SM-36 SPECIAL DISPOSITION UNDER SECTION 973.015 C EXPUNCTION[1]

The following is suggested as a framework for deciding whether or not a defendant should receive alternative disposition under § 973.015(1m)(a)1.[2]

AT THE TIME OF SENTENCING,[3] THE COURT SHALL, IF REQUESTED BY THE DEFENDANT OR DEFENDANT'S COUNSEL, AND MAY, ON THE COURT'S OWN MOTION, DETERMINE WHETHER THE DEFENDANT SHOULD BE AFFORDED SPECIAL DISPOSITION UNDER § 973.015.

I. An Offender is Eligible for § 973.015(1m)(a)1. Disposition if:

A. The offender was under the age of 25 at the time the offense was committed;

B. The offense is

1. a misdemeanor

2. a Class H felony and

a. the person has not been convicted of a prior felony, and
b. the felony is not a violent offense as defined in s. 301.048(2)(bm), and
c. the felony is not a violation of s. 940.32, s. 948.03(2), (3), or (5)(a)1., 2., 3., or 4., or of s. 948.095.

3. a Class I felony and

a. the person has not been convicted of a prior felony, and
b. the felony is not a violent offense as defined in s. 301.048(2)(bm), and
c. the felony is not a violation of s. 948.23(1)(a)

C. The court determines that the offender will benefit and society will not be harmed by the disposition.[4]

II. Ordering Special Disposition under § 973.015(1m)(a)1.

If the sentencing judge determines that special disposition under § 973.015(1m)(a)1. is appropriate, the judge should state the finding on the record as follows:

"The court finds that the defendant has been convicted of an offense for which the maximum penalty is imprisonment for six years or less and that the defendant was under age 25 at the time the offense was committed. The court also finds that the defendant will benefit and that society will not be harmed by special disposition under § 973.015(1m)(a)1."

"THEREFORE IT IS ORDERED, pursuant to § 973.015(1m)(a)1., that upon successful completion[5] of the sentence imposed, as evidenced by receipt by this court (of payment of the fine and costs) (of a certificate of discharge from the (detaining) (probationary) (authority)), the clerk of court shall expunge[6] the record without further order of this court."

III. Rejecting Special Disposition under § 973.015(1m)(a)1.

If the defendant has requested special disposition under § 973.015(1m)(a)1. and the judge determines that the disposition is not appropriate, the judge should make a specific statement on the record that the disposition was considered and state the reasons for rejecting it:

"Special disposition available under Wis. Stat. § 973.015(1m)(a)1. has been considered. The court has determined that such disposition is not appropriate because

(the offender will not benefit because (specify) (and) (society will be harmed because (specify)).

COMMENT

SM-36 was originally published in 1979 and revised in 1991, 1995, 1998, 2010, and 2013. This revision was approved by the Committee in April 2018; it involved editorial changes to the text, updating statutory references, and adding case law references to the Comment.

Section 973.015 was created by Chapter 39, § 711m, Laws of 1975, as a companion to the Youthful Offenders Act, Chapter 54, Wis. Stat., which has been repealed (Chapter 418, Laws of 1977).

This Special Material outlines the standards for discretionary expunction under § 973.015(1m)(a)1. Expunction is required under § 973.015(1m)(a)2. "if the offense was a violation of § 942.08 (2)(b), (c), or (d) or (3) and the person was under the age of 18 when he or she committed it." Section 942.08 defines the offense of "invasion of privacy." Subsection (1m)(a)2. was created by 2003 Wisconsin Act 50 [effective date: September 5, 2003]. A third expunction option is provided by sub. (2m), created by 2013 Wisconsin Act 362 [effective date: April 25, 2014]. It applies to victims of trafficking who were convicted of violating § 944.30, Prostitution.

2009 Wisconsin Act 28 expanded the scope of § 973.015. The statute originally allowed expunction of misdemeanor convictions committed by persons under the age of 21. Act 28 amended the statute to change the age limit to "under the age of 25" and to extend applicability to all offenses for which the maximum penalty is 6 years or less (with some exceptions). The changes first apply to sentencing orders that occur on the effective date of Act 28 – July 1, 2009. (Sections 9309 and 9400, Act 28.)

