STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2022AP995-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ISAAC M. GABLER,

Defendant-Appellant.

On Review from a Judgment of Conviction
Entered in Calumet County Circuit
Court, the Honorable Jeffrey S. Froehlich Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The circuit court erroneously exercised its discretion at sentencing when it denied Mr. Gabler's request for expungement of his conviction upon successful completion of his probation.

At issue on appeal is a contention from Mr. Gabler that the court considered inaccurate information at the time it denied him expungement, and that as a result of the consideration of inaccurate information, the denial of expungement constitutes an erroneous exercise of discretion in this matter. As detailed in the opening brief, in making this determination, the sentencing court must 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, 373 Wis. 2d 5, 891 N.W.2d 412; *See State v. Gallion*, 2004 WI 42, ¶19, 270 Wis. 2d 535, 678 N.W.2d 197. The *Gallion* court opined on what it means to exercise discretion in the sentencing context, which has been expanded to the expungement decision by *Helmbrecht*:

> This process 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.

Gallion, 2004 WI 42, ¶19.

The State contends that the court did not consider any inaccurate information in making the decision to deny eligibility for expungement, asserting there is no evidence that Mr. Gabler was incompetent as the

appellant claims at the time the temporary restraining order was issued and that procedural errors related to the issuance of the restraining order related to competency of the court and proper service and notice are not relevant to the court's expungement decision.

The State continues its argument to the court of appeals that the lower court decision should be affirmed asserting that Mr. Gabler's motion challenging the expungement decision is essentially an attempt to "collaterally attack the validity of a harassment injunction in a criminal prosecution for the violation of that injunction." (*Respondent's Brief,* pg. 24). On this issue, the State's brief, however, curiously ignores that several of these issues have already been considered by the circuit court in the civil case, Calumet County Case Number 2020CV52, and the court vacated the injunction and dismissed the civil proceedings against Mr. Gabler on these very grounds on October 19, 2021. (76).

The remaining arguments of the State are flawed and ignore substantial evidence in the record and the case law surrounding inaccurate information claims. First, the State's attempt to assert that the court's use of the incorrect reference to the "injunction" proceedings as opposed to a "temporary restraining order" proceeding had the same intent and meaning is based only upon its own guess regarding the court's intentions and not any statements made by the court.

The court's reliance on its belief that Mr. Gabler had violated the "injunction" ordered by the court when in fact the allegation was that he had violated a "temporary restraining order" was incorrect. In response to that position, the State alleges that the court

was using imprecise language and the interchangeable use of the two legal terms was not relevant to the court's expungement decision. This reasoning, however, is not supported by the record or ruling of the court – only by the State's guess about what the court meant and believed to be relevant.

Mr. Gabler specifically raised this point in his postconviction motion, but the court did not address it directly in its decision. The court began using the term "temporary restraining order" rather than "injunction" in its decision. The State's assumptions about whether the court had always meant that there was an allegation that the "temporary restraining order" was violated when it said "injunction" is nothing more than a guess and points to other facts in the record to support an erroneous conclusion, a practice that is not proper. *See U.S. ex rel. Welch v. Lane*, 739 F.2d 863 (7th Cir. 1984) ("[T]he fact that other information *might* have justified the sentence, independent of the inaccurate information, is irrelevant when the court has relied on inaccurate information as *part* of the basis of the sentence."). Therefore, this argument cannot carry the day.

Next, the State's reasoning that there is not support for Mr. Gabler's contention that he did not knowingly and intentionally violate the temporary restraining order is likewise problematic. To illustrate its point, the State points to various facts in the record to assert that Mr. Gabler was well-aware of the restraining order, such as substitute service (though this was not done properly pursuant to section 801.11(1)(b), *Stats*., as the TRO was not left at his regular abode, but

rather with a mental hospital staff member at the facility where he was temporarily residing and there is no evidence demonstrating Mr. Gabler personally received or read that paperwork), that Mr. Gabler was present at the April 29, 2020, hearing with counsel, and that he agreed to an extension of the TRO for six months. The State also argues that Mr. Gabler told police that he was aware of the TRO during his arrest on April 30, 2020, and that his conduct was in violation of it, looking to Document 79, page 7.

That document – the police report of Deputy Joseph Tenor – states that when officers arrived, it was discovered that Mr. Gabler had run from his house with his dog in tow, and that he was noticeably winded from doing so. He told officers that "he had to run from his house because his parents were possessed" and that "he was not sure why they were possessed." (79:7). He allegedly nodded in the affirmative when the officer asked if he knew about the restraining order and that he was not supposed to be there, but he explained he had to get out of his home because he was not "safe in [the] house." (79:7-8). To explain why he was unsafe with his parents at their home, Mr. Gabler pointed to a printed picture of two hands in handcuffs he had with him, which he stated was taped to his door to remind him he could be arrested. (79:8). This conversation certainly does not demonstrate that Mr. Gabler understood the TRO and its requirements, or that he knowingly and intentionally violated the same.

