COURT OF APPEALS DECISION DATED AND FILED

June 28, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP3146-CR **Cir. Ct. No. 2009CM4143**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDRE L. THOMPSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed*.

¶1 FINE, J. Andre L. Thompson appeals the judgment entered on his guilty plea to unlawfully carrying a concealed weapon, *see* WIS. STAT. § 941.23, and from the circuit court's order denying his various motions for postconviction

relief.[1] He argues that the circuit court erred in not suppressing evidence of his crime, and, also, in the alternative, that the circuit court erred by not permitting his conviction to be expunged.[2] We affirm.

I.

¶2 Thompson was arrested after he told the officer who stopped him for speeding, that he, Thompson, had a gun in his pocket. Only the officer and Thompson testified at the suppression hearing, and, as material, their testimony was essentially similar.

¶3 The officer testified that he and his partner were patrolling in an unmarked squad car in an area to which other officers were dispatched because of a "shots fired" complaint," when he saw the car Thompson was driving going well above the thirty-miles-an-hour speed limit. The officer estimated that Thompson was going some sixty miles an hour; Thompson testified that he believed he was going between forty-five and fifty miles an hour. Thompson admitted that he knew the speed limit in that area was thirty miles an hour and that he was speeding. It was shortly before 2 a.m.

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[1] Andre L. Thompson's notice of appeal mistakenly gives the date of the judgment as March 25, 2010, instead of April 12, 2010, the date on which it was entered. This does not affect our jurisdiction. *See* WIS. STAT. RULE 805.18(1) ("The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.") (made applicable to appellate proceedings by WIS. STAT. RULE 809.84). Additionally, the circuit court's order denying Thompson's various motions for postconviction relief was entered after Thompson filed his notice of appeal. This, too, does not affect our jurisdiction. *See* WIS. STAT. § 808.04(8) ("If the record discloses that the judgment or order appealed from was entered after the notice of appeal or intent to appeal was filed, the notice shall be treated as filed after that entry and on the day of the entry.").

[2] A defendant may appeal the denial of a motion to suppress evidence even though he or she has pled guilty. *See* WIS. STAT. § 971.31(10).

¶4 The officer testified that he followed the speeding Thompson and then activated the unmarked squad car's lights and sirens. According to the officer, Thompson immediately slowed and then came to what the officer said was a "grinding stop": "[At a]bout fifteen or twenty miles an hour Mr. Thompson placed the vehicle into park, and the transmission engaged and -- and again came to a grinding stop." The officer told the circuit court that he went over to the driver's side of Thompson's car and asked Thompson to get out. The officer explained why:

> Well, based on the totality of the circumstance[s], and what I mean is coming -- a vehicle traveling at a high rate of speed from an area, shots fired. It's 1:55 a.m. in the morning, bar time. Based on those two circumstances and, more importantly, the vehicle coming to a grinding stop, there's a lot of stuff going on. I thought that maybe Mr. -- Mr. Thompson was maybe going to flee from the vehicle. Based on my training and a lot of experience, that's what drivers do when they flee from the vehicle a lot of times is put the vehicle in park before it stops to have an opportunity to get out of the vehicle. Based on all those circumstances, I asked Mr. Thompson to step out -- step out of the vehicle.

The officer escorted Thompson to the back of Thompson's car, holding Thompson's arm as he did so. The officer explained why:

> [T]he reason for that is [the street on which he stopped Thompson's car] is a busy street. It's 1:55 a.m. in the morning. There was a lot of traffic, bar-type traffic, obviously, intoxicated drivers. For Mr. Thompson's safety, my safety, I escorted him by his arm to the -- to the back of the vehicle. At that point I didn't know if he was intoxicated and would have stumbled into traffic or not. That's the reason I escorted him back. I had my hand on his arm.

As the officer was escorting Thompson to the back of Thompson's car, Thompson, whom the officer said was "cooperative," volunteered that "he had a pistol in his pocket." The officer took the gun.

II.

