COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1789-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA A. PROPST,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed.*

VERGERONT, J.[1] Joshua Propst[2] was convicted of possessing drug paraphernalia in violation of § 961.573(1), STATS., after entering a plea of

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

[2] The trial court record contains two spellings of the defendant's surname—"Probst" and "Propst." We use the latter because it appears on the judgment of conviction and in the heading on the documents the defendant has filed on appeal.

guilty. The court withheld his sentence and placed Propst on probation for two years with conditions that included random drug testing, a fine, a booking procedure, and license revocation for two years. The court also ordered that if Propst successfully completed probation with no violations, he could have youthful offender status under § 973.015, STATS., which provides for expungement of the record of conviction upon successful completion of the sentence.[3] Propst appeals from an amended judgment of conviction changing the conditions of his probation by adding fifty hours of community service and vacating the condition that allowed for expungement of the record of conviction under § 973.015. He contends that the court did not have the authority to sua sponte review the conditions of probation and remove the expungement privilege since probation was not revoked. He also contends that the court lacked the authority to amend the conditions of probation without a request from him or another party. We conclude the trial court had the authority to sua sponte remove

[3] Section 973.015, STATS., provides:

> **Misdemeanors, special disposition.** (1) When a person is under the age of 21 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 penalty is imprisonment for one year or less in the county jail, 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.
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> (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.

the expungement privilege and amend the conditions of probation. We therefore affirm.

Propst's first argument requires us to construe § 973.015, STATS. This presents a question of law, which we review de novo. *See* ***Village of Shorewood v. Steinberg***, 174 Wis.2d 191, 201, 496 N.W.2d 57, 60 (1993). Statutory construction begins with a reading of the language of the statute, and, if the language is unambiguous, we apply the plain language of the statute to the facts at hand. ***Id.*** Section 973.015(1) authorizes a court, at the time of sentencing a person under twenty-one for an offense for which the maximum penalty is imprisonment for one year or less in the county jail, to "order … that the record be expunged upon the successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition." Successful completion is defined as not being convicted of a subsequent offense, not having probation revoked, and satisfying the conditions of probation. Section 973.015(2). This statute gives the sentencing court the discretion to order expungement; it does not require that a court do so.

The statute also specifies the method for effectuating the expungement upon successful completion of the sentence—the detaining or probationary authority issues a certificate of discharge, which is forwarded to the court of record and has the effect of expunging the record. *See* § 973.015(2), STATS. However, the language of the statute does not suggest that the court may not revoke the privilege prior to completion of probation upon a finding that the defendant has violated the conditions of probation and thus will not be entitled to expungement. In the absence of any indication in the language that the legislature intended this limitation on the court's authority, we may not read it into the statute. The only reasonable construction of the statutory language is that, just as the court

has the discretion to grant the expungement privilege at sentencing, it also has the discretion to revoke that privilege if it determines that the defendant has not satisfied the conditions of probation.

The court's decision to revoke the expungement privilege demonstrates a proper exercise of the court's discretion. The court expressly advised Propst at sentencing that he had to do everything "100%" in order to have expungement, and had to apply for it at the end of probation and show the court that he "didn't make any mistakes." The court continued:

> THE COURT: … And if I find out that you tested positive for a drug, you won't get it. If I found out you didn't - you violated some other rule, like you went out and got drunk or were drinking underage, that will - you won't get it. So you will have to have a perfect record for the next two years. All right?
>
> THE DEFENDANT: Yes.

(Emphasis added.)

The court scheduled a review of Propst's probation after the court was informed through another proceeding that Propst had been drinking underage. At that hearing, Propst's probation agent informed the court that Propst admitted to drinking; it was written up as a violation of the rules of his probation; and the rules were modified to require that he obtain an Alcohol and Drug Assessment and comply with any recommended treatment. The agent reported favorably on other aspects of Propst's compliance with the conditions and rules of probation. The court heard from Propst, his mother, and his counsel, and had a letter from Propst's employer. Propst's mother expressed her view and that of Propst that he should not be given jail time. Propst's counsel argued that this judicial proceeding

was sufficient to impress on Propst the importance of complying with the conditions and rules of his probation, and revocation of the expungement privilege was not warranted.

In explaining its decision to revoke the expungement privilege, the court reminded Propst that at sentencing the court told him that he would not get the privilege if there were even the slightest violation. The court stated that it was necessary to impose a consequence for every violation of the probation conditions, because otherwise those conditions had no meaning, and it was also necessary to impress upon him and his peer group that he and they must follow the law. Propst does not argue that, if the court had the authority to revoke the expungement privilege, it erroneously exercised its discretion in doing so. We conclude the court did properly exercise its discretion.

Propst's second argument involves a construction of § 973.09, STATS., governing the court's authority to impose probation, and § 973.10, STATS., governing the supervision of probationers. Propst argues that the court exceeded its authority in adding fifty hours of community service to the conditions of probation originally imposed because § 973.10(1) places the defendant in the control of the department of corrections once probation has been imposed. Section 973.10(1) provides:

> **Control and supervision of probationers**. (1) Imposition of probation shall have the effect of placing the defendant in the custody of the department and shall subject the defendant to the control of the department under conditions set by the court and rules and regulations established by the department for the supervision of probationers and parolees.

Propst contends that since his probation agent had decided that revocation was not warranted and a modification of the probation rules was sufficient to address the underage drinking, the court could not take any action on its own in response to that violation. Propst overlooks § 973.09(3)(a) which provides:

> Prior to the expiration of any probation period, the court, for cause and by order, may extend probation for a stated period or modify the terms and conditions thereof.

This section authorizes the court to modify both the conditions of probation it imposes and the rules of supervision imposed by the department. ***Taylor v. Linse***, 161 Wis.2d 719, 725, 469 N.W.2d 201, 203 (Ct. App. 1991). Although Propst argues that the court may modify rules or conditions of probation only upon the request of the agent or the defendant, he provides us with no case law supporting that position, and we are satisfied that the plain language of § 973.09(3)(a) does not impose such a requirement.

The trial court's decision to impose fifty hours of community service was a proper exercise of its discretion under § 973.09(3)(a), STATS. Propst admitted to underage drinking. He knew that was a violation of the rules of his probation, and one to which the court made specific reference at sentencing. The court could reasonably determine that consequences in addition to AODA assessment and compliance with treatment recommendations were necessary to impress upon Propst that he had to conform his behavior to the law. The court noted that fifty hours was one hour every two weeks over two years, and the court specified that the service be related to drug treatment or therapy, such as assisting at a treatment facility. This condition was reasonably related to the dual purposes of probation—rehabilitation and protection of the community interests. *See* ***State v. Heyn***, 155 Wis.2d 621, 629, 456 N.W.2d 157, 161 (1990). It is also reasonably

related to the specific concerns the court had with respect to Propst's conduct. We conclude that the court had the authority to add conditions of probation without being requested to do so by Propst or his probation agent, and that the court properly exercised its discretion in doing so.

By the Court.—Judgment affirmed.

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