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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal Case No. 2020AP001921-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KEANDRAE J. REED,

Defendant-Appellant.

Appeal From the Circuit Court for Milwaukee County
Honorable T. Christopher Dee Presiding, Circuit Court Case
No. 12CM004688

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

- I. Whether Defendant–Appellant Keandrae J. Reed is eligible for expungement under Wis. Stat. § 973.015(3)(b) after failing to satisfy the community service, restitution, and payment of court costs conditions of his probation.

The circuit court answered no.

- II. Whether Reed forfeited the claim that the restitution order violated his rights under the Equal Protection Clause.

Because Reed did not raise the issue, the circuit court did not address this question.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

Reed was charged in Milwaukee County Case Number 12CM4688 with Misdemeanor Theft (Moveable Property), contrary to §§ 943.20(1)(a) & (3)(a), 939.51(3)(a). Specifically, Reed stole three phones with a total value of \$2,099.97 from his employer, Target Mobile Radio-Shack. (R. 1:1-2.) Reed was eighteen years-old at the time of the offense. (*Id.*)

Reed ultimately pled guilty as charged and was sentenced to six months at the Milwaukee County House of Correction, stayed for one year of probation. (R. 5, R. 10; R. 20:10.) The sentencing court specifically stated that the

“conditions of probation are...next that you pay restitution of \$2,099.99 to Radio Shack, next that you pay the appropriate court costs, assessments and surcharge that come along with the action.” (R. 20:10.) The court also ordered Reed to perform ten hours of community service. (R. 20:11.)

The court explained that Reed should pay restitution in order to make Radio Shack whole stating, “The value is some \$2,099.99. I think initially the defendant should be making restitution for that amount to make Radio Shack whole for the amount that he has taken, so I will order that he pay restitution to Radio Shack of \$2,099.99.” (*Id.*) The court also explained its minimum expectations, stating “...you should be making payments on those amounts that I’ve ordered at the rate of at least \$200 per month starting as of May 1st.” (*Id.*) The court then ordered any monetary amount that remained unpaid at the time that the term of probation is completed should be reduced to a judgement against Reed for the balance. (*Id.*) Finally, the court authorized expungement stating, “I will find that if he completes the probation *totally with all of the conditions that have been ordered by the Court*...then he would benefit from the expungement; and society would not be harmed.” (R. 20:12) (emphasis added.)

Subsequently, defense counsel requested the court reconsider its restitution ruling, arguing there was no restitution request and the victim failed to meet its burden in demonstrating any loss. (R. 9; R. 12:2.) The court denied the request. (R. 12:4.) Defense counsel made no Equal Protection Clause objection. (R. 9; R. 12.)

Reed has not made any payments towards restitution or court costs. (R. 24:3; R. 25:11.) On June 14, 2013, the restitution and court costs were converted into a civil judgement. (R. 14-17; R. 24:3.) Reed does not assert, and thus concedes, that he completed his community service condition, suggesting instead that the court *now* allow him to complete the condition. (R. 32; R. 33:5.)

On June 26, 2020, Reed petitioned the circuit court to expunge his conviction. (R. 19-25.) On October 8, 2020, the circuit court denied the request. (R. 34.) This appeal follows.

STANDARD OF REVIEW

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

ARGUMENT

Reed first argues that he is entitled to expungement under § 973.015 because the conversion of the unpaid restitution and court costs into civil judgements satisfied his conditions of probation. (Appellant Br. at 10-17.) However, he is not entitled to expungement given the uncontested fact that he failed to satisfy the community service condition of probation. (R. 33:5.) Additionally, he failed to successfully complete the conditions which required that he pay restitution and costs. The conversion of Reed's unpaid amounts into civil judgments did not automatically satisfy his conditions of probation. Therefore, this court should deny relief.

Reed next argues that the sentencing court's restitution order violated his rights under the Equal Protection Clause. (Appellant Br. at 10-17.) However, this court may reject this claim without reaching the merits because Reed forfeited it by failing to raise it in front of the sentencing court and post-conviction court. (R. 9; R. 12:2; R. 25.) Alternatively, the claim is underdeveloped and there are insufficient facts in the record to warrant relief.

