STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2021AP000012-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

LARRY A. BROWN,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the circuit court erroneously exercise its discretion when it decided to deny Brown's request for expunction?

Trial court answered: Expunction shall not be granted due to Brown's multiple past violations on probation, the seriousness of the offense before the court, and the fact that Brown already had a conviction on his record.

This court should answer "no" and affirm.

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

Law enforcement officers with the Wauwatosa Police Department investigated the theft of approximately $1,450.19 from a 7-Eleven located in the City of Wauwatosa between August 27, 2016, and November 14, 2016. Larry Brown ("Brown") was ultimately charged with Theft (Embezzlement) (Value Not Exceeding $2,500) as a result of this investigation. (R. 1).

Officers were dispatched to the 7-Eleven where they made contact with the store manager, DJS. (R. 1). DJS advised that there were 202 suspicious transactions linked to one employee, namely Brown. (R. 1). DJS explained that Brown performed cash transactions with customers and that he would subsequently cancel the sale and take the cash provided by the customer. (R. 1).

Brown ultimately provided a *Mirandized*[1] statement to Officers in which he admitted to the conduct described by DJS. (R. 1). Brown advised that he would "grab the cash" after he cancelled the transactions or he could return at the end of his shift to "grab" the excess cash. (R. 1). Because Brown always cancelled these cash transactions, it was never apparent that the register was missing cash. (R. 1). Brown stated that he took cash from the register in this manner approximately 202 times without the consent of 7-Eleven between August 27, 2016, and November 14, 2016. (R. 1). Brown also agreed that the total amount of cash taken from the register was around $1,450.19. (R. 1). Notably, Brown was nineteen-years-old when the thefts began and twenty-years-old when the thefts ceased. (R. 1).

On February 26, 2020, Brown appeared before the Honorable Dennis R. Cimpl for a Plea and Sentencing Hearing. (R. 36:1). The State advised that in exchange for a plea to the sole count in the complaint, the recommendation would be four months in the House of Corrections imposed but stayed for twelve months of probation. (R. 36:2).

Brown ultimately entered a "guilty" plea to the sole count in the complaint. (R. 36:4). During the State's argument, Assistant District Attorney Krueger noted that Brown was currently on probation for a Carry Concealed Weapon conviction. (R. 36:12). The State explained that Brown entered into a "DPA" (Deferred Prosecution Agreement) as part of an Early Intervention program for this case. (R. 36:13). However, that agreement was ultimately revoked "due to the marijuana possession and CCW." (R. 36:13). Thus, the State issued the theft charge in this case based upon the "non-compliance with the early intervention diversion agreement." (R. 36:14).

Brown's attorney, Attorney Meehan, subsequently requested that the circuit court grant Brown the opportunity to expunge the theft conviction. (R. 36:16). The circuit court stated, No. [Judge] Borowski didn't allow expungement. I'm not gonna allow expungement…He's now got two criminal – He's now got two crimes. (R. 36:16).

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The circuit court then referenced a "probation memorandum" for Brown that was dated November 11, 2019. (R. 36:17). The circuit court noted that Brown missed an appointment with his agent on May 7, 2019, but then reported on May 9, 2019. (R. 36:17). A urine screen was not done at that appointment because Brown admitted to using THC approximately one week prior to his appointment. (R. 36:17). Brown missed another appointment on August 20, 2019. (R. 36:18). Also in August of 2019, Brown had police contact because he was speeding and did not have a valid driver's license. (R. 36:18). The circuit court went on to state that Brown missed a court appearance on June 18, 2019, and that he was subsequently arrested on October 16, 2019. (R. 36:18, R. 30:2).

Further in the hearing, the circuit court emphasized that Brown's actions were not simply a mistake. (R. 36:12). The circuit court stated, "This was a scheme…This went over a period of time. I mean, this just wasn't a one-day affair. You were stealing 200 and some time, for a period of August through November. That's almost three months before they finally caught on." (R. 36:21).

After that statement, Attorney Meehan asked again if the court would consider expunction. (R. 36:21). The circuit court responded by saying,

> No, I'm not gonna – Expunction's dead. He's got a record and he's gonna be sats – saddled with this 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. The fact is, you get a big break. $1,400 theft over three months, you got a big break, and you're walking around with a gun. (R. 36:21-22).

The circuit court ultimately sentenced Brown to four months in the House of Corrections, imposed but stayed for twelve months of probation with various conditions. (R. 36:23). One of those conditions was to pay restitution in the amount of $1,450.19 during the term of probation. (R. 36:23). The circuit court also ordered Brown to follow all the rules and regulations associated with probation. (R. 36:24). Brown did not pay the ordered restitution or court costs. (R. 25:1). Brown subsequently filed Notice of Appeal. (R. 28:1).

