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November 14, 2006

Representative Robin Vos, Chair
Legislative Council Special Committee on Expunction of Criminal Records

Dear Representative Vos:

Since our meeting on Thursday, September 28, 2006, I have given considerable thought to the issues facing this Committee. I have also polled the judges in our 9th Judicial Administrative District for their thoughts, several district attorneys and attorneys from the State Public Defender's office.

I advance these thoughts to you in the hope that they may clarify the approach I believe this Committee should take. In making this proposal, I make the assumption that the legislature believes there should be a public policy in favor of giving people who have committed criminal acts a "second chance" through a judicial process.

In order to have any value at all, a "2nd Chance" option must first provide a means to avoid a criminal *conviction.* Secondarily, it may be appropriate to consider a means of removing a record from the internet public database in a manner similar to what is now called "expunction."

My proposal would be threefold:

1. Expand the current concept of conditional discharge to include more misdemeanor offenses for more individuals.
2. After a period of time, remove the record of criminal proceedings from the court's public access website of cases involving a:
    a. Successful completion of a conditional discharge; and,
    b. Dismissal or finding of "not guilty" (that is not a "read-in" in another sentencing).
3. Eliminate the current expunction statute (§973.015(1)(a), Wisconsin Statutes) entirely.

The current conditional discharge statute allows a person who has not previously been convicted of a drug offense under ch. 961, Wisconsin Statutes to:

- Plead guilty (or be found guilty) of "possession or attempted possession of a controlled substance or controlled substance analog";

- Have the court find the person guilty but NOT enter a judgment of conviction;
- Be placed on probation upon terms or conditions [this requires a defendant's consent because a court cannot impose a criminal-type "penalty" such as probation without a conviction for a crime];
- Upon fulfillment of the probation, have the charges dismissed.

Part 1: the Conditional Discharge Statute. I would propose to do the following with the conditional discharge statute:

1. Remove it from chapter 961, Wisconsin Statutes, to the general sentencing statutes in chapter 973, Wisconsin Statutes.
2. Expand the availability of its usage to any misdemeanor on a one-time only basis except the following crimes:
    a. 2nd, , 3rd, and 4th offense OWI/PAC or other alcohol-related traffic crime;
    b. Misdemeanor crimes of domestic violence; and,
    c. Misdemeanor sexual offenses against children.
3. Require a person to plead guilty or be found guilty of the violation, but the court would NOT enter a judgment of conviction.
4. Allow the court to impose a sentence, place a person upon formal probation or, impose a period of self-monitored "good behavior" (in order to avoid objections from the Department of Corrections to too many probation cases, requiring a condition of formal probation for all cases is unnecessary).
5. Upon completion of the court-ordered requirements of paragraph 3 (above), the case is dismissed.
6. Following a period of time AFTER the dismissal (for example, a minimum of one year, two years or whatever the court decides or the legislature decrees), the record of the proceeding will be removed from the courts public internet website (WCCA) but the records would still remain available in the clerk of court's office and on the WCCA Secure website (which is not available to the public).
7. Expand the statutory authority of the court to provide access to the WCCA Secure website to district attorneys and other legitimate justice partners so that a person who is attempting to utilize this procedure more than one time can be discovered.

This process would answer the following concerns addressed by speakers at the first meeting as well as the concerns of the WCCA Advisory Committee:

1. The defendant can legitimately say they have not been convicted of a crime. A major objection to the current openness is the effect a conviction can have on a person's employment situation which is not really cured by "expunction";
2. The defendant must demonstrate a period of "good behavior" and/or successful completion of programming to show that they deserve the 2nd chance option;
3. The interests of the public in being able to have access to records in the clerk's office is undisturbed;
4. The interests of the public in being able to access records of the court on the internet is available for a pre-determined period of time after which that record is "sunsetted" and not available to the casual internet surfer.

You will note that I have not specified an age limit for entitlement to this process. Several of the judges with whom I spoke feel that the 2nd chance option shouldn't just be for the young and immature. A forty-year old can make stupid mistakes just as much as a twenty-year old. Personally, I would limit available to person 25 or under, but this is truly a legislative determination.

I would like to anticipate the argument that a person shouldn't have to plead guilty or no contest in order to get this option. I disagree. If a person is not guilty of the offense, they should defend their case. If a person is successful in that defense, Part 2 (below) can satisfy their needs. If they are not successful in that defense, the conditional discharge option is still available.

Part 2: Dismissed and "Not Guilty" Cases.

If a person who has been found guilty of a crime successfully completes a conditional discharge process that person can have his /her record removed from the court's public internet website (WCCA). It would seem logical that a person who has **not** been found guilty or where the case is dismissed should have some means of reducing access as well.

But there is a caveat. The legislative declaration of policy of the Wisconsin Open Records law is that "all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them" with a presumption of "complete public access" (see §19.31, Wisconsin Statutes).