I. Reed Cannot Receive Expungement Because He Failed To Satisfy Three Conditions Of Probation

A. A Defendant Fails A Statutory Requirement For Expungement If He Fails To Satisfy Any Condition Of Probation

Wisconsin Statute § 973.015 allows courts to tentatively grant expungement “**upon successful completion** of the sentence” in certain cases. Wis. Stat. § 973.015(1m)(a)(1) (emphasis added). The statute also explains that “successful completion” means the probationer (1) was not revoked, (2) has not been convicted of a subsequent offense, **and** (3) “**has satisfied the conditions of probation.**” Wis. Stat. §

973.015(1m)(b) (emphasis added). “Whether 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.’” *State v. Ozuna*, 2017 WI 64, ¶ 13. The purpose behind the expungement statute is to create an opportunity for young offenders who demonstrate that they can comply with the law by successfully completing *and* being discharged from their sentences. *State v. Hemp*, 2014 WI 129, ¶ 18, 359 Wis. 2d 320, 332, 856 N.W.2d 811, 816.

In *State v. Ozuna*, the Supreme Court of Wisconsin rejected the notion that expungement happens automatically regardless of whether a probationer complied with the conditions of probation. 2017 WI 64, ¶ 13. The *Ozuna* court also rejected the substantial compliance theory. *Id.* Rather, the court noted that “satisfaction of the conditions of probation is an indispensable prerequisite to a defendant’s entitlement to expungement.” *Id.* at ¶ 15. In other words, a defendant does not earn expungement if he violates even a single condition of probation. *See id.* ¶¶ 18–19. The court found that, “under the expungement statute, it is **proper** for the circuit court to deny expungement if a defendant has not met **all** three criteria... including satisfying the conditions of probation.” *Id.* at ¶ 14 (emphasis added). There, the defendant successfully completed probation but had not complied with the condition of probation that he not possess or consume alcohol. *Id.* at ¶¶ 4-6. This court found the circuit court properly denied expungement based on Ozuna’s drinking despite the condition. *Id.* at ¶¶ 18-20.

In contrast, in *State v. Hemp*, the court found the defendant *was* entitled to expungement, specifically noting that he had paid all of his supervision fees. 2014 WI 129, ¶ 19. Therefore, payment of fees are just as important to the analysis as other conditions of probation. However there, Hemp also completed all other conditions of his probation. *Ozuna*, 376 Wis. 2d 1, ¶ 16 (quoting *Hemp*, 2014 WI at ¶ 24).

B. Reed Is Not Entitled To Expungement Because He Undisputedly Did Not Complete The Community Service Condition of Probation

This court need not even reach Reed's claims regarding his failure to satisfy the monetary conditions of probation because there is an undisputed violation of the community service condition of probation, which is sufficient to establish that Reed is not entitled to expungement. *See State v. Ozuna*, 2017 WI 64, ¶ 19 n. 10 ("It appears that Ozuna also failed to satisfy the monetary conditions of probation, and he argues that it would violate equal protection 'to deny expungement'... We need not reach this argument, because we conclude that Ozuna's undisputed violation of the no-alcohol condition was sufficient to establish that he was not entitled to expungement.") Therefore, this court should affirm.

C. Reed Is Not Entitled To Expungement Because He Did Not Complete The Restitution And Court Costs Conditions of Probation

i. By law, restitution is a condition of probation

Both the Wisconsin Constitution and the Supreme Court of Wisconsin recognize crime victims' rights to "full restitution." Wis. Const. art. I § 9m. (emphasis added); *State v. Fernandez*, 2009 WI 29, ¶ 44, 316 Wis. 2d 598, 622, 764 N.W.2d 509, 521.

