STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2017AP0633-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, Wisconsin 53202-4116
(414) 227-4805
lambk@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

Page

ARGUMENT 1

I. If a circuit court denied expunction at the time of sentencing, the court has inherent authority to subsequently modify its decision. 1

A. Wisconsin law does not bar a circuit court from subsequently modifying a decision that denied expunction. 1

1. ***State v. Arberry*** 1

2. Wis. Stat. § 973.015 and ***State v. Matasek*** 2

3. ***State v. Hemp*** and ***State v. Ozuna*** .. 3

B. Circuit courts have inherent authority to modify a criminal sentence. 5

C. Circuit courts have inherent authority to expunge court records. 6

II. The circuit court erroneously exercised its discretion when it denied first-time offender Mr. Edwards's request for expunction of his misdemeanor conviction at the time of sentencing. 9

CONCLUSION 10

CERTIFICATION AS TO FORM/LENGTH 11

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12) 11

CASES CITED

City of Sun Prairie v. Davis,
226 Wis. 2d 738, 595 N.W.2d 635 (1999) 6, 8

In re Bruen,
102 Wash. 472, 172 Pac. 1152 (Wash. 1918) 7

In the Interest of E.C.,
130 Wis. 2d 376, 387 N.W.2d 72 (1986) 6, 7

State v. Anderson,
160 Wis. 2d 435,
466 N.W.2d 681 (Ct. App. 1991) 7

State v. Arberry,
2017 WI App 26,
375 Wis. 2d 179, 895 N.W.2d 100 ..... 1, 2

State v. Braunsdorf,
98 Wis. 2d 569, 297 N.W.2d 808 (1980) 7

State v. Hemp,
2014 WI 129,
359 Wis. 2d 320, 856 N.W.2d 811 ..... 3, 4, 5

State v. Ozuna,
2017 WI 64,
376 Wis. 2d 1, 898 N.W.2d 29 5

State v. Perry,
136 Wis. 2d 92, 401 N.W.2d 748 (1987) 2

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

Wisconsin Constitution
Wis. CONST. art. I, § 21 2

Wisconsin Statutes
§ 809.30 2

§ 973.015 ..... 2, 3, 4, 8

§ 973.19 2

ARGUMENT

I. If a circuit court denied expunction at the time of sentencing, the court has inherent authority to subsequently modify its decision.

A. Wisconsin law does not bar a circuit court from subsequently modifying a decision that denied expunction.

1. ***State v. Arberry***

The State cites this Court's decision in ***State v. Arberry***, 2017 WI App 26, 375 Wis. 2d 179, 895 N.W.2d 100 (District II) (petition for review granted and oral argument scheduled for November 14, 2017), and asserts that "[a] circuit court does not have authority to decide about expungement after sentencing, even if expungement was not considered at the time of sentencing." (State's Br. at 5).

First, ***Arberry*** involves a related, but different issue—whether a defendant who did *not* request expunction at the time of sentencing can subsequently seek eligibility. This Court's decision in ***Arberry*** did not address a situation, such as in this case, where expunction was considered at the time of sentencing but denied. *See* 2017 WI App 26, ¶ 2 (noting that eligibility for expunction was not requested nor addressed by the parties).

Second, ***Arberry*** is currently pending in the Wisconsin Supreme Court, so whether a circuit court has authority to grant eligibility when expunction was not considered at the time of sentencing is not yet settled.

Third, notably, in ***Arberry***, the State has conceded that when a defendant requests expunction at the time of sentencing, "the defendant retains the option of challenging the circuit court's failure to order expungement eligibility as an erroneous exercise of its sentencing discretion through a postconviction motion under Wis. Stat. §§ 809.30 or 973.19," which is precisely what Mr. Edwards did here. (*See* ***State v. Arberry,*** Plaintiff-Respondent's Wisconsin Supreme Court Br. at 14). [1]

In addition, by asking this Court to find that a decision denying expunction at the time of sentencing cannot be "revisited," the State is effectively seeking to deprive Mr. Edwards of his constitutional right to an appeal as guaranteed by the Wisconsin Constitution Article I, Section 21. *See* ***State v. Perry***, 136 Wis. 2d 92, 98, 401 N.W.2d 748 (1987). Holding that a circuit court cannot revisit or reexamine a denial of a request for expunction prevents a defendant from appealing or obtaining review of an adverse decision.