A. *Suppression of the gun.*

¶5 In reviewing a circuit court's order refusing to suppress evidence, we uphold a circuit court's findings of historical fact unless they are clearly erroneous. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). Whether a search was unreasonable or violated the Fourth Amendment, however, is a question of law that we review *de novo.* ***State v. Richardson***, 156 Wis. 2d 128, 137–138, 456 N.W.2d 830, 833 (1990).

¶6 Thompson contends that the circuit court erred in concluding that the officer did not violate Thompson's Fourth Amendment rights by ordering Thompson to get out of his car following the traffic stop. This is how Thompson puts it in his brief: "Mr. Thompson specifically argues that the Milwaukee Police Department had no legal right to order him from his vehicle." It is settled, however, that once a police officer makes, as it is conceded here, a lawful traffic stop, the officer may order the driver out of the car. ***Pennsylvania v. Mimms***, 434 U.S. 106, 110–111 (1977) (expired license plate).[3] Here, unlike the situation in ***State v. Betow***, 226 Wis. 2d 90, 93–95, 593 N.W.2d 499, 501–502 (Ct. App. 1999), on which Thompson relies, the officer did not detain Thompson for further investigation of whether Thompson had violated a law other than speeding; rather, as permitted by ***Mimms***, the officer directed Thompson to the back of Thompson's

[3] It is thus immaterial that the circuit court erroneously in its initial decision found that the officer had been dispatched to the area in response to the "shots fired" complaint. Later, in ruling on one of Thompson's motions for postconviction relief, the circuit court found, in accordance with the officer's testimony, that other officers had been dispatched to the area to investigate a reported shooting.

car, and Thompson volunteered that he was armed. The officer did not search or frisk Thompson until Thompson said that he had the pistol. The officer did not violate Thompson's rights.

B. *Expungement.*

¶7 As Thompson recognizes, WIS. STAT. § 973.015 permits, but does not require, a circuit court to order the expungement of a criminal conviction for those persons under the age of twenty-five when he or she commits a crime. Thompson was born in mid-November of 1987, and committed the crime at the end of July of 2009. The section reads:

> **(1)** (a) Subject to par. (b) and except as provided in par. (c), when a person is under the age of 25 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law for which the maximum period of imprisonment is 6 years or less, the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition. This subsection does not apply to information maintained by the department of transportation regarding a conviction that is required to be included in a record kept under s. 343.23(2)(a).
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> (b) The court shall order at the time of sentencing that the record be expunged upon successful completion of the sentence if the offense was a violation of s. 942.08(2)(b), (c), or (d), and the person was under the age of 18 when he or she committed it.
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> (c) No court may order that a record of a conviction for any of the following be expunged:
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> 1. A Class H felony, if the person has, in his or her lifetime, been convicted of a prior felony offense, or if the felony is a violent offense, as defined in s. 301.048(2)(bm), or is a violation of s. 940.32, 948.03(2) or (3), or 948.095.
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> 2. A Class I felony, if the person has, in his or her lifetime, been convicted of a prior felony offense, or if the

> felony is a violent offense, as defined in s. 301.048(2)(bm), or is a violation of s. 948.23.
>
> (2) A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, the probation has not been revoked and the probationer has satisfied the conditions of probation. Upon successful completion of the sentence the detaining or probationary authority shall issue a certificate of discharge which shall be forwarded to the court of record and which shall have the effect of expunging the record. If the person has been imprisoned, the detaining authority shall also forward a copy of the certificate of discharge to the department.

Sentencing is within the circuit court's discretion, and our review is limited to determining whether it erroneously exercised that discretion. ***McCleary v. State***, 49 Wis. 2d 263, 277–278, 182 N.W.2d 512, 519–520 (1971). We apply this standard to a circuit court's determination whether to expunge a conviction under § 973.015.

¶8 Thompson argues that the circuit court did not give any reasons: "The transcripts of the judge's sentencing pronouncement do not indicate the reasoning for the trial court's decision." This is not true.

