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COURT OF APPEALS

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

Appeal No. 2022AP995-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Isaac M. Gabler,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

**Appealed from an Order Entered in the Circuit
Court of Calumet County, Wisconsin,
The Honorable Jeffrey Froehlich Presiding
Trial Court Case No. 2020CF105**

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STATEMENT OF THE ISSUES

Did the circuit court consider inaccurate information when denying the defendant's request to expunge his conviction?

Trial Court Answered: No.

Did the circuit court properly exercise its discretion in denying the defendant's request for expungement?

Trial Court Answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not believe that oral argument is necessary as the issues raised on appeal will be fully developed in the briefs submitted to the Court. The State further believes that publication is unnecessary because the issues involve an application of well-settled rules of law to a recurring fact situation in trial courts.

STATEMENT OF THE CASE

On April 5, 2020, R.G., the father, of E.G., was outside his residence when Isaac Gabler pulled in. (Doc. No. 2 - Criminal Complaint at 2-3.) Gabler approached R.G. and asked him a series of strange questions about R.G.'s daughter, E.G. Gabler asked if he could take E.G., and R.G. replied no. (*Id.*) Gabler then stated he wanted to take E.G. so she could take his virginity. (*Id.*) R.G. told Gabler it would be best for him to leave. (*Id.*) Gabler replied, "are you sure you want to do that." (*Id.*) Gabler stood there staring at R.G. with an eerie smile on his face. (*Id.*) R.G. found Gabler's comment and reaction as threatening. (*Id.*) Gabler slowly walked back to his vehicle and slowly backed out of the driveway. (*Id.*) All the while, staring and smiling at R.G. (*Id.*) Later, R.G. saw Gabler slowly drive by the residence continuously staring. (*Id.*)

R.G. told his daughter, E.G., about the bizarre encounter. (*Id.* at 3.) E.G. said that Gabler had texted her the night before and again that day. (*Id.*) E.G. described the messages from Gabler as strange and not normal. (*Id.*) The messages began with Gabler telling her that he would be coming to her home to see her and help with homework. (*Id.*) E.G. told him not to. Gabler said he was coming to her home. (*Id.*) E.G. said why, and Gabler replied "Because I want you to take my virginity." (*Id.*)

This information was subsequently reported to the Calumet County Sheriff's Office. (*Id.* at 2-3.) While taking the complaint, a friend and previous college

roommate of Gabler, arrived at E.G.'s residence. (Doc. No. 79 - Def's Postconviction Motion Exhibit 1 – Motion to Vacate, Exhibit J at 15.) The friend explained that he was previously on the phone with Gabler while Gabler was driving by the residence. (*Id.*) The friend learned from Gabler what he was doing, which caused the friend to become afraid that Gabler would go back to see E.G. (*Id.*) So, the friend tried to distract Gabler in an effort to prevent Gabler from going back to E.G.'s residence. (*Id.*) The friend also reported that while at college with Gabler, Gabler would smoke marijuana and take non-prescribed medication, and more recently, Gabler began to act strangely and distance himself. (*Id.*) Then, due to COVID-19, Gabler and his friend moved back home. (*Id.*)

E.G.'s mother contacted Gabler's mother to report what had occurred. (*Id.*) Gabler's mother explained they would be taking Gabler to ThedaCare Regional Medical Center in Neenah. (*Id.*)

Deputy George Beattie of the Calumet County Sheriff's Office met up with Gabler at ThedaCare hospital. (Doc. No. 2 - Criminal Complaint at 3.) While speaking to Gabler, Deputy Beattie got the impression that Gabler did not seem to understand the inappropriateness of the comments that he made to R.G. or E.G. (*Id.*) Deputy Beattie issued a written warning to Gabler. (Doc. No. 79 - Def's Postconviction Motion Exhibit 1 – Motion to Vacate, Exhibit J at 17.) Deputy Beattie also instructed Gabler that he should not try to

contact E.G. or her family as they do not want any contact from him. (*Id.*) Deputy Beattie's warnings were also conveyed to Gabler's mother. (*Id.*)

