State of Wisconsin
Court of Appeals
District 1
Appeal No. 2021AP000012

State of Wisconsin,

Plaintiff-Respondent,

v.

Larry A. Brown,

Defendant-Appellant.

On appeal from a judgment of the Milwaukee County Circuit Court, The Honorable Jack L. Davila, presiding

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Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issue presented by this appeal is controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issue

The defendant-appellant, Brown, was convicted of misdemeanor theft in a business setting following his guilty plea. At the time of the offense, Brown was nineteen years-old. At sentencing, Brown's attorney repeatedly asked the court to grant expunction. The judge repeatedly denied the request on the grounds that another judge, in another case, had not granted expunction to Brown; and, therefore, Brown would not be granted expunction in this case. The issue on appeal is: Did the circuit court erroneously exercise its discretion in denying Brown's expunction request?

Answered by the circuit court: No. Because another judge in another case denied Brown's request for expunction, he is not entitled to expunction in this case.

Summary of the Argument

Whether to order expunction is a matter of sentencing discretion. The statute, § 973.015, Stats., guides the court's discretion. Once the court finds that the defendant meets the statute's eligibility requirements (age, nature of conviction), the court must then consider whether the defendant would benefit from expunction, which is almost always the case; and whether, if the defendant successfully completes his sentence, society would be harmed by expunging evidence of the conviction.

Here, the circuit court erroneously exercised its discretion because the judge never considered either of these statutory factors. Rather, the judge denied expunction solely because another judge in another case denied expunction. This, then, is plainly an erroneous exercise of discretion by the circuit court.

Statement of the Case

On May 16, 2019, the defendant-appellant, Larry A. Brown (hereinafter "Brown"), was charged with embezzlement where the loss did not exceed $2,500. (R:1) This is a misdemeanor. The complaint alleged that Brown's date of birth is October 17, 1996. According to the complaint, the thefts occurred between August 27, 2016 and November 14, 2016.

Therefore, Brown was nineteen years-old when the thefts allegedly began, and he turned twenty years old before the thefts ended. *Id.*

Brown eventually reached a plea agreement with the state. The state agreed that, in exchange for a guilty plea to the charge in the complaint, the state would recommend that the court impose four months in the House of Corrections, imposed but tayed, and place Brown on probation for twelve months. (R:36-2)

The judge conducted a colloquy with Brown in order to ensure that the guilty plea was freely, voluntarily, and intelligently entered. Thereafter, the court accepted Brown's guilty plea, and found him guilty. (R:36-12)

The case immediately proceeded to sentencing. During his sentencing remarks, Brown's attorney pointed out that, at the time of sentencing, Brown was twenty-three years old. (R:36-16) Counsel asked the court to grant expunction. *Id.*

The judge responded by saying, "No. [Judge] Borowski didn't allow expungement [on another case involving Brown]. I'm not gonna allow expungement." (R:36-16)[1]

Brown's lawyer pointed out that, "[T]his crime . . was

[1] The case to which the judge is evidently referring is Milwaukee County case number 2018CM2460. The date of offense in that case, according to CCAP, is July 23, 2018, nearly two years *after* the date of offense alleged in the present case. The district attorney explained at the sentencing hearing in this case-- the case currently on appeal-- that Brown was originally given an early intervention deferred prosecution agreement. However, the DPA in this case was revoked when he committed the offenses alleged in 2018CM2460. (R:36-13, 14)

done in 2016 when he was much younger than 23. Because this case is so much older than the case in front of Judge Borowski, I think that expungement would be proper here." (R:36-16)[2]

Again, the judge responded, "No, he's not gonna get expungement. [sic]" *Id.*

Later in the hearing, defense counsel once again raised the issue. Counsel said, "Your Honor, I would just ask another time, if you would consider expunction. . . " (R:36-21)

This time the judge responded, "No, I'm not gonna - - *Expunction's dead.* He's got a record and he's gonna be sats--saddled with the record forever. If he hadn't picked up another CCW and a marijuana case in front of Borowski, yeah, I'd think about it. But Borowski didn't expunge the record and neither am I." (emphasis provided; R:36-21, 22)

Thereafter, the judge imposed four months jail in the House of Corrections, stayed the sentence, and placed Brown on probation for one year. (R:36-23)

Brown filed a notice of intent to pursue postconviction relief. There were no postconviction motions. Rather, Brown filed a notice of appeal.[3]

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[2] What defense counsel is attempting to point here is that the offense in this case predated the offense on which Judge Borowski did not grant expunction.

[3] After the notice of appeal was filed, but before the briefs were due, the court ordered Brown to demonstrate that he had properly preserved the expunction issue in the circuit court. Brown submitted a report, and the court issued an order finding that the issue was properly preserved.

Argument

I. The circuit court erroneously exercised its discretion by basing the decision solely on an inappropriate consideration: whether a judge in a different case decided to grant Brown expunction.

Whether to order expunction is a matter of sentencing discretion. The statute, § 973.015, Stats., guides the court's discretion. Once the court finds that the defendant meets the statute's eligibility requirements (age, nature of conviction), the court must then consider whether the defendant would benefit from expunction, which is almost always the case; and whether, if the defendant successfully completes his sentence, society would be harmed by expunging evidence of the conviction.