Thus, the expunction authorized by § 973.015(1m)(a)1. now applies to all Class H and I felonies committed by persons under age 25, subject to exceptions set forth in new sub. (1)(c):

- it is not applicable to Class H felonies if
    - the defendant has a prior felony conviction, or
    - the crime is a "violent offense" under § 301.048(2)(bm)*, or
    - the crime is a violation of
        - § 940.32 [Stalking]
        - § 948.03(2), (3) or (5)(a)1., 2., 3., or 4. [Physical abuse of a child] or
        - § 948.095 [Sexual assault by school staff person]

- it is not applicable to Class I felonies if
    - the defendant has a prior felony conviction, or
    - the crime is a "violent offense" under § 301.048(2)(bm)*, or
    - the crime is a violation of § 948.23(1)(a) [Concealing the death of a child]

* The reference to a "violent offense under § 301.048(2)(bm)" is to the intensive sanctions statute, which lists more than 50 crimes that are deemed violent offenses. Of the crimes listed, only a few are Class H or I felonies.

NOTE: The standard for the court to use to determine whether expunction should be ordered remains the same: the person must successfully complete the sentence; and the person will benefit from expunction and society will not be harmed.

1. "Expunction" is the proper noun form of the verb "expunge." However, the use of "expungement" is common and § 973.015 is often referred to as "the expungement statute." See, for example, State v. Leitner, 2001 WI App 172, ¶1, 247 Wis.2d 195, 633 N.W.2d 207. The Wisconsin Supreme Court has noted: "There are two different words for the noun form of 'expunge'; we use 'expunction,' but 'expungement' is also used. To be clear, 'expungement' and 'expunction' mean the same thing." State v. Arberry, 2018 WI 7, ¶1, footnote 2, 379 Wis.2d 254, 905 N.W.2d 811.

2. Section 973.015 does not create a new type of sentence as such, but provides for the possibility of record expunction after completion of a sentence. It comes into play after an offender has been convicted and sentenced under standard procedure.

Ordering expunction is within the discretion of the sentencing judge since the statute provides: ". . . the court may order at the time of sentencing. . . ." (Emphasis added.) The court should consider disposition under § 973.015 and make a record of its decision, whenever the defendant requests it. The court may also consider disposition under this section on its own motion but need not consider it in every case where there is no request by the defendant or counsel.

A court commissioner does not have the authority to order expunction. State v. Michaels, 142 Wis.2d 172, 417 N.W.2d 415 (Ct. App. 1987).

Expunction under § 973.015 does not extend to judgments in forfeiture actions. Kenosha County v. Frett, 2014 WI App 127, 359 Wis.2d 246, 858 N.W.2d 397. The attorney general has concluded "that circuit courts in the State of Wisconsin do not possess the inherent or implied powers, in the absence of authorizing or enabling statutes, to order the destruction or expunction of criminal conviction records." 70 Op. Att'y Gen. 115, 120 (1981).

3. In State v. Matasek, 2014 WI 27, 353 Wis.2d 601, 846 N.W.2d 811, the supreme court affirmed a decision of the court of appeals which held that a trial court's decision whether or not to order expunction under § 973.015 is to be made at the time of sentencing. Under that view, the statute does not allow the trial court to leave the issue open until the defendant successfully completes the sentence. The supreme court stated:

> We interpret the phrase "at the time of sentencing" in 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. ¶6.

In State v. Arberry, 2018 WI 7, ¶5, 379 Wis.2d 254, 905 N.W.2d 811, the court reaffirmed the conclusion in State v. Matasek: ". . . a defendant may not seek expunction after sentence is imposed because both the language of Wis. Stat. § 973.015 and Matasek require that the

> determination regarding expunction be made at the sentencing hearing." Further, a motion for modification of sentence does not create a second "time of sentencing"; the term refers only to the original imposition of sentence. ¶17.

4. See § 973.015(1m)(a)1. Except for stating the standard "the person will benefit and society will not be harmed," § 973.015 contains no guidelines for the judge to apply in deciding whether to order special disposition. Since the statute says only that the court "may order" special disposition at the time of sentencing, the Committee concluded that the decision lies entirely within the discretion of the sentencing judge, applying those standards that are generally applicable to the sentencing decision. Also see, State v. Helbricht, 2017 WI App 5, 373 Wis.2d 203, 891 N.W.2d 412.

