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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2024AP002013

STATE OF WISCONSIN

Plaintiff-Respondent,

v.

STEPHEN LODWICK

Defendant-Appellant

APPEAL FROM A FINAL JUDGEMENT OF THE CIRCUIT
COURT FOR WASHINGTON COUNTY,
HONORABLE SANDRA J. GIERNOTH

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED FOR REVIEW

- I. Did the Circuit Court err in holding that the Defendant-Appellant Stephen Lodwick was not “in custody under sentence of a court” for purposes of his motions under Wis. Stat. § 974.06, and therefore denying the relief sought by his motions without a hearing?

This Court should answer: No.

- II. Did the Circuit Court err in ordering that the Defendant-Appellant pay restitution and entering a civil judgment for unpaid restitution at the conclusion of his sentence?

This Court should answer: No.

- III. Did the Circuit Court err in assessing the Domestic Abuse Surcharge on Defendant-Appellant’s conviction?

This Court should answer: No.

- IV. Did the Circuit Court err in denying the Defendant-Appellant’s request for expungement?

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication of this Court’s opinion. This case involves the application of settled law to the facts, which the briefs adequately address.

STATEMENT OF THE CASE

On August 28, 2022, at approximately 11:03 p.m., Village of Germantown Police Department Officer Cody Farnsworth was dispatched to a residence to investigate a

domestic violence complaint. (August 29, 2022 R. 2:2.) The criminal complaint alleges the following: Upon arrival, Officer Farnsworth spoke with JBB, who stated that she and her live-in boyfriend, Stephen Lodwick, had been in an argument. *Id.* JBB stated that Lodwick had been drinking throughout the evening and became angry after looking at her phone. *Id.* JBB stated that Lodwick began screaming and she repeatedly asked him to leave. *Id.* JBB stated that Lodwick damaged her phone charger and a bedroom mirror, picked her up over his shoulder, and threw her to the ground. *Id.*

On August 29, 2022, in Washington County case number 2022CM000780, the State of Wisconsin charged Lodwick with one count of Battery- Domestic Abuse and one count of Disorderly Conduct- Domestic Abuse as a result of Lodwick's actions on Sunday, August 28, 2022 in the Village of Germantown, Washington County, Wisconsin. (September 7, 2022 R. 7: 1-10, August 29, 2022 R. 2:1-2.)

A jury trial was held on the matter on June 12, 2023. At the conclusion of the trial, Lodwick was found guilty of Disorderly Conduct and not guilty of Battery and Criminal Damage to Property. (November 30, 2023 R. 92:1-366.) During the trial, pursuant to Wis. Stat. § 971.29(2), the court granted the State leave to file an amended criminal complaint adding the charge of Criminal Damage to Property. (November 30, 2023 R. 92:171-177, R. 12:1-2.)

On July 18, 2023, the court sentenced Lodwick to 40 days of jail with Huber privileges, imposed and stayed for one year of probation. (July 27, 2023 R. 54:1-2.) The court imposed a Domestic Abuse surcharge on Lodwick's Disorderly Conduct conviction under Wis. Stat. § 968.075(1)(a), 973.055(1). *Id.* The court indicated that restitution was "TBD"

and set a restitution hearing for August 14, 2023. (July 27, 2023 R. 54:2.)

On August 14, 2023 the court held a restitution hearing where JBB testified and a number of documents supporting her restitution request were examined. (November 3, 2023 R. 89:1-97.) JBB, Lodwick, and Lodwick's counsel were present, but the State did not appear. The court ordered that Lodwick pay restitution of \$5,705.12 along with the 10% Crime Victim Compensation Fund surcharge during his term of probation, otherwise a civil judgment would be entered for the balance due. (November 3, 2023 R. 89:95-96, August 15, 2023, R. 56:1-2.)

On June 4, 2024, the court held a probation review hearing to discuss Lodwick's unpaid court costs of \$1,113.51. (June 5, 2024 R. 97:1.) The court ordered that Lodwick's term of probation be extended for one year, or until these court costs were paid in full. *Id.* The court also entered a civil judgment for unpaid restitution. *Id.* On July 18, 2024, when Lodwick's probation was originally scheduled to terminate, the Department of Corrections terminated Lodwick's probation. (July 24, 2024 R. 99:1.)

On August 14, 2024 Lodwick filed a pro-se "Notice of Motion and Motion for A New Trial". (August 14, 2024 R. 101:1-386.) The motion was brought pursuant to Wis. Stats. §§ 805.15, 974.02, and 974.06, and, citing newly discovered evidence obtained through Washington County case 2022CV000543, sought the following relief:

- a. For this Court to VACATE the finding of guilt on the only Count upon which Mr. Lodwick was convicted and the matter sealed; or.

