STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2020AP001921-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEANDRAE J. REED,

Defendant-Appellant.

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

REPLY BRIEF OF APPELLANT KEANDRAE J. REED

Kimberly K. Dodd,
WI Bar No. 1044498
Kelsey C. Boehm,
WI Bar No. 1095936
Sarah E. Rieger,
WI Bar No. 1112873
Attorneys for Appellant

FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202-5306

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Mr. Reed seeks expungement of his single criminal conviction from when he was 18 years old to improve his chances of obtaining employment. He is entitled to expungement because he has not been convicted of a subsequent offense, his probation was not revoked, and he was successfully discharged from probation by the Department of Corrections.

Before the circuit court, Mr. Reed submitted evidence of his discharge from the Department of Corrections, which was not disputed with contrary evidence from the State. This evidence of discharge should be controlling. *See State v. Stefanovic*, 215 Wis. 2d 310, 318-19, 572 N.W.2d 140, 144 (Ct. App. 1997).

Mr. Reed's discharge from probation despite failure to pay restitution and court costs is consistent with the ordinary meaning of the word "or" (as a disjunctive) in his Judgment of Conviction because the sentencing judge ordered payment of these items "or" reduction to civil judgments. In its opposition brief, the State does not cite any authority for a different meaning of the word "or."

The State's reliance on the probation and restitution statutes is also consistent with this interpretation because the statutes contemplate reduction of restitution and court costs to judgments upon

termination of probation. The sentencing court can extend probation for unpaid amounts, but did not do so in Mr. Reed's case.

Interpreting Mr. Reed's Judgment of Conviction and the statutes in this matter also avoids an unconstitutional interpretation. Appellate courts may decide constitutional issues not raised at the circuit court level. The State does not substantively address the equal protection violation resulting from requiring an indigent defendant to pay restitution to receive the benefits of probation, instead focusing on technicalities and case law interpreting a different statute. In the end, the circuit court's interpretation of the conditions of probation divides similarly situated individuals into two groups based on financial status without a rational basis. Therefore, this interpretation should be rejected.

Accordingly, the Court should reverse and direct the circuit court to enter an order of expungement.

I. MR. REED SATISFIED THE CONDITIONS OF PROBATION.

The circuit court erred in denying expungement because Mr. Reed satisfied the conditions of his probation. The Judgment of Conviction indicates that Mr. Reed could satisfy his probation by paying restitution and court costs "or" by having those amounts reduced to civil judgments. (A-App. 31; *see also* A-App. 25-26 ("Any

monetary amount that remains unpaid when probation is terminated is ordered reduced to a judgment against you for the unpaid balance.").) Therefore, Mr. Reed satisfied his probation when the court-ordered restitution and court costs were reduced to civil judgments.

A. The State Cites No Authority Negating Interpretation of the Word "or" as a Disjunctive.

The State fails to cite any authority in its brief for the notion that the word "or" should be interpreted differently for purposes of Mr. Reed's Judgment of Conviction than its ordinary meaning. (State Br. at 4-9.) The ordinary meaning of the word "or" is disjunctive. *See Beaver Dam Cmty. Hosps., Inc. v. City of Beaver Dam*, 2012 WI App 102, ¶ 10, 344 Wis. 2d 278, 285, 822 N.W.2d 491, 494-95 ("The ordinary meaning of 'or' is disjunctive, meaning that a category that is included in a list of categories linked by the term 'or' is one alternative choice."); *State v. Harvey*, 2006 WI App 26, ¶48, 289 Wis. 2d 222, 710 N.W.2d 482 ("[S]ince the rule is stated in the disjunctive, all factors need not be satisfied.").

Certainly, there appears to be no sentencing or expungement case law directly on point. But the State does not even cite any case law outside the realm of sentencing and expungement law to suggest

that the word "or" means anything other than the disjunctive. (State Br. at 4-9.)

Under the ordinary meaning of the word "or," Mr. Reed satisfied the conditions of his probation when the restitution and costs were reduced to civil judgments.

B. Restitution Was Not a Condition of Mr. Reed's Probation Because the Department of Corrections Discharged Him from Probation.

