STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2019AP1272-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JORDAN ALEXANDER LICKES,

Defendant-Respondent.

ON APPEAL FROM AN ORDER EXPUNGING THREE CONVICTIONS ENTERED IN GREEN COUNTY CIRCUIT COURT, THE HONORABLE JAMES R. BEER, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

Page

ISSUE PRESENTED....1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION....1

INTRODUCTION....1

STATEMENT OF THE CASE....2

STANDARD OF REVIEW....6

ARGUMENT....6

Lickes cannot receive expungement because he violated conditions of probation....6

A. Lickes has not met all the statutory requirements for expungement....6

1. Under *Ozuna*, a defendant fails a statutory requirement for expungement if he violates a condition of probation....6

2. A defendant does not earn expungement if he violates DOC probation rules, which are court-imposed conditions as a matter of law....9

3. Lickes did not earn expungement under *Ozuna*....14

B. The circuit court's other grounds for distinguishing *Ozuna* fail....16

1. The *Ozuna* dissent does not matter....16

2. Pending bills are irrelevant here....16

3. Regardless of its timing, *Ozuna* denies Lickes expungement on counts one and three....17

CONCLUSION....21

Page

TABLE OF AUTHORITIES

Cases

Chaidez v. United States,
568 U.S. 342 (2013) 18, 20

Free v. Peters,
12 F.3d 700 (7th Cir. 1993) 18

Lockhart v. Fretwell,
506 U.S. 364 (1993) 18, 20

Moore v. Anderson,
222 F.3d 280 (7th Cir. 2000) 18

Outagamie Cty. v. Town of Greenville,
2000 WI App 65, 233 Wis. 2d 566, 608 N.W.2d 414 10

State ex rel. Kalal v. Cir. Ct. for Dane Cty.,
2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110 12

State ex rel. Martin v. Zimmerman,
233 Wis. 16, 288 N.W. 454 (1939) 17

State ex rel. Neelen v. Lucas,
24 Wis. 2d 262, 128 N.W.2d 425 (1964) 16, 17

State ex rel. Rodriguez v. Dep't of Health & Soc. Servs.,
133 Wis. 2d 47, 393 N.W.2d 105
(Ct. App. 1986) 11, 12, 13

State ex rel. Rupinski v. Smith,
2007 WI App 4, 297 Wis. 2d 749, 728 N.W.2d 1 11

State ex rel. Solie v. Schmidt,
73 Wis. 2d 76, 242 N.W.2d 244 (1976) 11, 12

State ex rel. Thompson v. Jackson,
199 Wis. 2d 714, 546 N.W.2d 140 (1996) 16

State ex rel. Vanderbeke v. Endicott,
210 Wis. 2d 502, 563 N.W.2d 883 (1997) 11

State v. Hemp,
2014 WI 129, 359 Wis. 2d 320,
856 N.W.2d 811 ..... 7, 8, 15, 19

Page

State v. Lagundoye,
2004 WI 4, 268 Wis. 2d 77, 674 N.W.2d 526..... 17, 18

State v. Ozuna,
2017 WI 64, 376 Wis. 2d 1, 898 N.W.2d 20.....1, *passim*

State v. Perry,
181 Wis. 2d 43, 510 N.W.2d 722 (Ct. App. 1993)..... 16

State v. Reyes Fuerte,
2017 WI 104, 378 Wis. 2d 504, 904 N.W.2d 773..... 10

State v. Simmelink,
2014 WI App 102, 357 Wis. 2d 430, 855 N.W.2d 437..... 9

State v. Ziller,
2011 WI App 164, 338 Wis. 2d 151, 807 N.W.2d 241..... 13

Winebow, Inc. v. Capitol-Husting Co.,
2018 WI 60, 381 Wis. 2d 732, 914 N.W.2d 631..... 12

Constitution

Wis. Const. art. V, § 10(1)(a) 16

Statutes

Wis. Stat. § 973.015 2

Wis. Stat. § 973.015(1m)(b) .....7, *passim*

Wis. Stat. § 973.10 10

Wis. Stat. § 973.10(1)..... 10, 11, 13, 14

Wis. Stat. § 973.10(2)..... 11, 12

Other Authorities

Wis. Admin. Code § (DOC) 328.04(3)(a) 13

Wis. Admin. Code § (HSS) 328.04(3)(a) 13

2019 Assembly Bill 33 ..... 5, 16

2019 Senate Bill 39.....5

ISSUE PRESENTED

Did Defendant-Respondent Jordan Alexander Lickes lose his eligibility for expungement in this case because he violated three conditions of probation?

The circuit court answered "no."

This Court should answer "yes" and reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the briefs should adequately set forth the facts and law. The State recommends publication to clarify whether a defendant fails one statutory requirement for expungement if he violates Wisconsin Department of Corrections (DOC) rules of probation.

