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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

Lickes cannot receive expungement because he violated conditions of probation.

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

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

Under *State v. Ozuna*, 2017 WI 64, 376 Wis. 2d 1, 898 N.W.2d 20, Lickes is not entitled to expungement because he admittedly violated multiple conditions of probation. (State's Br. 6–16.) Lickes' arguments are unavailing.

Lickes argues that he was entitled to expungement because the Wisconsin Department of Corrections (DOC) sent a discharge certificate to the circuit court, which should have triggered the self-executing expungement process discussed in *State v. Hemp*, 2014 WI 129, 359 Wis. 2d 320, 856 N.W.2d 811. (Lickes' Br. 9–10, 14–15.)

Lickes is wrong. A defendant is automatically entitled to expungement under *Hemp* only if he successfully completes his sentence by satisfying three statutory requirements, including the requirement that he satisfy all the conditions of probation. *Ozuna*, 376 Wis. 2d 1, ¶¶ 12, 14–16, 24–25; *Hemp*, 359 Wis. 2d 320, ¶ 25. Lickes did not successfully complete his sentence because he violated multiple conditions of probation. (State's Br. 6–16.)

Lickes further argues that "the expungement process would *never* be self-executing" if a circuit court had to review the record to determine if a defendant has earned expungement. (Lickes' Br. 15.) He misunderstands what the self-executing expungement process is. When a defendant successfully completes his sentence, expungement is self-

executing in that DOC must send a discharge certificate to the circuit court; a defendant has no burden to send a discharge certificate to the court or petition for expungement. *Hemp*, 359 Wis. 2d 320, ¶ 25.

Lickes alleges that he is entitled to expungement under *Hemp* because his discharge certificate did not have contradictory information about whether he met the requirements for receiving expungement. (Lickes' Br. 10–15.) He claims that the *Ozuna* court "reiterated that *Hemp* controls when the DOC certificate of discharge clearly indicates that all of the statutory requirements for the successful completion of probation have been met, but that *Ozuna* controls when the form contains contradictory information." (Lickes' Br. 12–13.) Lickes is wrong.

To be sure, the *Ozuna* court explained that "[n]othing in *Hemp* dictates that the mere receipt of a form from DOC stating that the probationer 'successfully completed' probation automatically entitles the probationer to expungement where, as here, the very same form contains a contradictory determination by DOC that the probationer violated one of the court-ordered conditions of probation." *Ozuna*, 376 Wis. 2d 1, ¶ 20. But the *Ozuna* court focused on the defendant's discharge certificate because it was the item "in the record" showing that he violated a condition of probation. *Id.* ¶ 18. Contrary to Lickes' suggestion, the *Ozuna* court did not hold that a defendant is entitled to expungement unless his discharge certificate states otherwise.

Instead, the *Ozuna* court held that "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 (emphasis added). The court further held that "Ozuna cannot claim that he gained any entitlement to expungement, because *the record* shows that

he did not meet the statutory criteria for 'successful completion of the sentence' under Wis. Stat. § 973.015(1m)(b), which include satisfying all the conditions of probation." *Id.* ¶ 25 (emphasis added).

Lickes accuses the State of "cherry-pick[ing] language from the *Ozuna* opinion." (Lickes' Br. 13.) He claims that "it is the *content* of the [discharge] form that matters," and *Ozuna*'s broader statements about the record "are dicta." (Lickes' Br. 14.) But this Court cannot disregard supreme court language as dictum. *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 58, 324 Wis. 2d 325, 782 N.W.2d 682.

Besides being binding, *Ozuna*'s requirement of looking at the record makes sense. It would be unreasonable to require a circuit court to expunge a conviction just because a probation agent incorrectly filled out a discharge form.