2. Wis. Stat. § 973.015 and ***State v. Matasek***

The State also argues that the expunction statute, Wis. Stat. § 973.015, and ***State v. Matasek***, 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811, prevent the circuit court from "revisiting" an earlier determination on expunction. (State's Br. at 5). However, as discussed in Mr. Edward's initial brief (at 10-11), neither the expunction statute nor ***Matasek*** address whether a decision *denying* expunction at the time of sentencing can subsequently be modified. Additionally,

[1] This brief is available at https://acefiling.wicourts.gov/documents/show_any_doc?appId=wscca&docSource=EFile&p%5bcaseNo%5d=2016AP000866&p%5bdocId%5d=196528&p%5beventSeqNo%5d=52&p%5bsectionNo%5d=1

Matasek left open the question of whether a circuit court has inherent power to order expunction of a court record when the circuit court cannot expunge the record under Wis. Stat. § 973.015. *See* ***Matasek***, 2014 WI 27, ¶ 6 n.4.

3. ***State v. Hemp*** and ***State v. Ozuna***

State v. Hemp, 2014 WI 129, 359 Wis.d 320, 856 N.W.2d 811, which is cited by the State (at 4), also does not bar the subsequent modification of a decision denying expunction.

In ***Hemp***, at the time of sentencing, the circuit court found Hemp eligible for expunction conditioned upon the successful completion of probation. ***Id.*** ¶ 5. Hemp petitioned for expunction within approximately one year of completing probation. ***Id.*** ¶¶ 6-8. The circuit court denied Hemp's petition, concluding that he failed to file the petition in a timely manner. ***Id.*** ¶ 8. Notably, at the time Hemp petitioned for expunction, he had been charged with new offenses. ***Id.*** ¶ 7. The circuit court stated that Hemp's "desire for expunction did not ripen until he was charged with new offenses." ***Id.*** ¶ 8.

The Wisconsin Supreme Court reversed. The Court held that: (1) Hemp's successful completion of probation "automatically entitled" him to expunction; (2) it was the probationary authority's responsibility to forward the discharge petition to the circuit court and Hemp bore no responsibility to take affirmative action to effectuate expunction; and (3) once Hemp successfully completed probation, the circuit court did not have the discretion to refuse to expunge Hemp's record. ***Id.*** ¶¶ 4, 15, 39.

In regards to the third holding, ***Hemp*** stated that:

> Nothing in the expungement statute grants the circuit court the authority to revisit an expungement decision. The fact that the circuit court cannot re-examine the decision is emphasized by our decision in ***Matasek***. The only point in time at which a circuit court may make an expungement decision is at the sentencing hearing. ***Matasek***, 353 Wis.2d 601, ¶ 45, 846 N.W.2d 811. If the circuit court exercises its discretion in ordering expungement upon the successful completion of the sentence, and the defendant successfully completes that sentence, then the defendant has earned, and is automatically entitled to, expungement. A circuit court cannot amend its expungement order, and once the detaining or probationary authority forwards the certificate of discharge, expungement is effectuated.

Id. ¶ 40. ***Hemp*** also stated that "Wisconsin Stat. § 973.015 does not allow for the kind of 'wait and see' approach taken by the circuit court here." ***Id.*** ¶ 42.

First, ***Hemp*** is distinguishable from this case in that it involved a circuit court changing its mind after expunction was granted and effectuated. *See* ***Hemp***, 2014 WI 129, ¶ 40. This case involves a denial of expunction, not a grant.

Second, Mr. Edwards did not take a "wait and see" approach here. *See* ***Hemp***, 2014 WI 129, ¶ 42. In accordance with ***Matasek***, Mr. Edwards requested expunction and the circuit court considered the request at the time of sentencing.