Wisconsin Statute § 973.20(1r) manifests the intent of the legislature that a victim who incurs an economic loss as a result of a crime should receive restitution. **"Restitution ordered under this section is a condition of probation..."** Wis. Stat. § 973.20(1r)(emphasis added). In fact, the legislature has designated that courts "shall" order the defendant to make either full or partial restitution to victims as a condition of probation. *Id.* See also Wis. Stat. § 973.09(1)(b). Furthermore, after probation is terminated, the legislature ensured that any restitution order would be "enforceable in the same manner as a judgment in a civil action." Wis. Stat. § 973.20(1r). Therefore, it is clear that the legislature intended for victims to be financially restored, even if it does not occur prior to the termination of a sentence.

ii. By failing to make any payments, Reed failed to successfully complete the restitution and court costs conditions of probation

Reed concedes he did not pay restitution or the ordered court costs. (R. 24:31; R. 25:2, 8.) By statute, restitution is a condition of probation. Wis. Stat. § 973.20(1r). Furthermore, the sentencing court clearly intended these to be conditions of probations when it stated, “Conditions of the probation are... next that you pay restitution of \$2,099.99 to Radio Shack, next that you pay the appropriate court costs, assessments and surcharge that come along with the action.” (R. 20:10.) *See State v. Perry*, 136 Wis. 2d 92, 114 (1987) (where a conflict exists between a court’s oral pronouncement of sentence and a written judgment, the oral pronouncement controls). Therefore, Reed’s complete failure to make *any* payments towards either restitution or court costs constitutes a violation of his conditions which, makes him ineligible for expungement. Furthermore, it is clear that the sentencing court intended completion of all conditions, which would include these payments, before Reed would be entitled to expungement. (R. 20:12.) Nothing in the record indicates the sentencing court intended Reed’s probation conditions to be fulfilled by a conversion to a civil judgment.

Reed’s argument that the court intended the conditions to be met despite making zero payments, resulting in the entry of a civil judgment, not only contradicts the record when taken as a whole, but it also completely ignores the plain language of § 973.20(1r), which states “**Restitution** ordered under this section is a **condition of probation...**” Section 973.20(1r) does *not* state that entry of a civil judgment satisfies the probation condition. The plain meaning of the statute simply makes restitution enforceable even after termination of the sentence. *Id.* Thus, the court’s pronouncement was merely a recognition of 973.20(1r), which allows victims to continue to enforce restitution even after probation has terminated. Furthermore, contrary to Reed’s assertion, the Supreme Court of Wisconsin’s discussion in *Hemp* supports affirmance because there the court specifically noted that one of the reasons Hemp was entitled to expungement was that he *had paid all* of his supervision fees. *See State v. Hemp*, 2014 WI 129, ¶ 24. Therefore, clearly the

paying off of fees prior to termination of the sentence is akin to completing other non-monetary conditions of probation.

Reed attempts to claim that unpublished case law supports his argument.¹ However, *Olson* had nothing to do with the current issue, but addressed whether courts could entertain a motion for plea withdrawal after termination of the sentence. *State v. Olson*, No. 2018AP1987-CR, 2019 WL 4433082 (Wis. Ct. App. Sept. 17, 2019). It does not stand for the asserted proposition. Furthermore, just because a court may exercise its discretion under § 973.09(3)(b) to extend probation and allow a defendant more time to successfully complete probation, it logically does not follow that a courts' decision declining to do so automatically results in "successful completion." In fact, such a holding would completely contradict *Ozuna's* rejection of the substantial compliance theory. 2017 WI 64, ¶ 13. The fact of the matter is Reed could have successfully completed probation by making restitution payments "or" he could make no payments and unsuccessfully complete probation, in which case the victim's restitution rights would still remain enforceable via the civil judgment. *See* Wis. Stat. § 973.20(1r). Nothing in what Reed cites actually supports the contention that he was released from his obligation by failing to make any payments.

To the extent this court may construe Reed's brief to argue that the court's suggestion of a payment plan is evidence the court intended a civil judgment to satisfy the condition of probation, such an argument is preposterous as the court only provided a *minimum* suggested payment, not a cap. (R. 25:11.)² Also, this does not negate the plain language of § 973.20(1r) which identifies restitution as a condition of probation, nor the sentencing court's pronouncement that it was a condition of

¹ The State points out that in support of his position, Reed cites to *State v. Colbert*, an unpublished *per curiam* case which is inappropriate under § 809.23(3). (Appellant's Br. at 12-13); *State v. Colbert*, 2015AP1880-CR, 2017 WL 5054306 (Wis. Ct. App. Nov. 1, 2017). Therefore, the State will not directly address that case.