On April 8, 2020, a Petition for a Temporary Restraining Order – Harassment (TRO) was filed against Gabler. (Doc. No. 78 - Def's Postconviction Motion Exhibit 1 – Motion to Vacate, Exhibit A at 14-17.) The Petitioner was listed as E.G. but her father, R.G. was also identified as the person completing the form on behalf of the petitioner. (*Id.*; *see also* Doc. No. 75 – Def's Postconviction Motion Exhibit 2 – Transcript of Injunction Hr'g April 22, 2020 at 5:20-9:3.) That same day, R.G. submitted a letter to the Court informing the Court that, according to Gabler's mother, Gabler was admitted to Rogers Behavioral Health in Oconomowoc. (Doc. No. 78 - Def's Postconviction Motion Exhibit 1 – Motion to Vacate, Exhibit B at 18; *see also* Doc. No. 75 – Def's Postconviction Motion Exhibit 2 – Transcript of Injunction Hr'g April 22, 2020 at 2:9-4:14.)

On April 14, 2020, the Waukesha County Sheriff's Office served the notice of the TRO on Gabler through substitute service. (Doc. No. 78 - Def's Postconviction Motion Exhibit 1 – Motion to Vacate, Exhibit D at 20.) The service was to Rogers Behavioral Health staff due to the present COVID 19 restrictions. (*Id.*) The notice of hearing had instructions for Gabler to call into the Court hearing, given the present COVID 19 court operational orders. (*Id.*)

On April 22, 2020, R.G. and his family appeared telephonically before the Honorable Judge Jeffrey Froehlich, in Calumet County case 20CV52. (Doc. No. 75 – Def’s Postconviction Motion Exhibit 2 – Transcript of Injunction Hr’g April 22, 2020 at 2:6-8; 4:21-24.) During that hearing, Judge Froehlich directed an amended petition for TRO be filed. (*Id.* at 6:5-9:4.) The Court required the signature on the petition to be from E.G. rather than R.G., who assisted her with the petition. (*Id.*) The hearing was adjourned until April 29, 2020. (*Id.*) An amended petition for TRO was filed later on April 22, 2020. (Doc. No. 78 - Def’s Postconviction Motion Exhibit 1 – Motion to Vacate, Exhibit F at 22.)

On April 29, 2020, an injunction hearing was held in 20CV52 upon the amended petition. (Doc. No. 80 – Def’s Postconviction Motion Exhibit 3 – Transcript of Injunction Hr’g April 29, 2020.) That hearing was conducted by telephone due to the court operational orders relating to COVID 19. (*Id.* at 2:9-24.) E.G. and R.G. appeared by phone, while Gabler and his attorney, Amy Menzel, appeared by phone. (*Id.*) All involved waived any objections to the use of telephonic proceedings. (*Id.*)

During the hearing on April 29, 2020, Gabler’s attorney, Amy Menzel, proposed an agreement “that this temporary restraining order be held open or really extended for six months” to avoid an injunction being issued. The parties stipulated that “the conditions and terms of the temporary restraining order would remain in

full force and effect with all of the no contacts and all of those conditions. If [Gabler] can show that he's able to follow that, and certainly if [E.G.] feels confident that he's no longer wishing to have contact with her, perhaps in six months [E.G.] would dismiss this action and not pursue the more permanent injunction. However, in that six months if there's still problems, obviously [Mr. Gabler] would have legal problems, but [E.G.] could then still have the option to pursue the more permanent injunction if she still feels it's necessary." (*Id.* at 2:25-3:23.) Both parties agreed to these terms. (*Id.* at 4:19-6:21.)

During this hearing Gabler waived his right to the hearing to contest the petition, stipulated to the six month extension, and was warned by the Court that "violations of this order would constitute a mandatory arrest..." (*Id.* at 6:22-8:25.) On April 29, 2020, the Honorable Jeffrey Froehlich signed the Amended TRO, which was in effect until October 29, 2020. (Doc. No. 78 - Def's Postconviction Motion Exhibit 1 – Motion to Vacate, Exhibit H at 27.)