Third, Mr. Edwards is not alleging that "*the expungement statute* grants the circuit court the authority to revisit an expungement decision." *See* ***Hemp,*** 2014 WI 129, ¶ 40 (emphasis added). Rather, as discussed in the following sections, Mr. Edwards asserts that circuit courts have inherent

authority to modify a criminal sentence and to expunge court records.

Fourth, ***Hemp's*** statement that a "circuit court cannot amend its expungement order" can be construed as relating only to the particular situation at issue in that case. *See* ***Hemp,*** 2014 WI 129, ¶ 40. In ***State v. Ozuna***, 2017 WI 64, ¶ 5, 376 Wis. 2d 1, 898 N.W.2d 20, at the time of sentencing, the circuit court placed Ozuna on probation and made him eligible for expunction so long as he satisfied the conditions of probation. After Ozuna was discharged from probation, DOC filed a form titled "Verification of Satisfaction of Probation Conditions for Expungement." ***Id.*** ¶ 6. The probation agent marked a boxed labeled "[t]he offender has successfully completed his/her probation." ***Id.*** However, further down on the form, the agent noted that "[a]ll court ordered conditions have not been met." ***Id.*** The agent explained that "[Ozuna] [f]ailed to comply with the no alcohol condition. Lake Geneva PD went to Harbor Shores Hotel for noise complaint. Mr. Ozaro [sic] cited for underage drinking . . . and marijuana odor in the halls." ***Id.*** As a result, the circuit court "entered an order denying expungement of Ozuna's record." ***Id.*** ¶ 7. Although the circuit court had granted expunction at the time of sentencing, the Wisconsin Supreme Court held that "the circuit court properly denied expungement of [Ozuna's] conviction" because he did not satisfy the conditions of probation. ***Id.*** ¶ 10. Thus, ***Ozuna*** reflects that an expunction order can subsequently be changed.

B. Circuit courts have inherent authority to modify a criminal sentence.

The State acknowledges that "courts do have inherent authority to modify criminal sentences . . ." but argues that

this does not include "expungement of criminal records." (State's Br. at 6). However, the State does not provide any case law for this proposition.

Thus, as set forth in Mr. Edwards's initial brief (at 12-13), expunction should be granted in this case. Since the time of sentencing, Mr. Edwards has successfully completed probation, including paying off court costs and extended supervision fees. Additionally, while on probation, Mr. Edwards did not commit any violations and complied with all conditions, including completing AODA and anger management programming.

C. Circuit courts have inherent authority to expunge court records.

As Mr. Edwards acknowledged in his initial brief (at 11 n.4), the Wisconsin Supreme Court in ***In the Interest of E.C.***, 130 Wis. 2d 376, 387-88, 387 N.W.2d 72 (1986), concluded that circuit courts lack inherent authority to expunge juvenile *police records*. However, ***E.C.*** did not address whether circuit courts have inherent authority to expunge *court records*, which is at issue here.

Moreover, contrary to the State's suggestion (at 6), it makes sense to allow courts to expunge their own records. Expunction is a means of exercising management and control over a docket and records. *See generally*, ***City of Sun Prairie v. Davis***, 226 Wis. 2d 738, 749-50, 595 N.W.2d 635 (1999).

Additionally, the expunction of a court record advances the "administration of justice" because it "provides a means by which trial courts may, in appropriate cases, shield youthful offenders from some of the harsh consequences of criminal convictions" outside of statutory confines. ***State v. Anderson***, 160 Wis. 2d 435, 440, 466

N.W.2d 681 (Ct. App. 1991); *see also* ***State v. Leitner***, 2002 WI 77, ¶ 38, 253 Wis. 2d 449, 646 N.W.2d 341. The inherent authority of the court includes "the power to administer justice whether any previous form of remedy had been granted or not." ***E.C.***, 130 Wis. 2d at 386 (citing ***In re Bruen***, 102 Wash. 472, 172 Pac. 1152 (Wash. 1918)).

