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**DISTRICT I**

June 6, 2023

*To*:

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Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Matt Borkovec
Electronic Notice

Kieran M. O'Day
Electronic Notice

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

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2021AP671-CR State of Wisconsin v. Brishawn Vaughn (L.C. #2020CF1256)

Before Brash, C.J., Donald, P.J., and Dugan, J.

**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).**

Brishawn Vaughn appeals from a judgment of conviction and an order denying his postconviction motion for sentence modification. 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 (2021-22).[1] The judgment and order are summarily affirmed.

Vaughn, then sixteen years old, was charged with one count of feeling or eluding an officer, a Class I felony contrary to WIS. STAT. §§ 346.04(3) (2019-20) and 346.17(3)(a) (2019-

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

20). According to the criminal complaint, Milwaukee police responded to a complaint of a subject with a gun. Officers observed a vehicle matching the description provided by the 911 caller and attempted to stop the vehicle by activating the lights and sirens of their marked squad car. The vehicle accelerated away. Police pursued the vehicle for over fourteen miles, during which it traveled in the wrong lane of traffic several times; disregarded numerous red lights and other traffic signals; exceeded a speed of eighty-five miles per hour; and drove directly at officers after making a U-turn on a dead end street.

Officers observed that the driver was wearing a gray hooded sweatshirt. Eventually, the driver lost control of the vehicle, crashing over a median and into a curb and light pole. Police saw a male in a gray sweatshirt exiting the driver's seat and flee on foot. The two passengers remained seated. The driver, later determined to be Vaughn, was located a few minutes after the crash, wearing a gray hooded sweatshirt and hiding under a vehicle parked near the crash site. One of the passengers later confirmed Vaughn was the driver. Vaughn was charged with one count of fleeing or eluding an officer.

Vaughn agreed to enter a plea to the charge. The parties made a joint recommendation of imprisonment up to the court, imposed and stayed for three years of probation, with expungement upon successful completion of probation. The circuit court accepted the plea and sentenced Vaughn to thirteen months' initial confinement and twenty-four months' extended supervision. The circuit court further found that expungement was "not appropriate here based upon the facts of the case, the juvenile history. I can't make a finding that this is in his best interest and the community will not be harmed by erasing this from his record."

Vaughn filed a postconviction motion for sentence modification, arguing that the circuit court "abused its discretion and unduly harshly sentenced Vaughn" by imposing a sentence "far beyond the joint recommendation." He asserted that because he was a minor at the time of the crime, he should have been punished "to a lower degree," consistent with ***Roper v. Simmons***, 543 U.S. 551 (2005), but was instead was punished to a "greater degree than that of an adult above the age of 25."[2] He also claimed that the circuit court "state[d] no reason that expungement should not be granted, and thus has unduly harshly punished Vaughn by not allowing expungement." The circuit court denied the motion, explaining that it "gave explicit attention to expungement at multiple points during its sentencing analysis and explained at some length why expungement was not an appropriate disposition in this case." Vaughn appeals.

WISCONSIN STAT. § 973.015(1m)(a)1. allows the circuit 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.'" ***State v. Helmbrecht***, 2017 WI App 5, ¶8, 373 Wis. 2d 203, 891 N.W.2d 412. Determining whether to authorize expungement is a sentencing issue involving the circuit court's discretion. *See* ***State v. Matasek***, 2014 WI 27, ¶6, 353 Wis. 2d 601, 846 N.W.2d 811. We will not disturb the circuit court's discretionary decision unless discretion was erroneously exercised. *See* ***Helmbrecht***, 373 Wis. 2d 203, ¶8. We start with the presumption that the sentencing court acted reasonably; the defendant has the burden of showing unreasonableness from the record. *See* ***State v. Haskins***, 139 Wis. 2d 257, 268, 407 N.W.2d 309 (Ct. App. 1987). "A circuit court properly exercises its discretion if it

[2] Vaughn cites the judgment of conviction for this claim, but the judgment contains no information about the degree to which any "adult[s] above the age of 25" have been punished.

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.

Vaughn's appellate argument is largely a repetition of his postconviction argument: under ***Roper***, juvenile offenders like him should be punished less harshly than adult offenders because juvenile brains are not as developed; the circuit court did not explain why it was denying expungement; and denying expungement in this case constitutes an unduly harsh, extra punishment. We reject these arguments.