The State's reliance on the restitution statute, Wis. Stat. § 973.20, does not support its position. The State is correct that Wis. Stat. § 973.20(1r) requires restitution as a condition of probation, but the statute provides that restitution is reduced to a civil judgment if not paid during probation:

> *Restitution ordered under this section is a condition of probation*, extended supervision, or parole served by the defendant for a crime for which the defendant was convicted. ***After the termination of probation***, extended supervision, or parole, or if the defendant is not placed on probation, extended supervision, or parole, ***restitution ordered under this section is enforceable in the same manner as a judgment in a civil action*** by the victim named in the order to receive restitution or enforced under ch. 785.

Wis. Stat. § 973.20(1r) (emphasis added).

Failure to satisfy the conditions of probation is a basis for extension of the probation, but the extension is not automatic:

> we properly read § 973.09(5), STATS., in harmony with the extension provision of paragraph § 973.09(3)(a) and in light of the case law we have already addressed. *R.L.C.* teaches that an unfulfilled condition of probation does not automatically extend the probation period. Rather, an extension must be obtained. *Bartus* teaches that if the probation has not been stayed and the period of probation has been served, the defendant is entitled to discharge as a matter of law even in the face of an unfulfilled condition of probation.

Stefanovic, 215 Wis. 2d at 318-19.

More importantly, the Court of Appeals in *Stefanovic* went on to state that the prior case law "strongly suggests that the issuance of the discharge certificate by the [Department of Corrections] is controlling." *Id.* at 319.

Here, Mr. Reed submitted a letter to the circuit court from the Department of Corrections stating that he had been discharged from probation on March 21, 2014. (R. Dkt. 21; *see also* A-App. 62.) Under Wis. Stat. § 973.09(3)(b), the Department had the option of seeking an extension of Mr. Reed's probation due to the unpaid

restitution, but chose to discharge him after completion of the original term of his probation. (*Id.*)

Because the Department did not seek extension of Mr. Reed's probation, and instead discharged him from probation, Mr. Reed met the conditions of probation.

C. The Civil Judgments Against Mr. Reed Will Remain Outstanding.

Without any authority on its side regarding the meaning of the word "or" in the Judgment of Conviction, the State focuses on the public policy of restitution for victims. (State. Br. at 6-7.) But restitution is an issue separate from expungement. The expungement statute does not relieve an offender's obligation to pay restitution. Wis. Stat. § 973.015(1m). Expungement merely erases a criminal record so that the offender can transition to becoming a productive member of society.

If the court grants expungement, Mr. Reed will remain incentivized to satisfy the judgments because they will remain a burden on his credit until the 20-year statute of limitation expires. 15 U.S.C. § 1681c(a)(2) (allowing a consumer reporting agency to include civil judgments for "seven years or until the governing statute of limitations has expired, whichever is the longer period"); Wis. Stat.

§ 893.40 (setting a 20-year statute of limitations on actions to collect judgments).

The Wisconsin Statutes also provide various mechanisms for collection of judgments, such as garnishment, execution, and a judgment lien on real property. *See generally* Wis. Stat. chapters 812, 815 & 816.

The expungement statute does not mention restitution – it merely asks if the conditions of probation were met. Here, they were.

D. The State's Argument Regarding Community Service Was Not Addressed by the Circuit Court and Conflicts with the Department of Corrections' Discharge.

The State leads with the argument that Mr. Reed also did not complete his community service (State Br. at 6), but that issue was not even addressed by the circuit court. Regardless, Mr. Reed will address the State's argument.

First, contrary to the State's brief, there is no "undisputed violation" of the court-ordered community service requirement. (*See* State Br. at 6.) Mr. Reed merely offered to perform community service at this juncture, if required by the circuit court, given the lack of documentary evidence on this issue (other than the discharge evidence from the Department of Corrections). (A-App. 62-63.)

Second, as discussed above, Mr. Reed submitted evidence from the Department of Corrections indicating that he was discharged from probation on March 21, 2014. (R. Dkt. 21; *see also* A-App. 62.) The Court of Appeals has suggested that this evidence should be controlling. *Stefanovic*, 215 Wis. 2d at 319.

Finally, the State cites no evidence of any failure by Mr. Reed to perform the court-ordered community service or any evidence to indicate that the Department of Correction's discharge of Mr. Reed was in error.

