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

---

Defendant-Appellant's Reply Brief

Law Offices of Jeffrey W. Jensen
111 E. Wisconsin Avenue, Suite 1925
Milwaukee, WI 53202-4825

414-671-9484

Attorneys for the Appellant

Table of Authority

Cases

Table of Contents

Argument

I. The purpose of the statute is not frustrated by granting Brown expunction.

Although the state admits that the circuit court did not consider the proper statutory factors in deciding the expunction request, the state claims that, "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." (Resp. brief p. 6) In nutshell, the state asserts that the purpose of the expunction statute is to "shield youthful offenders from some of the future consequences of criminal convictions." *Ibid* p. 7 Thus, the state contends, since Judge Borowski denied expunction, Brown is going to have a criminal record anyway, so he would therefore not benefit from expunction in this case. This is precisely the unreasonable conclusion that the circuit court reached in denying Brown's expunction request.

This reasoning is based upon the false assumption that a young person benefits only from having a perfectly clean record, and not from having fewer criminal convictions. Having only one criminal conviction on his record is far better for Brown than having two or three. Plainly, then, granting Brown

expunction in the present case would benefit him despite the fact that it would not leave him with a perfectly clear record.

II. The state argues outside of the record on appeal when it asserts that Brown failed to successfully complete probation; this argument is made for the first time of appeal; and, even if the court of appeals chooses to consider the argument, there is no basis to find that Brown has not successfully completed his probation.

The state argues that, even if the circuit court did erroneously exercise its discretion in denying Brown's expunction request, the error is harmless because, "Brown failed to successfully complete probation in this case." (Resp. brief p. 9) Evidently, the state is referring to circuit court docket entries from March, 2021, which reflect that Brown was discharged from probation, but money judgments were entered against him for unpaid financial obligations.

The court should disregard the state's argument for three reasons: (1) the state's factual assertion contains no citation to the record on appeal; (2) the state raises this argument for the first time on appeal; and, (3) even if the court decides to consider the merits of the state's argument, it appears that Brown successfully completed probation.

A. The state's argument contains no citation to the record on appeal

Without a citation to the record on appeal, the state asserts that Brown failed to pay restitution and court costs.[1] Thus, according to the state, Brown has not successfully completed probation. In other words, even if the circuit court had granted Brown expunction, he would ultimately have failed to earn it.

Regarding legal arguments that lack a citation to the record on appeal, the court of appeals has, "[S]aid many times that we will not consider arguments unsupported by citations to the record, for it is not our duty to 'sift and glean the record' to find facts to support a party's argument." *State v. Boshcka,* 178 Wis. 2d 628, 637, 496 N.W.2d 627, 630, 1992 Wisc. App. LEXIS 1346, *7-8; *See also* §§ 809.19(1)(e), 809.83(2), Stats. Assertions of fact that are not part of the record on appeal will not be considered. *Nelson v. Schreiner,* 161 Wis. 2d 798, 804, 469 N.W.2d 214, 217, 1991 Wisc. App. LEXIS 308, *7; *see also, State v. McMorris,* 2007 WI App 231, P30, 306 Wis. 2d 79, 99, 742 N.W.2d 322, 332, 2007 Wisc. App. LEXIS 787, *24

Thus, because there is no document in the record on appeal to substantiate the state's factual claim that Brown did not successfully complete his probation, this is not an argument

[1] This assertion is evidently based upon docket entries in the circuit court file that on March 16, 2021, after the record was sent to the court of appeals, the court entered judgments for unpaid financial obligations.

that the court of appeals should consider.

B. The state raises this argument for the first time on appeal.

The state never argued in the circuit court that Brown had not successfully completed his period of probation.[2] The state raises this argument for the first time on appeal.

"The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal." *State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501, 505 (1997)

More problematic, the argument is wholly undeveloped. The court of appeals should not consider inadequate arguments and arguments that lack sufficient references to legal authority. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) The court must not develop an argument for the state. *See Industrial Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("we will not abandon our neutrality to develop arguments" for the parties).

The state merely asserts that Brown did not pay his financial obligations and, therefore, he did not successfully complete his probation. This wholly undeveloped argument

[2] Granted, it would have been impossible for the state to make this argument at the time of sentencing. Brown's period of probation had not even begun yet. Nevertheless, the fact remains that this issue was never presented to the circuit court.

should be disregarded by the court.

C. Even if the court of appeals considers this argument, it does not demonstrate that Brown has not successfully completed his probation.

The state relies upon *State v. Ozuna*, 2017 WI 64, P18, 376 Wis. 2d 1, 16, 898 N.W.2d 20, 26, 2017 Wisc. LEXIS 381, *11, 2017 WL 2687890 for the proposition that merely because the DOC terminated Brown's probation without revoking it, does not necessarily mean that Brown "successfully completed" it. That is, on March 16, 2021, the circuit court entered a money judgment against Brown for unpaid financial obligations.

Ozuna is distinguishable from Brown's case.

First off, in *Ozuna*, the supreme court reaffirmed the proposition, as held in *State v. Hemp,* 2014 WI 129, ¶12, 359 Wis. 2d 320, 856 N.W.2d 811, that expunction is self-executing upon the filing of termination of probation documents by the Department of Corrections. In *Ozuna,* the court reiterated that, in *Hemp*, "The record clearly indicates Hemp successfully completed probation. . . In such a scenario, expungement was 'required by statute' and the clerk of the circuit court accordingly had a duty to expunge the record upon receiving a copy of the certificate of discharge from DOC. *Ozuna*, 2017 WI 64, P16, 376 Wis. 2d at 14.

Ozuna's probation had not been revoked either, but the

documents filed by the DOC also asserted that he had not completed his conditions of probation. According to the supreme court, "On the form, the probation agent checked a box marked 'All court ordered conditions have not been met.' The agent noted the nature of the violation, namely, that Ozuna '[f]ailed to comply with the no alcohol condition, because he was 'cited for underage drinking.'" *Ozuna*, 2017 WI 64, P18, 376 Wis. 2d at 16. Thus, in *Ozuna*, the circuit court was correct in denying expunction to Ozuna. The records filed by the DOC did not establish that Ozuna had successfully completed all of his conditions.

Here, at least according to the DOC document available on CCAP, there is no indication that Brown has not completed his conditions of probation. Rather, it appears that money judgments were entered. Thus, if Brown is ultimately granted expunction, it should automatically occur.

Dated at Milwaukee, Wisconsin, this 3rd day of May, 2021:

Law Offices of Jeffrey W. Jensen
Attorneys for Appellant
Electronically signed by:
Jeffrey W. Jensen
State Bar No. 01012529

111 E. Wisconsin Avenue
Suite 1925
Milwaukee, WI 53202-4825

414.671.9484

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 1730 words.

This brief was prepared using *Google Docs* word processing software.The length of the brief was obtained by use of the Word Count function of the software

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

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 at Milwaukee, Wisconsin, this 3rd day of May, 2021.

Law Offices of Jeffrey W. Jensen
Attorneys for Appellant
Electronically signed by:
Jeffrey W. Jensen
State Bar No. 01012529

111 E. Wisconsin Avenue
Suite 1925
Milwaukee, WI 53202-4825

414.671.9484