5. "Successful completion" involves paying a fine, serving a jail sentence, or completing a period of probation and not being convicted of a subsequent offense (see § 973.015(1m)(b)).

In State v. Ozuna, 2017 WI 64, 376 Wis.2d 1, 898 N.W.2d 20, the defendant was issued a certificate discharging him from probation. The certificate had two boxes – both of which were checked – one indicating that probation was successfully completed and the other that he had not satisfied a "no alcohol" condition. He was denied previously-ordered expunction because he did not "successfully complete" probation. The supreme court concluded that expunction was properly denied – completing probation without revocation does not mean that all conditions were satisfied, and "successful completion" requires that those conditions be satisfied. The court noted that the form has been changed – it now has two boxes: "successfully completed" and "not successfully completed."

In State v. Hemp, 2014 WI 129, 359 Wis.2d 320, 856 N.W.2d 811, the supreme court reversed a decision of the court of appeals which held that Hemp's successful completion of his sentence did not automatically entitle him to expungement: while the controlling authority must issue the certificate of discharge, the court of appeals held that Hemp was responsible for doing the latter and he failed to do so in a timely manner. The supreme court reversed:

> ¶4 First, we hold that the successful completion of probation automatically entitled Hemp to expungement. Second, we hold Wis. Stat. § 973.015 is unambiguous and places no burden on Hemp to petition for expungement within a certain period of time because the duty to forward the certificate of discharge rests solely with the "detaining or probationary authority." Finally, we hold the circuit court improperly exercised its discretion when it reversed the decision it made at sentencing to find Hemp eligible for expungement.

6. Section 973.015 does not define "expunge." The word literally means "to destroy or obliterate; it implies not a legal act, but a physical annihilation." (Black's Law Dictionary, Revised 4th Edition.) On November 3, 1997, the Wisconsin Supreme Court issued Order No. 97-07, dealing with expunction of court records. The order created SCR 72.06 to read as follows:

> 72.06 Expunction
>
> When required by statute or court order to expunge a court record, the clerk of the court shall do all of the following:

(1) Remove any paper index and nonfinancial court record and place them in the case file.
(2) Electronically remove any automated nonfinancial record, except the case number.
(3) Seal the entire case file.
(4) Destroy expunged court records in accordance with the provisions of this chapter.

While this order clarifies the procedure to be followed by the clerk of courts in dealing with a record ordered expunged, there is little authority in Wisconsin relating to the consequences of expunged convictions. In State v. Anderson, 160 Wis.2d 435, 466 N.W.2d 681 (Ct. App. 1991), the court held that a conviction ordered expunged under § 973.015 cannot be used to impeach the credibility of the convicted person. [Anderson also held that the statute required physical destruction of the court record, a conclusion apparently overruled by SCR 72.06.]

The Committee concluded that a conviction expunged under § 973.015 may not be used as a prior offense for purposes of the general repeater statute, § 939.62. Section 939.62(2) requires that prior convictions "remain of record and unreversed." In the Committee's judgment, an expunged conviction does not "remain of record." This conclusion was also reached by the Wisconsin Supreme Court in State v. Leitner, below.

The Wisconsin Supreme Court has held that "§ 973.015 does not direct district attorneys or law enforcement agencies to expunge their records documenting the facts underlying an expunged record of conviction. We further conclude that the circuit court may consider, when sentencing an offender, the facts underlying a record of conviction expunged under § 973.015." State v. Leitner, 2002 WI 77, ¶48, 253 Wis.2d 449, 646 N.W.2d 341. The court also recognized that "expunging the court record provides substantial advantages to the offender. An expunged record of a conviction cannot be considered at a subsequent sentencing; an expunged record of a conviction cannot be used for impeachment at trial under § 906.09(1); and an expunged record of a conviction is not available for repeater sentence enhancement." 2002 WI 77, ¶39. The Wisconsin Court of Appeals applied Leitner in State v. Allen, 2015 WI App 96, ¶38, 373 Wis.2d 98, 890 N.W.2d 245: ". . . a sentencing court must be permitted to consider all the facts underlying an expunged criminal conviction, and not just those underlying the crime itself."