On April 30, 2020 the Calumet County Sheriff's Office dispatch was contacted by Gabler. (Doc. No. 79 - Def's Postconviction Motion Exhibit 1 – Motion to Vacate, Exhibit J at 7.)¹ Gabler said he was not in a safe environment, there was tension between his parents and

¹ It should be noted that in the probable cause section of the Criminal Complaint the date is listed incorrectly as April 29, 2020. This citation is to the original incident reports, which properly identifies the date as April 30, 2020.

him, and his father was being overly aggressive and threatening. Gabler hung up the call. (*Id.*) Deputy Joseph Tenor spoke to Gabler's father, who reported that Gabler was released from Rogers Behavioral Health, Gabler suffers from a delusion disorder, and Gabler was not taking his medication as prescribed. (*Id.*) Gabler was last seen leaving the house and carrying the family dog. Gabler's father feared that Gabler was going to run down the railroad tracks to E.G.'s residence. (*Id.*)

Only a few moments later, it was reported that Gabler was knocking at the front door of E.G.'s residence in violation of the TRO. (*Id.* at 9.) While on the way to the residence, Deputy John McGuire spotted the family dog sitting in the roadway near the railroad tracks. (*Id.*) Deputy McGuire then arrived at the residence while Gabler was knocking. (*Id.*)

Deputy McGuire spoke to Gabler. (*Id.*) Gabler said the dog is the devil, there was a demon element in the dog and we needed to get rid of it. (*Id.*) Gabler stated he ran from his house because he parents were possessed. (*Id.*) He stated he did not feel safe in his house and held up a sheet of paper with a photocopy picture of two hands in handcuffs. (*Id.* at 7-8.) When asked about the picture, Gabler said his parents taped it to the door to remind him that he would be arrested. (*Id.* at 8.) Gabler was asked why he was at the residence. (*Id.* at 9.) Gabler said "I'm here to take [E.G.'s] virginity." (*Id.*) Deputy McGuire asked Gabler if he was aware that there was a temporary restraining order prohibiting him from being at the

residence and prohibiting him from making contact with E.G. Gabler said he was aware. (*Id.* at 9-10.)

Gabler was arrested for violating the temporary restraining order. (*Id.* at 10.) Gabler's parents were contacted but they declined to pick Gabler up from jail because they feared Gabler would run from the residence again and go to E.G.'s residence. (*Id.*)

E.G. spoke to law enforcement about the emotional distress caused by Gabler's actions. (Doc. No. 2 - Criminal Complaint at 4-5.) E.G. stated she was home on April 30th when Gabler came to the residence. (*Id.*) E.G. described it as being "the most scared I've ever been in my life." (*Id.*) E.G. stated, "A wave of fear" came over her. (*Id.*) E.G. stated when she found out Gabler was at her residence it "made my heart stop." (*Id.*) E.G. stated she has lost sleep because of Gabler. (*Id.*) E.G. stated she enjoys running, but she has avoided going on a run until she knows that Gabler had been hospitalized. (*Id.*) E.G. is in athletics at college and she told her coaches and friends about the incident in an effort to have extra security provided for her during athletic events. (*Id.*) E.G. stated she does not feel safe in her house or in her driveway. (*Id.*) She has difficulty sleeping even though she has known Gabler had been in jail or the hospital. (*Id.*) E.G. stated she is afraid of Gabler using "any means possible" to come into her house. (*Id.*) E.G. stated she is fearful that Gabler may attempt to force himself upon her and touch her inappropriately. (*Id.*)

Her family made plans for if and when Gabler tries to enter the house. (*Id.*) They have even had discussions about moving E.G. to be safe. (*Id.*) In addition, R.G. said he has had to change his practices at home because of Gabler. (*Id.*) R.G. stated he does not normally carry a gun; however, he has had to carry a gun within his residence for fear of Gabler. (*Id.*) R.G. explained he has initiated safety plans within the residence in case Gabler would come to the residence. (*Id.*)

On May 6, 2020, the criminal complaint in this case was filed charging Gabler with Stalking, contrary to Wis. Stat. § 940.32(2); Disorderly Conduct, contrary to Wis. Stat. § 947.01(1); Violation of Temporary Restraining Order – Harassment, contrary to Wis. Stat. § 813.125(3); and Disorderly Conduct, contrary to Wis. Stat. § 947.01(1). (*Id.*) On May 11, 2020 an initial appearance was held. (Doc. No. 9 – Minutes from Initial Appearance on May 11, 2020.) Gabler was represented by counsel, Amy Menzel. (*Id.*) Competency was raised. (*Id.*) On May 28, 2020, the Court found Gabler not competent but likely to regain. (Doc. No. 15 – Minutes from Competency Hearing on May 28, 2020.) Gabler remained at Winnebago Mental Health Institution in an effort to restore his competency. (*Id.*) On July, 7, 2020, Gabler was found to be competent. (Doc. No. 25 – Minutes from Review Hearing on July 7, 2020.)

