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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
CASE NO. 2021AP001018 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SEAN D. DAY,

Defendant-Appellant.

**ON APPEAL FROM A FINAL JUDGMENT OF CONVICTION,
SENTENCE, AND DENIAL OF POSTCONVICTION MOTION
ENTERED IN THE GRANT COUNTY CIRCUIT COURT,
THE HONORABLE ROBERT P. VANDEHEY PRESIDING.**

BRIEF OF DEFENDANT – APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
STATEMENT OF THE ISSUE	4
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	4
SUMMARY OF THE ARGUMENT	5
STATEMENT OF FACTS	5
ARGUMENT	8
THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT DENIED EXPUNGEMENT AS THE FACTS IN THE RECORD OR A REASONABLE INFERENCE FROM THESE FACTS DO NOT SUPPORT THE CIRCUIT COURT’S REASONING AND THE BENEFIT OF EXPUNGEMENT TO MR. DAY IS SIGNIFICANTLY OUTWEIGHED BY ANY HARM TO SOCIETY	8
A. Standard of Review	8
B. The reasons set forth by the circuit court reveal the decision denying expungement was erroneous.	9
C. The circuit court erroneously exercised its discretion in denying expungement and the facts in this case demonstrate that expungement is warranted and promotes the purpose of the expungement statute.	12
CONCLUSION	13
CERTIFICATION AS TO FORM/LENGTH	14

TABLE OF AUTHORITIES

Cases

<i>McCleary v. State</i> , 49 Wis. 2d 263, 182 N.W.2d 512 (1971)	10
<i>State v. Allen</i> , 2017 WI 7, 373 Wis. 2d 98, 890 N.W.2d 245	13
<i>State v. Helmbrecht</i> , 2017 WI App 5, 373 Wis. 2d 203, 891 N.W. 2d 412.....	7, 9
<i>State v. Hemp</i> , 359 Wis. 2d 320, 856 N.W. 2d 811 (Wis. 2014)	13
<i>State v. Leitner</i> , 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341	13

Statutes

Wis. Stat. §809.23(1)(b).....	5
Wis. Stat. §940.225(3m)	7
Wis. Stat. §948.02(1) or (2)	6
Wis. Stat. §973.015	9, 10

Other Authorities

https://www.dictionary.com/browse/assault	11
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STATEMENT OF THE ISSUE
STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Appellant Sean D. Day does not believe oral argument is necessary to address the issues raised on appeal or that publication is warranted under Wis. Stat. §809.23(1)(b).

SUMMARY OF THE ARGUMENT

The circuit court erroneously exercised its discretion when it denied Mr. Day's request for expungement. The facts in the record and reasonable inferences from these facts demonstrate Mr. Day would benefit greatly from expungement especially because of his prior conviction, Mr. Day did appreciate the seriousness of the offense, and expungement would not deter district attorneys from offering amendments to similar charges. Accordingly, when balancing the benefit to Mr. Day with the harm to society, if any, the circuit court erroneously exercised its discretion in denying expungement.

STATEMENT OF FACTS

On December 23, 2019, Mr. Day was charged with one count of Repeated Sexual Assault of a Child (Wis. Stat. §948.02(1) or (2)). (R1:1). The complaint alleged that on two occasions between November 17, 2019 and November 27, 2019, Mr. Day had sexual contact with a 14-year-old female. (R2:1). When the contact occurred, Mr. Day was a 17-year-old high-school senior. (R23:2). No threatening behavior, use of force, or violence was associated with the contact. (R11:2). The contact was considered age appropriate from a developmental psychology perspective. (R23:8).

At the time of contact, Mr. Day was on probation for one count of "Sexual Intercourse with a Child Aged 15 or Older, Actor Under 19." (See Attached Exhibit A - Grant County Case 2020CM206). Mr. Day had pled no-contest to this charge three weeks before the contact occurred in the instant case. The circuit court of Grant County imposed a two year term of probation in 2020CM206. (*Id.*) Probation in that case was revoked as a result of the contact, and on February 10, 2020, Mr. Day was sentenced to four (4) months jail in 2020CM206. (*Id.*)

The time Mr. Day spent in jail was a life altering experience. (R22:5). Mr. Day learned he needed to "choose an appropriate life path, and alter his ways." (R23:2).

