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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2017AP000633-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

CHENEYE LESHIA EDWARDS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER PARTIALLY DENYING A POSTCONVICTION MOTION, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. KREMERS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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DISTRICT I

Appeal Case No. 2017AP0006343-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

CHENEYE LESHIA EDWARDS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER PARTIALLY DENYING A POSTCONVICTION MOTION, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. KREMERS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1. Does a circuit court have statutory authority to revisit its initial decision regarding expungement after the sentencing hearing?

   The postconviction court said no.

2. Does a circuit court have inherent authority to modify a decision regarding expungement after sentencing when it denied expungement at the time of sentencing?

The postconviction court said no.

3. Did the circuit court abuse its discretion when it denied expungement at the time of sentencing?

The circuit court did not specifically address this issue in postconviction proceedings.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. See Wis. Stat. (Rule) 809.23(1)(b)4.

STANDARDS OF REVIEW

Whether a court has inherent authority to act in a certain way is a question of law that the court is to review de novo. *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, ¶ 12, 595 N.W.2d 635 (1999). When a circuit court exercises its discretion on a sentencing issue, an appellate court will not interfere with that decision unless that discretion was inappropriately exercised. *State v. Helmbrecht*, 2017 WI App 5, ¶ 8, 373 Wis. 2d 203, 891 N.W.2d 412.

STATEMENT OF THE CASE

Mr. Edwards pled guilty to one count of Disorderly Conduct, in violation of Wis. Stat. § 947.01. (R44:2; *see also*, R. 12). Two additional counts were dismissed, and the State agreed to recommend probation. (R44:2). Ultimately, the Honorable Jeffrey Kremers sentenced Mr. Edwards to sixty days in the House of Correction, imposed and stayed for nine months of probation. (R45:18).

At the sentencing hearing, defense counsel requested expungement and argued that Mr. Edwards should be eligible for expungement. (R45:12-13). Judge Kremers expressed his frustration with the state of the law in Wisconsin, which required him to determine eligibility for expungement before Mr. Edwards completed his sentence, depriving him of important information relevant to whether Mr. Edwards would benefit from expungement or whether society would be harmed. (R45:16-18). The circuit court decided not to make Mr. Edwards eligible for expungement:

> THE COURT: I am not going to find expungement is appropriate in this case…
>
> DEFENSE COUNSEL: Your Honor, I suppose I struggle with, if not expunction on this case, when is it appropriate in a D.V. case?
>
> THE COURT: I don't know I have done it, but I am not doing it on this case.
>
> DEFENSE COUNSEL: I mean, he engaged in treatment ahead of time. He is –
>
> THE COURT: I know he did. I am not going to debate this anymore, Mr. Eichenlaub, I am not even going to respond to it.

(R45:20-21).

After completing probation, Mr. Edwards filed a post-conviction motion arguing that the circuit court had inherent authority to expunge Mr. Edwards' Disorderly Conduct conviction after he completed probation and requesting that it do so. (R28:5-8). The motion also argued that the circuit court erroneously exercised its discretion when it denied Mr. Edwards' request for expungement. (R28:8-10).

The circuit court concluded that it did not have inherent authority to expunge Mr. Edwards' conviction after the sentencing hearing. (R33:2).

ARGUMENT

I. Mr. Edwards is not eligible for expungement now because the circuit court declined to make him eligible for expungement at sentencing, and the law requires that determination to be made at sentencing.

Wis. Stat. § 973.015(1m)(a)1. allows, but does not require, a court to expunge a conviction under certain circumstances. The statute requires a court to determine whether a defendant will be eligible for expungement at the time of sentencing. *Id.* It reads,

> [T]he 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.

Id. (emphasis added).

Time and again, courts have reiterated what is clear in the statute: the only time a court can make a decision regarding eligibility for expungement is at the time of the initial sentencing hearing. *See generally State v. Matasek*, 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811; *State v. Hemp*, 2014 WI 29, 359 Wis. 2d 320, 856 N.W.2d 320; *State v. Arberry*, 2017 WI App 26, 375 Wis. 2d 179, 895 N.W.2d 100 (petition for review granted). Ruling otherwise would, in effect, erase the phrase "at the time of sentencing" out of the statute. *Matasek*, 353 Wis. 2d 601, ¶ 17.

"Nothing in the expungement statute grants the circuit court the authority to revisit an expungement decision . . . The only point in time at which a circuit court may make an expungement decision is at the sentencing hearing." *Hemp*, 359 Wis. 2d 320, ¶ 40. The legislature is capable of empowering a court to determine eligibility for expungement at a later time, as it did in expungement of juvenile records. *See* Wis. Stat. § 938.355(4m); *Matasek*, 353 Wis. 2d 601, ¶¶ 20 – 22. There is no statutory authority to grant expungement at any time other than the sentencing hearing. *Id.* ¶¶ 44 - 45.