INTRODUCTION

Lickes was convicted of three misdemeanors and a felony because he had sex with an underage girl. After conviction, the circuit court ordered probation as part of the sentence. Lickes later admittedly violated multiple DOC rules of his probation.

The circuit court expunged two misdemeanor convictions and the felony conviction even though Lickes violated multiple DOC probation rules. The court erred. Under *State v. Ozuna*, 2017 WI 64, 376 Wis. 2d 1, 898 N.W.2d 20, a defendant does not meet the statutory requirements for earning expungement if he violates one or more conditions of probation. The circuit court refused to follow *Ozuna*, relying in part on the *Ozuna* dissent and a pending bill that would expand expungement. The court also seemed to determine that *Ozuna* does not deny expungement if a defendant violates a DOC probation rule, as opposed to a court-imposed condition of probation.

The circuit court should have applied *Ozuna* and denied Lickes expungement. As a matter of law, a defendant is required to follow DOC probation rules and probation conditions expressly mentioned by a sentencing court. The defendant in *Ozuna* was properly denied expungement because he violated a single probation condition by consuming alcohol. Because Lickes admittedly violated multiple probation rules, he has not met all the statutory requirements for expungement.

STATEMENT OF THE CASE

In 2012, the State charged Lickes with four counts: (1) third-degree sexual assault, a class G felony; (2) sexual intercourse with a child, a class A misdemeanor; (3) child enticement, a class D felony; and (4) exposing genitals or pubic area, a class I felony. (R. 12.) All four counts stemmed from his having "vaginal sexual intercourse" with a 16-year-old girl when he was 19 years old. (R. 12.)

The State and Lickes resolved the case in July 2013. The State filed the following amended charges: (1) fourth-degree sexual assault, a class A misdemeanor; (2) sexual intercourse with a child, a class A misdemeanor; (3) disorderly conduct, a class B misdemeanor; and (4) exposing genitals or pubic area, a class I felony. (R. 36.) That same day, Lickes pled guilty to count two and pled no contest to the other three counts. (R. 48:1, 4; 50.)

The circuit court sentenced Lickes on January 23, 2014. (R. 90:1.) On counts one and three, the court withheld sentence and imposed concurrent terms of probation for "24 months." (R. 90:2–3.) For count two, the court sentenced Lickes to serve 90 days in jail. (R. 90:2.) On count four, the court imposed and stayed a prison sentence and placed Lickes on probation for "three (3) years." (R. 90:4.) The court told Lickes that if he "successfully complete[d]" his probation, he would "receive [Wis. Stat. §] 973.015 treatment," meaning

expungement. (R. 90:2, 4, 6.) The court imposed several conditions of probation, including a requirement that Lickes "enter into, participate and successfully complete sex offender treatment." (R. 90:5–6.)

In October 2015, Lickes' probation agent wrote a letter informing the circuit court that "Mr. Lickes has violated his probation multiple times. Mr. Lickes has had unapproved sexual contact, has given his agent false information, and has been terminated from Sex Offender Treatment." (R. 57:1.) The next page of the document contained the following admission from Lickes, "I hereby admit as shown by my signature affixed below, that I violated the rules and conditions of probation as described on the front [page]." (R. 57:2.) Lickes' statement further provided: "In lieu of probation revocation proceedings being initiated, I hereby accept 45 days, as shown by my signature affixed below, commencing effective the date of this order, in the Green County Jail with work release privileges." (R. 57:2.) The court signed the front page of the letter, thus ordering that "[a]s a condition of probation, the defendant is to serve 45 days in the Green County Jail with Huber privileges for employment and treatment, said term to commence effective the date of this order." (R. 57:1.)

Lickes completed his term of probation on counts one and three on January 23, 2016. (R. 61:1; 90:1–3; 91:3.) In July 2016, Lickes wrote a letter to the circuit court requesting expungement. (R. 78:6.)

In September 2016, Lickes' probation agent filed with the circuit court a letter titled "Verification of Satisfaction of Probation Conditions for Expungement." (R. 61.) This form related to counts one and three: fourth-degree sexual assault and disorderly conduct. (R. 61:1.) The letter contained conflicting information about whether Lickes had successfully completed his probation, entitling him to expungement. The form checked a box before an item that read, "The offender has successfully completed his/her probation." (R. 61:1.) The

form, however, left unchecked a box in front of an item that read, "All court ordered conditions have been met." (R. 61:1.) The form did check a box in front of an item that read, "All court ordered conditions have **not** been met. . . [Lickes] is still currently participating in sex offender treatment and is expected to complete in January 2017." (R. 61:1.)

Lickes completed his term of probation for count four on January 23, 2017. (R. 67:1; 90:1, 4; 91:3.)