And even if a court must look solely at a discharge form, Lickes would not be entitled to expungement of his two misdemeanor convictions. As the State has argued, the discharge form for those two convictions stated that Lickes had not satisfied the court-ordered condition of sex offender treatment. (State's Br. 15–16; *see also* R. 61:1.) Lickes' argument relies on record item 67, the discharge form for his *felony* conviction. (Lickes' Br. 9, 14.) His failure to address the State's argument about his misdemeanor convictions is fatal because "unrefuted arguments are deemed conceded." *O'Connor v. Buffalo Cty. Bd. of Adjustment*, 2014 WI App 60, ¶ 31, 354 Wis. 2d 231, 847 N.W.2d 881.

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

The State has explained that *Ozuna* denies expungement to a defendant who violates a DOC probation rule, even if it was not expressly mentioned by the sentencing court. (State's Br. 9–14.)

Lickes does not respond to several of the State's arguments on this point.

First, the State argued that the circuit court's view of the expungement statute would produce unreasonable results by: (1) requiring sentencing courts to utter magic words telling defendants to comply with DOC probation rules; (2) allowing expungement to hinge on whether a DOC probation-rule violation led to revocation; and (3) allowing a defendant to *receive* expungement even if he engaged in serious misconduct in violation of DOC probation rules, while *denying* expungement to a defendant who committed a minor infraction in violation of a court-ordered condition of probation. (State's Br. 12–14.) Lickes has not responded to these arguments and thus concedes that the circuit court's view of the expungement statute would produce these unreasonable results. *See O'Connor*, 354 Wis. 2d 231, ¶ 31.

Second, the State argued that the expungement statute's use of the phrase "conditions of probation" includes DOC probation rules because Wis. Stat. § 973.10(1) "equates DOC probation rules with probation conditions set by a court." (State's Br. 10–11.) Lickes has not responded to this argument, either.

Third, the State argued that the phrase "conditions of probation" in the expungement statute includes DOC probation rules because it does not use qualifying language that is used in Wis. Stat. § 973.10(1). (State's Br. 10.) More

precisely, section 973.10(1) uses the phrase "conditions set by the court and rules and regulations established by the [DOC] for the supervision of probationers." Because the expungement statute does not qualify "conditions of probation" with "set by the court," it refers both to conditions expressly mentioned by a court and DOC probation rules. (State's Br. 10.)

In response, Lickes argues that section 973.10(1) shows that the Legislature intended the expungement statute to require compliance only with court-imposed conditions because the expungement statute does not use the phrase "rules and regulations." (Lickes' Br. 18.) He contends that "§ 973.10(1) makes clear that the legislature knows the difference between 'conditions set by the court' and 'rules and regulations established by the department.'" (Lickes' Br. 18.) His argument proves too much because the Legislature did not make this distinction in the expungement statute, which just mentions "conditions of probation," not "conditions set by the court." The State's view does not insert the words "rules and regulations" into the expungement statute. It just interprets this statute's phrase "conditions of probation" to include DOC probation rules and conditions of probation expressly mentioned by a sentencing court.

Fourth, the State argued that section 973.10(2) supports its view of the expungement statute because both statutes use the phrase "conditions of probation," and this phrase in section 973.10(2) includes DOC probation rules. The State's argument used the following logic: (1) section 973.10(2) authorizes probation revocation; (2) probation may be revoked if a defendant violates a DOC probation rule; and (3) therefore, section 973.10(2) refers to DOC probation rules when it allows revocation for a violation of "conditions of probation." (State's Br. 11–12.) Lickes does not dispute the validity of this logic or argue that probation may be revoked only due to a violation of a court-imposed condition.

He instead seems to narrowly argue that *section 973.10(2)* does not authorize revocation due to a violation of a DOC probation rule. He reasons that the State cited cases that do not mention this statutory subsection—even though one of those cases upheld a revocation decision based on a violation of a departmental regulation, and the court there cited section 973.10(1) when equating departmental probation rules with court-ordered conditions of probation. (Lickes' Br. 18–19.) Lickes is grasping at straws. When courts uphold decisions revoking probation due to a violation of a DOC probation rule (or a probation agreement), the courts implicitly rely on section 973.10(2) because that is the statutory provision authorizing probation-revocation proceedings. Tellingly, Lickes has not explained what other statute might have authorized revocation in cases where a defendant did not violate a court-ordered condition of probation.

