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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

2017AP001845 CR
2017AP001846 CR
2017AP001847 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Kole R. Eichinger,
Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN CIRCUIT
COURT BRANCH 6 FOR OUTAGAMIE COUNTY

The Honorable Vincent R. Biskupic, Presiding

BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

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POSITION ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent, State of Wisconsin, requests neither oral argument nor publication because resolution of this case requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE AND STATEMENT OF THE ISSUES

As respondent, the State exercises its option not to present a statement of the issues and statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a)2. Instead, the State will outline the issues and present additional facts in the “Argument” portion of its brief.

ARGUMENT

I. EICHINGER'S ARGUMENT REGARDING "CLEAR ERROR" IS UNDEVELOPED AND UNSUPPORTED BY CASE LAW

While Eichinger's brief is someone difficult to decipher, it appears that his main argument is that he "should be granted an expungement of this Courts [sic] entire record as at sentencing Judge Dyer committed clear error in his interpretation of § 973.015." (Def. Br. at 10). The only case law Eichinger cites to support this argument is *State v. Thiel*, 2012 WI App 48, 340 Wis.2d 654, 813 N.W.2d 709.

In *Thiel*, the defendant was convicted sexually assaulting a child and was sentenced to prison. *Id.*, ¶ 2. Thiel was subsequently "adjudged to be a sexually violent person and was committed to the custody of DHS." *Id.* Later, Thiel petitioned the court for supervised released. *Id.*, ¶ 3. The circuit court adopted the plan submitted by DHS which required Thiel to abide by forty-eight rules upon release. *Id.* Thiel objected to two of those rules. *Id.*

The issue in *Thiel* was whether the circuit court properly exercised its discretion in approving the DHS plan. *Id.*, ¶ 1. The court of appeals affirmed the circuit court and held that "the circuit court appropriately exercised its discretion in approving Thiel's supervised release plan." *Id.*, ¶ 13. In the *Thiel* decision, the court of appeals does not once mention the standard of "clear error."

Eichinger also confusingly argues that "[t]he 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." (Def.'s Br. at 10). Eichinger is essentially arguing that because Judge Dyer decided to "hold open" the

decision of expungement rather than authorize expungement at the time of sentencing, Judge Dyer committed clear error. This argument, however, makes little sense.

In the leading case on expungement, *State v. Matasek*, 2014 WI 27, 353 Wis.2d 601, 846 N.W.2d 811, the circuit court told *Matasek* at sentencing that it would “withhold its decision on expunction until the defendant successfully completed his sentence.” *Id.*, ¶ 8. The Wisconsin Supreme Court held that this was insufficient to authorize expunction because expunction must be granted “at the time of sentencing.” *Id.*, ¶ 44-45. In *Matasek*, there is no talk about “clear error” despite the fact that the circuit court’s attempted authorization of expunction was insufficient. Instead, the Court affirmed the decision of the court of appeals and held that *Matasek* was not entitled to expunction because it was not ordered “at the time of sentencing.” *Id.* 44-46. Eichinger, just like *Matasek*, is not entitled to expunction because it was not ordered “at the time of sentencing.” *Id.*

Throughout Eichinger’s brief, he mentions “clear error” on numerous occasions but fails to sufficiently develop the argument or support it with relevant case law. For these reasons, this court should not consider the argument. Neither Plaintiff-Respondent nor the court should be required to develop Eichinger’s argument on his behalf. *See State v. McMorris*, 2007 WI App 231, ¶ 30, 306 Wis.2d 79, 742 N.W.2d 322 (“[I]t is not this court’s duty to develop legal arguments on behalf of the appellant. . . . Accordingly, we may choose not to consider arguments unsupported by references to legal authority, arguments that do not reflect any legal reasoning, and arguments that lack proper citations to the record.”); *State ex rel. Harris v. Smith*, 220 Wis.2d 158, 165, 582 N.W.2d 131 (Ct. App. 1998) (“We cannot serve as both advocate and judge.”); *Block v. Gomez*,

201 Wis.2d 795, 811, 549 N.W.2d 783 (Ct. App. 1996) (noting that “amorphous” and “insufficiently developed” arguments will not be considered); *State v. Pettit*, 171 Wis.2d 627, 642, 492 N.W.2d 633 (Ct. App. 1992) (noting that undeveloped arguments supported only by general statements and arguments unsupported by references to legal authority will not be considered).

II. EICHINGER’S ARGUMENT SHOULD BE REJECTED BECAUSE HE IS SEEKING EXPUNCTION AFTER SENTENCE HAS BEEN IMPOSED

Eichinger argues that because Judge Dyer did not make a decision about expunction at the time of sentencing, he committed “clear error” and this court should order expungement. However, Eichinger’s argument should be rejected because he is requesting expunction after sentence has already been imposed. On January 19, 2018, the Wisconsin Supreme Court released its opinion in *State v. Arberry*, 2018 WI 7, 905 N.W.2d 832. The Court held that “a defendant may not seek expunction after sentence is imposed because both the language of Wis. Stat. § 973.015 and *Matasek* require that the determination regarding expunction be made at the sentencing hearing.” *Id.*, ¶ 23.

In *Arberry*, the defendant was sentenced to prison after being convicted of felony retail theft. *Id.*, ¶ 7. At the defendant’s sentencing hearing, the issue of expunction was not raised. *Id.*, ¶ 9. The defendant argued in a postconviction motion that the issue of expunction was “unknowingly overlooked by all of the parties,” arguing that it constituted a “new factor” justifying resentencing. *Id.*, ¶ 10. The circuit court denied the defendant’s postconviction motion and the court of appeals affirmed. *Id.*, ¶ 11-12. The Wisconsin Supreme Court subsequently granted the petition for review. *Id.*, ¶ 13.

The Wisconsin Supreme Court, in a relatively short and concise opinion, affirmed the decision of the court of appeals. *Id.*, ¶ 24. The court analyzed *Matasek* and concluded:

In *Matasek*, we evaluated two proffered times for expunction: the sentencing hearing when sentence was imposed and after successful completion of the sentence. Between the two, we determined that the former—the sentencing hearing—was the only time at which the circuit court could exercise its discretion to expunge a record under the statute, if it was going to do so, because otherwise ‘at the time of sentencing’ would be rendered surplusage. Thus . . . *Matasek* controls here and dictates that, if a circuit court is going to exercise its discretion to expunge a record, the discretion must be exercised at the hearing where sentence is imposed.

Id., ¶ 21 (internal citations omitted). The court made clear that expunction may only be granted at the time of sentencing.

In the instant case, the circuit court “held open” the decision of expunction. Pursuant to *Matasek* and *Arberry*, because the circuit court did not exercise its discretion to expunge a record at the sentencing hearing, Eichinger “may not seek expunction after sentence is imposed.” *Arberry*, 2018 WI 7, ¶ 23.

CONCLUSION

For the foregoing reasons, this court should affirm the decision of the circuit court.

Respectfully submitted this 21st day of February, 2018.

By: _____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 5 pages.

Dated: February 21, 2018

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on February 21, 2018, this brief or appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief or appendix was correctly addressed.

Date: February 21, 2018

Signature: _____

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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.

Dated this 21st day of February, 2018.

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