By September 21, 2020, Gabler and the State of Wisconsin reached an agreement and settled the criminal case. (Doc. No. 53 – Transcript of Plea and Sent. Hr’g on

September 21, 2020.) The Statement of Negotiated Plea set forth the terms of the agreement. (Doc. No. 38 – Statement of Negotiated Plea). Gabler entered no contest pleas to the three misdemeanor counts, and the felony Stalking count was dismissed and read-in. (Doc. No. 53 – Transcript of Plea and Sent. Hr’g on September 21, 2020 at 7:11-15:21.) The State agreed to recommend two years of probation as the disposition. (*Id.* at 16:11-18:19.) Gabler recommended one year of probation and expungement. (*Id.* at 18:21-23:7.)

Ultimately, the Court withheld sentence and placed Gabler on probation for two years. (*Id.* at 24:1-25:12.) The Court stated the following regarding expungement: “As far as expungement goes here, Mr. Gabler has received the significant benefit of having the felony charge dismissed and read-in, and the Court believes that there needs to be some information available to the public given the events that took place here, so the Court is not going to allow for expungement in this matter.” (*Id.* at 25:13-19.)

Subsequently, Attorney Menzel provided additional argument in support of expungement: “I understand the Court’s desire that there be something on the record. There is the restraining order that will always show up on a background check, so I just would remind the Court that that is there and that’s available for the public to see, so I’d just ask you to reconsider your decision about denying expungement.” (*Id.* at 26:17-25.)

The Court replied, “I appreciate that that record is still out there, but there is a significant difference between just knowing that an order was entered at some point in the past and knowing that the order was violated.” (*Id.* at 27:1-5.)

On September 21, 2020, Attorney Menzel submitted a letter to the court, clarifying the mental health diagnosis of Gabler and requesting additional reconsideration of the Court’s expungement decision in light of the diagnosis. (Doc. No. 39 – Letter from Atty Menzel to Court on September 21, 2020.)

On October 7, 2020, the Honorable Judge Froehlich wrote a reply to this third request for expungement: “The Court did not form its opinion denying expungement based upon any particular mental health diagnosis nor Mr. Jones’ comments that your client may be suffering from schizophrenia. The Court’s concern was that while the public might have been able to ascertain that Mr. Gabler had an injunction ordered against him that information was not sufficient. The Court believes there is a vast difference between have an injunction ordered against an individual and knowing that the individual violated that injunction. For public safety reasons the Court believed it was important that that information be accessible.” (Doc. No. 49 – Letter from Court to Atty Menzel on October 7, 2020.)

On February 17, 2022, Gabler filed a postconviction motion seeking “an order granting Mr. Gabler expunction of his conviction” alleging that his “trial counsel was

ineffective as a matter of law for failing to properly detail the procedural and substantive history of the injunction matter for the sentencing court, resulting in the court considering inaccurate information regarding Gabler's knowledge and level of culpability in his failure to adhere to the conditions of the court ordered temporary restraining order issued in Calumet County Case Number 2020CV52." (Doc. No. 71 – Def's Postconviction Motion at 1-2.)

Specifically, Gabler alleges that trial counsel was ineffective in three different Calumet County cases: the criminal case (20CF105), the temporary restraining order hearing and subsequent injunction (20CV52), and the Chapter 51 mental health commitment case (20ME42). (*Id.* at 16.) According to Gabler, in 20CV52 trial counsel was ineffective for failing to file necessary and appropriate objections and failed to request dismissal of the temporary restraining order. (*Id.*) Also according to Gabler, "when the court was considering the defense's request for expunction, it unknowingly considered inaccurate information about the nature of the supposed violation of the temporary restraining order and the level of culpability he had in attempting contact with [E.G.] on April 30, 2020. Thus...the court relied upon inaccurate information in the expunction determination and denied Mr. Gabler expunction privileges, it engaged in an erroneous exercise of discretion...." (*Id.* at 16-17.) In the end, the postconviction motion requested the sentencing hearing be reopen, the expunction determine be

reconsidered and Gabler be granted expunction. (*Id.* at 18.)