In short, the Department of Corrections has provided evidence that Mr. Reed was discharged from probation on March 21, 2014, meaning the conditions of his probation were met. The State has not provided any evidence to the contrary to negate expungement.

II. INTERPRETING THE CONDITIONS OF PROBATION TO USE THE DISJUNCTIVE "OR" AVOIDS AN UNCONSTITUTIONAL INTERPRETATION.

Requiring that an indigent defendant pay restitution under Wis. Stat. § 973.015 means that individuals who are unable to pay court-ordered costs will be unable to receive the benefits of expungement regardless of their efforts or ability to pay. This interpretation presents an Equal Protection violation. Rather than substantively addressing

this argument,[1] the State requests that this Court summarily reject it on technicalities. Neither of the bases argued by the State support summary rejection of Mr. Reed's argument and this Court should address and adopt the constitutional interpretation of the conditions of probation.

A. The Interests of Justice Allow this Court to Decide Mr. Reed's Equal Protection Argument.

Appellate courts may "decide a constitutional question not raised below if it appears in the interests of justice to do so and where there are no factual issues that need resolution." *Bradley v. State*, 36 Wis. 2d 345, 359a, 153 N.W.2d 38, 44 (1967); *see also State v. Benzel*, 220 Wis. 2d 588, 591, 583 N.W.2d 434, 436 (Ct. App. 1998) (observing that the "*Bradley* rule has been consistently followed" and addressing an issue not raised in the trial court in the interests of

[1] It is worth noting that the State only used 2,816 words and had ample opportunity (8,184 words) to address Mr. Reeds' equal protection argument. The States' failure to substantively address the merits of Mr. Reed's equal protection argument is telling and does not in any way prevent the Court from issuing a decision on the equal protection issue. Rather, the consideration is whether "both parties have had an *opportunity* to brief the issue[,]" *Brooks v. Lab. & Indus. Rev. Comm'n*, 138 Wis. 2d 106, 109, 405 N.W.2d 705, 706 (Ct. App. 1987) (emphasis added).

justice); *Brooks*, 138 Wis. 2d at 109 (deciding equal protection challenge raised for the first time on appeal).

It is in the interest of justice to consider Mr. Reed's equal protection argument. This case exemplifies the rationale behind the expungement statute – "to shield qualified youthful offenders from some of the harsh consequences of criminal convictions." *State v. Anderson*, 160 Wis. 2d 435, 440, 466 N.W.2d 681 (Ct. App. 1991). Mr. Reed, as an African American job applicant with a criminal record, is nearly three times less likely to receive a callback for a potential job applicant than those with no criminal record. Devah Pager, *Double Jeopardy: Rice, Crime, and Getting A Job*, 2005 WIS. L. REV. 617, 642 (2005). Expungement is the logical solution for those who demonstrate, like Mr. Reed, that they are willing to right their wrongs and fulfill their obligations to society.

Further, requiring that an indigent defendant pay restitution under Wis. Stat. § 973.015 prior to expungement means that individuals who are unable to pay court-ordered amounts will be unable to receive the benefits of expungement regardless of their efforts or ability to pay. The interests of justice require consideration of whether such an interpretation violates equal protection. As detailed in Mr. Reed's opening brief, there is no rational basis for

granting expungement based on an individual probationer's wealth. (*See* Reed Op. Br. at 18-21.) Accordingly, such an interpretation should be rejected as it would result in an equal protection violation.

B. Mr. Reed's Equal Protection Claim Is Fully-Developed and Supported by the Record.

The record reflects that at the time of Mr. Reed's conviction and probation, he was eighteen years old, living in poverty, expecting his first child, and was helping support this four younger siblings. (A-App. 35.) Nonetheless, Mr. Reed completed all non-pecuniary conditions of his probation, including staying out of legal trouble. (*Id.*)