A circuit court does not have authority to decide about expungement after sentencing, even if expungement was not considered at the time of sentencing. *Arberry*, 375 Wis. 2d 179. In *Arberry*, neither party nor the court mentioned expungement at the time of sentencing. *Id.* ¶ 2. Arberry petitioned for expungement in a post-conviction motion, and the circuit court determined that it could not make the defendant eligible for expungement after sentencing. *Id.* ¶ 3. Bound by the plain language of Wis. Stat. § 973.015 and by *Matasek*, "the circuit court's decision finding that it could not consider expungement after Arberry's sentencing was proper." *Id.* ¶ 5.

In this case, defense counsel requested and argued for expungement at sentencing. (R45:12). After hearing that argument, the court declined to make Mr. Edwards eligible for expungement. (R45:20-21). At post-conviction, bound by Wis. Stat. § 973.015 and *Matasek*, the circuit court correctly determined that it had no statutory authority to revisit its earlier determination regarding expungement. (R33:2).

II. Circuit courts do not have inherent authority to expunge criminal records.

Whether a court has inherent authority to act in a certain way is a question of law that the court is to review de novo. *Davis*, 226 Wis. 2d 738, ¶ 12.

"Within certain constraints, Wisconsin circuit courts have inherent authority to modify criminal sentences." *State v. Harbor*, 2011 WI 28, ¶ 34, 333 Wis. 2d 53, 797 N.W.2d 828. To justify sentence modification, a defendant must show both that there is a new factor and that the new factor justifies sentence modification. *Id.* ¶ 38.

> The requirements for sentence modification are meant to promote the policy of finality of judgments while at the same time satisfying the purpose of sentence modification, which is the correction of unjust sentences.

Id. ¶ 51.

While courts do have inherent authority to modify criminal sentences, that power is not absolute and does not include expungement of criminal records. Generally, courts can exercise inherent authority in three areas. *Davis*, 226 Wis. 2d 738, ¶ 17. First, courts have inherent authority over their own internal operations, like retaining a judicial assistant or janitor. *Id.* Second, courts have inherent authority to regulate members of the bench and bar. *Id.* ¶ 18. Third, "[a] circuit court has inherent authority to ensure that it 'functions efficiently and effectively to provide the fair administration of justice.'" *Id.* ¶ 19.

Only the third category of inherent authority is at issue here, and to fall under that category, an action must be "necessary to the efficient and orderly functioning of the court or to maintain the court's dignity, transact its business, or achieve the purpose of its existence." *Id.* ¶ 21. Such actions include: appointing counsel for indigent parties, determining compensation for court appointed attorneys, vacating a void judgment because the court had no authority to enter the judgment in the first place, assessing costs to the parties of empaneling a jury, and ordering parties to exchange the names of lay witnesses." *Id.* ¶ 19. Expungement of criminal convictions has nothing in common with the types of actions that courts inherently have to efficiently and effectively provide for the fair administration of justice.

Conversely, courts do not have inherent authority to expunge juvenile police records under the authority of a police chief, or dismiss a criminal case with prejudice before jeopardy attaches on non-constitutional grounds. *Id.* ¶ 20. Expungement is similar to these actions. Expunging juvenile arrest records is specifically excluded from a court's inherent authority. *In Interest of E.C.*, 130 Wis. 2d 376, 387, 387 N.W.2d 72 (1986).

Allowing courts inherent authority to expunge criminal records would also, effectively, allow courts to dismiss a case with prejudice on non-constitutional grounds. Courts can expunge a conviction to shield youthful offenders from the harsh consequences of a criminal conviction. *State v. Anderson*, 160 Wis. 2d 435, 440, 466 N.W.2d 681 (Ct. App. 1991). A circuit court, seeking to do the same thing, is not able to accomplish that goal by dismissing a case with prejudice before

prejudice attaches and before conviction. *Davis*, 226 Wis. 2d 738, ¶ 20 There is no principled reason to allow a court, unfettered by the requirements of Wis. Stat. § 973.015, to effectively do the same thing by expunging a conviction under inherent authority.

Furthermore, ruling that courts have inherent authority to expunge criminal convictions would effectively erase Wis. Stat. § 973.015. "Statutes are interpreted to give effect to each work and to avoid surplusage." *Matasek*, 353 Wis. 2d 601, ¶ 11. "§ 973.015(1) only provides authority to expunge conviction records in limited circumstances." *In Interest of E.C.*, 130 Wis. 2d at 385. "The legislature has provided for expungement of misdemeanor records of persons under the age of 21 for good cause." *Id.* at 393 (*Abrahamson concurring*) (citing a previous version of the statute).