Despite the cryptic postconviction motion, in Gabler's reply brief to his postconviction motion he clarified his position that he is making "a straightforward *Tiepelman* challenge – that the sentencing court relied on incorrect information regarding the validity of the temporary restraining [order], the service of those documents, and Mr. Gabler's mental status and incompetence at the time of the April 2020 restraining order hearing at the time the restraining order was violated when it denied Mr. Gabler's request for expunction...." (Doc. No. 97 – Def's Postconviction Motion Reply Brief at 1.)

The Honorable Judge Froehlich issued a written decision indicating "whether [Gabler] knowingly or unknowingly violated the restraining order is of no consequence to the Court's decision on expungement. What the Court believed and continues to believe is important for the public to know, so that the members of the public are 'on notice' and can take measures to protect themselves and others, is that there was a temporary restraining order in place and that the order had been violated. The Court did not rely on inaccurate information when making that decision." (Doc. No. 98 – Court's Decision on Def's Postconviction Motion at 2.)

This appeal followed.

ARGUMENT

The circuit court was not presented with and did not rely on any inaccurate information when denying Gabler expungement, and it properly exercised its discretion in doing so.

Gabler's underlying conviction for intentionally violating a TRO is not at issue in this case. Gabler challenges only the circuit court's decision to deny his request for expungement when sentencing him for that conviction. (Gabler's Br. at 6.) The court is authorized, pursuant to Wis. Stat. § 973.015(1m)(a)1, to expunge certain criminal convictions of an offender under certain conditions if "the court determines the person will benefit and society will not be harmed by this disposition." *State v. Helmbrecht*, 2017 WI App 5, ¶ 8, 373 Wis. 2d 203, 891 N.W.2d 412. "The determination of this sentencing issue involves the circuit court's discretion, which, on review, an appellate court will disturb unless erroneously exercised." *Id.* (citing *State v. Gallion*, 2004 WI 42, ¶ 8, 270 Wis. 2d 535, 678 N.W.2d 197).

The State does not dispute that a sentencing court could erroneously exercise its discretion in denying expunction if it relies on errors of fact to make its decision. (Gabler's Br. at 20–23); *See State v. Tiepelman*, 2006 WI 66, ¶ 9, 2291 Wis. 2d 79, 717 N.W.2d 1. Unlike the exercise of discretion to impose a sentence based on correct facts, whether a circuit court was presented with inaccurate information at sentencing and actually relied

on that information is a question of law reviewed de novo. *Id.*

A. The sentencing court was not presented with any inaccurate information nor has Gabler shown that the circuit court relied on any inaccurate information.

Gabler's brief makes two arguments in support of establishing inaccurate information: the Court's use of the term "injunction" when denying the defendant's third request to expunge and Gabler's violation was unintentional because there was a lack of personal service and Gabler was incompetent as a matter of law at the time the TRO as issued. (Gabler's Br. at 23-24.)

The Court, using the imprecise word "injunction" on one occasion does not equate to reliance on inaccurate information. Language must be evaluated in context and not in isolation. The plea hearing, sentencing hearing, and decision of expungement all occurred on September 21, 2020. (Doc. No. 53 – Transcript of Plea and Sent. Hr'g on September 21, 2020.) A statement of negotiated plea and a plea questionnaire outlined that Gabler would be entering a no contest plea to a violation of the temporary restraining order – harassment (Count 3), among others. (*Id.* at 3:10-15.)

During the plea colloquy, the Court specifically reviewed the charges, the maximum penalties, and the elements of the charges with Gabler. (*Id.* at 8:14-9:4.) The Court stated "In Count 3 you're charged with violation of a temporary restraining order – harassment."

The Court stated that “the State would have to prove beyond a reasonable doubt that a temporary restraining order was issued against you prohibiting you from being involved in specific conduct and, secondly, that you committed an act that violated the terms of that temporary restraining order, and that you knew that the temporary restraining order had been issued and knew that your actions were going to violate its terms....” (*Id.*) Gabler acknowledged an understanding to all of this. (*Id.*)

During this hearing the Court did use the term “order” when denying the request to expunge, but this was on the heels of Attorney Menzel’s argument that “the restraining order...will always show up on a background check, so...that’s available for the public to see, so I’d just ask you reconsider your decision about denying expungement.” (*Id.* at 26:17-27:5.)

Never once did the Court reference an “injunction” on the day of the plea and sentencing and original expungement determination and the reconsideration request. So for Gabler to now argue that this “demonstrates reliance on inaccurate information” is utterly disingenuous. (Gabler’s Br. at 23.)