After his release from jail, Mr. Day underwent a psychosexual evaluation relating to the instant case. (R22:3). No evidence of sexual preoccupation was found and the evaluator noted the contact in this case was “activity considered age appropriate from a developmental psychology perspective.” (R23:8). The evaluator also noted 47% of high school students in our nation have sexual intercourse and that number is 42% in Wisconsin. (R23:9). The evaluator also concluded Mr. Day has a low probability of sexual recidivism. (R23:9-10).

On May 7, 2020, Mr. Day pled no contest in this case to an amended charge of 4th Degree Sexual Assault (Wis. Stat. §940.225(3m) - Class A Misdemeanor.) (R51:11). Mr. Day was placed on probation for two years and the circuit court imposed and stayed a nine (9) month jail sentence. (R37:1). At the sentencing hearing, defense counsel asked the circuit court to order expungement, but the circuit court forgot to rule on that request before the hearing concluded. (R51:21; R49:30).

The day after sentencing, defense counsel informed the circuit court the judgment of conviction did not contain an expungement decision. (R29:1). Defense counsel asked the circuit court whether it intended to grant or deny expungement and if it intended to grant expungement, to amend the judgement of conviction accordingly. (R29:1).

The following day, the circuit court responded in a letter that it intended to deny expungement “primarily because Mr. Day was already provided an opportunity to expunge his first case [the Grant County 19CM620 case] and failed, rendering an expungement in this case of limited value to him.” (R30:1). At the conclusion of a restitution hearing that occurred a few weeks later, the circuit court stated it “forgot to address expungement at the time of the first hearing, and that was because I wasn’t going to grant it[.]” (R49:30).

On April 12, 2021, Mr. Day filed a postconviction motion asking the circuit court to grant expungement or, in the alternative, to set forth on the record the reasons for denying expungement. (R57:2-3).¹

¹ The motion cited *State v. Helmbrecht*, 2017 WI App 5, ¶12, 373 Wis. 2d 203, 891 N.W.2d 412 wherein this Court stated, “We hold that in assessing whether to grant

At the postconviction motion hearing, the circuit court set forth its reasons for denying expungement. The circuit court stated that while it believed Mr. Day would benefit from expungement, it qualified that belief by stating the benefit would not be as meaningful because of his conviction in 20CM620. (R63:10-11). The circuit court also stated that while the “effect upon society as a whole is normally [] pretty minor,” granting expungement in this case would deter district attorneys from offering amended charges in similar cases, and encouraging district attorneys to amend similar charges is in everyone’s interest, including defendants, victims, and the public. (R63:11). The circuit court further explained that because contact in this case occurred very shortly after Mr. Day was placed on probation, the circuit court didn’t feel Mr. Day appreciated the seriousness of his conduct. (R63:11).

Mr. Day now appeals the circuit court’s decision, arguing that its denial constitutes an erroneously exercise of discretion.

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.” (R57:2-3).

ARGUMENT

The Circuit Court erroneously exercised its discretion when it denied expungement as the facts in the record and a reasonable inference from these facts demonstrate the benefit of expungement to Mr. Day is significantly outweighed by any harm to society.

The circuit court essentially provided the following three reasons for denying expungement:

- (1) The benefit Mr. Day would receive is less meaningful because of his other conviction;
- (2) Expungement would discourage district attorneys from offering amendments to charges in similar cases; and
- (3) Mr. Day did not seem to appreciate the seriousness of the underlying offense as it occurred shortly after he was placed on probation for a prior offense. (R63:11).

Mr. Day contends these reasons are not supported by the record and the circuit court's decision denying expungement constitutes an erroneous exercise of discretion.

A. Standard of Review

A circuit court's authority to order expungement is derived from Wis. Stat. §973.015. This statute provides that if a defendant is statutorily eligible for expungement², then the circuit court may, at the time of sentencing, order "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. §973.015(1m)(a)1.