Lickes further argues that the State's view would make the no-revocation requirement in the expungement statute superfluous. (Lickes' Br. 20.) But to create this surplusage, Lickes assumes that the phrase "conditions of probation" means two different things when used in sections 973.015(1m)(b) and 973.10(2). His surplusage argument assumes that section 973.10(2) authorizes revocation when a defendant violates a DOC probation rule, but his argument views the phrase "conditions of probation" in section 973.015(1m)(b) as *not* referring to DOC probation rules. (Lickes' Br. 19–20.) He has not explained why this phrase has different meanings in two closely related statutes.

And the three statutory requirements for earning expungement are not superfluous. The three requirements are that the defendant (1) must not have been convicted of a subsequent offense, (2) must not have had his probation revoked, and (3) must have satisfied the conditions of probation. Wis. Stat. § 973.015(1m)(b). Of course, a defendant

will usually (perhaps always) fail the third requirement if he fails the first or second one. But the first two requirements are not superfluous with the third one just because a defendant might have failed multiple requirements. The first two requirements serve an important function: they allow a court to easily determine that a defendant is not entitled to expungement just by looking at a new judgment of conviction or revocation order, avoiding the need for a possibly fact-intensive inquiry into whether the defendant violated a condition of probation.

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

1. The *Ozuna* dissent does not matter.

As the State has explained, the circuit court erred by relying on the *Ozuna* dissenting opinion. (State's Br. 16.)

Lickes does not directly respond to this argument, but he makes some of the arguments that the dissent made in *Ozuna*. He contends that the State's view of the expungement statute "demands perfection from every probationer." (Lickes' Br. 5.) He raises the specter of a defendant being denied expungement because she arrived at a meeting with her probation agent five minutes late. (Lickes' Br. 5.) The *Ozuna* dissent raised similar concerns with the majority opinion. *Ozuna*, 376 Wis. 2d 1, ¶¶ 42–44 (A.W. Bradley, J., dissenting). 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).

Further, the parade of horribles discussed by Lickes and the *Ozuna* dissent is not persuasive. It is unclear whether arriving five minutes late would violate a condition or rule of probation. Further, a defendant is not entitled to expungement if *the record* shows that he did not successfully complete his sentence. *Ozuna*, 376 Wis. 2d 1, ¶¶ 16–20, 25. It is highly unlikely that a probation agent would file in circuit

court a document stating that a defendant arrived at a meeting five minutes late.

The facts of Lickes' case bear this point out. A document in the record informed the circuit court of Lickes' probation violations because they were so serious that Lickes agreed to serve 45 days in jail in lieu of revocation proceedings. (R. 57.) Minor infractions, by contrast, will likely go unreported to a circuit court and thus will not prevent expungement.

2. Pending bills are irrelevant here.

The State also argued that the circuit court erred by relying on pending bills that would expand the availability of expungement. (State's Br. 16–17.) In response, Lickes partly relies on those pending bills when he argues that the circuit court properly ordered his convictions expunged. (Lickes' Br. 21–22.) But he does not address the State's point that pending bills have no bearing on whether Lickes is entitled to expungement because they do not have the force of law. He has thus implicitly conceded that reliance on pending legislation is improper. *See O'Connor*, 354 Wis. 2d 231, ¶ 31.

3. Regardless of its timing, *Ozuna* denies Lickes expungement.

The State further argued that the circuit court erred by relying on the timing of the *Ozuna* decision in relation to when Lickes finished his sentences. (State's Br. 17–20.) The State argued that the circuit court appeared to be relying on the non-retroactivity doctrine and that such reliance was wrong.