STANDARD OF REVIEW

The determination of this expunction issue involves the circuit court's discretion, which, on review, an appellate court will not disturb unless erroneously exercised. *State v. Gallion*, 270 Wis. 2d 535, ¶17, 678 N.W.2d 197. "A circuit court properly exercises its discretion if 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.

This case also requires the interpretation of the expunction statute, Wis. Stat. § 973.015, which is a question of statutory interpretation that is reviewed de novo. *State v. Hemp*, 2014 WI 129, ¶12, 359 Wis. 2d 320, 856 N.W.2d 811.

ARGUMENT

I. The circuit properly exercised its discretion because it considered the purpose of expunction and Brown's conduct when it ultimately decided that the defendant should not be afforded the opportunity for expunction in this particular case.

The statute for expunction indicates that "when 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." Wis. Stat. Ann. § 973.015(1m)(a)(1) (emphasis added).

This statute "clearly contemplates the exercise of discretion by the sentencing court." *State v. Helmbrecht*, 2017 WI App ¶ 11, 373 Wis. 2d 203, 211, 891 N.W.2d 412, 415–16. "The term 'discretion' contemplates a process of reasoning which depends on facts in the record or reasonably derived by inference from the record that yield a conclusion based on logic and founded on proper legal standards." *See State v. Delgado*, 223 Wis. 2d 270, 280, 588 N.W.2d 1 (1999).

The statute "puts forth two factors for the sentencing court to utilize in exercising that discretion after it determines whether a defendant is indeed eligible for expunction: (1) whether the person will benefit from expungement and (2) whether society will be harmed by the expungement." *Helmbrecht*, 2017 WI App ¶ 11. In "assessing whether to grant expungement, the sentencing court should set forth in the record the facts it considered and the rationale underlying its decision for deciding whether to grant or deny expungement." *Id*.

The State agrees that the circuit court did not specifically state that its decision was based upon the factors set forth in the expunction statute. That being said, Wisconsin courts "have repeatedly held that the utterance of 'magic words' is not the equivalent of providing a logical rationale." *Helmbrecht*, 2017 WI App ¶ 12. Thus, the circuit court is not required to utter "magic words" regarding the factors that it considered. Rather, the circuit court must simply provide its "process of reasoning."

This analysis regarding the reasonableness of the circuit court begins with the "presumption that the court has acted reasonably, and the defendant-appellant has the burden to show unreasonableness from the record." *State v. Haskins*, 139 Wis. 2d 257, 268, 407 N.W.2d 309 (Ct. App. 1987). Specific to this case, whether the circuit court reasonably considered the appropriate factors and purpose of the expunction statute when it decided that Brown should not be granted an opportunity for expunction.

The circuit court clearly considered the purpose of expunction when it decided not to allow the expunction of Brown's record upon the successful completion of probation. "At the heart of the expungement statute lies an intention 'to provide a break to young offenders who demonstrate the ability to comply with the law' by successfully completing and being discharged from their sentences." *State v. Leitner*, 2002 WI 77, ¶ 38, 253 Wis. 2d 449, 646 N.W.2d 341. As set forth above in the "Statement of the Case," the circuit court clearly considered the fact that Brown had *not* "demonstrate[d] the ability to comply with the law." The circuit court made a record of

Brown's violations of conditions and the law while on probation, including Brown's admission that he consumed an illegal substance and that he was driving without a valid license. (R. 36:17-18). Further, the circuit court noted the gravity of Brown's actions in the underlying case when he emphasized that Brown's behavior "was not simply a mistake" because he repeatedly stole from his place of employment over the course of three months. (R. 36:12, 21).

Further, "expunction provides a means by which sentencing courts may shield youthful offenders from some of the future consequences of criminal convictions." *State v. Allen*, 2017 WI 7, ¶ 38, 373 Wis. 2d 98, 117, 890 N.W.2d 245, 254. For example, "[e]xpungement offers young offenders a fresh start without the burden of a criminal record and a second chance at becoming law-abiding and productive members of the community…[because it] allows 'offenders to ... present themselves to the world—including future employers—unmarked by past wrongdoing.'" *Hemp*, 2014 WI ¶ 19. The circuit court's reference to Judge Borowski's unwillingness to grant expunction was clearly a consideration of the fact that the purpose of expunction would not be achieved in this case because Brown already had a conviction on his record. (R36:21-22).

The legislature, by enacting Wis. Stat. § 973.015, "provide[d] a break to young offenders who demonstrate the ability to comply with the law." *Leitner,* 253 Wis. 2d ¶ 38. The circuit court stated that if Brown "hadn't picked up another CCW and a marijuana case," he would have considered granting expunction. (R. 36:22). Thus, the circuit court was acknowledging that the expunction of this case would not serve the purpose of the statute *and* that Brown has demonstrated an inability to comply with the law and with the terms of probation.

The court in *McCleary v. State* explained that "[d]iscretion is not synonymous with decision making." *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512, 519 (1971). "Rather, the term contemplates a process of reasoning…[that] must depend on facts that are of record or that are *reasonably derived by inference from the record* and a

conclusion based on a logical rationale founded upon proper legal standards." *Id.* (emphasis added).

