STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I/II

Case No. 2018AP2274

DEMONTA ANTONIO HALL,

Petitioner-Respondent,

v.

WISCONSIN DEPARTMENT
OF JUSTICE,

Respondent-Appellant.

APPEAL FROM A FINAL ORDER OF THE CIRCUIT
COURT FOR MILWAUKEE COUNTY,
THE HONORABLE WILLIAM POCAN, PRESIDING

REPLY BRIEF OF WISCONSIN DEPARTMENT OF JUSTICE

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INTRODUCTION

The database statute requires DOJ to accept and keep information about an arrestee's path through the legal system. When a given arrest lacks a connection to that system—if there are no related charges or the person is cleared of them—the arrest may be deleted. Otherwise, it is kept.

Hall's arguments do not come to terms with that statutory scheme. Where, as here, a person does not satisfy either of the limited avenues the Legislature has chosen for deleting an arrest, the arrest remains in the database and is updated. DOJ's administrative decisions should be affirmed, and the circuit court's order reversed.

ARGUMENT

I. DOJ's administrative decisions were proper under the terms of the statute.

DOJ has explained why its application of the database statute was correct under the touchstones of statutory interpretation: statutory language and context. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶¶ 45–46, 271 Wis. 2d 633, 681 N.W.2d 110. (Opening Br. 9–13.)

The analysis is not especially complex. The database statute is, almost entirely, about data collection and retention. Wis. Stat. § 165.83(2). Core components of the database are arrest fingerprint cards obtained by police at the time of arrest, which state the offenses underlying it. Wis. Stat. § 165.84(1). When law enforcement submits an arrest, the statutory default is that DOJ keeps that arrest record and continues to collect "information concerning the legal action taken." Wis. Stat. § 165.83(2)(f).

There is one statutory sentence about removal. The Legislature has provided two instances where a person may

request a fingerprint record be returned: if the arrested person is "[1] subsequently released without charge, or [2] cleared of the offense through court proceedings." Wis. Stat. § 165.84(1).

Neither happened here, as the opening brief explained. Hall could not have been "subsequently released without charge" because he already had been charged via municipal citations. In other words, the first removal path has no application to someone who was arrested after absconding. Hall still had a second path available: to be "cleared" of the offenses on the fingerprint card. However, he was not. (R. 9:22, 36, 40, 51.)[1]

Because neither path applied, DOJ did not return Hall's fingerprint arrest cards. The arrests remained on the database, just like the millions of others that remain on the database. The entries reflected the truthful facts of the arrests and the results: certain offenses were "dismissed" and others resulted in his being "convicted" with a "fine." (R. 9:15–17.) That chronicling is what the database does.

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[1] In its opening brief, DOJ explained that the order in which someone is charged and arrested should not matter. Hall asserts that DOJ's explanation of that is flawed, but it is difficult to discern Hall's reasoning. (Hall Br. 13–15.) It remains the case that Hall's proposal results in an anomaly. He says that, even though he was not cleared, his arrest should be removed because there was no "new" charge. For those, like Hall, who were not cleared, that treats people differently simply because a charge preceded or followed a given arrest.

II. Hall's arguments do not apply the express statutory language but rather imagine a different statute.

Hall's real quarrel is not with DOJ's interpretation of the statute, but rather the Legislature's policy choice expressed through the statute. He does not accept that the database is, by default, comprehensive and that it has only limited paths to erase an arrest.[2]

First, Hall asserts that DOJ's interpretation should not be entitled to deference. (Hall Br. 8–9.) There is no disagreement on that point. (Opening Br. 7–9.) Rather, DOJ's interpretation is entitled to respect because it has expertise through its long-term administration of this technical statute. Wis. Stat. § 227.57(10); *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶¶ 77–78, 382 Wis. 2d 496, 914 N.W.2d 21. But what ultimately matters is what the statute says.

Second, Hall argues that DOJ reorganizes data in a way that is contrary to the statute. He contends that DOJ applies "unwritten" policies or a "practice of conflating past charges," where the offenses have "no relationship" with each other. (Hall Br. 1 n.2, 5.) That is not correct. DOJ was the recipient, not the author, of Hall's fingerprint arrest cards. DOJ does not decide which of Hall's offenses have a "relationship"; rather, the arrest records dictate that. (R. 9:21–22, 39–40.) Hall's database report contains "Cycle 6" and "Cycle 7" that reflect the offenses stated on the corresponding fingerprint arrest cards. (*Compare* R. 9:14–17, *with* R. 9:21–22, 39–40.)

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[2] Separately, a person may seek to *correct* information on the database, as Hall notes. (Hall Br. 7 n.5.) However, Hall identifies nothing that is incorrect. He says that certain charges were dismissed, and the database reflects that. (R. 9:15–17.)

DOJ houses that information and updates it when circumstances dictate. That is what the statutes tell DOJ to do. *See* Wis. Stat. §§ 165.83(2)(a)–(f), 165.84(1), (4)–(5).[3]

Third, Hall at times seems to take the position that DOJ should treat the two offenses on his arrest cards separately. (*E.g.*, Hall Br. 2.) For example, Hall was arrested for possession of an electronic weapon and for an outstanding warrant for operating while suspended. Everyone agrees that he was not charged for the former, but was charged and not cleared through court proceedings of the latter. (R. 9:40, 43, 51.)[4]

Hall provides no statutory support for treating the possession offense separately. The database's removal provision operates at the arrest, not offense, level. A fingerprint arrest card is created at arrest and the removal provision operates on that "fingerprint record." Wis. Stat. § 165.84(1). The statute says nothing about DOJ *altering* those law enforcement records. The arrest card either is "returned" because there were no related charges or all charges were cleared, or is kept and updated. Wis. Stat. §§ 165.84(1), 165.83(2)(f).