Here, the circuit court erroneously exercised its discretion because the judge never considered either of these statutory factors. Rather, the judge denied expunction solely because another judge in another case denied expunction. This, then, is plainly an erroneous exercise of discretion by the circuit court.

A. Standard of appellate review

A circuit court's decision to grant or deny expunction is discretionary. On appeal, then, the court of appeals will not reverse the decision unless the circuit court erroneously

exercised its discretion. *State v. Helmbrecht*, 2017 WI App 5, ¶8, 373 Wis. 2d 203, 891 N.W.2d 412 (2016). A circuit court properly exercises its discretion when it "relies on relevant facts in the record and applies a proper legal standard to reach a reasonable decision." *State v. Thiel*, 2012 WI App 48, ¶6, 340 Wis. 2d 654, 813 N.W.2d 709. Additionally, determining whether the court applied the proper legal standard requires the appellate court to consider statutory interpretation principles; the interpretation and application of a statute present questions of law that the court of appeals reviews *de novo*. *State v. Arberry*, 2018 WI 7, ¶14, 379 Wis. 2d 254, 905 N.W.2d 832.

B. Factors guiding the court's discretion

In pertinent part, § 973.015, Stats., provides, "[W]hen a person is under the age of 25 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law for which the maximum period of imprisonment is 6 years or less, the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition."

At the sentencing hearing, once the court determines that the defendant is statutorily eligible (the defendant is age appropriate, and the offense is appropriate) the only remaining statutory considerations are whether the defendant would

benefit from expunction, and whether, if the defendant successfully completes the sentence, society would be harmed by expunction.

C. The circuit court erroneously exercised its discretion

With regard to a sentencing decision, the court of appeals, "[W]ill find an erroneous exercise of discretion where the trial court does not consider the appropriate factors." *State v. Love,* 2001 Wisc. App. LEXIS 1271, *16, 2002 WI App 34, 250 Wis. 2d 354, 639 N.W.2d 802

Here, the circuit court plainly did not consider the appropriate statutory factors. Whether another judge in another case granted the defendant expunction is not one of the statutory factors. Strictly speaking, then, the judge in this case considered an inappropriate factor; and did not at all consider the statutory factors.

Perhaps the judge had in mind that Brown would not benefit from expunction in this case because he already had a criminal record due to the other case. In fact, later in the hearing, the judge said,"He's got a record and he's gonna be sats -- saddled with this record forever." (R:36-21)

Even so, this certainly does not permit the inference that Brown would not benefit from expunction. It is to the defendant's benefit that his record reflects only one misdemeanor conviction rather than two.

More importantly, though, the circuit judge made no effort to discern whether, if Brown successfully completed his probation, society would be harmed by expunging the conviction, much less did the judge make any finding in that regard.

Because the judge did not consider the statutory factors concerning expunction, the court's decision denying Brown's request for expunction represents an erroneous exercise of discretion.

Nevertheless, "[T]he failure to exercise discretion (discretion that is apparent from the record) when discretion is required, constitutes an abuse of discretion. We will not, however, set aside a sentence for that reason; rather, we are obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained. It is not only our duty not to interfere with the discretion of the trial judge, but it is, in addition, our duty to affirm the sentence on appeal if from the facts of record it is sustainable as a proper discretionary act." *McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512, 522, 1971 Wisc. LEXIS 1119, *28

Here, there does not appear to be any evidence in the record to suggest that society would be harmed if, upon successful completion of his period of probation, Brown's conviction for theft were expunged.

The state might argue by inference that society would generally be harmed by expunction because of the nature of Brown's conviction in this case. That is, he was convicted of theft in a business setting (embezzlement). Thus, any future potential employer would not have access to the information that when Brown was nineteen years old he stole some money from his employer.

This, of course, is false logic. It is an inference *that could be drawn in every case* where expunction is requested. Whenever expunction is granted there exists the possibility that, in the future, some person might have reason to check the defendant's criminal record-- for example, employers and landlords-- and find no conviction.

To construe the statute in this manner renders it meaningless. The privilege of expunction would be chimerical. A judge could *never* find that society would not be harmed by expunction. "When construing a statute, we will give meaning to every word, clause, and sentence in the statute. [internal citation omitted] We will avoid construing a statute in such a way that would render a portion of it meaningless." *In re S.J.K.*, 132 Wis. 2d 262, 264, 392 N.W.2d 97, 98, 1986 Wisc. App. LEXIS 3634, *3

Furthermore, asserting that society is always harmed by expunction totally ignores the statutory provision that, even where expunction is ordered, it does not happen unless and

until the defendant *successfully completes the sentence.*

Thus, the statute requires the judge to find that, if the defendant successfully completes his period of probation, then society will not be harmed by not having access to evidence of the defendant's criminal conviction. In other words, successful completion of the period of probation demonstrates that the defendant poses no significant threat to the community.

In this case, then, there is nothing in the record to support the implicit conclusion of the circuit court that society would be harmed by expunging Brown's conviction if he successfully completes his period of probation.

Conclusion

For these reasons, it is respectfully requested that the court of appeals reverse the order of the circuit court denying Brown's request for expunction, and to remand the matter to the circuit court for a hearing at which the judge will consider the proper statutory factors.

Dated at Milwaukee, Wisconsin, this 15th day of March, 2021.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,377 words.

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Dated at Milwaukee, Wisconsin, this 15th day of March, 2021.

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