COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP97-CR **Cir. Ct. No. 2010CF141**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW W. ARMSTRONG,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed*.

¶1 NEUBAUER, C.J.[1] Matthew W. Armstrong appeals from orders denying his motions to expunge his criminal convictions. He argues that the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

circuit court erroneously exercised its discretion in denying his motions. We disagree and affirm.

¶2 Between March and April of 2010, the then twenty-year-old Armstrong engaged in repeated acts of sexual contact and/or sexual intercourse with a thirteen-year-old girl. As a result, Armstrong was charged with the class A felony of engaging in repeated sexual assault of the same child, contrary to WIS. STAT. § 948.025(1)(a).

¶3 Subsequently, Armstrong and the State struck a plea bargain. Armstrong and the State jointly recommended to the court that the complaint be amended to charge three counts of the class A misdemeanor sexual intercourse with a child sixteen years of age or older, contrary to WIS. STAT. § 948.09, and two counts of the class B misdemeanor disorderly conduct, contrary to WIS. STAT. § 947.01(1). Upon that amendment, the parties asked the court to withhold sentence and impose four years of probation on Armstrong along with certain conditions such as sex offender counseling and prohibiting contact with minor females. Defense counsel and the Assistant District Attorney (ADA) explained that the rationale behind the recommendation was that Armstrong had "significant mental … challenges." He has a "pervasive developmental disorder" and an intelligence quotient of approximately seventy-five, placing him at the "mental age" of thirteen to sixteen years old. The ADA expressed that Armstrong was "probably seeking out someone who functioned at a similar age level" and, while not "plac[ing] any blame on [the] victim," she was probably more sophisticated. The ADA did not think that Armstrong was "equipped to figure out what the best, appropriate action to do with [the victim's] advances." Armstrong, the ADA said, has a supportive family and would likely succeed on probation. Indeed, Armstrong's parents intended to file for guardianship so that they could oversee

his day-to-day living. In addition, under these facts, the ADA did not think a felony conviction would be appropriate. It would already be a challenge for Armstrong to find gainful employment because of his mental challenges and, while misdemeanor convictions might hinder him to some extent, a felony conviction would make things far worse for him. Both the victim and her mother agreed that the plea deal was appropriate. The court accepted Armstrong's plea of no contest.

¶4 The court immediately proceeded to sentencing. Defense counsel asked that the court expunge Armstrong's convictions, and the State took no position. Counsel argued that granting expungement would not harm the community and it would be beneficial for Armstrong because a criminal conviction would only add to the difficulties he was going to have in finding employment. Armstrong, counsel added, would have multiple people monitoring him: his parents, a probation agent, a social worker, and a doctor, as required by the rules of guardianship. Considering all the rules and conditions with which Armstrong would have to comply, expungement was appropriate.

¶5 The court imposed four years of probation with various conditions. The court, however, deferred the request of expungement until after Armstrong successfully completed his probation.

¶6 In December 2014, the Department of Corrections (DOC) wrote the circuit court, informing it that Armstrong was scheduled to complete his probation successfully in one week, that he had not violated his probation, had no contact with the victim or any other underage females, and completed sex offender treatment. DOC noted that Armstrong was requesting expungement, but the DOC made no recommendation either for or against granting expungement.

¶7 In January 2015, the court held a hearing on Armstrong's request for expungement. The State opposed expungement because it was originally charged as "an extremely serious offense," and the public interest would not be served in granting expungement. In addition, the district attorney stated, the Wisconsin Supreme Court had recently held that expungement had to be decided at sentencing. *See* ***State v. Matasek***, 2014 WI 27, ¶45, 353 Wis. 2d 601, 846 N.W.2d 811.