It was not until Gabler’s third request to expunge, in the letter to the Court dated September 21, 2020, that the Court responded with the imprecise language in its letter dated October 7, 2020. (Doc. No. 49 – Letter from Court to Atty Menzel on October 7, 2020.)

The context in which that statement was made shows that the circuit court was imprecise in its language. Obviously the circuit court was referring to his violation of the TRO, which was indeed in place at the time of the violation, because Gabler was never convicted for violating any “injunction” and the sentencing occurred on violation of the TRO, and a trial court’s trivial verbal slip does not equal reliance on inaccurate information.

Gabler’s second premise, that Gabler did not intentionally violate the TRO because of a lack of personal service and incompetence, is based on similarly faulty reasoning. (Gabler’s Br. at 24.) Gabler plead no contest, was found guilty, and sentenced for intentionally violating a TRO. (Doc. No. 53 – Transcript of Plea and Sent. Hr’g on September 21, 2020.) To prove a violation of the TRO, the State must prove a TRO was issued against the defendant; the defendant committed an act that violated the terms of the TRO; and the defendant knew the TRO was issued and knew that his acts violated its terms. WIS JI-CRIMINAL 2040. Gabler’s no contest plea itself concedes the intentional nature of the violation.

The lack of personal service does not equate to a lack of knowledge and awareness of the TRO in this case. The TRO, granted by the Court on April 9, 2020, was served on Gabler through hospital staff, due to the COVID pandemic. (Doc. No. 78 - Def’s Postconviction Motion Exhibit 1 – Motion to Vacate, Exhibit D at 20.) The law enforcement officer attempting service was

required to use a substitute method given the uniqueness of the pandemic. (*Id.*) Around the time after the substitute service, Gabler retained Attorney Menzel, and likely had communication with her leading up to the April 29, 2020 hearing. (Doc. No. 78 - Def's Postconviction Motion Exhibit 1 – Motion to Vacate, Exhibit G at 26.) After all, on April 29, 2020, Gabler and Attorney Menzel were able to follow the instructions to appear by phone due to the COVID-19 pandemic and the Wisconsin Supreme Court orders from March 22, 2020 and April 15, 2020. (Doc. No. 80 – Def's Postconviction Motion Exhibit 3 – Transcript of Injunction Hr'g April 29, 2020 at 2:2-24.)

Gabler agreed to have the TRO extended for 6 months. (*Id.* at 3:5-9.) The Court communicated directly with Gabler to ensure he understood the circumstances of the order. (*Id.* at 7:3-10.) The Court's direct communication with Gabler also ensured the seriousness of this order was stressed. (*Id.* at 8:16-25.). Then the Court approved the stipulation of Gabler, his attorney, and E.G and R.G. The Court's order continued the original TRO terms but extended the length of it. (*Id.* at 9:5-11.) The very next day, Gabler went to the victim's residence in violation of the order. (Doc. No. 79 - Def's Postconviction Motion Exhibit 1 – Motion to Vacate, Exhibit J at 7.) Then, when interviewed by law enforcement, Gabler stated he was aware of the TRO and his conduct was in violation of it. (*Id.*) These facts support the conclusion that Gabler intentionally violated an order he was aware of.

Regardless of any procedural problems with how the original TRO was initiated or the lack of personal service, Gabler was both present and represented by counsel at the April 29, 2020, hearing at which the terms were made clear to him. Gabler's statements to the Court on April 29, 2020 and his statements to the law enforcement officer on April 30, 2020, demonstrate that Gabler knew the terms of the TRO.

To the extent that there were errors in the TRO case, Gabler waived his right to challenge them based on his stipulation. Faults in procedure may have deprived the circuit court of competency to proceed over him. *See City of Cedarburg v. Hansen*, 2020 WI 11, ¶ 47, 390 Wis. 2d 109, 938 N.W.2d 463 (A loss of competence can be triggered by a variety of defects in statutory procedure. A lack of competency does not negate subject matter jurisdiction or nullify the judgement.... Lack of competency is not jurisdictional and does not result in a void judgement.). But, competency challenges are subject to the normal rules of waiver and are waived if not challenged in the circuit court prior to the proceeding. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 27, 273 Wis. 2d 76, 681 N.W.2d 190; *see also Studelska v. Avercamp*, 178 Wis. 2d 457, 461, 504 N.W.2d 125 (Ct. App. 1993) (objections to personal jurisdiction for insufficient service of process are waived if not timely made).