Courts must make a decision on expungement at sentencing, because holding otherwise would make part of Wis. Stat. §973.015 superfluous. *Matasek*, 353 Wis. 2d 601, ¶ 17. If a circuit court has inherent authority to expunge a criminal conviction it makes the entirety of Wis. Stat. § 973.015 superfluous.

III. The circuit court did not abuse its discretion when it declined to make Mr. Edwards eligible for expungement.

Wis. Stat. § 973.015(1m)(a)1. allows, *but does not require*, a court to expunge a conviction if certain criteria are met:

> 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.

(emphasis added).

This is distinct from certain situations in which a circuit court is required to expunge a conviction, described in the very next subsection of the statute. Wis. Stat. § 973.015(1m)(a)2 reads,

> 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.

Id. (emphasis added). The statute also describes situations in which a circuit court is prohibited from expunging a conviction. Wis. Stat. § 973.015(1m)(a)3.

Courts interpret a statute by looking at the text and the "[t]he statutory language is examined within the context in which it is used." *Matasek*, 353 Wis. 2d 601, ¶ 12; *citing Alberte v. Anew Health Care Servs., Inc.*, 2000 WI 7, ¶ 10, 232 Wis. 2d 587, 605 N.W.2d 515 ("While it is true that statutory language begins with the language of the statute, it is also well established that courts must look not to a single, isolated sentence or portion of a sentence, but at the role of the relevant language in the entire statute."). Looking at Wis. Stat. § 973.015 as a whole, the legislature is clearly able to require a court to expunge a conviction under certain circumstances if it intends to, but in these circumstances granted circuit courts discretion to determine whether a conviction should be expunged.

When a circuit court exercises its discretion on a sentencing issue, an appellate court will not interfere with that decision unless that discretion was inappropriately exercised. *Helmbrecht*, 373 Wis. 2d 203, ¶ 8. "The analysis starts with the presumption that the court has acted reasonably, and the defendant-appellant has the burden to show unreasonableness from the record." *Id.* ¶ 11. Uttering "magic words" is not a substitute for providing a logical rationale. *Id.* ¶ 12.

A circuit court should set forth the facts it considered in reaching its decision regarding expungement and its rational for granting or denying expungement. *Id*. Wis. Stat. § 973.015 sets forth two factors for a court to consider when exercising its discretion; (1) whether the offender will benefit from

expungement and (2) whether society will be harmed by expungement. *Id.* ¶ 11.

The circuit court appropriately exercised its discretion in declining to make Mr. Edwards eligible for expungement. (*See* R45:16-18, 20-21). First, even if the circuit court had found that Mr. Edwards would benefit from expungement and society would not be harmed, it was not required by the plain language of the statute to make him eligible for expungement.

Second, the circuit court expressed its frustration at the state of the law, which requires that the decision on expungement be made at the time of sentencing. (R45:16-18). Without being able to wait for the facts about how the Mr. Edwards would perform on probation, the court decided that it was unable to make a determination about whether Mr. Edwards would benefit or whether society would be harmed. (R45:16-18, 20-21). The court affirmed that position during post-conviction proceedings. (R33:2). The circuit court may not have used "magic words" to indicate whether Mr. Edwards would benefit or whether society would be harmed, but it's meaning was clear and it was not required to do so. *See Helmbrecht,* 373 Wis. 2d 203, ¶ 12. On this record, the appellant cannot show that the court abused its discretion in declining to make Mr. Edwards eligible for expungement.

Further, the circuit court would not be allowed to consider expungement at this time if the issue had not been raised at the time of sentencing. *See generally Arberry*, 375 Wis. 2d 179. In Mr. Edwards' case, expungement was requested by defense counsel, considered by the court, and the court declined to make him eligible. (R45:12-13, 16-18, 20-21). Practically, it would be absurd to allow a circuit court to revisit its expungement decision after sentencing under these circumstances when a court cannot do exactly the same thing when expungement was not considered at the time of sentencing.

CONCLUSION

The State respectfully requests that the court deny Mr. Edwards request to reverse the circuit court's postconviction order and remand the case to the circuit court to consider whether Mr. Edwards' performance on probation entitles him to expungement because the circuit court has no authority to consider expungement after the initial sentencing hearing. *Hemp*, 359 Wis. 2d 320, ¶ 40. Further, the State requests that the court deny Mr. Edwards' request to remand the case to the circuit court to consider expungement again because he has not shown that the circuit court abused its discretion when it denied expungement.

Dated this _____ day of October, 2017.

Respectfully submitted,

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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 word count of this brief is 2,645.

_____ _____

Date Owen Piotrowski
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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 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.

_____ _____

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