² There is no dispute that Mr. Day was statutorily eligible for expungement. To be eligible for expungement, a defendant must be under the age of 25 when the offense occurred and the maximum period of incarceration for his convicted crime was less than six years. (See Wis. Stat. §973.015(1m)(a)1). Mr. Day satisfies both these conditions.

The decision to grant expungement lies within the discretion of the circuit court. *State v. Helmbrecht*, 2017 WI App 5, ¶11, 373 Wis. 2d 303, 891 N.W.2d 412. However, this discretion is guided by two factors: (1) whether the person will benefit from expungement and (2) whether society will be harmed by expungement. *Id.* When ruling on expungement, the circuit court must set forth its process of reasoning on the record as to the benefit defendant would receive and the harm, if any, to society. *Id.* at ¶12.

When this Court reviews a circuit court's expungement decision, the review begins with this Court affording the circuit court a strong presumption of reasonability. *Id.* A decision will not be reasonable however if it fails to contemplate a process of reasoning based on facts in the record, reasonable inferences from the record, or it demonstrates a conclusion based on improper legal standards. *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512, 219 (1971). In other words, if the circuit court relies on relevant facts in the record, makes reasonable inferences derived from the facts on record, and applies a proper legal standard to reach a reasonable decision, the Court of Appeals will not disturb the discretionary decision of the circuit court. *Helmbrecht* at ¶12.

On appeal, the burden is on a defendant to show the circuit court's decision was erroneous. *Id.* at ¶11. But even if the circuit court's decision was erroneous, the Court of Appeals will not set aside the sentence if, following a review of the record, the facts of record will sustain the sentence as a proper exercise of discretion. *McCleary* at 282.

B. The reasons set forth by the circuit court reveal the decision denying expungement was erroneous.

Wis. Stat. §973.015 requires the circuit court weigh the benefit of expunction against the harm to society. Each of these factors shall be addressed in turn.

The Benefit to Mr. Day

The circuit court unequivocally noted Mr. Day “would [certainly] benefit from expungement[.]” (R63:10). However, the circuit court then went on to qualify that benefit and stating expungement would not be as “meaningful” to Mr. Day because of his prior conviction in 20CM620. (R63:10). The facts in this case support just the opposite, that expungement would be more meaningful to Mr. Day in light of the prior conviction.

Mr. Day is seeking expungement of his conviction for “Fourth Degree Sexual Assault.” His prior conviction was for “Sexual Intercourse with a Child Age 15 or Older, Actor Under 19.” (See Attached Exhibit A.) Mr. Day is not eligible for expungement of his prior conviction. Accordingly, the prior conviction will be a part of Mr. Day’s record for the foreseeable future.

Accordingly, any potential employer or other individual conducting a search on CCAP pertaining to Mr. Day and his criminal history will encounter the prior conviction for “Sexual Intercourse with a Child Age 15 or Older, Actor Under 19.” On its fact, this charge contains the details of what occurred: intercourse between two teenagers. Nothing on the fact of this charge reveals the intercourse was the result of force, coercion, threats, or violence.

On the other hand, the conviction for “Fourth Degree Sexual Assault” is far less forgiving and far more damaging to Mr. Day. The definition of “assault” according to www.dictionary.com is:

1. a sudden, violent attack; onslaught: *an assault on tradition*.
2. *Law*. An unlawful physical attack upon another; an attempt or offer to do violence to another, with or without battery, as by holding a stone or club in a threatening manner. (See <https://www.dictionary.com/browse/assault>).

While the common definition of assault involves violence, force, or threats, there was no such underlying violence, force, or threats, that accompanied this case. Accordingly, the title of the charge alone, “fourth degree sexual assault” is significantly more harmful to Mr. Day than his prior conviction.

In addition, having two sexually related convictions on one's record indicates a pattern of criminal sexual acts and a likelihood of recidivism. However, the only evidence as to recidivism is the psychosexual evaluation that concluded Mr. Day's risk of recidivism was low. (R23:8). In addition, Mr. Day's second conviction does not, on its face, indicate Mr. Day's behavior was age appropriate from a developmental psychology perspective. (R23:8). For these two reasons, the circuit court's finding that the second conviction would be less meaningful because of the first conviction, is simply erroneous.