Furthermore, Gabler cannot collaterally attack the validity of a harassment injunction in a criminal prosecution for the violation of that injunction. *State v. Bouzek*, 168 Wis. 2d 642, 643, 484 N.W.2d 362 (Ct. App. 1992). There is no 6th Amendment Right to Counsel in civil cases. *State v. Krause*, 2006 WI App 43, ¶ 11, 289 Wis.2d 573, 712 N.W.2d 67. Likewise, there is no statutory right to counsel in TRO cases either – so there is no state-law right to effective assistance of counsel. *See In Interest of M.D.*, 168 Wis. 2d 995, 1004-1005, 485 N.W.2d 52 (1992). Therefore, the lack of personal service does not establish an unintentional violation, and does not defeat the criminal charge.

Gabler's next reckless assertion, that he was "incompetent as a matter of law," is also demonstrably false. (Gabler's Br. at 24.) A defendant is competent to proceed to trial if: "1) he or she possesses sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding, and 2) he or she possesses a rational as well as factual understanding of a proceeding against him or her." *State v. Garfoot*, 207 Wis. 2d 214, 222, 558 N.W.2d 626 (1997). Gabler does not present any evidence to suggest that Gabler lacked the capacity to understand the proceedings at the time. (Gabler's Br. at 24.)

During the April 29, 2020 hearing on the TRO, Attorney Menzel represented that "[m]y client has spent the last couple of weeks in an inpatient mental health

treatment facility. He's now taking medication. He's stabilized. I find him to be competent and able to communicate with me, but I know some other people involved in his life, they disagree with that at this time, but he is still actively engaged in outpatient treatment for his mental health issues, and I believe he's getting a much better handle on things than he had, and so considering all of those circumstances, that's why I think this proposal is a good idea at this time." (Doc. No. 80 – Def's Postconviction Motion Exhibit 3 – Transcript of Injunction Hr'g April 29, 2020 at 3:25-4:10.) Attorney Menzel also indicated that Gabler is living at his parents' home. (*Id.* at 5:16-17.)

The Court, in approving the stipulation to extend the TRO, found that the agreement to extend the TRO provided an incentive for Gabler to continue with his mental health treatment. (*Id.* at 6:14-20.) Further, the record demonstrates that Gabler expressed an understanding of the agreement and circumstances surrounding it, as he was able to appropriately answer questions and respond to the Court during its colloquy. (*Id.* at 6:22-8:25.)

Simply being mentally ill does not mean you're incompetent to proceed. The record reveals that Gabler was hospitalized at Rodger's Memorial prior to the April 29, 2020 hearing. (Doc. No. 78 - Def's Postconviction Motion Exhibit 1 – Motion to Vacate, Exhibit B at 18.) A petition for a Chapter 51 commitment was filed but

never pursued in Waukesha County. (Doc. No. 78 - Def's Postconviction Motion Exhibit 1 – Motion to Vacate, Exhibit C at 19.) Thus, there is nothing in this records to suggest that Gabler was not competent at the April 29, 2020 hearing.

What the record does reveal is that after Gabler's arrest on April 30, 2020 were other tools utilized to address Gabler's mental health issues. A Chapter 51 case, 20ME42, was filed, even though there was not a finding of incompetency in that case. (*See* Doc. No. 79 - Def's Postconviction Motion Exhibit 1 – Motion to Vacate, Exhibit J at 3-4.) In the criminal case, 20CF105, competency was raised but not until May 11, 2020, and the Court did not make a finding of not competent until May 28, 2020. (Doc. No. 9 – Minutes from Initial Appearance on May 11, 2020; Doc. No. 15 – Minutes from Competency Hearing on May 28, 2020.) Nonetheless, all of this occurred after the April 29, 2020 hearing.

What is apparent here is that Gabler is trying to bootstrap a challenge to the TRO proceedings in the criminal case, which is prohibited. His argument amounts to a backdoor collateral attack on issuance of the TRO itself, which is not properly before the court.

Assuming *arguendo*, that Gabler was so incompetent that he cannot comply with a simply no contact order, doesn't this support rather than refute the sentencing

court's decision to deny expungement on the grounds of public protection?