In July 2018, Lickes' probation agent filed in circuit court a form titled "Certificate of Discharge and Satisfaction of Probation Conditions for Expungement." (R. 67 (capitalization omitted).) This letter related to count four: exposing genitals to a child. (R. 67.) The form checked boxes in front of items that read "[t]he offender has successfully completed his/her probation" and "[a]ll court ordered conditions have been met." (R. 67.)

The parties filed several briefs on whether Lickes was entitled to expungement in early 2019. (R. 76; 78–81.) The briefs discussed a case where the supreme court held that the defendant was not entitled to expungement, *State v. Ozuna*, 2017 WI 64, 376 Wis. 2d 1, 898 N.W.2d 20.

The circuit court held a hearing on expungement in March 2019. The court determined that Lickes was entitled to expungement on counts one and three because (1) he completed his probation before *Ozuna* was decided, (2) the Legislature was considering changes to the expungement statute, and (3) *Ozuna* was not a unanimous decision. (R. 91:8, 15, 17, 19–20.) The court said that "[s]ometimes a dissent can be convincing to the Court because the Court has changed its makeup." (R. 91:19.) The court noted that the two dissenting justices in *Ozuna* were still on the Wisconsin Supreme Court. (R. 91:19.) The court mentioned an article about a pending bill. (R. 91:20.) The prosecutor said that the bill had not been passed into law. (R. 91:20.) The court responded by saying,

"Well in the past they had favored youthful offenders to put this in and they are looking—I would like to see what the result of their current intent is or what their intent is." (R. 91:20.) The court said that "it could be that Mr. Lickes is caught between a rock and a hard place in the back waters of an ongoing dispute with the legislature and a not unanimous decision by the Supreme Court." (R. 91:20.)

The circuit court held a hearing in May 2019 and granted Lickes expungement on count four. (R. 92:8.) The court noted that "two counts have already been decided because they were prior to the change in the how [*sic*]," apparently referring to the fact that *Ozuna* was decided after Lickes completed his probation on counts one and three. (R. 92:2.) Turning to whether count four should be expunged, the court noted that "Mr. Lickes did break a rule, but it was not deemed serious by the Department, in that they didn't try to revoke probation, they didn't come back to court asking for additional sanctions, they didn't come back ask for jail time."[1] (R. 92:7.) The court noted that *Ozuna* "was not a unanimous decision" because "there was a dissent" by two justices who "are on the Court yet." (R. 92:7.) The court also noted that there was a "new bipartisan bill" that would "expand expungement." (R. 92:7.) The court reiterated that "Assembly Bill 33 is bipartisan."[2] (R. 92:8.) Addressing *Ozuna* again, the court said that "*Ozuna* does not appear to be such a strict rigid ruling that it's one that the Court must absolutely follow in all regards, because it doesn't deal with this situation. And I'm going to decline to expand it and I am going to grant the expungement as requested." (R. 92:8.)

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[1] As noted above, Lickes agreed to serve 45 days in jail for these rule violations in lieu of probation revocation proceedings. (R. 57.)

[2] Two Wisconsin bills seek to expand the availability of expungement. *See* 2019 Assembly Bill 33; 2019 Senate Bill 39.

On June 13, 2019, the circuit court entered a written order expunging Lickes' convictions on counts one, three, and four. (R. 83.) The State appeals that order. (R. 84.)

STANDARD OF REVIEW

This Court independently interprets the expungement statute and independently decides how this statute applies to undisputed facts. *State v. Ozuna*, 2017 WI 64, ¶ 9, 376 Wis. 2d 1, 898 N.W.2d 20.

ARGUMENT

Lickes cannot receive expungement because he violated conditions of probation.

A. Lickes has not met all the statutory requirements for expungement.

Under *Ozuna*, a defendant is not entitled to expungement if he violates a condition of probation. Relying on the dissent in *Ozuna*, Lickes argued that *Ozuna* does not apply to a defendant who violates a DOC probation rule. (R. 91:10–11; *see also* 92:5.) Lickes is wrong. *Ozuna* applies equally to DOC probation rules and conditions of probation that are expressly mentioned by a sentencing court. Under *Ozuna*, Lickes has not earned expungement because he admittedly violated several DOC probation rules.

1. Under *Ozuna*, a defendant fails a statutory requirement for expungement if he violates a condition of probation.

If a defendant is tentatively granted expungement at sentencing, he is entitled to expungement after he completes his sentence if "[1] the person has not been convicted of a subsequent offense and, if on probation, [2] the probation has not been revoked and [3] the probationer has satisfied the

conditions of probation." *Ozuna*, 376 Wis. 2d 1, ¶ 12 (alterations in original) (quoting Wis. Stat. § 973.015(1m)(b)).

In *Ozuna*, the sentencing court found the defendant eligible for expungement if he successfully completed his sentence. *Ozuna*, 376 Wis. 2d 1, ¶ 5. The court placed the defendant on probation and imposed conditions, including a prohibition on possessing or consuming alcohol. *Id.* ¶ 4. After the defendant completed his term of probation, the DOC sent to the circuit court a form titled "Verification of Satisfaction of Probation Conditions for Expungement." *Id.* ¶ 6. "On that form, the probation agent had marked a box labeled 'The offender has successfully completed his/her probation.' Further down on the form, however, the agent had marked the box labeled, 'All court ordered conditions have *not* been met." *Id.* The agent wrote on the form that the defendant had violated the no-alcohol condition and was cited for underage drinking. *Id.*

The supreme court held that, "under the expungement statute, it is proper for the circuit court to deny expungement if a defendant has not met all three criteria for the 'successful completion of the sentence' under Wis. Stat. § 973.015(1m)(b), including satisfying the conditions of probation." *Ozuna*, 376 Wis. 2d 1, ¶ 14. The court noted that "satisfaction of the conditions of probation is an indispensable prerequisite to a defendant's entitlement to expungement." *Id.* ¶ 15. The court "emphasize[d] that, in order to be entitled to expungement, the probationer must meet all three of the statutory criteria, including satisfying 'all the conditions of probation.'" *Id.* ¶ 13 (quoting *State v. Hemp*, 2014 WI 129, ¶ 22, 359 Wis. 2d 320, 856 N.W.2d 811).

The *Ozuna* court concluded that the defendant was not entitled to expungement because he had indisputably violated a condition of probation. *Ozuna*, 376 Wis. 2d 1, ¶ 18. The court explained that "DOC submitted a form to the [circuit] court which showed that Ozuna had violated one of the court-

ordered conditions of his probation." *Id.* "Based on this clear violation of one of the court-ordered conditions of probation," the supreme court concluded, "Ozuna did not satisfy the conditions of probation. Therefore, the circuit court properly denied expungement of Ozuna's record." *Id.* ¶ 19.

Because the relevant statute lists three requirements for earning expungement, the *Ozuna* court "reject[ed]" the defendant's argument "that a probationer has 'satisfied the conditions of probation' under Wis. Stat. § 973.015(1m)(b) simply because his probation was not revoked." *Ozuna*, 376 Wis. 2d 1, ¶ 13. The court explained that "[w]hether a probationer's conduct was adequate to avoid revocation is a question separate and distinct from whether the probationer 'has satisfied all the conditions of probation.'" *Id.*

The *Ozuna* court also rejected the defendant's reliance on *Hemp*, a case where the defendant was entitled to expungement. The defendant in *Hemp* was entitled to expungement because he "was not convicted of any subsequent offense while on probation, his probation was not revoked, and '[he] satisfied all the conditions of probation.'" *Ozuna*, 376 Wis. 2d 1, ¶ 16 (quoting *Hemp*, 359 Wis. 2d 320, ¶ 24). "But," the *Ozuna* court held, "*Hemp* does not control a case where DOC informs the circuit court that the probationer violated the court-ordered conditions of probation." *Id.* In such a case, "the probationer has no entitlement to expungement." *Id.*

The *Ozuna* court also rejected the defendant's argument that he was entitled to expungement because DOC sent a discharge form to the circuit court stating that he had successfully completed his sentence. *Ozuna*, 376 Wis. 2d 1, ¶ 20. The supreme court held that "a person's statutory entitlement to expungement depends not on whether the court receives a particular notice from DOC, but on whether the probationer meets all of the statutory criteria for the 'successful completion of the sentence.'" *Id.* ¶ 14. So, "the

simple fact that DOC forwards a certificate of discharge or other form to the circuit court does not, by itself, establish an entitlement to expungement if the record demonstrates that the probationer has not met the prerequisites under Wis. Stat. § 973.015(1m)(b)." *Id.* ¶ 17.

2. A defendant does not earn expungement if he violates DOC probation rules, which are court-imposed conditions as a matter of law.

Relying on the dissent in *Ozuna*, Lickes argued that *Ozuna* does not apply to a defendant who violates a DOC probation rule. (R. 91:10–11; *see also* 92:5.) The circuit court seemed to agree with that argument. In ordering count four expunged, the circuit court "declined to expand" *Ozuna*, which "doesn't deal with this situation." (R. 92:8.)

Lickes' reliance on the *Ozuna* dissent is ironic because it supports the State's view of the *Ozuna* majority opinion. The dissent correctly noted that, under the majority opinion's approach, a defendant would be denied expungement for violating one of the "standard rules of community supervision that probationers must follow." *Ozuna*, 376 Wis. 2d 1, ¶¶ 43–44 (A.W. Bradley, J., dissenting).

Lickes' contrary view is flawed because it relies on words that are not in the expungement statute. A court "should not read into [a] statute language that the legislature did not put in." *State v. Simmelink*, 2014 WI App 102, ¶ 11, 357 Wis. 2d 430, 855 N.W.2d 437 (citation omitted). To earn expungement, a probationer must have "satisfied the conditions of probation." Wis. Stat. § 973.015(1m)(b). Lickes' argument improperly adds language to the expungement statute so that it reads something like, "satisfied the conditions of probation expressly mentioned by the court."

