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

REPLY 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

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 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. 3) 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, y*ou 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.

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.

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 State in Responding to the Appellants opening brief puts forth the argument that Eichinger is not entitled to an expungement because it was not ordered at the time of sentencing.

In making this argument the State fails to acknowledge the issue of this appeal nearly in its entirety. That is, did Judge Dyer commit an error of law at the time of sentencing by issuing a sentence that improperly put a burden on the Defendant to petition the court after the completion of sentencing and probation for an expungement?

As the both the State and the Appellant agree the only time under Wis. Stat. § 973.015 that an expungement order can enter is at the time of sentencing.

That is exactly why the Appellant is seeking review, because at the time of sentencing and after being qualified for an expungement, rather than issue expungement when he had statutory authority to do so, the Judge indicated that the Appellant must himself complete probation and then petition the court post sentencing for an expungement. Further the Court added and if he were to do so "*you might come back to me and have a favorable response with respect to expungement. All right"* (R. 21 , 27)

THE JUDGES ORDER IS AN ERROR OF LAW

…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

"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 and application 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. *Hemp* goes further, in its final holding indicating "we hold the circuit court ***improperly exercised its discretion*** when it reversed the decision it made at sentencing".

Rather than apply the clear language of the statute, Judge Dyer at sentencing qualified the Appellant 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.*** (R. 21, 27)

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 its plain meaning and 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 in his application of the expungement statute, when he inappropriately put the burden on the Appellant to petition the court 20 months subsequent to his sentencing. As the Court of appeals and subsequently the Wisconsin Supreme Court have expressly indicated, 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, t**hen 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

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 to me and have a favorable response with respect to expungement. All right?" (R. 21, 7)

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 if he himself petitioned the court. Subsequently he did complete his probation, yet did not receive the "favorable response"

as indicated at his sentencing. 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. Placing the burden on the Appellant to re-petition the court after the time of sentencing amounts clear error of the application of the statute. At the very least it was an error of law to require the defendant, post sentencing, to petition for another hearing where the Court no longer had authority to issue an expungement decision- to acquire the same.

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 as is the application of the statue.

THEREFORE, Due to the Courts Clear Error in Ordering the Petitioner to come back to court in 20 months (after sentencing) to petition for expungement post sentencing, 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 prays 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 Motions and Briefs as well as supported by the transcripts and record of this case.

Dated this 9th day of March, 2018.

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)(c) for a Reply brief and appendix produced with a proportional serif font. The length of this brief is 2,819 words.

Dated this 9th day of March, 2018.

_____

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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.

Dated this 9th day of March, 2018.

_____

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