¶8 Defense counsel responded that at sentencing the court decided to leave open the issue of expungement, and, prior to ***Matasek***, this was permissible. On the merits, counsel, after reviewing his notes from the plea, pointed out that the State agreed to take no position on expungement; thus, the State was in breach of the plea agreement.[2] In any case, it was appropriate to grant expungement because it would benefit Armstrong and not harm the public. Counsel recounted that Armstrong was mentally challenged, was under the guardianship of his parents, and had successfully completed probation. Five criminal convictions, three of which were sex related, would add to the difficulties Armstrong was facing in securing employment. Any employment he did secure, because of his mental challenges, would be "extremely structured."

¶9 The court denied Armstrong's request to expunge his convictions. First, the court held, based on ***Matasek***, since expungement was not decided at sentencing, the court was powerless to decide it now. Second, notwithstanding the procedural bar, on the merits, the public's right to know of Armstrong's

[2] Subsequently, defense counsel stated that Armstrong did not want to address breach of the plea agreement.

convictions outweighed the benefit to him. On the former, if Armstrong was to volunteer or find employment, that organization or employer had the right to take prudent steps to ensure the well-being of others. They needed to know that Armstrong might "not be well equipped to handle advances or aggressive occurrences from other people in similar situations." On the latter, the impact on Armstrong was small. It was not as if he was pursuing a particular license or degree for which he would be ineligible if he had a conviction.

¶10 In April 2015, Armstrong moved again for expungement.[3] Counsel argued that the issue of expungement was properly before the court because at sentencing the court said it would allow Armstrong to file a motion for expungement upon successful completion of probation. On the merits, the court improperly exercised its discretion in denying expungement. Counsel argued that there was still a detriment to Armstrong even though he was not pursuing a license or degree. Armstrong is mentally challenged with limited employment opportunities, which will only be further limited if his convictions remain on his record. As for the impact to society, the court failed to consider that whether Armstrong was volunteering or working he would be strictly supervised because of his mental challenges. Further, he had received counseling about how to handle situations that led to his convictions, and he has the support of his parents as guardians and a social worker. Given the foregoing, expungement should be granted.

¶11 At a hearing on Armstrong's motion to reconsider, counsel provided the court with an update. Armstrong has a job coach who helps him search for

[3] Counsel later characterized the motion as one for reconsideration.

employment. He had potential employment opportunities at healthcare facilities such as an assisted living facility for the elderly but he was denied employment "only because of this being out on the Internet and him having this conviction." If his convictions were expunged, his potential would be greatly expanded.

¶12 The court denied Armstrong's motion. First, the court ruled that it could not rehear the matter. Second, the court reiterated that because it did not decide expungement at sentencing, it could not decide the issue now. Third, on the merits, Armstrong had not shown that the benefit to him outweighed the harm to society. Reviewing the record, the court pointed out that there were "some general statements about efforts for employment that have not been successful." Those "general statements" were "not supported by anything in writing." The court could not differentiate between a denial of employment due to lack of "fundamental skills or qualifications of [Armstrong] versus the record." The court was "not satisfied" that Armstrong had shown that his convictions were the "sole reason" he could not obtain employment. In other words, there was "no clear showing of detriment" to Armstrong. In addition, the State was not agreeing to expungement and "without the agreement of … the lead prosecutor" it was "hard for the Court to say I know better."[4]

¶13 WISCONSIN STAT. § 973.015(1m)(a)1. authorizes the court 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." A court will weigh the benefit of expungement to the offender

[4] While defense counsel suggested at the plea/sentencing hearing that there was a joint recommendation for expungement, Armstrong acknowledges in his brief that the State only agreed not to oppose expungement.

against the harm to society. *See* ***Matasek***, 353 Wis. 2d 601, ¶41. The determination of this sentencing issue involves the circuit court's discretion, which, on review, an appellate court will not disturb unless erroneously exercised. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "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." ***State v. Thiel***, 2012 WI App 48, ¶6, 340 Wis. 2d 654, 813 N.W.2d 709.