Moreover, there is ample evidence the State simply ignores in its brief that Mr. Gabler was actively mentally ill and incompetent to proceed on

April 29, 2020. In the weeks prior to the TRO hearing and Mr. Gabler's arrest, his family took substantial steps to get him mental health treatment but was met with roadblocks. They made the decision to pay privately for inpatient treatment, and he was checked into Rogers Behavioral Health in Oconomowoc, Wisconsin on April 10, 2020. That same day, his family and the facility attempted a Chapter 51 emergency commitment in Waukesha County Circuit Court, but the proceeding could not move forward as court jurisdiction had not been established because Mr. Gabler was a resident of Winnebago County and not Waukesha County. (78:19).

At the time of Mr. Gabler's arrest in the evening of April 30, 2020, police plainly identified mental health concerns and the Department of Health Services was contacted to proceed with an emergency detention under section 51.15, *Stats*. (79:3). Winnebago County proceeded with a request for a formal involuntary commitment for treatment pursuant to section 51.20, *Stats.*, just days later. On May 5, 2020, the court held a probable cause hearing for the involuntary civil commitment in Calumet County Case Number 2020ME42. (81:5-6). At the conclusion of the hearing, the court found that Mr. Gabler was mentally ill, was a proper subject for treatment, was a danger to himself, and that he was not competent to refuse medication. (81:5-6). The court set the matter for a final hearing and in the meantime, ordered that Mr. Gabler be detained at Winnebago Mental Health to undergo evaluations by Dr. Marshall Bales and Dr. Sangita Patel. (81:5-6).

That same day, Mr. Gabler was interviewed by Dr. Marshall Bales at Winnebago Mental Health, who

concluded he was not competent to refuse medications, lacked any insight into his mental illness, and concluded that he was the appropriate subject of a Chapter 51 commitment order. (81:8-11). Mr. Gabler was also interviewed by Dr. Sangita Patel at Winnebago Mental Health, who likewise concluded he was not competent to refuse medications, lacked any insight into his mental illness, and was the appropriate subject of a Chapter 51 commitment order. (82:1-7).

All of these facts challenge the State's assertions that Mr. Gabler was competent and that he knew the terms of the TRO and intentionally violated them on April 30, 2020, when he went to the home of E.G. While the State references one statement by Attorney Menzel on April 29, 2020, that she did not see competency issues on the date of the hearing, but that "other people involved in his life…disagree" with her assessment of his current mental health, every other aspect of this case counters a claim that he was competent and understood those proceedings. In fact, on May 4, 2020, after the court likely realized that there was a service and notice issue in the case and contacted Attorney Menzel to obtain an acknowledgement of service, Attorney Menzel responded that she could not do so because she did "not believe that Isaac Gabler is competent to proceed in any legal proceedings" and that he "cannot assist in or comprehend the nature of the proceedings at this time." (81:4).

The final assertion by the State on this point is that assuming Mr. Gabler was incompetent at the time the TRO hearing was held, that he was unable to adhere or understand the no contact provisions only supports the denial of expungement on the grounds of public

safety. (Respondent's Brief, 26-27). This rationale is problematic as it is the State justifying the expungement denial with other facts and reasons than those provided by the court, contrary to *Welch*.

Further, this reasoning runs contrary to well-established confidentiality protections the Wisconsin legislature has provided those suffering from pervasive mental illness set forth in Chapter 51 as the State is asserting in different words that the public has a right to know when people in the community are mentally ill and cannot conform their actions to court orders. Section 51.30 specifically dictates that records related to court proceedings and treatment for those committed under section 51.15, or 51.20, *Stats.*, are to remain closed and sealed from public view, but for limited and inapplicable circumstances. As a result, the State's reasoning is not supported by the law and public policy set forth in the legislatively enacted statutory scheme.

Most importantly, the State's arguments do not demonstrate that the court relied only upon a correct understanding of the factual picture or that the court engaged in a proper exercise of discretion when denying Mr. Gabler the right to expungement. One only need look at the court's words to understand how the lack of knowledge of the faulty procedural history related to the temporary restraining order and of Mr. Gabler's competency and mental illness at the time that order was issued and the first hearing on the petition was held undermines the court's reasoning supporting the denial of expungement in this case.

Notably, at the time of sentencing, the court engaged in functionally no analysis whatsoever as to why expungement was not appropriate, providing no clear reasons as to how Mr. Gabler would not benefit or alternatively why society would be harmed by the removal of the conviction history from CCAP. The court stated only:

> 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.

