STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal Nos.:

2017AP001845 - CR
2017AP001846 – CR
2017AP001847 – CR

State of Wisconsin,
Plaintiff-Respondent,

v.

Kole R. Eichinger,
Defendant-Appellant

BRIEF OF DEFENDANT – APPELLANT

APPEAL FROM THE CIRCUIT COURT FOR OUTAGAMIE COUNTY
THE HONORABLE VINCENT BISKUPIC PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Cases

LEGISLATION:

ISSUE PRESENTED FOR REVIEW

Did the Trial Court commit clear error in requiring the Defendant to Petition the Court at the completion of probation for expungement after sentencing?

Trial Court: Did not address this issue in denying the Defendants Petition for Expungement

The Appellant Answers: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested due to the complexity of the issues, the vastness of the topics application and the clear violations of the Appellants rights so that both parties can verbally illustrate their interpretations of law as they apply to the facts of this case. Publication is suggested in order to give further guidance to the bench and bar in this state as to the limitations of ordering a Defendant to Petition to the Court post sentencing for an order of expungement.

STATEMENT OF CASE:

On August 1st, 2011 case number 2011CM000796 was filed in Outagamie County Circuit Court Charging the Appellant with violations of Battery under Wisconsin Statute § 940.19(1) and Disorderly Conduct under Wisconsin Statute § 947.01. (R. 4) On August 13th, 2011 the Appellant completed a plea-questionnaire waiver of rights form and entered a Plea to the Battery Charge. (R. 10) At sentencing the Appellant raised the issue of expungement where he was told: "I am going to hold open the decision on expungement, but I allow

you to apply for expungement after 20 months of your probation, you might come back to me and have a favorable response with respect to expungement. All right" (R.21 Page 27) On March 10th, 2017 appellate counsel was retained. New counsel discovered the August 13th, 2011 Order of the Court requiring the Defendant to petition for expungement 20 months after sentencing. On June 14th, 2017 the Appellant filed a motion with Judge Biskupic, the new judge assigned to the case, to execute expungement as contemplated by judge Dyer on August 13, 2011, as the Appellant had successfully completed his probation. On July 19th, 2017 Judge Biskupic entered an Order Denying the Appellants request for expungement. (R. 17) This appeal follows.

STANDARD OF REVIEW

At the time of Sentencing, Wisconsin Stat. § 973.015(1m)(a)1 authorizes the court to expunge certain criminal convictions of an offender under certain conditions if "the court determines the person will benefit and society will not be harmed by this disposition." A court will weigh the benefit of expungement to the offender against the harm to society. *See* ***Matasek,*** **353 Wis.2d 601, ¶ 41, 846 N.W.2d 811**.

The determination of this sentencing issue involves the circuit court's discretion, which, on review, an appellate court will not disturb unless erroneously exercised. *See State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis.2d 535, 678 N.W.2d 197. "A circuit court properly exercises its discretion if it relies on relevant facts in the record and applies a proper legal standard to reach a reasonable decision." *State v. Thiel*, 2012 WI App 48, ¶ 6, 340 Wis.2d 654, 813 N.W.2d 709.

AUTHORITY

"Wisconsin Stat. § 973.015(1)(a) clearly and unambiguously states that expunction decisions should be made "at the time of sentencing[.]" In the

absence of ambiguity, this court must simply apply the statute as written. See Kalal, 271 Wis.2d 633, ¶ 45, 681 N.W.2d 110. State v. Matasek, 2013 WI App 63, ¶ 11, 348 Wis. 2d 243, 250, 831 N.W.2d 450, 453, aff'd, 2014 WI 27, ¶ 11, 353 Wis. 2d 601, 846 N.W.2d 811

Our supreme court addressed the issue of expungement under § 973.015 in State v. Matasek, 2014 WI 27, 353 Wis.2d 601, 846 N.W.2d 811. Matasek, a 2014 seventeen-page unanimous opinion of our supreme court, held that § 973.015 requires that "if a circuit court is going to exercise its discretion to expunge a record, the discretion **must** be exercised at the sentencing proceeding." Matasek, 353 Wis.2d 601, ¶ 45, 846 N.W.2d 811.