- b. For the Court to VACATE the conviction and schedule the matter for a new trial on the only Count upon which Mr. Lodwick was convicted; or,
- c. For the Court to VACATE the *modifier* on the count upon which Mr. Lodwick was convicted and Order that expungement is available to Mr. Lodwick; and
- d. For the Court to VACATE the restitution imposed in this case; or,
- e. For the Court to alter, amend or otherwise meet the ends of justice in any equitable fashion deemed just and appropriate by the Court.

On September 11, 2024, the court issued a written decision denying Lodwick any relief. (September 11, 2024 R. 103:1-2.) The court found that Lodwick lacked standing to proceed under Wis. Stat. § 974.06 as he was not in custody serving a sentence nor serving a probationary term at either the time of filing his motion or at the time the decision was written. (September 11, 2024 R. 103:2.) Additionally, the court found that Lodwick had failed to file a notice of intent to seek postconviction relief within twenty days after sentencing or final adjudication, and that his reliance on Wis. Stat. § 805.15 was misplaced as it pertained to civil trials. *Id.*

On September 23, 2024, Lodwick filed a pro-se “Motion for Reconsideration” in regards to the above motion and decision. (September 23, 2024 R. 105:1-18.) On October 3, 2024, the court issued an Order denying Lodwick’s Motion for Reconsideration. (October 3, 2024 R. 106:1.) On October 4, 2024, Lodwick filed a Notice of Appeal. (October 4, 2024 R. 107:1.) On November 21, 2024, Lodwick filed a pro-se Motion for Expungement. On December 2, 2024, the court issued an order denying Lodwick’s request for expungement since no such request was made at the time of sentencing as required

by Wis. Stat. § 973.015, and Lodwick would not have been eligible had such a request been made since he was over the age of 25 at the time of the offense. This appeal follows.

STANDARD OF REVIEW

The proper interpretation of a statute is a question of law, reviewed de novo. *State v. Quintana*, 2008 WI 33, ¶ 11, 308 Wis. 2d 615, 748 N.W.2d 447. Whether Lodwick proved a due process violation is a question of law reviewed independently by this Court. *State v. Luedtke*, 2015 WI 42, ¶ 37, 362 Wis. 2d 1, 863 N.W.2d 592. This Court reviews that question of law in light of the trial court's findings of fact which must stand unless they are clearly erroneous. *Id.* These findings of fact are clearly erroneous when they are unsupported by the record. *Royster-Clark, Inc. v. Olsen's Mill, Inc.*, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530.

This Court may not reverse Lodwick's conviction "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). It is an exacting standard. Under it, "a reviewing court may overturn a verdict on grounds of insufficiency of the evidence only if the trier of fact could not possibly have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt." *State v. Watkins*, 2002 WI 101, ¶ 68, 255 Wis. 2d 265, 647 N.W.2d 244.

ARGUMENT

I. This Court should affirm the Circuit Court’s decision that Lodwick was not in custody for purposes of his Motions under Wis. Stat. § 974.06.

The Circuit Court’s decision denying the relief Lodwick requested in his August 14, 2024 brief could not be a more natural and obvious conclusion based on current law. As Lodwick had been discharged from probation on July 18, 2024, he was not in custody or on probation and therefore lacked standing to bring a motion under Wis. Stat. § 974.06. (September 11, 2024 R. 103:2.), Wis. Stat. § 974.06. He failed to file a notice of intent to seek postconviction relief within 20 days of sentencing or final adjudication under Wis. Stat. § 809.30(2)(b), so the Circuit Court found that a motion under Wis. Stat. § 974.02 was untimely. *Id.*, Wis. Stat. § 809.30(2)(b). The record is unclear as to when exactly Lodwick paid the court costs which resulted in the Circuit Court ordering his probation be extended for a year if he did not pay, but the Circuit Court’s decision makes it clear that Lodwick’s probation ended on schedule on July 18, 2024. *Id.* at 1. Finally, the Circuit Court found that Wis. Stat. § 805.15 pertains to civil trials and was therefore inapplicable to Lodwick’s motion. *Id.*, Wis. Stat. § 805.15.

Lodwick urges this Court to re-define “in custody” for purposes of Wis. Stat. § 974.06 to include “laboring under an unjust and fraudulent restitution award.” (Lodwick’s Brief P. 7.) As Lodwick states, the court in *Mentzel* did find that the statute’s definition of “in custody under sentence of a court” was ambiguous. *State v. Mentzel*, 218 Wis. 2d 734, 741, 581 N.W.2d 581, 583 (Ct. App. 1998). Therefore, the Court looked beyond the plain language of the statute. *Id.* In doing

so, the Court found that people serving a probationary term had standing to pursue relief under Wis. Stat. § 974.06. *Id.* at 744. What the *Mentzel* court did not do was open the door to Lodwick’s view that a civil judgment places one “in custody under sentence of a court” as contemplated by Wis. Stat. § 974.06. Lodwick offers no authority whatsoever to support this argument, instead he simply states that it would be “reasonable” for this Court to agree with him. (Lodwick’s Brief P. 6.)