¶9 During sentencing, the circuit court considered that Thompson did not have a criminal record (other than the conviction that is the subject of this appeal), was cooperative with the officer, was a member of the Army Reserve, and was training to be a pharmacy technician. It also accepted his lawyer's assertion that Thompson would not be able to work in a pharmacy unless the circuit court ordered that Thompson's conviction be expunged. It determined, however, that expungement would harm the public interest in light of what it viewed as the seriousness of Thompson's carrying a concealed gun that was fully loaded with a

thirteen-round magazine, even though Thompson said he needed the gun for protection. The circuit court explained:

> And he said that it's for his -- to protect himself. You know, I just wonder, what would people do? I mean, I bet seventy-five percent of the people that have [carrying-concealed-weapon] charges say they're doing it for their protection. Maybe all of them -- I don't know -- but a large percentage.
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> …
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> I view this [carrying-concealed-weapon] case as a serious charge. I don't know how else a judge can look at that. You've got a loaded -- a loaded .380 caliber Baretta [*sic* — Beretta] pistol on you, sir, and it's just not going to be tolerated.

Although these comments were part of the circuit court's sentencing rationale, it also applied its view of the seriousness of Thompson's crime to the issue of expungement:

> I'm not ordering expungement on a [carrying-concealed-weapon] case. I do understand, if I believe it's appropriate, if I make the appropriate finding. I cannot make those findings with what I have in front of me.
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> …
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> Clearly, the defendant would benefit if it's expunged, but I do not believe it's appropriate to expunge this charge. People are carrying guns for protection. It's not going to be tolerated in our community.

¶10 In light of the extreme deference we owe to sentencing determinations, *see* ***State v. Mosley***, 201 Wis. 2d 36, 43, 547 N.W.2d 806, 809 (Ct. App. 1996) ("The defendant bears the burden of showing that there was some unreasonable or unjustifiable basis for the sentence imposed."), we cannot say that the circuit court erroneously exercised its discretion in determining that the seriousness of carrying a concealed fully-loaded gun outweighed the positive

aspects of Thompson's life and character. Further, the circuit court's comment that it would, "if I believe it's appropriate," order the expungement, negates Thompson's contention that the circuit court had an improper inflexible preconceived policy. *See* ***State v. Martin***, 100 Wis. 2d 326, 327, 302 N.W.2d 58, 59 (Ct. App. 1981) (trial court's statement that it would never grant straight probation to a person convicted of a drug offense was improper).[4]

By the Court.—Judgment and order affirmed.

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

[4] As we have seen, the circuit court opined that carrying concealed weapons, even for protection, was "not going to be tolerated in our community." Of course, by virtue of Article I, section 25 of the Wisconsin Constitution, not every act of carrying a concealed weapon can be made criminal, especially when the gun is carried for protection. *See* ***State v. Hamdan***, 2003 WI 113, ¶¶5–6, 39–41, 86, 264 Wis. 2d 433, 442-443, 459–461, 489–490, 665 N.W.2d 785, 790, 798–799, 813. Further, we can take judicial notice, *see* WIS. STAT. RULE 902.01, that Wisconsin is on the cusp of repealing WIS. STAT. § 941.23 and permitting persons to carry concealed weapons except in specified places. *See* 2011 Senate Bill 93 (generally and § 48, repealing § 941.23, and § 49, creating new § 941.232). http://legis.wisconsin.gov/2011/data/SB-93.pdf. *See also* Jason Stein, *Assembly passes concealed carry bill, sends to Walker*, MILWAUKEE JOURNAL SENTINEL, (June 21, 2011), http://www.jsonline.com/news/statepolitics/124289954.html. Thus, it may very well be that the community-interest calculus identified by the circuit court during its March 25, 2010, sentencing will be soon changed. We express no view, however, whether a motion for sentence modification based on that changed public-interest calculus should or could be granted. *See* ***State v. Ralph***, 156 Wis. 2d 433, 438, 456 N.W.2d 657, 659 (Ct. App. 1990) ("A trial court may modify a sentence even though no new factors are presented."). That will have to await circuit court action and appellate review on a full Record.