A related statute supports the State's view that Lickes is not entitled to expungement. Wisconsin Stat. § 973.10 is relevant here because it is in the same chapter as the expungement statute and uses the same phrase "conditions of probation." When interpreting a statute, a court may consider other statutes that "are in the same chapter, reference one another, or use similar terms." *State v. Reyes Fuerte*, 2017 WI 104, ¶ 27, 378 Wis. 2d 504, 904 N.W.2d 773.

For three reasons, section 973.10 shows that the expungement statute's use of the phrase "conditions of probation" includes DOC probation rules.

First, when discussing probation, section 973.10(1) uses the language "conditions *set by the court* and rules and regulations established by the [DOC] for the supervision of probationers." Wis. Stat. § 973.10(1) (emphasis added). The phrase "set by the court" is significant. It shows that the Legislature knows how to refer specifically to probation conditions set by a court. "[I]f a statute contains a given provision, 'the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed.'" *Outagamie Cty. v. Town of Greenville*, 2000 WI App 65, ¶ 9, 233 Wis. 2d 566, 608 N.W.2d 414 (citation omitted). As just explained, the expungement statute does not modify the term "conditions of probation" with "set by the court." The omission of this qualifying language shows that the expungement statute does not apply only to probation conditions expressly mentioned by a court.

Second, section 973.10(1) equates DOC probation rules with probation conditions set by a court. This statute provides that *"[i]mposition of probation shall have the effect* of placing the defendant in the custody of the department [of corrections] and shall subject the defendant to the control of the department under *conditions set by the court and rules and regulations established by the department* for the supervision of probationers." Wis. Stat. § 973.10(1) (emphases

added). So, a court's imposition of probation is the reason why a defendant must comply with DOC probation rules. In other words, a defendant does not need to comply with DOC probation rules unless *a court* imposes probation. The DOC probation rules thus *are* court-imposed conditions as a matter of law.

Third, section 973.10(2) uses the unmodified phrase "conditions of probation," which includes DOC probation rules. This subsection states that probation may be revoked "[i]f a probationer violates the conditions of probation." Wis. Stat. § 973.10(2). Despite using the plural word "conditions," section 973.10(2) allows revocation if a defendant "violated a condition of probation." *State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 502, 513, 563 N.W.2d 883 (1997) (citing Wis. Stat. § 973.10(2)); *see also id.* at 514 (noting that a revocation proceeding determines "whether the probationer acted in violation of one or more of the conditions of probation").

Significantly, the phrase "conditions of probation" in section 973.10(2) has never been interpreted to include only conditions that have been expressly set by a court. To the contrary, a "probationer" is "subject to *all of the conditions and rules* of supervision, the violation of which could be cause for revocation." *State ex rel. Rupinski v. Smith*, 2007 WI App 4, ¶ 20, 297 Wis. 2d 749, 728 N.W.2d 1 (emphasis added). As just explained, by placing a defendant on probation, a court "subject[s] the defendant to the . . . rules and regulations established by the [DOC] for the supervision of probationers." Wis. Stat. § 973.10(1). This statutory provision requires a probationer "to abide, as a matter of law, with departmental regulations." *State ex rel. Rodriguez v. Dep't of Health & Soc. Servs.*, 133 Wis. 2d 47, 52, 393 N.W.2d 105 (Ct. App. 1986). A violation of a departmental regulation can thus result in revocation of probation. *See, e.g.*, *id.* Probation can also be revoked if a defendant violates a term of a probation agreement. *See, e.g.*, *State ex rel. Solie v. Schmidt*, 73 Wis. 2d

76, 77, 80–81, 242 N.W.2d 244 (1976). The phrase "conditions of probation" in section 973.10(2) is thus broad—it includes not only conditions mentioned by a court but also departmental regulations and terms of a probation agreement.

Section 973.10(2) is thus significant here because, "[w]hen the same term is used throughout a chapter of the statutes, it is a reasonable deduction that the legislature intended that the term possess an identical meaning each time it appears." *Winebow, Inc. v. Capitol-Husting Co.*, 2018 WI 60, ¶ 29, 381 Wis. 2d 732, 914 N.W.2d 631 (citation omitted). Because the phrase "conditions of probation" in section 973.10(2) includes DOC rules, the same is true of that phrase when used in the expungement statute, section 973.015(1m)(b).