In doing so the Wisconsin Supreme Court relied on its statutory interpretation of the plain meaning of Wis. Stat. § 973.015. In doing so the Court held: "…we are convinced that the statutory language restricts the time at which the circuit court may order expunction. We interpret the phrase "at the time of sentencing" in Wis. Stat. § 973.015 to mean that if a circuit court is going to exercise its discretion to expunge a record, the discretion must be exercised at the sentencing proceeding. State v. Matasek, 2014 WI 27, ¶ 45, 353 Wis. 2d 601, 618, 846 N.W.2d 811, 819–20

The Statute interpreted under *State v. Matasek,* is nearly identical to the Statute considered in the instant case at the time of sentencing, yet

the Court violated the plain meaning of the Statute in requiring the Appellant to petition the court after 20 months to make the decision as to expungement. This is a clear error in the application of law in that under the statutes plain meaning, consideration for expungement could clearly only take place at the sentencing hearing itself.

Under 2013 Wisconsin Act 362, it is clear that at any modification to the statute pertains only to reference to "Par." Instead of "subd", leaving the material information and language nearly identical.

Section 48. 973.015 of the statutes is renumbered 973.015 (1m), and 973.015 (1m) (a) 1., as renumbered, is amended to read:

"973.015 (1m) (a) 1. Subject to par. (b) subd. 2. and except as provided in par. (c) 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 <u>at the time of sentencing</u> 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. This subsection does not apply to information maintained by the department of transportation regarding a conviction that is required to be included in a record kept under s. 343.23 (2) (a). See Generally, 2013 Wisconsin Act 362 substitution of "subd" for "par"

Expungement offers young offenders a fresh start without the burden of a criminal record and a second chance at becoming law-abiding and productive members of the community. Expungement allows individual defendants a chance to move past the barriers that can be created by a criminal record by giving them "an incentive to rehabilitate," which, in turn, "promotes the public's safety." Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota–State v. Schultz*, 31 Wm. Mitchell L.Rev. 1331, 1335 (2005) (internal citations omitted). Indeed, expungement allows "offenders to ... present themselves to the world—including future employers—unmarked by past wrongdoing." *Hemp,* 353 Wis.2d 146, ¶ 17, 844 N.W.2d 421. State v. Hemp, 2014 WI 129, ¶ 19, 359 Wis. 2d 320, 333, 856 N.W.2d 811, 817

The legislature, by enacting Wis. Stat. § 973.015, not only "provide [d] a break to young offenders who demonstrate the ability to comply with the law" but also "provide[d] a means by which trial courts may, in appropriate cases, shield youthful offenders from some of the harsh consequences of criminal convictions." *Leitner*, 253 Wis.2d 449, ¶ 38, 646 N.W.2d 341 (internal quotation marks and citations omitted). The subsequent amendments to § 973.015 show a consistent legislative effort to expand the availability of expungement to include a broader category of youthful offenders. This legislative effort is reflected in the language of the relevant statute, in that, originally, only those 21 years or younger who

were found guilty of an offense for which the maximum penalty was one year or less in the county jail were eligible for expungement. Laws of 1975 ch. 39, § 711m. However, Wis. Stat. § 973.015 has since been amended to apply to those 25 years or younger who are found guilty of an offense for which the maximum period of imprisonment is six years or less. Wis. Stat. § 973.015(1)(a). State v. Hemp, 2014 WI 129, ¶ 20, 359 Wis. 2d 320, 333–34, 856 N.W.2d 811, 817

Once an individual defendant successfully completes his sentence, the plain language of the expungement statute mandates a s**elf-executing process.** The legislature's use of the word "shall" indicates that the legislature required the detaining or probationary authority to both issue a certificate of discharge *and* forward the certificate to the court of record. *See Rotfeld v. Wis. Dep't of Natural Res.*, 147 Wis.2d 720, 726, 434 N.W.2d 617 (Ct.App.1988) State v. Hemp, 2014 WI 129, ¶ 27, 359 Wis. 2d 320, 336, 856 N.W.2d 811, 819

"We review a published decision of the court of appeals[1] affirming the Milwaukee County circuit court's order denying Kearney *324 **Hemp's** ("**Hemp**") petition for expungement.[2] At **Hemp's** sentencing, the circuit court found **Hemp** eligible for expungement conditioned upon his successful completion of probation. **Hemp** petitioned for expungement a year after successfully completing probation but the circuit court denied his petition, concluding that not only did **Hemp** have the responsibility to petition for

expungement, but that he also had the responsibility to do so in a timely fashion. The circuit court explained that **Hemp's** "desire for expungement did not ripen until he was charged with new offenses in Walworth County." "The implied time element ... coupled with the defendant's tardy action in seeking expungement" led the circuit court to deny his petition.