(53:25). The record unequivocally demonstrates no sifting or winnowing of the facts in this case to explain why under these circumstances, either Mr. Gabler would not benefit from expungement, or the community would be harmed as is required both by the statutory scheme controlling expungement and the case law to follow. *See* Wis. Stat. 973.015; *State v. Helmbrecht*, 2017 WI App 5, 373 Wis. 2d 5, 891 N.W.2d 412; *See State v. Gallion*, 2004 WI 42, ¶19, 270 Wis. 2d 535, 678 N.W.2d 197; *State v. Delgado*, 223 Wis. 2d 270, 280, 588 N.W.2d 1 (1999). To sustain the court's choice as a reasonable exercise of discretion on appeal, "[t]he record on appeal must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts of the case." *Delgado*, 223 Wis. 2d 270, 281.

After the court declined to provide adequate reasoning to support its decision on expungement, trial counsel wrote to obtain clarification of the decision. In

response, the court issued a letter to trial counsel, which read as follows:

> …The Court recognizes that Mr. Gabler's mental health issues were a significant part of his case. 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 having 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.

(49).

Following the postconviction motion that challenged this reasoning, asserting that Mr. Gabler did not knowingly or intentionally violate the temporary restraining order or any subsequent injunction, and for that reason, the court's decision on expungement improperly relied upon inaccurate information, the court opined in its decision denying relief:

> While the Defendant pled no contest to knowingly violating a temporary restraining order, whether the defendant 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 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.

(98:2).

This logic and the court's explanation is fundamentally flawed. The court asserts that it is important for the public to be aware that a temporary restraining order had been issued and "that the order had been violated," but if that conduct was not knowing and not intentional because of the issues with notice and Mr. Gabler being unable to comprehend the proceedings at the time due to his substantial untreated illness, there has been no violation of the temporary restraining order as knowledge and intent are necessary elements of such an offense. [1]

Thus, the court's inaccurate assumptions regarding whether Mr. Gabler knowingly and intentionally violated the court order unquestionably tainted the court's decision on expungement. One cannot separate the issues surrounding Mr. Gabler's understanding and competence regarding the TRO back on April 29 and 30, 2020, and the court's conclusion that he violated the TRO, as a violation of the restraining order only occurs as a matter of law if the conduct was knowing and intentional. Wis. Stat. §813.125(7); WIS JI-CRIMINAL 2040, fn. 5. If Mr. Gabler did not know that a restraining order had been issued, had not been properly served,

[1] That Mr. Gabler entered a "no contest" plea to this charge is of no consequence and does not mean that he waived or forfeited the right to challenge consideration of inaccurate information at sentencing.

did not know what it meant to violate such an order, and did not understand the proceedings and nature of the consequences due to mental illness, there was no violation of the temporary restraining order. Thus, a decision positing reliance on that fact is based on an erroneous understanding of the law and circumstances surrounding the case and cannot stand.

Moreover, the court's reasoning regarding expungement fails to demonstrate how the alleged violation of the TRO implicates future public safety and why the ability to look at Mr. Gabler's convictions on CCAP for twenty years will protect the community. At the time of the sentencing hearing, Mr. Gabler was healthy, had by that time been appropriately diagnosed and treated for his mental illness, and was in full compliance with the terms of his bond, the injunction requirements, and involuntary civil commitment order that was ongoing at the time of sentencing. (53:19-21). Thus, there was no demonstrated exercise of discretion illustrated by the court's ruling as to how keeping the conviction history on CCAP protected the community in any manner, as is required by section 973.015 and *Helmbrecht.*

Because Mr. Gabler has demonstrated that the court erroneously exercised its discretion by relying upon inaccurate information, the burden shifts to the State to prove beyond a reasonable doubt that the decision on expunction would have been the same absent the consideration of inaccurate information. *See State v. Travis*, 2013 WI 38, ¶¶73, 86, 347 Wis. 2d 142, 832 N.W.2d 491. The State presented no argument related to harmless error to contradict Mr. Gabler's position. As a result, Mr. Gabler moves this court to reverse the decision of the circuit court and to remand his case back

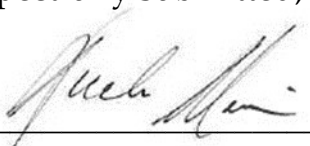
to the circuit court for a new hearing on expungement decision.

CONCLUSION

For all of the reasons set forth above, Mr. Gabler moves this court for an order reversing the decision of the sentencing court and remanding the case back to the circuit court for a new determination regarding expungement in this matter.

Dated this 8th day of February, 2023.

Respectfully submitted,



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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,957 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of February, 2023.

Signed: 

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Attorney for the Defendant-Appellant