungement because she is statutorily eligible.

The state attempts to distinguish Ms. Arberry's statutory eligibility for expungement from other new factor cases. (State's Brief at 10). Two of the cases the state cites do

not support its argument that other new factor cases involve more discrete facts. ***State v. Boyden,*** 2012 WI App 38, 340 Wis. 2d 155, 814 N.W.2d 505, and ***State v. Stafford,*** 2003 WI App 138, 265 Wis. 2d 886, 667 N.W.2d 370, demonstrate that new factors can involve more analysis of the new facts presented than Ms. Arberry's statutory eligibility for expungement does.

For instance, in ***Stafford***, it was discovered after sentencing that the same counselor who conducted a psychological evaluation of Stafford had also treated the victim in the case for psychological issues that resulted from Stafford's crime. ***Id.***, ¶2-5. Based on the facts about when the counselor was treating the victim, and the extensive treatment relationship they formed, the court of appeals concluded that, "[t]he information, attitude and impressions [the counselor] received from the victim could have impacted her assessment at either a conscious or a subconscious level." ***Id.***, ¶11. The court determined the counselor's conflict of interest amounted to a new factor. ***Id.***, ¶18. The determination that a relationship constitutes a conflict of interest requires more legal analysis than does the determination that Ms. Arberry meets that statutory requirements to be eligible for expungement.

In ***Boyden***, the court analyzed both Boyden's pre-sentencing assistance to law enforcement and the results of that assistance which came to fruition after Boyden's sentencing. In determining that the fruits of Boyden's assistance could constitute a new factor, the ***Boyden*** court adopted the five factors from the federal sentencing guidelines that were discussed in ***State v. Doe***. ***Boyden***, 2012 WI App 38, *citing* ***State v. Doe***, 280 Wis. 2d 731, ¶9, 697 N.W.2d 101. The ***Doe*** court noted that these factors, which are "(1) the court's evaluation of the significance and usefulness of the defendant's assistance…(2) the truthfulness,

completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant's assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his [or her] family resulting from his [or her] assistance; (5) the timeliness of the defendant's assistance" are helpful to courts in determining whether a new factor exists. ***Id.***, ¶12-13.

The factors set out in ***Doe*** and used in ***Boyden*** require courts to make much more qualitative judgments about the objective facts before determining if they amount to new factor than a circuit court is required to do when considering expungement eligibility. The fact that courts have adopted these standards and determined they are helpful undermines the state's argument that Ms. Arberry's statutory eligibility for expungement is not an objective set of facts. These facts, applied to Ms. Arberry's case, demonstrate that she was statutorily eligible for expungement. This is what the parties overlooked.

It is also worth noting that there are multiple cases where courts have found new factors, even when the new information is something that defense counsel could have been aware of at the time of sentencing. *See* ***State v. Armstrong***, 2014 WI App 59, 354 Wis. 2d 111, 847 N.W.2d 860, finding a new factor when a sentence was imposed based on erroneous belief about how much credit defendant would receive, ***State v. Ralph***, 156 Wis.2d 433, 456 N.W.2d 657 (1990), finding codefendant's prior jail time was a new factor when parties compared codefendant's sentencing recommendations at sentencing hearing.

Next, the state argues that even if Ms. Arberry's statutory eligibility is a factor the court can consider, it is not highly relevant to Ms. Arberry's sentence. (State's Brief at

10-11). The state argues that there are facts in the record that make Ms. Arberry a poor candidate for expungement and therefore expungement eligibility is not highly relevant to her sentence. ***Id.*** In doing so, the state confuses relevance with factors that a party or court might rely on to argue expungement should be denied. The fact that the court discussed protection of the public and her risk of re-offense (48:22) does not mean expungement must be denied. The court also discussed its hope for Ms. Arberry's long-term success. (48:24). The discussion of these points demonstrates that expungement eligibility is highly relevant to Ms. Arberry's sentence and, thus, a new factor.

C. ***Matasek*** does not bar appellate review of sentences.

Next, the state argues that Ms. Arberry should not be able to bring a new factor motion based on eligibility for expungement being overlooked because of this court's holding in ***State v. Matasek***, 2014 WI 27, ¶44, 353 Wis. 2d 601, 846 N.W.2d 811. (State's Brief at 6, 11-14). This court decided in ***Matasek*** that the expungement decision should be made at the sentencing hearing rather than after the sentence is completed. ***Matasek***, 2014 WI 27, ¶3-6.

Allowing a defendant to bring a new factor motion when eligibility for expungement is overlooked at sentencing does not create an end run around ***Matasek***. Ms. Arberry was not requesting that the court delay its decision until she completed her sentence. Additionally, courts have previously held that rehabilitation during one's sentence is not a new factor. *See* ***State v. Kluck***, 210 Wis. 2d 1, 7, 563 N.W.2d 468 (1997). Thus, even if this court holds that Ms. Arberry's

eligibility for expungement was overlooked, defendants will not be able to return to court simply to ask the court to evaluate their progress during their sentence.