¶ 2 The court of appeals affirmed, concluding the expungement statute, Wis. Stat. § 973.015 (2009–10)[3], required **Hemp** to forward his "certificate of discharge" to the circuit court. ***State** v. **Hemp***, 2014 WI App 34, ¶ 10, 353 Wis.2d 146, 844 N.W.2d 421. The court explained that **Hemp's** failure to forward his certificate for over a year after the Department of Corrections (DOC) discharged him from probation rendered his petition for expungement tardy. *Id.*

¶ 3 Three issues are presented for our consideration: 1) **whether Hemp's successful completion of probation automatically entitled him to expungement;** 2) whether Wis. Stat. § 973.015 places any burden on **Hemp** to petition the circuit court within a certain period of time in order to effectuate expungement; and 3) whether the circuit court could reverse the decision it made at sentencing to find **Hemp** eligible for expungement conditioned upon the successful completion of his sentence.

*325 ¶ 4 **First, we hold that the successful completion of probation automatically entitled Hemp to expungement.** Second, we hold Wis. Stat. § 973.015 is unambiguous and places no burden on **Hemp** to petition for expungement within a certain period of time

because the duty to forward the certificate of discharge rests solely with the "detaining or probationary authority." Finally, we hold the circuit court improperly exercised its discretion when it reversed the decision it made at sentencing to find **Hemp** eligible for expungement. Accordingly, the decision of the court of appeals is reversed, and we remand to the circuit court with the instructions that the clerk of courts expunge **Hemp's** record. State v. Hemp, 2014 WI 129, ¶¶ 1-4, 359 Wis. 2d 320, 323–25, 856 N.W.2d 811, 812–13

ARGUMENT

The Circuit Court Committed Clear Error in interpreting the Expungement statute

"A circuit court properly exercises its discretion if it relies on relevant facts in the record and applies a proper legal standard to reach a reasonable decision." *State v. Thiel*, 2012 WI App 48, ¶ 6, 340 Wis.2d 654, 813 N.W.2d 709.

"…we are convinced that the statutory language restricts the time at which the circuit court may order expunction. We interpret the phrase "at the time of sentencing" in Wis. Stat. § 973.015 to mean that if a circuit court is going to exercise its discretion to expunge a record, the discretion must be exercised at the sentencing proceeding. State v. Matasek, 2014 WI 27, ¶ 45, 353 Wis. 2d 601, 618, 846 N.W.2d 811, 819–20

When construing the facts of this case with the clear meaning and legislative intent of the expungement statute as it then existed and the cases cited herein that interpret the same, the analysis clearly indicates that

Kole Eichinger should be granted an expungement of this Courts entire record as at sentencing Judge Dyer committed clear error in his interpretation of § 973.015. Specifically, § 973.015 clearly stated and was interpreted by the superior courts to mean that *at the time of sentencing* expungement must be decided.

Rather than apply the clear language of the statute, judge Dyer at sentencing qualified Kole for expungement asking him his age, employment and hearing evidence of the isolated nature of the offense ***and having made that determination improperly put the burden on the defendant to petition the court 20 months after sentencing for a new Order.***

Further, unlike the Judge in Hemp who simply qualified the defendant in that case, if he completed and petitioned the court, here in the instant case the sentencing judge went further than simply qualifying. In this case, Judge Dyer like the Hemp court makes the statement: "I am going to hold open the decision of expungement, but I allow you to apply for expungement after 20 months of your probation, you might come back to me and have *a favorable response with respect to expungement.* (R. 21 at Page 27)

The decision to "hold open" the decision of expungement is a clear error as it is an interpretation of the statute that is completely juxtaposed to the superior courts own interpretation of the same statute. *See Generally* State v. Matasek, *Id.*

Expungement offers young offenders a fresh start without the burden of a criminal record and a second chance at becoming law-abiding and productive members of the community. "Wisconsin Stat. § 973.015(1)(a) clearly and unambiguously states that expunction decisions should be made "at the time of sentencing[.]" In the absence of ambiguity, this ***court must simply apply the statute as written***. See Kalal, 271 Wis.2d 633, ¶ 45, 681 N.W.2d 110. State v. Matasek, 2013 WI App 63, ¶ 11, 348 Wis. 2d 243, 250, 831 N.W.2d 450, 453, aff'd, 2014 WI 27, ¶ 11, 353 Wis. 2d 601, 846 N.W.2d 811

In the August 13, 2012 Order Judge Dyer commits a clear error when he inappropriately put the burden on the Appellant to petition the court subsequent to sentencing. As the Court of appeals and subsequently the Wisconsin Supreme Court indicate the clear language of the statute indicates that the judge must make the determination of expungement at the time of sentencing. (R. 21) *See Generally* State v. Matasek, Id.