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[3] By statute, information also may be received in other ways. Hall observes in a footnote that the database may include other information, like that about entry and release from correctional institutions, and Hall suggests that DOJ should not be including it. (Hall Br. 4 n.4.) It is not clear why Hall thinks that. For example, the statutes expressly require that "correctional institutions shall obtain fingerprints," which are then "forwarded to the department." Wis. Stat. § 165.84(4). And clerks, law enforcement, and penal institutions must provide updates relating to the person's path through the system from "inception" until "final discharge." Wis. Stat. § 165.84(5) (referencing Wis. Stat. § 165.83(2)(f)).

[4] Hall's other arrest at issue has the same relationship between the offenses.

Hall says it is absurd that his arrest was included when he was simultaneously arrested for an outstanding warrant and a new offense, but he does not explain why. (Hall Br. 11.) Like many other states' database statutes (*see* Opening Br. 15–16), Wisconsin's database chronicles arrests and what they are for. It is not absurd to include arrests when someone absconded from an existing charge. Rather than identify absurdity, Hall points to a policy preference: he wants there to be a "nexus" analysis. (Hall Br. 11, 15.) But the statute makes no mention of a "nexus" and, likewise, criteria for a "nexus" do not exist. Further, as a practical matter, DOJ receives this information in very large quantities from outside law enforcement. It is not generally involved in the events themselves.

Indeed, instead of rebutting the all-or-nothing statutory mechanism, Hall's argument frequently adopts it. For example, he says the issue presented is about "the fingerprint record" being returned, and that it concerns "fingerprint cards." (Hall Br. 2–3.) DOJ agrees: the statute speaks in terms of the "return" of the fingerprint arrest card. But it is a single document; there is nothing to "return" piecemeal. (*See* R. 9:21–22, 39–40.)

Fourth, Hall argues that DOJ's interpretation of the removal sentence renders the word "subsequently" surplusage. (Hall Br. 11.) However, that misunderstands the surplusage concept. The canon says that one should avoid reading a statute in a way that renders a term meaningless. For example, to avoid surplusage, the supreme court gave meaning to "substantially" in the term "substantially similar." *Appling v. Walker*, 2014 WI 96, ¶ 25, 358 Wis. 2d 132, 853 N.W.2d 888. Something merely "similar" was not covered; it had to be "substantially" so. *Id.*

That kind of surplusage problem has no application here. DOJ's reading does not ignore "subsequently." The word means nothing on its own and has meaning only when paired

with "released." It is true that someone like Hall, who absconded after being charged, is incapable of being "subsequently released" without one. But that does not mean the avenue is rendered altogether meaningless. It just means that someone who has absconded, like him, may not use it. Others who have not absconded but were simply arrested might be "subsequently released."

Hall's argument, rather, is really about concision. He observes that the Legislature might have said "released" instead of "subsequently released." However, most things can be said in more than one way, including in more or less concise ways. That is not a surplusage scenario.

Fifth, Hall argues about the database's "fugitive from justice" coverage. (Hall Br. 15–20.) As explained in the first brief, the database law separately covers someone who is arrested as a "fugitive from justice." Wis. Stat. § 165.83(2)(a)4. And that person necessarily has a preexisting charge. For present purposes, the provision helps illustrate that the database law does not require there to be *new* charges after a given arrest. (Opening Br. 13–14.)

Hall proposes that someone arrested as a fugitive from justice should have to be newly charged, but that proposal appears nowhere in the statute. (Hall Br. 16–18.) Rather, its coverage is for a person arrested "*[a]s* a fugitive from justice." Wis. Stat. § 165.83(2)(a)4. In other words, it covers a person arrested based on his fugitive status—this looks backward.

Sixth, Hall contends that the statute should not be read as requiring retention of an arrest for an outstanding warrant "no matter how those warrants are resolved." (Hall Br. 19.) DOJ agrees. It does not retain those arrests no matter what. Rather, if a person arrested on a warrant is "cleared" of the underlying offenses, that person is eligible for removal, just like everyone else. *See* Wis. Stat. § 165.84(1).

Hall's efforts are misdirected. He seeks a database law that looks at nexuses or otherwise carves out offenses. But that is not how the statute works. Under the law as it exists, DOJ properly kept Hall's arrest records. Hall is free to seek changes, but that would be a policy decision for the Legislature, not the courts. *See Capital Times Co. v. Doyle*, 2011 WI App 137, ¶ 15, 337 Wis. 2d 544, 807 N.W.2d 666.

CONCLUSION

The circuit court's order should be reversed, and DOJ's administrative decisions should be affirmed.

Dated this 17th day of April, 2019.

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 length of this brief is 1821 words.

Dated this 17th day of April, 2019.

ANTHONY D. RUSSOMANNO
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 17th day of April, 2019.

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