Thus, "[i]f the facts are fairly inferable from the record, and the reasons indicate the consideration of legally relevant factors, the sentence should ordinarily be affirmed…[and] [i]f there is evidence that discretion was properly exercised, and the sentence imposed was the product of that discretion, the trial judge fully complies with the standard." *McCleary*, 49 Wis. 2d at 281 (1971).

The facts are certainly "fairly inferable from the record, and the reasons indicate the consideration of legally relevant factors." *McCleary*, 49 Wis. 2d at 281 (1971). The circuit court highlighted that Brown's actions in the underlying case were continuous and methodical, and not "simply a mistake." (R. 36:12, 21). That emphasis lends to the reasonable inference that the circuit court considered that society would be harmed if Brown's conviction was expunged. Further, the circuit court carefully stated each of Brown's probationary and legal violations since this case was charged. (R. 36:17-18, 21-22). One can reasonably infer from those comments that the circuit court considered that society would be harmed by expunction because of the gravity of Brown's actions throughout the pendency of this case.

He also emphasized that Brown already had "a record and he's gonna be…saddled with this record forever." (R. 36:21). Thus, the record indicates that the circuit court considered legally relevant factors to ultimately reach the decision that granting expunction was not appropriate in this case.

II. Even if the circuit court erroneously exercised its discretion, it is harmless error because Brown did not successfully comply with the terms of probation, which is required to be afforded expunction of one's record.

As set forth above, "[a]t the heart of the expungement statute lies an intention 'to provide a break to young offenders who demonstrate the ability to comply with the law' by successfully completing and being discharged from their sentences." *Leitner,* 2002 WI ¶ 38. The Defense accurately

stated in its brief that "even where expunction is ordered, it does not happen unless and until the defendant *successfully completes the sentence*." (App. Br. at 11-12). Brown failed to successfully complete probation in this case. Thus, even if the circuit court erroneously exercised its discretion when it denied Brown an opportunity for expunction, that error was harmless.

"The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party." Wis. Stat. Ann. § 805.18 (West). "Wisconsin's harmless error rule is codified in Wis. Stat. § 805.18 and is made applicable to criminal proceedings by Wis. Stat. § 972.11(1)." *State v. Sherman*, 2008 WI App 57, ¶ 8. An error is considered harmless "if it does not affect the defendant's substantial rights." Wis. Stat. § 805.18. "The defendant has the initial burden of proving an error occurred, after which the State must prove the error was harmless." *Sherman*, 2008 WI App ¶ 8.

In *State v. Sherman*, the Defense contended that the "circuit court erred by failing to consider applicable sentencing guidelines for his two counts of second-degree sexual assault of a child under Wis. Stat. § 948.02(2)." *Sherman*, 2008 WI App ¶ 6. In that case, it was undisputed that the circuit court "gave no indication at the sentencing or post-conviction hearings that it considered the applicable sentencing guidelines." *Id*. However, the State successfully argued that the error was harmless because the circuit court imposed a concurrent sentence that was less than the controlling sentence rendered for repeated sexual assault of a child. *Id.* The Wisconsin Court of Appeals reasoned that the defendant's "substantial rights were not affected by the court's failure to consider the sentencing guidelines." *Id*.

Similarly to the *Sherman* case, the circuit court's decision regarding expunction did not affect Brown's substantial rights. "A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been *revoked and the probationer has satisfied the conditions of probation*." Wis. Stat. Ann. § 973.015(1m)(b) (emphasis added). "Because the three criteria are distinct, we reject [the] notion that a probationer has 'satisfied the conditions of probation' under

Wis. Stat. § 973.015(1m)(b) simply because his probation was not revoked." *State v. Ozuna*, 2017 WI 64, ¶ 13, 376 Wis. 2d 1, 11, 898 N.W.2d 20, 24.

Brown did not comply with the terms of probation because he failed to pay restitution, which was ordered at the time of sentencing. (R. 25:1). Brown also failed to pay any of the required court costs. (R. 25:1). Thus, if the circuit court did erroneously exercise its discretion, that error is harmless because Brown's conviction for misdemeanor theft would not have been expunged due to his failure to comply with the conditions of probation.

CONCLUSION

The circuit court did not erroneously exercise its discretion when he denied Brown's request for expunction because it considered the purpose of the expunction statute and Brown's demonstrated inability to follow the law. Even if the circuit court did erroneously exercise its discretion, that error was harmless because the defendant's conviction for misdemeanor theft would not have been expunged due to his failure to comply with the conditions of probation. For these reasons, the State requests that the order of the circuit court be affirmed.

Dated this 21st 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 2886.

_4/21/2021____
Date

_/s/ Anna M. Meulbroek__
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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.

Dated this 21st day of April 2021.

_4/21/2021_____
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