Harm to Society

In addressing the harm to society, the circuit court began by stating "the effect upon society as a whole is normally, you know, pretty minor" and "society benefits when the person can be as successful as possible." (R63:10). The circuit court then went on to conclude that society would be harmed by expungement because expungement would discourage district attorneys from offering amendments to charges in similar cases, and that is not in the best interests of society. (R63:11).

No factual basis exists in the record supporting the circuit court's reasoning that expungement in this case would deter district attorneys from amending charges. While it is not unreasonable to conclude that expungement may be a factor taken into account by a district attorney when deciding how or whether to amend a charge, there is nothing in the record to support that expungement in this case would discourage district attorneys from amending charges.

What is reasonable is that there are numerous factors (strength of the evidence, availability of witnesses, etc.) that go into a district attorney's decision to amend a charge. If a district attorney is discouraged from amending the charges because of expungement, and easy way to prevent this is to make it part of the plea agreement that a defendant will not ask for expungement. Accordingly, a conclusion that expungement in this case would harm society by deterring district attorneys from amending charges is erroneous.

- C. The circuit court erroneously exercised its discretion in denying expungement and the facts in this case demonstrate expungement is warranted and would promote the purpose of the expungement statute.

The purpose of the expunction statute is 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. The expunction statute allows the Court to shield a youthful offender 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. Expungement also allows offenders a second chance to become 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. *State v. Hemp*, 359 Wis. 2d 320, ¶19, 856 N.W.2d 811 (Wis. 2014).

Mr. Day was 17 years old when he charged with the underlying offense. He was 17 years old when he pled guilty to Sexual Intercourse with a child aged 15 or older in 2020CM620. The contact committed by Mr. Day was age appropriate from a psychological standpoint and his chances of recidivism are low. (R23:8). As noted above, Mr. Day would benefit greatly from having expunged this second sexually related offense entitled “fourth degree sexual assault” and the record does not support that society would be harmed by his expungement.

Finally, while the circuit court also stated expungement was not warranted because the offense occurred so soon after Mr. Day was put on probation and therefore did not seem to appreciate the seriousness of this conduct, this too is not supported by the record. (R63:11). The underlying offense occurred within a few weeks after Mr. Day was placed on probation for the 2020CM620 offense. Since Mr. Day was charged in the underlying offense, the record supports Mr. Day appreciated the seriousness of the offense. Mr. Day expressed remorse for his actions and has accepted responsibility. (R59:1). Mr. Day indicated that the time he spent in jail, which

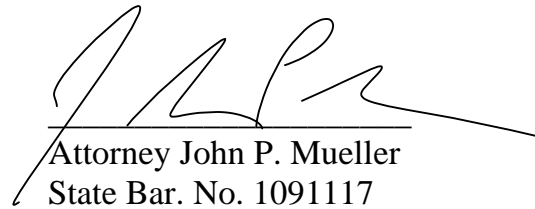
directly relates to the contact, was a life altering experience. (R22:5). While it may be more accurate to conclude Mr. Day did not accept responsibility for the first offense, it is erroneous to conclude he did not appreciate the seriousness of the underlying offense.

CONCLUSION

For the reasons set forth above, Mr. Day asks this Court to find the circuit court erroneously exercised its discretion in denying expungement, to reverse the order of the circuit court denying expungement, and to remand the matter to the circuit court with instructions that the circuit court amend the judgment of conviction accordingly with an order for expungement.

Dated this 23rd day of August 2021.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JPM', is written over a horizontal line.

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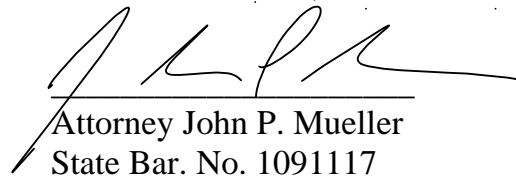
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s.809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,581 words.

Dated this 23rd day of August 2021.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J P Mueller', is written over a horizontal line.

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