² The State recognizes that the Supreme Court of Wisconsin, in *State v. Fernandez*, held that § 973.21 does not cap restitution at the amount that a defendant has the ability to pay within the period of his probation, nothing in *Fernandez* indicated that converting unpaid restitution or court cost to a civil judgement alleviated a defendant's responsibility to make payments as a condition of probation. 2009 WI 29, ¶ 47. Rather, the court merely recognized that the legislature contemplated instances where restitution would not, or could not, be paid. *Id.*

probation. Here, Reed made no good-faith payments. He paid absolutely nothing, not even any of these minimum payments. Therefore, it is even more evident that he falls short of successfully completing the condition.

Ultimately, to grant expungement would completely fly in the face of the legislative intent — to provide breaks to young offenders who can successfully complete the terms of their sentence. Reed has failed to complete these terms.

II. Reed Forfeited Any Equal Protection Claim, Which Is Also Underdeveloped and Unsupported By The Record

When a party fails to raise an objection before the circuit court, the claim is forfeited on review. *State v. Ndina*, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 670, 761 N.W.2d 612, 620; *See also State v. Mercado*, 2021 WI 2, ¶ 35, 395 Wis. 2d 296, 314, 953 N.W.2d 337, 345 (finding forfeiture where objection is raised for the first time in front of the post-conviction court). “It is a fundamental principle of appellate review that issues must be preserved at the [trial] court. Issues that are not preserved at the [trial] court, even alleged constitutional errors, generally will not be considered on appeal.” *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 492, 611 N.W.2d 727, 730.

Here, not only did Reed fail to raise an Equal Protection claim in front of the sentencing court, but he also failed to raise any such claim in front of the post-conviction court. (R. 9; R. 12; R. 25.) Therefore, he has forfeited the claim and this court should reject it without further analysis.

However, even if this court were to ignore the forfeiture, it should also reject the argument as underdeveloped. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Specifically, Reed fails to develop any argument regarding whether it always violates equal protection to ask a defendant on probation to pay restitution and/or court costs before expungement. He also fails to develop an argument as to what amount is too much for an indigent defendant to be expected to pay.

Further still, if this court were to address the merits of Reed's claim it should reject it as Reed has not shown that he is being treated disparately in violation of the Equal Protection Clause. "The equal protection clause ... 'is designed to assure that those who are similarly situated will be treated similarly.'" *State v. Smith*, 2010 WI 16, ¶15, 323 Wis. 2d 377, 387-88, 780 N.W.2d 90, 95. To demonstrate an equal protection violation "a party must demonstrate that the statute treats members of similarly situated classes differently." *Blake v. Jossart*, 2016 WI 57, ¶ 30, 370 Wis. 2d 1, 20, 884 N.W.2d 484, 493. Reed asserts, that there are two groups, one including individuals who attempt to pay but cannot afford to do so. (Appellant's Br. at 18-19.) Regardless, Reed made no such attempts to pay. He paid absolutely nothing. (R. 24:3; R. 25:11.)

Moreover, a defendant has the burden of proving at an *evidentiary* hearing that he is unable to pay a fee and that the statute is unconstitutional as applied to him. *State ex rel. Pedersen v. Blessinger*, 56 Wis. 2d 286, 296, 201 N.W.2d 778 (1972). Here, Reed has failed to meet this affirmative burden, in fact he never even requested such a hearing.³

Therefore, because any equal protection claim was forfeited, underdeveloped, and unsupported by the record, this Court should decline to extend relief.

CONCLUSION

For the reasons stated above, because Reed failed to successfully complete three distinct conditions of probation, this court should affirm the circuit court's denial of expungement.

³ The State also notes that while Reed explains that he was expecting a child and helping his mother support his siblings, there is nothing to indicate that he was unable to make a single payment of *any* monetary amount over the course of his probation with the income he received from his landscaping jobs. *See State v. Milashoski*, 163 Wis. 2d 72, 471 N.W.2d 42 (1991) (rejecting a defendant's argument that his indigency automatically meant he could not afford to pay a \$15,000 fine because he was able to work).

Dated this 23rd day of April, 2021.

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 word count of this brief is 2816.

04/23/2021
Date

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

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