***Roper*** holds that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *See* ***State v. Ninham***, 2011 WI 33, ¶34, 333 Wis. 2d 335, 797 N.W.2d 451 (quoting ***Roper***, 543 U.S. at 578). It does not hold that juveniles should be given lesser sentences than adults. Indeed, in ***Ninham***, our supreme court considered ***Roper*** but nevertheless concluded "that sentencing a 14-year-old to life imprisonment without the possibility of parole for committing intentional homicide is not categorically unconstitutional." ***Ninham***, 333 Wis. 2d 335, ¶83. Accordingly, it does not follow that refusing expungement of a record for a crime committed by a juvenile must be considered unduly harsh.

"Individualized sentencing … has long been a cornerstone to Wisconsin's criminal justice jurisprudence." ***State v. Gallion***, 2004 WI 42, ¶48, 270 Wis. 2d 535, 678 N.W.2d 197. Vaughn does not identify any cases supporting his implicit suggestion that a person's young chronological or developmental age must mitigate the severity of a sentence in every case. Not only is this incongruous with the notion of individualized sentences, it is also contrary to ***State v.***

***Davis***, 2005 WI App 98, ¶18, 281 Wis. 2d 118, 698 N.W.2d 823, which recognizes that age is a secondary factor that courts may—but are not required to—consider in fashioning a sentence.

We likewise reject the notion that denying expungement is akin to imposing an extra punishment or that it makes a sentence unduly harsh. Expungement is the exception, not the rule. Even if a defendant satisfies the threshold criteria, the statute simply provides that the circuit court *may* grant expungement in appropriate circumstances; it is not required to do so. *See* WIS. STAT. § 973.015. Moreover, a sentence well within the limits of the maximum sentence authorized by law is unlikely to be unduly harsh. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. The maximum sentence authorized in this case does not include expungement.

Finally, the claim that the circuit court failed to give a reason for denying expungement is simply false. The circuit court noted that Vaughn, who was seventeen by the time of sentencing, had a juvenile record that included a robbery, an attempted armed robbery, and four misdemeanors, resulting in a serious juvenile offender order. *See* WIS. STAT. § 938.538. The circuit court commented that there had been "numerous opportunities provided to [Vaughn] to get [him]self together and, as of yet, we don't have any proof that that's happened." It observed that while brain development might make a young person "more likely to act impulsively than a person 25 or 30 … [a]t the same time, what that means is you are likely to be a danger for the next several years while we are waiting for that brain to form."

The circuit court further commented:

> There is no expungement for a 14-mile fleeing case. I don't care what you did. You are going to have to wear that for the rest of your life. You are lucky you didn't get charged with

> second-degree recklessly endangering safety and waived on that. Based on what I have seen about the facts, that certainly could have been done. I am not sure what it is going to take….
>
> Yeah, I appreciate that you are 16, but we got to look at what has been done here. There is also a stolen car in the mix here somewhere. I looked at these juvenile matters …. I will give you credit here for accepting responsibility for this, but that is only going to go so far. If this was a mile or two of fleeing, it would be a different story and I would give consideration here for expungement or other types of considerations to your benefit. Yeah, it is true, there are not a lot of people on the road typically at 3:30. There are police officers on the road, though. Why they are getting put at risk on a daily basis in this city because people are treating the streets of Milwaukee like a video game, 85 miles an hour, no regard for stop lights, signals, it is very dangerous. We have had officers die of this. It is unnecessary. Really, the community is fed up with it….
>
> I am not giving you probation. It is a prison sentence…. This is kind of it as far as I am concerned. It is unfortunate to say that at your age. You are setting yourself up for a long life in prison if you don't get turned around here. Anybody that opens up your record and sees attempted robbery, robbery, a 14-mile fleeing, other various adjudications, nobody will be thinking about probation. I will tell you that right now. Adult court does not work like that.

We discern no erroneous exercise of sentencing discretion. Even if the circuit court did not expressly consider whether Vaughn would benefit from expungement, it is clear from the circuit court's comments that it did not believe society would be unharmed by expungement, particularly in light of Vaughn's already established juvenile record and his failure to be deterred by those penalties. Youthful offenders are not entitled to lesser sentences simply because they are youthful offenders. The circuit court considered proper sentencing factors and appropriately exercised its discretion in fashioning a reasonable sentence.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

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*Sheila T. Reiff*
*Clerk of Court of Appeals*