In short, Gabler has not demonstrated that anything presented to the court was inaccurate and has not pointed to a single part in the sentencing transcript where the circuit court relied on anything he's complaining about. What he is really doing is dressing up a challenge to the circuit court's exercise of discretion to deny expungement as an inaccurate information at sentencing challenge to circumvent the court of appeals' highly deferential standard of review of challenges to discretionary decisions of the sentencing courts, because that type of challenge would be clearly meritless.

"[T]he 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." *State v. Helmbrecht*, 2017 WI App 5, ¶ 12, 373 Wis. 2d 203, 891 N.W.2d 412 (2016). The circuit court did just that.

B. The sentencing court properly exercised its discretion when it determined that the public would be harmed if Gabler's conviction was expunged.

"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." *Id.* ¶ 8 (citing *State v. Thiel*, 2012 WI App 48, ¶ 6, 340 Wis. 2d 654, 813 N.W.2d 709). "[T]here is a strong public policy against any interference with the sentencing discretion of

the court and there is an equally strong presumption that the sentencing court acted reasonably.” *State v. Mata*, 2001 WI App 184, ¶ 13, 247 Wis. 2d 1, 632 N.W.2d 872. “The burden is on the defendant to show some unreasonable or justified basis for the sentence imposed.” *Id.* Wis. Stat. § 973.015 “puts forth two factors for the sentencing court to utilize in exercising that discretion after it determines whether a person is indeed eligible for expunction: (1) whether the person will benefit from expungement and (2) whether society will be harmed by the expungement.” *Id.* Here, the sentencing transcript shows that the circuit court considered the two required factors and explained why it was concluding that expungement was not appropriate.

The resolution in this case, pursuant to the Statement of Negotiated Plea, resulted in Gabler receiving a benefit by avoiding the felony conviction for Stalking. (Doc. No. 38 – Statement of Negotiated Plea.) But as the State noted “[t]here still is notice to the public with concerns for following court orders, which are outlined in the conviction of Count 3.” (Doc. No. 53 – Transcript of Plea and Sent. Hr’g on September 21, 2020 at 7:8-10.) The Court took this fact and others into consideration when determining whether the plea agreement was in the public interest. (*Id.* at 4:24-7:10) *see also State v. Conger*, 2010 WI 56 ¶ 27, 325 Wis. 2d 664, 797 N.W.2d 341.²

² The Circuit Court referred to this as a “*Comstock* Letter” referencing *State v. Comstock*, 168 Wis. 2d 915, 485 N.W.2d 354 (1992).

The Court found that Gabler's criminal acts were very serious: "[F]rom the perspective of [E.G.], they had to be quite terrifying giving her anxiety and fear because you were just not acting yourself." (Doc. No. 53 – Transcript of Plea and Sent. Hr'g on September 21, 2020 at 24:1-25:19.) The Court found that Gabler's "parents made a pretty significant effort to get [Gabler] to understand that there were going to be significant penalties if [he] didn't change [his] conduct, but unfortunately...those warning just didn't sink in." (*Id.*) The Court also noted that although progress with Gabler's mental health has been made, only a few months had passed from the violations. (*Id.*) Noting the significant break Gabler already received by avoiding a felony conviction, the Court rejected expungement to ensure that the public has notice about the events that took place. (*Id.*) This was particularly important to the Court because of the pattern of conduct by Gabler. (*Id.* at 27:1-5.)

These factual findings by the Court demonstrate that the Honorable Judge Froehlich properly considered Gabler's character, the harm it caused the victim, his lack of prior record, and the need to protect the public. This explanation supports the conclusion that when addressing the expungement question, the circuit court properly considered the facts and made a conclusion that expungement was not appropriate based on a rational and reasoned basis. Plainly, the record shows the Court acted reasonably.

CONCLUSION

This Court should affirm the circuit court's decision that it did not rely on inaccurate information when making the decision to denying expungement here. This Court should hold that the sentencing court properly exercised its discretion when it determined that the public would be harmed if Gabler's conviction was expunged.

Dated this 23rd day of December, 2022.

Respectfully submitted,



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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. It uses proportional serif font with 13 point body text, 11 point text for block quotes and footnotes, leading above the minimum of 2 points, maximum of 60 characters per full line of body text. The length of this brief is 6,022 words.

Dated this 23rd day of December, 2022.

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