¶14 Initially, we disagree that the circuit court was powerless to decide Armstrong's motion for expungement because it did not decide expungement at sentencing and, thus, could not decide the issue now under the circumstances of this case. True, our supreme court has interpreted WIS. STAT. § 973.015 "to mean that if a circuit court is going to exercise its discretion to expunge a record, the discretion must be exercised at the sentencing proceeding." ***Matasek***, 353 Wis. 2d 601, ¶45. The facts in ***Matasek***, however, are distinguishable. There, at sentencing, the defendant asked that the court withhold its decision on expunction until after he successfully completed his probation. ***Id.***, ¶8. The circuit court concluded that § 973.015 restricted the decision to the time of sentencing. ***Matasek***, 353 Wis. 2d 601, ¶8. The supreme court agreed. ***Id.***, ¶45. Yet, in ***Matasek***, the supreme court acknowledged that some circuit courts had come to a different conclusion and had deferred a decision on expungement. ***Matasek***, 353 Wis. 2d 601, ¶5 n.3. The parties argued about the effect ***Matasek*** would have on these cases going forward, and the supreme court said the "question of the effect of a circuit court's having incorrectly deferred the discretionary expunction decision is not before us in the present case and we do not address it." ***Id.*** Thus, the holding in ***Matasek*** does not bar a circuit court, which alone decided to defer

an expungement request, from later deciding that request after probation has been successfully completed.

¶15 Where a circuit court has deferred a request for expungement based on its own erroneous interpretation of § 973.015, deciding the deferred request later, after the offender has successfully completed probation, does not undermine the policy behind § 973.015. The ***Matasek*** court noted that deciding expungement at sentencing "creates a meaningful incentive for the offender to avoid reoffending" whereas under a "'wait-and-see' approach, offenders will be uncertain whether the circuit court will expunge the record and this uncertainty might provide a weaker incentive to an offender to complete his or her sentence successfully." ***Matasek***, 353 Wis. 2d 601, ¶43. This legislative policy was not undermined here, for Armstrong did comply with the law and successfully completed his probation without reoffending, despite the fact he had a "weaker incentive" to do so. Ultimately, "[t]he legislative purpose of … § 973.015 is to provide … a break to young offenders who demonstrate the ability to comply with the law and to provide a means by which trial courts may, in appropriate cases, shield youthful offenders from some of the harsh consequences of criminal convictions." ***Matasek***, 353 Wis. 2d 601, ¶42 (citation omitted). Armstrong did comply with the law, and whether he should be shielded from some of the harsh consequences of his convictions, such as the added difficulty a conviction may have on him finding employment, should be decided on the merits. To do otherwise, because of an error on the part of the circuit court, would be unjust.

¶16 On the merits, the circuit court did not erroneously exercise its discretion. The court found that Armstrong did not show that he would benefit from expungement. There was insufficient evidence that Armstrong had been denied employment because of his convictions and not because of some other

reason, such as a lack of qualifications or skills. Defense counsel's "general statements," as the court noted, were not proof. Further, the circuit court rationally concluded that Armstrong had failed to show that society would not be harmed by the expungement. If the convictions were expunged, anyone who hired Armstrong would be unable to take additional prudent steps to ensure the protection of its employees. Under these circumstances, we cannot say that the circuit court erroneously exercised its discretion when it concluded that the harm to society outweighed the benefit to Armstrong. *See* ***id.***, ¶41 (noting that the test involves weighing the benefit to the offender and the harm to society); ***State v. Abdel-Hamid***, No. 2015AP1517-CR, unpublished slip op. ¶13 (WI App Jan. 20, 2016) (where the circuit court was aware of the defendant's stellar school record and his ambitious plans for the future but concluded that expunging his convictions would unduly depreciate the seriousness of what he did and send the wrong message, denial of expungement was not an erroneous exercise of discretion).

¶17 Accordingly, we affirm the orders denying Armstrong's motions for expungement of his convictions.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.