A contrary view of the expungement statute would violate a cardinal rule that courts must interpret statutory language "reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. Again, probation can be revoked if a defendant violates a departmental rule of probation. *See, e.g.*, *Rodriguez*, 133 Wis. 2d at 52. And a defendant cannot get expungement if his probation is revoked. *Ozuna*, 376 Wis. 2d 1, ¶¶ 12–13. A violation of a DOC rule can thus result in probation revocation and, consequently, denial of expungement. It would be incongruous to hold that a defendant can get expungement after admittedly violating a DOC probation rule. A holding to that effect would make expungement hinge on whether the defendant's probation gets revoked. The *Ozuna* court rejected that unreasonable result, concluding that a probationer who violated a condition of probation cannot get expungement even if he avoided revocation. *Ozuna*, 376 Wis. 2d 1, ¶ 13.

Lickes' view of the expungement statute would produce another unreasonable result: it would require circuit courts to utter "magic words" at sentencing. Sentencing courts, however, are "not required to use magic words." *State v. Ziller*, 2011 WI App 164, ¶ 13, 338 Wis. 2d 151, 807 N.W.2d 241. Under Lickes' logic, a DOC rule violation would make a defendant ineligible for expungement only if the sentencing court uttered certain words like, "You must comply with all DOC rules of probation." Perhaps, even more absurdly under Lickes' logic, a DOC rule violation would deny a defendant expungement only if the sentencing court expressly told the defendant to comply with that rule.

The facts of *Rodriguez* illustrate this absurdity. In *Rodriguez*, the defendant's probation was revoked because, among other things, he struck a woman in the face several times, injuring her so badly that a cut on her face required seven sutures. *Rodriguez*, 133 Wis. 2d at 49. On appeal, the defendant argued that "because he did not sign a probation agreement when his probation began, the department could not revoke him for violating the terms of the agreement." *Id.* at 52. This Court rejected that argument because Wis. Stat. § 973.10(1) "places a probationer under the control of the department 'under conditions set by the court and rules and regulations established by the department.'" *Id.* (citation omitted). This Court thus concluded that, "even without a written agreement, Rodriguez still had to abide, as a matter of law, with departmental regulations prohibiting 'conduct which is in violation of state statute.'" *Id.* (quoting Wis. Admin. Code § (HSS) 328.04(3)(a)).[3] This Court noted that "Rodriguez's assaultive conduct obviously violated this regulation." *Id.*

[3] This probation regulation is now located at Wis. Admin. Code § (DOC) 328.04(3)(a).

If Lickes' view of *Ozuna* is correct, a probationer like the one in *Rodriguez* would satisfy the third statutory requirement for earning expungement simply because *a court* never told him to refrain from committing new crimes while on probation. That result would be absurd given the holding of *Ozuna*. The defendant in *Ozuna* committed a single violation of a court-ordered no-alcohol condition of probation and thus failed the third statutory requirement for getting expungement. *Ozuna*, 376 Wis. 2d 1, ¶¶ 18–19. Yet under Lickes' logic, a defendant would satisfy this statutory requirement even after committing a relatively serious crime, so long as the crime does not violate any court-ordered probation condition.

Fortunately, though, the law avoids those unreasonable results. As a matter of law, a circuit court requires a defendant to comply with DOC probation rules when the court imposes probation. Wis. Stat. § 973.10(1). A defendant is not entitled to expungement if he violates those rules.

In sum, *Ozuna* denies expungement to a defendant who violates a DOC probation rule, which is a court-imposed condition as a matter of law.

3. Lickes did not earn expungement under *Ozuna*.

Under *Ozuna*, Lickes is not entitled to expungement. Here, like in *Ozuna*, the record shows that Lickes failed the third statutory requirement for earning expungement—he did not satisfy all the conditions of probation. *See* Wis. Stat. § 973.015(1m)(b). In a letter to the circuit court, Lickes' probation agent stated that "Mr. Lickes has violated his probation multiple times. Mr. Lickes has had unapproved sexual contact, has given his agent false information, and has been terminated from Sex Offender Treatment." (R. 57:1.) The next page of the document contained the following admission from Lickes, "I hereby admit as shown by my signature

affixed below, that I violated the rules and conditions of probation as described on the front [page]." (R. 57:2.) Those undisputed violations deprived Lickes of his entitlement to expungement.

Again, "satisfaction of the conditions of probation is an indispensable prerequisite to a defendant's entitlement to expungement." *Ozuna*, 376 Wis. 2d 1, ¶ 15. In other words, "to be entitled to expungement, the probationer must . . . satisfy[] '*all* the conditions of probation.'" *Id.* ¶ 13 (emphasis added) (quoting *Hemp*, 359 Wis. 2d 320, ¶ 22). A defendant does not earn expungement if he violates even a single condition of probation. *See id.* ¶¶ 18–19. Lickes admittedly violated multiple conditions of probation. He thus has not earned expungement on counts one, three, and four.