This Court should interpret this statute reasonably, to avoid absurd or unreasonable results. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124. Adopting Lodwick’s interpretation of Wis. Stat. § 974.06 would result in every single defendant who has a civil judgment imposed on them being “in custody under sentence”. Following this reasoning to its logical conclusion, a person subject to a civil judgment for restitution alone would be forever eligible for postconviction relief, after the conclusion of their sentence. Even after one satisfies the civil judgment, it could be said that they are “laboring” financially for the rest of their days. Respondent can find no directly on-point case law, but the Wisconsin Supreme Court has discussed civil judgments for restitution:

In fact, it is significant that in providing for converting unpaid restitution to civil judgments, the legislature, it seems clear, recognized that there would be circumstances where all the necessary restitution amounts often would not and **could not be paid before the completion of the sentence or probationary period.**

State v. Fernandez, 2009 WI 29, ¶ 47, 316 Wis. 2d 598, 623, 764 N.W.2d 509, 521–22 (*emphasis added*). While this case did not specifically discuss Wis. Stat § 974.06, the Court

clearly stated that a civil judgment can be entered **after** the completion of sentence. *Id.* Logically, a civil judgment does not and cannot mean that the person under judgment is “in custody under sentence of a court”.

Lodwick argues that *State v. Jones* demonstrates that Wis. Stat. § 974.06 is the appropriate avenue for relief from a restitution judgment. (Lodwick’s Brief P. 10.) First of all, this is an unpublished opinion, which Lodwick failed to serve Respondent with a copy of pursuant to Wis. Stat. 809.23(3)(a). Additionally, the defendant’s custody status was not at issue in that case. *State v. Jones*, 2015 WI App 13, 359 Wis. 2d 677, 859 N.W.2d 630. Respondent is unable to locate anything confirming that Jones was “in custody under sentence of a court” as defined in Wis. Stat. § 974.06 and *Mentzel* at the time of his motion, but given that the court did not discuss this issue, Respondent assumes he was either confined or under extended supervision on May 19, 2014 when he filed his postconviction motion. *Jones* at ¶ 4. Therefore, Wis. Stat. § 974.06 is a valid method to appeal a restitution order only when the appellant is “in custody under sentence of a court”.

If this Court is inclined to examine Lodwick’s “newly-found evidence” on the merits, his motions should still be denied. None of this evidence, should it be deemed admissible, weighs against the sole count on which he was convicted. Lodwick was convicted by a jury of Disorderly Conduct- Domestic Abuse (Count 2), while he was acquitted of Battery- Domestic Abuse and Criminal Damage to Property. (June 12, 2023 R. 42:1, 44:1, 46:1, November 30, 2023 R. 92:139-144.)

II. The Circuit Court's Restitution Order was supported by the weight of the evidence and the Circuit Court was empowered to enter a civil judgment.

Of note, Respondent was not a party to the Restitution Hearing on August 14, 2023. At the Sentencing Hearing in this case, the Circuit Court excused the State from appearing at the Restitution Hearing per Wis. Stat. § 973.20(14)(a). Wis. Stat. § 973.20(14)(a). The transcript of the Sentencing Hearing is not in the record before this Court, but Respondent's internal notes indicate this fact.

As the Circuit Court noted, it is the Victim's burden to prove losses by a preponderance of the evidence. (November 3, 2023, R. 89:43.) The Victim must show that there is a "causal nexus" between the crime and the victim's losses, and that the crime of which the defendant was convicted was a "substantial factor" in causing those losses. *Id.* at 85-86, *State v. Wiskerchen*, 2019 WI 1, ¶ 25, 385 Wis. 2d 120, 134, 921 N.W.2d 730, 738. Wis. Stat. § 973.20(1r) clearly empowers the Circuit Court to order a civil judgment for restitution after the termination of probation. *Fernandez* at ¶ 47, Wis. Stat. § 973.20(1r).

The Circuit Court cited all of the above law accurately at the Restitution Hearing, where Lodwick was represented by counsel but the victim was not, and found that \$5,705.12 was an appropriate restitution figure. (November 3, 2023, R. 89:83-96.) The Circuit Court made its restitution findings based only on the count of Disorderly Conduct- Domestic Abuse of which Lodwick was convicted, noting that the other two counts on which he was acquitted were not to be considered. *Id.* at 84-85. Lodwick did not make an argument as to inability to pay restitution. *Id.* at 84.