This was what ***Matasek*** sought to avoid, not the correction of an unjust sentence, but rather a wait-and-see approach where the court evaluates the defendant's behavior upon the completion of his sentence. 2014 WI 27, ¶43. This is not an opportunity for Ms. Arberry to game the system, rather it is an opportunity for a young offender, whose eligibility was overlooked, to be considered for expungement. This is consistent with the legislative purpose of the expungement statute, which this court has described as an opportunity

> to help young people who are convicted of crimes get back on their feet and contribute to society by providing them a fresh start, free from the burden of a criminal conviction. Through expungement, circuit court judges can, in appropriate circumstances, help not only the individual defendant, but also society at large.

State v. Hemp, 2014 WI 129, ¶21, 359 Wis. 2d 320, 856 N.W.2d 811. This court in ***Hemp*** also explained that the legislature's recent amendments to the expungement statute show a consistent effort to expand the availability of expungement to more and more youthful offenders. ***Id.***, ¶20. Ms. Arberry's case is not in conflict with ***Matasek***, and is also consistent with the legislative purpose of the expungement statute, to ensure that young offenders are given the opportunity to be made eligible for expungement in appropriate cases, for both their own benefit and the benefit of society at large.

D. If the fact of eligibility for expungement may not be raised as a new factor, this court should require circuit courts to address expungement at the time of sentencing in order to effectuate the purpose of the expungement statute.

Next, the state acknowledges that this court does have superintending and administrative authority over all state courts. (State's Brief at 15). The state argues that using this authority to require circuit courts to make a record of their expungement decision whenever a defendant is eligible would be inconsistent with the purpose of the expungement statute.

But, as noted above, the purpose of the expungement statute is to benefit youthful offenders and society at large by shielding youthful offenders from some of the harsh consequences of criminal convictions, and to do so in more and more cases. ***Hemp***, 2014 WI 129, ¶20-21. Requiring courts to make a record of their expungement decision would ensure that all eligible defendants are being considered for expungement and would further the purposes of the statute.

Next, the state argues that the defendant benefits the most from expungement so he or she should be the one to raise it. (State's Brief at 15). This argument ignores this court's pronouncement that society at large also benefits from expungement. ***Hemp***, 2014 WI 129, ¶21. Additionally, the court also has a duty at sentencing to acquire and consider all information that might influence its sentencing decision**.** ***State v. Guzman***, 166 Wis. 2d 577, 592, 480 N.W.2d 446 (1992). This includes the "responsibility" that the sentencing court "acquire full knowledge of the character and behavior pattern of the convicted defendant in imposing a sentence." ***Elias v. Stat***e, 93 Wis. 2d 278, 285, 286 N.W.2d 559 (1980).

Requiring courts to address expungement for eligible defendants is consistent with those principles as well as the expungement statute.

II. The Circuit Court's Denial of Expungement Was Not a Proper Exercise of Discretion Because the Reasoning Could Be Applied to Any Case.

The state acknowledges that the court did not "explicitly link the comments to Arberry" while making the postconviction expungement decision, but argues that in context it is "clear that the court applied its reasoning to Arberry's case." (State's Brief at 19).

In order to properly exercise its discretion, the court needed to do more than simply indicate it was referring to Ms. Arberry. 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).

The state then points to comments the court made at sentencing that it believes could be used to support a finding that Ms. Arberry should not be made eligible for expungement. (State's Brief at 18-19). The state cannot simply pick a few facts the court referenced at sentencing and determine that it would have denied expungement. A proper exercise of discretion requires not only analysis of the facts of the case, but also use of the correct legal standard.

The standard for determining whether expungement should be granted is if "the court determines the person will benefit and society will not be harmed by this disposition." Wis. Stat. § 973.015(1m)(a)1. The court of appeals recently

addressed this standard in ***State v. Helmbrecht***, 2017 WI App 5, 373 Wis. 2d 203, 891 N.W.2d 412. The ***Helmbrecht*** court confirmed that in order to properly exercise discretion regarding expungement, courts must do more than utter "magic words" and must apply the facts of the case to the two factors set out in the expungement statute. ***Id***., ¶11-12.

The state ignores ***Helmbrecht*** and asserts that the court did apply the facts of her case to the legal standard by simply citing to the court's comments at the postconviction hearing. (State's Brief at 20). Those are the exact comments that do not contain any reference to Ms. Arberry, saying instead, "convictions have consequences and they are of public record so that the public can protect themselves. The public has a right to know who commits crimes so they can make decisions to decide how to best interact with that individual…" (49:7-8). If the circuit court's comments are allowed by this court as a proper exercise of discretion, they could be used to deny expungement in any case.

Instead, Ms. Arberry requests that this court determine that the circuit court's comments were not sufficient, and remand the case so the circuit court can discuss the specific facts of her case and apply them to the proper standard in order to determine if she can be made eligible for expungement.

CONCLUSION

Ms. Arberry respectfully requests that the court reverse and remand so that the circuit court can exercise its discretion regarding expungement.

Dated this 22nd day of September, 2017.

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-Petitioner

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 2,764 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 22nd day of September, 2017.

Signed:

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

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

Attorney for Defendant-Appellant-Petitioner