Further, if this Court holds that *Ozuna* does not apply to DOC probation rules, it should still conclude that Lickes cannot get expungement on counts one and three. Specifically, Lickes did not satisfy all probation conditions expressly set by the circuit court before he completed his probation for counts one and three. As a condition of probation, the sentencing court ordered Lickes to "enter into, participate and successfully complete sex offender treatment." (R. 90:6.) Lickes' probation on counts one and three ended on January 23, 2016. (R. 61:1; 90:1–3.) In a discharge certificate filed several months later, in September 2016, Lickes' probation agent noted that "[a]ll court ordered conditions have **not** been met. . . [Lickes] is still currently participating in sex offender treatment and is expected to complete in January 2017." (R. 61:1.) A defendant does not earn expungement if a DOC discharge certificate indicates that he violated a probation condition. *Ozuna*, 376 Wis. 2d 1, ¶¶ 16, 18–20. Lickes did not successfully complete sex offender treatment—one condition of his probation—before his probation ended for counts one and three. He thus did not successfully complete his probation

for those two counts, so he is not entitled to expungement on those counts.

This Court should reverse the order expunging three of Lickes' convictions.

B. The circuit court's other grounds for distinguishing *Ozuna* fail.

The circuit court declined to follow *Ozuna* for three additional reasons. First, it found the *Ozuna* dissent convincing. Second, it relied on pending legislation. Third, it incorrectly applied the non-retroactivity doctrine. None of these reasons are persuasive.

1. The *Ozuna* dissent does not matter.

When the circuit court ordered that three of Lickes' convictions be expunged, it repeatedly noted that two justices dissented in *Ozuna*. (R. 91:19–20; 92:7.) The court, for example, said that "[s]ometimes the dissent can be convincing." (R. 91:19.) But "[a] dissent is what the law is not." *State v. Perry*, 181 Wis. 2d 43, 49, 510 N.W.2d 722 (Ct. App. 1993). Only "[a] majority of the participating justices must agree on a particular point for it to be considered the opinion of the court." *State ex rel. Thompson v. Jackson*, 199 Wis. 2d 714, 719, 546 N.W.2d 140 (1996) (per curiam). The five-justice majority opinion in *Ozuna* is controlling. The circuit court erred by relying on the dissent.

2. Pending bills are irrelevant here.

Besides relying on the *Ozuna* dissent, the circuit court pointed to a "new bipartisan bill," "Assembly Bill 33," which aims to expand expungement. (R. 92:7–8.) But a bill does not become law until it passes the Legislature and is presented to the governor. Wis. Const. art. V, § 10(1)(a) ("Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor."); *see also, e.g.*, *State ex rel.*

Neelen v. Lucas, 24 Wis. 2d 262, 267, 128 N.W.2d 425 (1964) (concluding that a bill "did not become law" because the governor "neither signed nor returned the bill" to the Legislature); *State ex rel. Martin v. Zimmerman*, 233 Wis. 16, 20, 288 N.W. 454 (1939) (noting that a bill "becomes a law" when the secretary of state publishes it after it has been approved by the governor).

The *Ozuna* court's interpretation of the expungement statute is good law unless and until a contrary amendment to the statute becomes law. Pending bills do not deprive the *Ozuna* majority opinion of its precedential force.

3. Regardless of its timing, *Ozuna* denies Lickes expungement on counts one and three.

In ordering counts one and three expunged, the circuit court further reasoned that Lickes completed his probation on those two counts before the supreme court decided *Ozuna*. (R. 91:17, 20; 92:2.)[4] It is unclear why the timing of *Ozuna* would matter. The circuit court was presumably thinking of the non-retroactivity doctrine. But that doctrine does not apply here for two reasons.

First, the non-retroactivity doctrine cannot be applied against the State. Under this doctrine, "new rules of criminal procedure are to be applied retroactively to all cases pending on direct review or non-finalized cases still in the direct appeal pipeline." *State v. Lagundoye*, 2004 WI 4, ¶ 12, 268 Wis. 2d 77, 674 N.W.2d 526. However, "a new rule of criminal procedure generally cannot be applied retroactively to cases

[4] The circuit court seemed to incorrectly think that Lickes completed his probation on count four after *Ozuna* was decided. (R. 91:17; 92:2.) As noted above, Lickes completed his probation on count four on January 23, 2017. *Ozuna* was orally argued on January 11, 2017, and the supreme court decided the case on June 22, 2017.

that were final before the rule's issuance under the federal nonretroactivity doctrine announced by the Supreme Court." *Id.* ¶ 13. Wisconsin has adopted the United States Supreme Court's case law on non-retroactivity. *Id.* ¶ 14.

Significantly, however, the "retroactivity rule was motivated by a respect for the States' strong interest in the finality of criminal convictions." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). It therefore can be asserted against a criminal defendant but not against the State. *See id.* at 372–73. In other words, "[the non-retroactivity principle] entitles the state, but not the petitioner, to object to the application of a new rule to an old case." *Moore v. Anderson*, 222 F.3d 280, 285 (7th Cir. 2000) (alteration in original) (citing *Free v. Peters*, 12 F.3d 700, 703 (7th Cir. 1993), in turn citing *Lockhart*, 506 U.S. at 371–73). Because the non-retroactivity doctrine was intended to promote the finality of convictions, the circuit court should not have implicitly relied on it to expunge two of Lickes' convictions.