When it comes to the courts it is precisely the individual cases and the people involved in them that constitute the "affairs of government" and the "official acts" of government officials and employees. It is what we do. Therefore, it is important that the public be able to have access to these cases so that the public can have confidence that their courts are doing what they are supposed to do. Hiding cases from the public creates distrust. The clerk of court's files and the public record, including the public WCCA website, should not become just a listing of those people *convicted* of crimes**. The public has as much right to know about those cases where people are acquitted or cases are dismissed as they do those in which people are convicted.** These cases are as important if not sometimes more important than those which result in a conviction.

But I do believe it might be appropriate to temper that access by creating a similar "sunset" provision to accessibility on the public WCCA website after a period of time, perhaps two to three years following the dismissal or finding of not guilty. Allowing removal immediately after the dismissal or finding of not guilty deprives the public of knowing "what happened?" during the period of time that is most relevant to the case. Keeping the records available for a period of time satisfies the public's need to know but provides solace to the individual that after a period of time they will not be available to the casual internet websurfer.

Part 3: Elimination of expunction.

As it currently exists, misdemeanor expunction is a hollow remedy for an individual. Expunction allows a person who was under the age of 21 who has been found guilty of a misdemeanor to ask a court at the time of sentencing to order the record be expunged upon successful completion of the sentence. Although it may give a degree of "practical obscurity" about the fact of a conviction because the clerk of court won't have a record of it, **it does NOT vacate or set aside the conviction.** The conviction itself remains of record (just not in the Clerk of Court's office). This has two practical effects:

a) If the person applies for a job, tries to join the military or whatever and is asked "if he or she has been convicted of a crime?" they must answer "YES." If they answer "NO," they are providing incorrect information and subjecting themselves to firing/discharge if and when the employer/military/whatever learns the truth. This is not a hypothetical. It has happened. Why has it happened? Because the conviction is still of record and available. When I grant expunction, I tell the person that they have still been convicted of a crime and must answer truthfully any question to that effect.

b) The record of the conviction is still retained by law enforcement, the district attorney, and the defense counsel. It has been reported to CIB, the Department of Justice, NCIC and the FBI. For $13.00, anybody can contact the Department of Justice and obtain a copy of any person's criminal record. Employers are doing this. And when they find out about the conviction that was expunged, people lose their jobs.

Under the proposals outlined in Parts 1 and 2 (above), the defendant will receive something of real value—no conviction that needs be declared and the return of practical obscurity of a court record by sunsetting it from the public WCCA internet site. There will be no need for the confusing aspects of "expunction."

I don't believe such procedures as the DEJ are within the mandate of this Committee so I will not discuss it further other than to say it should remain unchanged.

A recap of basic points

Certainly there are potential problems with this proposal. In order to alleviate problems, I reiterate the following points:

One, conditional discharge should be a one-time opportunity. A person gets one shot at this benefit.

Two, conditional discharge should be ordered at the time of the original plea so it is considered, bargained for, and approved at that point. The idea of being able to apply for this "at any time" creates great difficulties for law enforcement, the courts, victim/witness offices, and district attorneys. Requiring an "up front" determination avoids the problems of victim notification so that the victims are aware of what is happening. It also will generally reduce the number and length of hearings because the DA is already involved and probably agreeable. Finally, it eliminates any question of retroactivity of this legislation since, by definition, it can only apply to future cases.

Three, it must be limited in the types of misdemeanors to which it can apply. Unfortunately, a blanket application to "any misdemeanor" includes crimes the legislature surely does not want removed.

Four, in order to receive this benefit, the person must either complete a probation sentence or at least show a period of time of criminal-free activity. If this is to give someone a break, to show that the criminal act is an aberration and not a lifestyle, then the legislature should require a period of time to pass before the person can obtain the benefit. The benefit should be conditioned on, for example, a successful completion of a probation sentence of at least one year, or (if you don't want to overburden probation), a period of time of at least one year in which there are no further criminal charges brought against the individual supported to the level of probable cause (do not require a conviction as the time frame is too short for the act, charges to be brought, and trial/conviction to occur). The point is I would not want someone to be able to come to court, enter a plea, pay a fine, and immediately get the benefit of vacating, dismissal, and expunction. There must be some time of "good behavior" to justify the granting of this benefit. Further, the public has a right to know what is going on in their courts and a right to know the identities of those who have been lawbreakers even if but for a limited period of time.

Five, do not attempt to legislate any requirements that the district attorney, law enforcement, the DOJ, or others, to destroy their records along with the courts. Why? Because if this is a one-time thing, there has to be a method to determine if it has been done before (and, no, I won't trust the defendant to tell me s/he's never had the benefit of dismissal/expunction before). Also, I believe there would be significant political opposition to requiring law enforcement, district attorneys, and the DOJ to destroy records that would possibly sink any proposal. Further, some of the records are kept by the federal government (NCIC, FBI) over which the Wisconsin legislature has no control anyway.

Quite honestly, if we are going to ask the legislature to do something that gives people a “break," then let’s do it right. Let’s create a process that can give a defendant a real break as well as protect the public’s right to know what their courts are doing.

Thank you for your consideration.

Respectfully,

/s/Gary L. Carlson

Gary L. Carlson
Circuit Judge