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, 130, 370 Wis. 2d 1, 884 N.W.2d 484. Here, the circuit court's interpretation of the conditions of probation divides similarly situated individuals – those initially deemed eligible for expungement into two groups (1) individuals who have the means to pay costs during the supervision period, and (2) individuals who cannot afford to do so during the supervision period. Rather than addressing this concerning disparate treatment, the State emphasizes that "Reed paid absolutely

nothing." (State Br. at 10.)[2] But this proves too much. The record reflects that Mr. Reed *was unable to make the required payments* during his probation period because of his financial situation and familial obligations. (A-App. 35.) There is no rational basis for granting expungement based on an individual probationer's wealth and/or denying it when the individual is unable to pay. Indeed, "conditioning probation on the satisfaction of requirements which are beyond the probationer's control undermines the probationer's sense of responsibility." *State v. Jackson*, 128 Wis. 2d 356, 363, 382 N.W.2d 429, 432 (1986) (internal citation omitted); *see also Williams v. Illinois*, *399 U.S. 235* (1970) (law under which an indigent offender could be continued in confinement if his indigency prevented him from satisfying the monetary portion of the sentence violated the Equal Protection Clause).

[2] The State goes on to suggest, without citing any legal authority, that Mr. Reed has an obligation to develop a bright-line rule regarding whether it always presents an equal protection violation to require payment of restitution and identify what amount is too much for an indigent defendant to pay. (State Br. at 9.) These unsupported assertions need not be addressed as there is no such requirement. Rather, case law recognizes a successful equal protection claim when the plaintiff alleges that s/he was "treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074, 145 L. Ed. 2d 1060 (2000).

By interpreting the conditions of probation to allow a probationer to satisfy the conditions of probation *either* by paying restitution or by having the debts reduced to civil judgments, this Court can avoid this untenable and unconstitutional result.

Finally, the State misconstrues and misapplies the Court's holding in *State ex rel. Pedersen v. Blessinger*, 56 Wis. 2d 286, 299, 201 N.W.2d 778, 785 (1972). First, *Pederson* addresses requirements under an entirely different statute: Wis. Stat. § 973.07, which relates to a defendant's commitment to jail until fines, costs, and fees are discharged. In the event a defendant is unable to pay fines under that statute, s/he may request an evidentiary hearing on ability to pay to avoid unconstitutional application of the statute. *Id.* at 298. Mr. Reed is not challenging the constitutionality of commitment under Wis. Stat. § 973.07, but rather, the constitutionality of expungement orders under Wis. Stat. § 973.015. No court has held that the hearing requirement for Wis. Stat. § 973.07 also applies to Wis. Stat. § 973.015. Even if this Court did find that a hearing was required, the proper recourse (as ordered in *Pederson*) is not denial of the equal protection argument, but remand to the circuit court to determine the defendant's ability to pay fines and costs. *Pederson*, 56 Wis.2d at 299. Therefore, the States' evidentiary hearing argument should be

rejected, or alternatively, this Court should remand to the lower court to allow an evidentiary hearing to take place.

CONCLUSION

Mr. Reed respectfully requests that the Court reverse the decision of the circuit court and remand to the circuit court with instructions to find that Mr. Reed satisfied his conditions of probation and enter an order completing the expungement of this conviction.

Dated this 10th day of May, 2021.

Respectfully submitted,

Electronically signed by Kelsey C. Boehm

Kimberly K. Dodd, WI Bar No. 1044498
Kelsey C. Boehm, WI Bar No. 1095936
Sarah E. Rieger, WI Bar No. 1112873
Attorneys for Defendant-Appellant

Foley & Lardner LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202-5306
(414) 319-7345
(414) 297-4900 (Fax)
kdodd@foley.com
kboehm@foley.com
srieger@foley.com

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,759 words.

Dated: May 10, 2021

Electronically signed by Kelsey C. Boehm

Kimberly K. Dodd, WI Bar No. 1044498
Kelsey C. Boehm, WI Bar No. 1095936
Sarah E. Rieger, WI Bar No. 1112873
Attorneys for Defendant-Appellant

Foley & Lardner LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202-5306
(414) 319-7345
(414) 297-4900 (Fax)
kdodd@foley.com
kboehm@foley.com
srieger@foley.com

E-FILING PILOT PROGRAM CERTIFICATION

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.

Dated: May 10, 2021

Electronically signed by Kelsey C. Boehm

Kimberly K. Dodd, WI Bar No. 1044498
Kelsey C. Boehm, WI Bar No. 1095936
Sarah E. Rieger, WI Bar No. 1112873
Attorneys for Defendant-Appellant

Foley & Lardner LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202-5306
(414) 319-7345
(414) 297-4900 (Fax)
kdodd@foley.com
kboehm@foley.com
srieger@foley.com