III. The Circuit Court correctly ordered the Domestic Abuse Surcharge on Defendant-Appellant's Conviction.

On this point, Defendant-Appellant makes no conceivable argument other than boldly arguing that Disorderly Conduct cannot constitute Domestic Abuse. If the crime of which a defendant is convicted meets certain criteria, then in imposing sentence the court “shall impose a domestic abuse surcharge”. Wis. Stat. § 973.055(1). Violations of Wis. Stat. § 947.01(1), Disorderly Conduct, are enumerated as a crime subject to the domestic abuse surcharge. Wis. Stat. § 973.055(1)(a)1. Wis. Stat. § 973.055(1)(a)2 requires that if:

The court finds that the conduct constituting the violation under subd. 1. involved an act by the adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided or against an adult with whom the adult person has created a child

Wis. Stat. § 973.055(1)(a)2. At least in the record Appellant has access to, the Circuit Court did not explicitly find that Lodwick's Disorderly Conduct conviction met this bar. Lodwick argues that the Circuit Court never made this finding. (Lodwick's Brief P. 17.) It is likely that the Circuit Court made this finding at the Sentencing Hearing, the transcript of which is not in the record before this Court or in the Circuit Court record. It is Appellant's burden to ensure that the record is sufficient to address issues raised on appeal. *State v. Sabs*, 2013 WI 51, ¶ 50, 347 Wis. 2d 641, 657, 832 N.W.2d 80, 88. Since the appellate record is incomplete regarding an issue raised by Lodwick, this Court must assume that the missing material supports the Circuit Court's

ruling. *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 27, 496 N.W.2d 226, 232 (Ct. App. 1993).

There is a more than adequate factual record for the Circuit Court to have determined that Defendant's conduct met the criteria in Wis. Stat. § 973.055(1), and thus to impose the Domestic Abuse Surcharge. Lodwick himself testified that he and the victim lived together. (November 30, 2023 R. 92:255-256.) The Jury decided, beyond a reasonable doubt, that Lodwick committed a violation of Wis. Stat. 947.01(1). *Id.* at 361-364. The Jury watched surveillance video that contained audio of Lodwick yelling at the victim. *Id.* at 143. Lodwick later admitted that his voice was in the audio, he had been using profanities, and he had taken the victim's phone. *Id.* at 289-291. The Circuit Court's implicit findings of fact in imposing the Domestic Abuse Surcharge are well-supported by the record and are not clearly erroneous, and therefore this Court should not disturb these findings.

IV. The Circuit Court correctly denied the Defendant-Appellant's request for Expunction

This is the most undeveloped of all of Defendant-Appellant's arguments. Lodwick completely ignores Wis. Stat. § 973.015(1m)(a)1, which states that expungement is only available "when a person is under the age of 25 at the time of the commission of an offense". Wis. Stat. § 973.015(1m)(a)1. Lodwick emphasizes Wis. Stat. § 973.015(1m)(b), arguing that since he completed probation, he is entitled to expungement. (Lodwick's Brief P. 18-19), Wis. Stat. § 973.015(1m)(b). However, Wis. Stat. § 973.015(1m)(b) does not exist in a vacuum independent of the remainder of the statute. Defendant-Appellant is correct that this Certificate of Discharge would trigger an "otherwise automatic expungement". (Lodwick's Brief P. 19.) However, this case

falls into the “otherwise” category, as he was 31 years old at the time of the offenses for which he was convicted. (November 30, 2022 R.12:1).

Regardless of Defendant-Appellant’s age, he failed to raise the issue of expunction at his Sentencing Hearing. The Wisconsin Supreme Court has held that this is the only stage at which Defendants may request expungement, not in postconviction motions. *State v. Arberry*, 2018 WI 7, ¶¶ 16- 22, 379 Wis. 2d 254, 267, 905 N.W.2d 832, 839. This Court should affirm the Circuit Court’s order that Defendant-Appellant is ineligible for expunction.

CONCLUSION

For the foregoing reasons, this Court should affirm the Circuit Court’s finding of guilt as to the Defendant-Appellant’s sole conviction, and its orders applying the domestic abuse surcharge, entering a civil judgment for the unpaid restitution, and denying expunction.

Dated at West Bend, Wisconsin, this 1st day of May, 2025.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,175 words.

Dated this 1st day of May, 2025.

Electronically signed by:

Jeanette K. Corbett
JEANETTE K. CORBETT
Assistant District Attorney

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 1st day of May, 2025.

Electronically signed by:

Jeanette K. Corbett
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