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. State v. Hemp, 2014 WI 129, ¶ 40, 359 Wis. 2d 320, 344–45, 856 N.W.2d 811, 823

Statutory interpretation begins with the language of the statute, and, if the language is unambiguous, we apply the statute's plain language to the facts at hand. *Id.* Statutory language is examined within the context in which it is used. *330 *Alberte v. Anew Health Care Servs., Inc.*, 2000 WI 7, ¶ 10, 232 Wis.2d 587, 605 N.W.2d 515. " Words are ordinarily interpreted according to their common and approved usage; technical words and phrases and others that have a particular meaning in the law are ordinarily interpreted according to their technical meaning." *State v. Matasek*, 2014 WI 27, ¶ 12, 353 Wis.2d 601, 846 N.W.2d 811. Further, statutes are interpreted to avoid surplusage, giving effect to each word. *Id.* "Moreover, words are given meaning to avoid absurd, unreasonable, or implausible results and results that are clearly at odds with the legislature's purpose." **816 *Id.*, ¶ 13; *see also State v. Hanson*, 2012 WI 4, ¶ 17, 338 Wis.2d 243, 808 N.W.2d 390 (" 'Context and [statutory] purpose are important in discerning the plain meaning of a statute.' ... We favor an interpretation that fulfills the statute's purpose.") (citation omitted).

However, if the statute is ambiguous, we examine extrinsic sources, such as legislative history, to ascertain the legislature's intent; a statute is ambiguous if the language reasonably gives rise to two or more different meanings. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶¶ 47, 50–51, 271 Wis.2d 633, 681 N.W.2d 110. State v.

Hemp, 2014 WI 129, ¶¶ 13-14, 359 Wis. 2d 320, 329–30, 856 N.W.2d 811, 815–16

The current Wisconsin Statute for expungement is clear in its application to the facts in this case.

Once an individual defendant successfully completes his sentence, the plain language of the expungement statute mandates a self-executing process. The legislature's use of the word "shall" indicates that the legislature required the detaining or probationary authority to both issue a certificate of discharge *and* forward the certificate to the court of record. *See Rotfeld v. Wis. Dep't of Natural Res.,* 147 Wis.2d 720, 726, 434 N.W.2d 617 (Ct.App.1988) State v. Hemp, 2014 WI 129, ¶ 27, 359 Wis. 2d 320, 336, 856 N.W.2d 811, 819

After hearing sentencing recommendations and otherwise qualifying Eichinger for expungement the Court instructed Mr. Eichinger " so depending upon how you don on that probation, you might come back onto me and have a favorable response with respect to expungement. All right?" Page 27 Transcript from August 13th plea and sentencing.

Kole Eichinger was qualified for the statutory expungement requirements, and was told at sentencing that if he successfully completed probation in 20 months his record would "have a favorable response" in regards to expungement. Further, the legislative intent of the statute and the case law cited above all support the position that following the completion of conditional terms an expungement is self-executing and

burden placed on the Appellant to re-petition the court after sentencing amounts clear error of the application of the statute.

The legislature clearly intended the completion of probation to trigger expungements automatically where the defendant was told at sentencing that a successful completion of probation would result in expungement. The line of case law under Hemp is strongly in support of expungement in this case.

THEREFORE, Due to the Courts Clear Error in Ordering the Petitioner to come back to court in 20 months, the circumstances of the defendant character, nature and circumstances surrounding the events and the status of this courts record when interpreted with the intent of the legislature and case law interpreting the same statute the Defendant humbly pays for an Order of expungement of the entire court record as contemplated at Sentencing before the application of an error of law in applying the statute and requiring the Appellant to come back for a second sentencing hearing.

AS GROUNDS FOR THIS MOTION, the Defendant relies on the Wisconsin Statutes and any other grounds as indicated in the foregoing paragraphs.

Dated this __ day of December, 2017.

Respectfully Submitted,

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FORM AND LENGTH CERTIFICATION

I, John M. Carroll, hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,561words.

Dated this __ day of December, 2017.

_____

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ELECTRONIC BRIEF CERTIFICATION

I, John M. Carroll, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

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