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**DISTRICT I**

December 30, 2014

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You are hereby notified that the Court has entered the following opinion and order:

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2014AP1141-NM In the interest of Dexter A., a person under the age of 17: State of Wisconsin v. Dexter A. (L.C. #1992JV253570)

Before Curley, P.J.[1]

Dexter A. appeals an order denying his motion to expunge the record of his juvenile delinquency adjudications from 1992 and 1993. Attorney Cheryl A. Ward filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Dexter A. filed a response. After reviewing the no-merit report and conducting an independent review of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the record, we conclude that there are no arguably meritorious appellate issues. We summarily affirm.

Dexter A., born June 12, 1976, was adjudicated delinquent on September 2, 1992, because he possessed a dangerous weapon and because he recklessly endangered safety in the second degree. The juvenile court imposed one year of probation, which Dexter A. completed.

Within a month after Dexter A. completed the probation imposed in 1992, the State alleged that he obstructed an officer. Dexter A. admitted committing the offense and the circuit court adjudicated him delinquent on November 23, 1993. The juvenile court again imposed one year of probation, and Dexter A. again completed it.

In March 2010, Dexter A. petitioned to expunge his juvenile record under WIS. STAT. § 938.355(4m) (2009-10). At that time, he was in federal prison serving a 300-month sentence imposed on December 1, 2004, for one count of possessing with intent to deliver cocaine, one count of conspiracy to deliver cocaine, and five counts of delivery of cocaine. At the hearing on the petition, he acknowledged that he also had a 1995 felony conviction in Texas state court for manufacturing and delivering a controlled substance. The circuit court denied expungement. The circuit court observed that if Dexter A. is released from prison and "can show that [he] can stay out of trouble" then "it's fair to come back and ask again."

In March 2011, Dexter A. petitioned a second time to expunge his juvenile record. The circuit court denied the petition on the ground that "there's nothing that indicates that anything has substantially changed" since the circuit court denied expungement in 2010.

In July 2013, Dexter A. filed the petition for expungement that underlies this no-merit appeal. The circuit court held a hearing at which Dexter A. appeared by telephone. The hearing revealed that he remained in federal prison and that he had an expected release date in 2024. Dexter A. explained that he sought expungement to "take out the violence from his custody classification." Dexter A. acknowledged that he discharged a firearm when he recklessly endangered safety in 1992, but he said that no one was shot in the incident. The circuit court denied expungement.

Pursuant to WIS. STAT. § 938.355(4m)(a):

> A juvenile who has been adjudged delinquent under s. 48.12, 1993 stats., or s. 938.12 may, on attaining 17 years of age, petition the court to expunge the court's record of the juvenile's adjudication. [With an exception that does not apply here], the court may expunge the record if the court determines that the juvenile has satisfactorily complied with the conditions of his or her dispositional order and that the juvenile will benefit from, and society will not be harmed by, the expungement.

The circuit court found that Dexter A. had complied with the conditions of his dispositional orders and would benefit from expungement, but that society would be harmed by the expungement. The circuit court accordingly denied expungement, and Dexter A. appeals.

Preliminarily, it appears that the circuit court lacked any authority to expunge the 1992 adjudication from Dexter A.'s record. The statute explicitly permits a circuit court to expunge only adjudications imposed under "s. 48.12, 1993 stats.," or under "[WIS. STAT.] s. 938.12," neither of which applies to Dexter A.'s 1992 adjudication. When the circuit court adjudicated Dexter A. delinquent on September 2, 1992, § 48.12 (1991-92) was in effect; § 48.12, 1993 stats. was not. Chapter 938 did not apply to Dexter A.'s 1992 adjudication because that chapter first took effect on July 1, 1996. *See* 1995 Wis. Act 77, §§ 629, 9400.

We note, however, that, although the circuit court signed and sealed the order adjudicating Dexter A. delinquent for the 1992 offenses on September 2, 1992, the clerk entered the order on January 19, 1993. Accordingly, we assume, for the sake of argument only, that the circuit court had the authority to expunge his adjudications from both 1992 and 1993.

Nonetheless, we conclude that further proceedings in this matter would lack arguable merit. The circuit court has discretion to exercise its authority to expunge a court record. *See* ***State v. Matasek***, 2013 WI App 63, ¶9, 348 Wis. 2d 243, 831 N.W.2d 450, *aff'd*, 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811 (statute providing that court "may" expunge a record of conviction vests circuit court with discretion to decide whether to do so). When we consider whether a circuit court properly exercised its discretion, "we examine the record to determine if the trial court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach." ***State v. Wanta***, 224 Wis. 2d 679, 689, 592 N.W.2d 645 (Ct. App. 1999). We review discretionary decisions with deference. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Indeed, the erroneous exercise of discretion standard "is difficult to overcome in the best of cases." *See* ***Nelson v. Machut***, 138 Wis. 2d 301, 309, 405 N.W.2d 776 (Ct. App. 1987).

Here, the circuit court observed that Dexter A. completed probation for the 1992 matters only one month before the State alleged that he was delinquent in 1993 for obstructing an officer. By 2004 he was serving a significant prison sentence for federal drug offenses. The circuit court concluded that Dexter A. had not demonstrated satisfactory adjustment to life in the community. The circuit court did not foreclose a future petition, but observed that Dexter A. must demonstrate that he can live in the community appropriately before the circuit court would consider expunging his juvenile record. Thus, we cannot agree with Dexter A. that he could

pursue an arguably meritorious challenge to the circuit court's exercise of discretion. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206 ("our inquiry is whether discretion was exercised, not whether it could have been exercised differently").

Dexter A. asserts in his response that the State did not meet its burden of showing harm to society from an expungement of his record. Pursuit of such an argument would be frivolous. "The customary common law rule [is] that the moving party has the burden of proof, including not only the burden of going forward but also the burden of persuasion." ***Sterlingworth Condo. Ass'n, Inc. v. DNR***, 205 Wis. 2d 710, 726, 556 N.W.2d 791 (Ct. App. 1996). WIS. STAT. § 938.355(4m) does not assign the State any burden of proof. Therefore, Dexter A., as the petitioning party, had the burden. He failed, however, to persuade the circuit court.

Dexter A. also tells us that his "current custody status" is not relevant to determining whether to grant expungement. Pursuit of that issue would be frivolous, because the question of whether Dexter A. can live safely in the community is highly relevant to the expungement decision. *Cf.* WIS. STAT. § 938.355(4m)(a).

Last, we note Dexter A.'s wish to pursue a claim that nothing limits the number of times he can pursue expungement. Such a claim would lack arguable merit. The circuit court did not impose a limitation upon him. Rather, the circuit court permitted him to request expungement, notwithstanding his past efforts to obtain the same relief. An appellant cannot seek review of a favorable ruling. *See* WIS. STAT. RULE 809.10(4) (appeal brings before the appellate court rulings adverse to the appellant).

Our independent review of the record discloses no other potentially meritorious issues warranting discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FUTHER ORDERED that Attorney Cheryl A. Ward is relieved of any further representation of Dexter A. in this matter. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*
*Clerk of Court of Appeals*