The State argues, presumably in reference to ***State v. Braunsdorf***, 98 Wis. 2d 569, 297 N.W.2d 808 (1980), that "[a]llowing circuit courts inherent authority to expunge criminal records would also, effectively, allow courts to dismiss a case with prejudice on non-constitutional grounds." (State's Br. at 6-7). In ***Braunsdorf***, the Wisconsin Supreme Court held that courts do not have inherent authority to dismiss a criminal case with prejudice prior to the attachment of jeopardy. 98 Wis. 2d 569 at 586.

However, dismissing a case with prejudice prior to the attachment of jeopardy is different than the relief sought in this case—expunction of a court record after a conviction. In the dismissal with prejudice scenario, the individual has not been convicted or received any type of punishment. In contrast, here, Mr. Edwards is seeking expunction after he has been convicted and sentenced. And, while his court record would be expunged, his district attorney and law enforcement records would remain.[2] Thus, "the implications for society as whole" are much broader in the context of "dismissing a case with prejudice prior to jeopardy" than in the context of expunging a court record after conviction. *See generally*, ***Braunsdorf***, 98 Wis. 2d 569 at 585-86.

In addition, the State argues that ruling that courts have inherent authority to expunge convictions "would make

[2] Mr. Edwards is not arguing that a circuit court has inherent authority to expunge district attorney or law enforcement records.

a part of Wis. Stat. § 973.015 superfluous." (State's Br. at 7). However, the existence of legislative regulation does not preclude a finding that a circuit court has inherent authority. Inherent authority can be either exclusive or shared. The Wisconsin Supreme Court has stated that:

> *A court's inherent authority may fall within its exclusive inherent authority or within inherent authority shared with the legislative or executive branches.* If a specific function falls within the court's exclusive inherent authority, neither the legislature nor the executive branches may constitutionally exercise authority within that area. Although the court may allow another branch to exercise authority in an area of exclusive judiciary inherent authority, it does so merely as a matter of comity and courtesy rather than as an acknowledgment of power. *The judiciary's exclusive inherent authority is immune from legislative abrogation.*
>
> In contrast, if a function falls within constitutional powers of the judiciary and another branch, it is within the judiciary's shared powers. *Another branch may exercise power in an area of shared powers but "only if it does not unduly burden or substantially interfere with the judiciary."*

Davis, 226 Wis. 2d 738 at 748 (citations omitted) (emphasis added).

Therefore, circuit courts have inherent authority to grant expunction and expunction should be granted in this case. As set forth in Mr. Edwards's initial brief (at 14), he is young, suffered significant consequences because of the allegations in this case, has completed programming, and has taken responsibility for the disturbance that occurred.

II. The circuit court erroneously exercised its discretion when it denied first-time offender Mr. Edwards's request for expunction of his misdemeanor conviction at the time of sentencing.

The State argues that the circuit court was not required to grant expunction and that it properly exercised its discretion because it "expressed its frustration at the state of the law." (State's Br. at 9).

While it is true that circuit courts have discretion to grant or deny expunction, expressing frustration at the state of the law does not reflect a proper exercise of discretion. As set forth in Mr. Edwards's initial brief (at 15-18), the circuit court did not discuss any individualized facts specific to Mr. Edwards. Moreover, the circuit court's comments appear to reflect a preconceived policy that it will not grant expunction in any case because the defendant's performance on probation is unknown.

Therefore, in this case, the circuit court erroneously exercised its discretion when denying Mr. Edwards's request for expunction.

CONCLUSION

For the reasons stated above, this Court should enter an order reversing the circuit court's denial of the postconviction motion, remanding this matter, and ordering the circuit court to consider whether Mr. Edwards's performance on probation entitles him to expunction or, alternatively, to properly exercise its discretion on the question of expunction eligibility.

Dated this 8th day of November, 2017.

Respectfully submitted,

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, Wisconsin 53202-4116
(414) 227-4805
lambk@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,304 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 of November, 2017.

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, Wisconsin 53202-4116
(414) 227-4805
lambk@opd.wi.gov

Attorney for Defendant-Appellant