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COURT OF APPEALS

**State of Wisconsin
Court of Appeals
District 1**

State of Wisconsin,

Plaintiff-Respondent,

v.

Appeal No. 2021AP12-CR

Larry Brown,

Defendant-Appellant.

Appellant's Memorandum Concerning Forfeiture

Larry Brown (hereafter "Brown") was convicted of misdemeanor theft, and the circuit court imposed and stayed four months in jail, and placed Brown on probation.

Brown did not file a postconviction motion; rather, he filed a notice of appeal. The court of appeals directed Brown's counsel to submit this memorandum addressing the question of whether there are any issues for appeal that have not been forfeited by the fact that Brown did not file a postconviction motion.

As will be set forth in more detail below, Brown has not forfeited his right to appeal the circuit court's decision on his request for expunction under § 973.015, Stats.

At the sentencing hearing, Brown's attorney asked the court to grant Brown expunction. (R:36-16) The circuit court denied the request, saying, "No. [Judge] Borowski didn't allow expungement [in an earlier case]. I'm not gonna allow expungement." *Id.*

Almost immediately, Brown's attorney asked the judge to reconsider. The judge responded, "No, he's not gonna get expungement." *Id.*

Finally, near the end of the sentencing hearing, defense counsel, for a third time, asked the court to consider expunction. The judge said, "No, I'm not gonna --

Expunction's dead." (R:36-21)

Whether Brown has any properly preserved issues for appeal is strictly a procedural, not a jurisdictional, question. The court of appeals always has inherent authority to review a sentence. "Wisconsin circuit courts have inherent authority to modify criminal sentences." *State v. Harbor*, 2011 WI 28, P35, 333 Wis. 2d 53, 72, 797 N.W.2d 828, 837, 2011 Wisc. LEXIS 160, *18-19

The question, then, is whether Brown was procedurally required to file a postconviction motion asking the circuit court to once again reconsider the expunction decision. In other words, in order to properly preserve the issue for appeal, is it truly necessary for the circuit court to officially declare, for a fourth time, that the expunction issue is *still dead*.

Under the appellate forfeiture rule, the issue of whether the circuit court erroneously exercised its discretion in denying Brown's expunction request is well preserved.

The appellate waiver rule is well-known, but here the objective of the rule bears repeating:

This waiver rule serves several important objectives in sound judicial administration. Failure to raise an issue in the circuit court deprives both the adversary and the circuit court of the opportunity to address the issue and perhaps remedy the defect without the necessity of an appeal.

State v. Hayes, 2004 WI 80, P21, 273 Wis. 2d 1, 11-12, 681 N.W.2d 203, 208, 2004 Wisc. LEXIS 442, *13

Here, the defense counsel gave the circuit court three opportunities to correct the purported error. Therefore, Brown has not forfeited the expunction issue on appeal by not raising it in a postconviction motion.

Dated at Milwaukee, Wisconsin, this 27nd day of January, 2021.

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