In response, Lickes does not rely on the non-retroactivity doctrine. He instead suggests, in a footnote, that applying *Ozuna* to deny him expungement would violate the constitutional ban on *ex post facto* laws. (Lickes' Br. 10 n.3.) But an argument is forfeited if it is raised only in a footnote.

State v. Santana-Lopez , 2000 WI App 122, ¶ 6 n.4, 237 Wis. 2d 332, 613 N.W.2d 918.

Besides, applying *Ozuna* to Lickes' case does not raise *ex post facto* concerns, and he has not adequately developed an argument to the contrary. A change in law does not violate constitutional *ex post facto* principles if it "does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed." *Collins v. Youngblood*, 497 U.S. 37, 52 (1990). Even if *Ozuna* announced a new rule—which it did not do, as explained in the State's main brief—applying that rule to Lickes would not do any of the three things prohibited by *Youngblood*.

C. Lickes' additional arguments are not convincing.

1. Circuit courts do not have discretion to grant expungement when a defendant fails a statutory requirement for it.

Lickes acknowledges that "[t]he construction and application of [Wis. Stat.] § 973.015 to undisputed facts present questions of law, which this court reviews de novo." (Lickes' Br. 8 (citing *Ozuna*, 376 Wis. 2d 1, ¶ 9; *Hemp*, 359 Wis. 2d 320, ¶ 12).) Yet Lickes then argues that "it seems reasonable to apply" a deferential standard of review here because "the initial decision to deem a defendant eligible for expungement is reviewed for an erroneous exercise of discretion." (Lickes' Br. 16.)

Lickes is wrong to argue for a deferential standard because only the initial decision to grant conditional expungement at sentencing is discretionary: "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, 846 N.W.2d 811.

In a footnote, Lickes argues that deferential review should apply here because revocation decisions are reviewed for an erroneous exercise of discretion and because the *Ozuna* court "did not reject the suggestion that denial-of-expungement procedures should mirror the procedures required for revocation." (Lickes' Br. 16 n.5 (citing *Ozuna*, 376 Wis. 2d 1, ¶¶ 24–25).) Again, however, an argument is forfeited if it is raised only in a footnote. *Santana-Lopez* , 237 Wis. 2d 332, ¶ 6 n.4.

In any event, *Ozuna* does not support Lickes' argument. The *Ozuna* court merely noted that "due process requires an evidentiary hearing before the State may revoke probation," and it "disagree[d] with Ozuna" that due process required a hearing before the circuit court denied him expungement. *Ozuna*, 376 Wis. 2d 1, ¶¶ 24–25. The court did not suggest that a decision granting or denying expungement, after a defendant has completed his sentence, is reviewed for a misuse of discretion.

2. The rule of lenity does not apply here.

In one sentence, Lickes says that the rule of lenity should apply here. (Lickes' Br. 20.) This Court should decline to consider that argument because it generally does not consider inadequately developed arguments. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Besides, the rule of lenity does not apply here for two reasons. First, "[a]pplication of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471

U.S. 419, 427 (1985). This expungement statute, however, does not render any conduct illegal or define criminal liability. Second, even if the rule of lenity could apply to the expungement statute, it should not apply to Lickes' case. "[T]he rule of lenity applies if a 'grievous ambiguity' remains after a court has determined the statute's meaning by considering statutory language, context, structure and purpose, such that the court must 'simply guess' at the meaning of the statute." *State v. Guarnero*, 2015 WI 72, ¶ 27, 363 Wis. 2d 857, 867 N.W.2d 400 (citation omitted). This Court does not need to guess what the expungement statute means. A straightforward analysis, relying on basic rules of statutory interpretation, shows that Lickes is not entitled to expungement.

CONCLUSION

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

Dated this 26th day of November 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 2989 words.

_____
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I hereby certify that:

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Dated this 26th day of November 2019.

_____
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