Second, even if the non-retroactivity doctrine could be asserted against the State, it would not apply here because *Ozuna* did not announce a new rule. "[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (citation omitted). A court "will rarely state a new rule" "when all [it] do[es] is apply a general standard to the kind of factual circumstances it was meant to address." *Id.* at 348.

Lickes' probation on counts one and three ended on January 23, 2016. (R. 61:1; 90:1–3.) The circuit court thought that those two counts "probably would have been expunged" had the DOC forwarded discharge certificates to the court when those periods of probation ended, before *Ozuna* was decided. (R. 91:17.)

The circuit court was wrong. *Ozuna* did not announce a new rule but instead simply applied the rule from *Hemp*, which was decided in December 2014, while Lickes was still serving probation on all three counts. And, under *Hemp*, Lickes was not entitled to expungement when he completed his terms of probation for counts one and three.

In *Hemp*, the supreme court held that "[i]f a circuit court finds an individual defendant eligible for expungement and conditions expungement upon the successful completion of the sentence, then the plain language of the statute indicates that once the defendant successfully completes his sentence, he has earned, and is automatically entitled to, expungement." *Hemp*, 359 Wis. 2d 320, ¶ 23. The court further held that a defendant "successfully completes probation if (1) he has not been convicted of a subsequent offense; (2) his probation has not been revoked; and (3) *he has satisfied all the conditions of probation*." *Id.* ¶ 22 (emphasis added). Under that rule, Lickes was not entitled to expungement when he completed his terms of probation for counts one and three because, as explained above at pages 14–16, he violated three DOC probation rules. And, as explained above at page 15, Lickes violated a condition of probation expressly set by the court before he completed his probation for counts one and three—specifically, he failed to successfully complete sex offender treatment before his probation for those two counts ended.

The *Ozuna* court merely applied the general rule from *Hemp* to the specific facts before it. *See Ozuna*, 376 Wis. 2d 1, ¶¶ 13–16, 18–20. The *Ozuna* court "emphasize[d] that, in order to be entitled to expungement, the probationer must meet all three of the statutory criteria, including satisfying 'all the conditions of probation.'" *Id.* ¶ 13 (quoting *Hemp*, 359 Wis. 2d 320, ¶ 22). Indeed, the *Ozuna* court noted that "*Hemp*

reinforce[d] [its] understanding that a probationer's entitlement to expungement turns on whether the probationer 'has satisfied the conditions of probation,' as is required by Wis. Stat. § 973.015(1m)(b)." *Id.* ¶ 15. The fact that two justices dissented in *Ozuna* does not mean that the majority opinion announced a new rule. "Dissents have been known to exaggerate the novelty of majority opinions; and 'the mere existence of a dissent' . . . does not establish that a rule is new." *Chaidez*, 568 U.S. at 353 n.11 (citation omitted).

In short, *Ozuna* denies Lickes expungement on counts one and three even though that case was decided after he completed his terms of probation for those two counts. Lickes cannot object to the application of *Ozuna* because the non-retroactivity doctrine was meant to promote the finality of convictions. *See Lockhart*, 506 U.S. at 371–73. In any event, *Ozuna* is not being applied to Lickes retroactively because it did not announce a new rule but instead merely applied *Hemp*, which was decided while Lickes was still on probation. And, under *Hemp*, Lickes did not earn expungement on counts one and three because he did not satisfy all the conditions of probation.

CONCLUSION

This Court should reverse the order expunging Lickes' convictions on counts one, three, and four.

Dated this 16th day of October 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 5862 words.

_____
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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).

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Assistant Attorney General

APPENDIX OF PLAINTIFF-APPELLANT

INDEX

State of Wisconsin v. Jordan Alexander Lickes
Case No. 2019AP1272-CR

Page

Circuit Court Order for Defendant
to Serve 45 Days Jail Time (Rec. 57) ..... 101 – 102

Verification of Satisfaction of Probation
Conditions for Expungement for
Counts 1 and 3 (Rec. 61)..... 103 – 104

Certificate of Discharge and Satisfaction
of Probation Conditions for Expungement
For Count 4 (Rec. 67)..... 105

Transcript of Sentencing Hearing (partial)
Dated: Jan. 3, 2014 (Rec. 90)..... 106 – 115

Transcript of Oral Ruling
Dated: March 15, 2019 (Rec. 91) ..... 116 – 139

Transcript of Hearing
Dated: May 7, 2019 (Rec. 92)..... 140 – 149

Circuit Court Order Granting Expungement
Filed: June 13, 2019 (Rec. 83) ..... 150 – 151

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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SCOTT E. ROSENOW
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