



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

November 3, 2021

To:

Hon. James K. Muehlbauer
Circuit Court Judge
Electronic Notice

Theresa Russell
Clerk of Circuit Court
Washington County
Electronic Notice

Mark Bensen
Electronic Notice

Sarah Burgundy
Electronic Notice

Timothy A. Provis
Electronic Notice

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

2020AP1253-CR State of Wisconsin v. Anthony S. Barbuto (L.C. #2016CF189)

Before Gundrum, P.J., Neubauer and Reilly, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Anthony S. Barbuto appeals from judgments convicting him of fleeing/eluding and forgery. On appeal, he challenges the circuit court's refusal to order expungement of his convictions after he successfully completes probation. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We conclude that the issue is not preserved for appeal and,

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

even if it were preserved, the circuit court properly exercised its discretion when it declined to expunge Barbuto's convictions. We affirm.

We agree with the State that in order to challenge the circuit court's refusal to expunge his convictions, Barbuto had to first file a postconviction motion in the circuit court. A discretionary decision regarding expunction² is part of the sentencing proceeding. WIS. STAT. § 973.015(1m)(a)1; *State v. Arberry*, 2018 WI 7, ¶¶15, 20, 379 Wis. 2d 254, 905 N.W.2d 832 (expunction is only addressed at the sentencing hearing and is discretionary with the circuit court). Therefore, a challenge to a circuit court's refusal to expunge must begin with a postconviction motion. See *State v. Walker*, 2006 WI 82, ¶31, 292 Wis. 2d 326, 716 N.W.2d 498 (postconviction motion required to challenge an exercise of discretion at sentencing).³ Even though Barbuto's challenge is not properly before us, we will address it.

Although this appeal is taken from convictions for fleeing/eluding and forgery, a total of six cases were resolved at the same time, including felony bail jumping charges that were read in at sentencing. The sentencing record shows that the circuit court was aware of and considered Barbuto's relentless and disturbing campaign to gain custody of or control over the adult victim via forged adoption, power of attorney and guardianship documents and his harassing and

² When used as a noun, expunction and expungement are interchangeable. *State v. Arberry*, 2018 WI 7, ¶1 n.2, 379 Wis. 2d 254, 905 N.W.2d 832.

³ That Barbuto requested expunction at sentencing did not obviate the requirement that he file a postconviction motion.

threatening behavior thereafter. While he was on bond for the forgery case,⁴ Barbuto violated his bond conditions when he had multiple contacts with the victim and her family. After being alerted to the contacts, the police located Barbuto who then led police on a high-speed pursuit. Barbuto was later apprehended in another county.

In urging the circuit court to expunge his convictions, Barbuto argued at sentencing that he was a few months shy of twenty-five when he committed the crimes, and his convictions should be expunged if he successfully completes his probation. He also argued that he has engaged in prosocial activities, some of which the circuit court acknowledged in its sentencing remarks.

In its sentencing remarks, the circuit court found that Barbuto's conduct "terroriz[ed]" the victim and her family over a lengthy period of time, and his conduct was "very grave and very serious" and dangerous. The victim and her family were significantly impacted by Barbuto's conduct and required protection from him. Barbuto's conduct toward the victim continued despite prior mental health and other treatment and despite numerous additional consequences for his repeated violation of court orders in connection with the victim. The court deemed this behavior a "troubling" part of Barbuto's character. The court also found very troubling that Barbuto manipulated events involving the victim's family such that a S.W.A.T. unit responded to the victim's home, which created a dangerous situation.

⁴ Among the allegations against Barbuto in the forgery and bail jumping cases were that he forged the signatures of the victim and a circuit court judge on documents he filed to obtain power of attorney and guardianship over the victim, he filed false adoption documents relating to the victim, and he engaged in an array of criminal and harassing behavior directed at the victim and her family in an attempt to gain custody of or control over the victim. At the plea hearing, Barbuto agreed that the circuit court could rely upon the allegations in the complaints against him as a factual basis for his pleas.

Despite significant doubts about whether he would succeed on probation, the circuit court placed Barbuto on probation.⁵ While the court acknowledged that Barbuto would benefit if his convictions were expunged, the court declined to expunge because Barbuto’s crimes were “very grave, very serious, and very extensive” and “society would be harmed” by expunction.

On appeal, Barbuto argues that the circuit court misused its discretion and did not offer adequate reasons for declining to expunge his convictions. We disagree. The court stated its reasons for denying expunction, reasons grounded in its remarks at sentencing. Those reasons addressed the factors stated in the expunction statute, WIS. STAT. § 973.015(1m)(a)1: a record may be expunged upon the “successful completion of the sentence if the court determines that the person will benefit and society will not be harmed by this disposition.”⁶ In assessing the harm to society, the court recognized Barbuto’s concerning pattern of conduct, including a refusal to comport with the law and court orders. The court was free to determine that Barbuto’s conduct amounted to something other than a youthful mistake that would warrant expunction. See *State v. Hemp*, 2014 WI 129, ¶¶19-21, 359 Wis. 2d 320, 856 N.W.2d 811; *State v. Matasek*, 2014 WI 27, ¶42, 353 Wis. 2d 601, 846 N.W.2d 811 (citation and footnote omitted) (expunction

⁵ For the forgery, the circuit court imposed and stayed a three and one-half year term in favor of five years of probation. For fleeing/eluding, the circuit court imposed nine months in jail (which was time served).

⁶ WISCONSIN STAT. § 973.015(1m)(a)1. states in pertinent part:

[W]hen 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.

“provide[s] a break to young offenders” and can “shield youthful offenders from some of the harsh consequences of criminal convictions”). The circuit court clearly determined that society would be harmed if Barbuto’s convictions were expunged. *Cf. Hemp*, 359 Wis. 2d 320, ¶19 (public safety is a consideration in expunction).

The record reflects “the circuit court’s reasoned application of the appropriate legal standard to the relevant facts of the case.” *State v. Helmbrecht*, 2017 WI App 5, ¶11, 373 Wis. 2d 203, 891 N.W.2d 412 (citation omitted). The circuit court did not misuse its discretion when it denied Barbuto’s request to expunge his convictions. *Arberry*, 379 Wis. 2d 254, ¶20.

Upon the foregoing reasons,

IT IS ORDERED that the judgments of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals