IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 75 MAP 2015

COMMONWEALTH OF PENNSYLVANIA,

Appellant

v.

VICTORIA GIULIAN,

Appellee

BRIEF FOR APPELLEE

Appeal from the Order of the Superior Court at 906 MDA 2014 dated February 23, 2015, affirming the Order of the Centre County Court of Common Pleas, docketed at CP-14-MD-0836-2013, dated April 30, 2014.

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Date: January 20, 2016

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I. Counter- Statement of Question Involved

A. DID THE TRIAL COURT PROPERLY DENY PETITIONER'S PETITION FOR EXPUNGEMENT WHEN PETITIONER FAILED TO REMAIN ARREST AND PROSECUTION FREE FOR A PERIOD OF FIVE YEARS FOLLOWING THE OFFENSE WHICH PETITIONER NOW SEEKS TO EXPUNGE?

(Suggested answer in the affirmative.)

II. Counter Statement of the Case

On April 20, 1997, the Commonwealth charged Victoria Guilian (hereinafter Petitioner) with one (1) count of Disorderly Conduct—Engage in Fighting, 18 Pa. C.S.A. § 5503(a)(1) (misdemeanor); one (1) count of Public Drunkenness, 18 Pa. C.S.A. § 5505 (summary offense); one (1) count of Purchase/Consumption/Etc. Alcohol by a Minor, 18 Pa. C.S.A. § 6308(a) (summary); and one (1) count of Harassment—Strike/Shove/Kick, 18 Pa. C.S.A. § 2709(a)(1) (summary). The charges stem from a motor vehicle accident that had occurred at the intersection of N. Atherton St. and Park Ave. in State College, Pennsylvania. According to the police incident report, Petitioner was found "laying in the road" and explained to police that she had tripped and fell. When police asked Petitioner for identification, however, she became combative with them. Specifically, Petitioner responded to the request for identification with "Fuck you" and by running away. Police managed to catch Petitioner after she fled, but she remained combative, kicking Corporal Argiro in the shin as police placed her in the squad car. Corporal Argiro reported that Petitioner, in addition to being kicked in

the shin, Petitioner used obscenities throughout the investigation and even threated to take his gun.

On June 9, 1997, Petitioner pled guilty to Counts 2, 3 and 4 on the Criminal Information docketed at CP-14-CR-708-1997 (hereinafter "1997 offense"). Specifically, Petitioner pled guilty to the three summary offenses charged; in return for her negotiated plea, the Commonwealth agreed to *nolle prosequi* Count One, the lone misdemeanor charged from the incident. Petitioner served approximately nine (9) months of probation, from June 9, 1997, to March 5, 1998.

On September 27, 1998, a mere seven (7) months after Petitioner's probation sentence ended, she was again charged with a crime, Criminal Mischief, 18 Pa. C.S.A. § 3304(a)(2) (summary). Although the details of this charge are unavailable because the record was expunged, Petitioner did plead guilty to that offense on December 16, 1998 (hereinafter "1998 offense").

On May 8, 2013, Petitioner filed a "Petition for Expungement Pursuant to Pa.R.Crim.P. 790," docketed at CP-14-MD-836-2013, seeking the expungement of her 1997 offense. The District Attorney's

Office filed its partial consent and partial objection to Petitioner's Petition for Expungement on November 6, 2013. The reasoning for the partial objection to expungement of the 1997 offense was based on Petitioner's inability to remain arrest free for five (5) years following the 1997 offense as evidenced by her 1998 offense. The Honorable Bradley P. Lunsford denied Petitioner's Petition for Expungement because she had failed to remain arrest-free for five (5) years following the 1997 offense. That order was entered on November 22, 2013.

On March 12, 2014, Petitioner filed a "Request for Hearing on Petition for Expungement," which was held on April 4, 2014. While the hearing was held on April 4, 2014, no witnesses testified; on April 11, 2014 both parties filed Briefs in Support of their respective positions. On April 29, 2014, the Court entered an Order granting Petitioner's Petition for Expungement as to the charges of Purchase/Consumption/Etc. Alcohol by a Minor, 18 Pa. C.S.A. § 6308(a) and Disorderly Conduct, 18 Pa. C.S.A. § 5503(a)(2) but denied Petitioner's Petition for Expungement as to the charges of Public Drunkenness, 18 Pa. C.S.A. § 5505 and Harassment, 18 Pa. C.S.A. § 2709(a)(1). On April 30, 2014, Petitioner appealed the Order from April

29, 2014. A panel of the Superior Court (Ford Elliot, P.J.E., Shogan, J., Stabile, J.) affirmed. This Honorable Court granted allowance of appeal on September 8, 2015.

A chart has been provided outlining the charges and the resolution or disposition of those charges:

Date of Offense	Charge (Grade)	Disposition	Disposition Date	Expunged?	Contested
April 20, 1997	Harassment (S)	Guilty Plea	June 9, 1997	No	Yes
April 20, 97	Disorderly Conduct (M)	*Nolle Prosequi*	June 9, 1997	Yes	No
April 20, 1997	Public Drunkenness (S)	Guilty Plea	June 9, 1997	No	Yes
April 20, 1997	Underage Drinking (S)	Guilty Plea	June 9, 1997	Yes	No
September 27, 1998	Criminal Mischief (S)	Guilty Plea	December 16, 1998	Yes	No

III. Summary of the Argument

The Trial Court acted within its discretion in denying Petitioner's Petition for Expungement. Petitioner did not remain arrest or prosecution free for the mandatory five-year window provided in 18 Pa. C.S.A. § 9122(b)(3), and is, therefore, not eligible to have the record of her 1997 offense expunged.

IV. Argument

PETITIONER'S RECORD IS STATUTORILY INELIGIBLE FOR EXPUNGEMENT PURSUANT TO 18 PA. C.S.A. 9122(B)(3) BECAUSE SHE FAILED TO REMAIN ARREST OR PROSECUTION FREE FOR FIVE YEARS FOLLOWING THE 1997 OFFENSE DUE TO HER SUBSEQUENT 1998 ARREST AND CONVICTION.

A criminal defendant is not entitled to expungement of her criminal record after conviction unless "extremely limited circumstances permitted by statute" exist. *Commonwealth v. Hanna*, 964 A.2d 923, 924 (Pa. Super. 2009) (citations omitted). One of the rare times that a criminal defendant may be eligible for expungement exists when she "petitions the court for expungement of a summary offense and **has been free of arrest or prosecution for five years following the conviction for that [summary] offense.**" 18 Pa. C.S.A. § 9122(b)(3)(i) (emphasis added). The right to expungement of a summary offense is not absolute, however, because the legislature provides that the defendant's criminal history "may be expunged when" the defendant

fulfils her obligations of (1) petitioning the court and (2) remaining arrest or prosecution free for five years after conviction of that offense. 18 Pa. C.S.A. § 9122(b)(3). As such, expungement is left to the discretion of the trial court, even after a defendant meets both statutory prongs for expungement. *See Commonwealth v. Waughtel*, 999 A.2d 623, 624-25 (Pa. Super. 2010).

At issue in the instant appeal is the second prong of expungement consideration: whether the statute requires a defendant to be arrest-free for five years immediately following her conviction or simply allows a defendant the gratuitous time-frame of "any five-year period" after conviction. The statutory language used in Pa. C.S.A. § 9122(b)(3)(i) is clear on its face and is, therefore, unambiguous in its meaning: a defendant must be arrest or prosecution free for five years immediately following the conviction for the offense she wishes to expunge. Even if the statute is ambiguous, however, legislative intent supports the Commonwealth's contention that the five-year period must immediately follow the summary offense conviction.

A. 18 PA. C.S.A. § 9122(b)(3)(i) Is Not Ambiguous And Clearly Sets Forth The Requirements For Expungement Eligibility, Which Petitioner Failed To Meet Because She Did Not Remain

Arrest Free For Five Years Immediately Following Her 1997 Offense.

Pennsylvania statutes must be interpreted in accordance with the "common and approved usage" given to those words. 1 Pa. C.S.A. § 1903(a). Courts have an obligation to "read the statutory language as the drafters intended it to be read" and may not disregard a statute's "clear and unambiguous language" in an effort to "pursue its spirit." *Lodge No. 5 of Fraternal Order of Police v. City of Philadelphia*, 677 A.2d 887, 890 (Pa. Cmmw. 1998) (citations omitted)." Moreover, since 18 Pa. C.S.A. § 9122(b)(3)(i) is a penal statute, the rule of lenity requires that it be "strictly construed, with ambiguities being resolved in favor of the accused,"[1] should they exist. *Commonwealth v. Rivera*, 10 A.3d 1276, 1284 (Pa. Super. 2010). Finally, the basic rules of statutory interpretation require a court to "give effect to all its provisions," while keeping in mind that the legislature would not have included "any statutory language to exist as mere surplusage." *Commonwealth v. Baker*, 72 A.3d 652, 662 (Pa. Super. 2013) (citations and quotation marks omitted); 1 Pa. C.S. 1921(a), (b).

[1] The Commonwealth primarily asserts that the statute is not ambiguous, so the defendant is not entitled to have the statute read in a light favoring her position. Should this Honorable Court find that the statute is ambiguous, however, Section B of this Argument addresses that argument.

A plain reading of 18 Pa. C.S.A. § 9122(b)(3)(i) indicates that the statute implies that the five year period would immediately follow the summary conviction. The statute specifies that in order to be eligible for expungement, a defendant must be arrest-free for an unbroken five years following her conviction for the summary offense she wishes to expunge. 18 Pa. C.S.A. § 9122(b)(3)(i). Simply put, the statute provides that a defendant's record must be clear of arrest or prosecution for five years following the Summary Offense that she wishes to expunge. When a defendant is arrested or prosecuted during that five-year window, the clock stops and her record will *never* remain arrest or prosecution free so long as that subsequent arrest or prosecution remains on her record.[2] In essence, the opportunity to expunge the initial summary offense disappears upon a defendant's subsequent arrest or prosecution and the focus turns to the new, subsequent offense. Thus, a defendant with a subsequent arrest or prosecution within the five years following the initial summary offense conviction may never have the initial summary offense expunged because the five-

[2] To be clear, the Commonwealth is not arguing a collateral issue of whether a defendant may expunge a record piecemeal. Petitioner has not raised this issue, nor briefed it. As such, it is waived. *Commonwealth v. Melendez-Rodriguez*, 856 A.2d 1278, 1287 (Pa. Super. 2004) (issues not raised before the trial court are deemed waived and may not be raised on appeal).

year clock restarts from the date of the subsequent conviction. Put another way, the existence of a second summary offense within five-years of the first automatically disqualifies expungement of the first summary offense because the statute clearly and unequivocally states that the clock begins for "that" specific offense, which implies specificity (i.e., the second summary offense).

Furthermore, and as the Pennsylvania Superior Court observed, if the General Assembly intended the gratuitous "any five year period" as Petitioner contends, the statute would not have included "following the conviction for that offense." *Commonwealth v. Guilian*, No. 906 MDA 2014, 4 (Pa. Super. 2015). That language would be superfluous. *See Baker*, 72 A.3d at 662 (Pa. Super. 2013) (legislature would not intend for any statutory language to be "mere surplusage"). Instead, the statute would simply read "and has been free of arrest or prosecution for five years." Even under the Superior Court's hypothetically abbreviated reading, it is obvious that the five-year period must still follow the conviction; otherwise, the statute would not make sense. There is no question that the clock starts following the offense. This observation further supports the assertion that the statute implies

"immediately" between the date of conviction and the end of the five year window time because it designates when the clock starts (i.e., immediately following conviction). Otherwise, the statute would contain repetitive information as to when the clock starts (i.e., after the conviction, following the conviction). Rather than mere repetitive and superfluous language, the legislature's inclusion of "following that conviction" answers the temporal question of "when does that five-year clock start?" The answer: "immediately following that summary offense conviction."

Petitioner erroneously argues that because the statute does not include "**immediately** following **the** conviction," it must implicitly read "**any** five year **period** following **the** conviction." *Petitioner's Brief*, pg. 10-14. First, simply because the statute does not explicitly read "immediately following the conviction" is not dispositive of her position. The lack of specific qualifiers does not ruin or misconstrue the statute's clear meaning. For example, the language does not explicitly require that the five-year window be a "consecutive five years following that conviction," yet it is unequivocal that a defendant must remain arrest or prosecution free for five consecutive years following that conviction to

be eligible for expungement. Petitioner's argument boils down to the assertion that the legislature's already-clear language in § 9122 should be more specific. That is simply unnecessary because the statute is clear on its face.

Next, Petitioner and her *amici* mistakenly rely on public policy to bolster their positions. The gravamen of this argument hinges on the legislative intent that defendants convicted of summary offenses be given a break through expungement so they may be protected from "the difficulties and hardships that may result from an arrest on record." *Brief of Amici Curiae*, pg. 8 (citing *Commonwealth v. Butler*, 672 A.2d 806, 808 (Pa. Super. 1996) (citation omitted). While that humanitarian goal is certainly the reason for the five-year window, it is limited to the window that follows that summary offense. In this regard, the language is crystal clear: expungement may occur only if an individual "has been free of arrest or prosecution for five years following the conviction for that [summary] offense." 18 Pa. C.S.A. § 9122(b)(3)(i) (emphasis added). It is unequivocal that the statute does not read, nor imply, that summary offenses committed before the conviction triggers the wait period for expungement. However many summary offenses a defendant

is convicted of in during that prosecution, she is entitled to expungement of those offenses after five years from that conviction. The statute simply does not consider prior, unrelated summary offenses. Put another way, the five-year expungement window shuts the instant a defendant is arrested or prosecuted for an offense inside that window of time. When considered in that light, the humanitarian goal of the legislature is reached: a defendant rids herself of the stigma associated with a summary offense conviction if she can simply remain arrest-free for five years following that conviction. The defendant has not, however, earned the right to rid herself of the stigma of prior, unrelated summary offense convictions when she fails to remain arrest-free after those offense.

Therefore, § 9122(b)(3)(i) clearly and unambiguously explains that a defendant must be arrest or prosecution free for a period of five years immediately following the conviction she wishes to expunge.

B. Even If 18 PA. C.S.A. § 9122(b)(3)(i) Is Ambiguous, The Legislative Intent Clearly Supports The Interpretation That The Five Years Must Immediately Follow Conviction For A Summary Offense, Which Petitioner Failed To Do Because Of Her 1998 Arrest And Conviction.

When a statute's meaning is unclear, the Court should resolve the ambiguity through "reference to principles of statutory construction." *Delaware County v. First Union Corp.*, 992 A.2d 112, 118 (Pa. 2010) (citations omitted). This includes the consideration of "the object to be attained," "consequences of specific interpretations," and how the statute in-question reconciles with other statutes of similar implications. *Id.*

The legislature clearly intended § 9122 to apply to the five-year window of time immediately following the summary offense conviction. Section (b)(3)(i) was added to § 9122 in 2008 after the legislature decided the rules governing expungement, § 9122(b)(1) and § 9122(b)(2), were too narrow. 2008 Pa. Legis. Serv. Act 2008-134 (H.B. 1543) (Purdon's). Reference to other sections in § 9122 provides guidance on the intent because the language in (b)(3)(i) mirrors the language in (b)(1). In § 9122(b)(1), the language reads "An individual who. . . reaches 70 years of age and **has been free of arrest or prosecution for ten years following final release**. . ." is eligible for expungement. 18 Pa. C.S.A. § 9122(b)(1) (emphasis added). This portion of the statute, like § 9122(b)(3)(i) also has two requirements for expungement: (1) a

defendant must reach the age of 70, and (2) she must be arrest and prosecution free for ten years after final release from custody. Unlike § 9122(b)(3)(i), however, § 9122(b)(1) applies to any conviction, not just summary offenses. The draconian obligations of § 9122(b)(1)[3] requires a defendant to be released from custody by the age of sixty to meet the earliest minimum age requirement of seventy years old. The temporal qualifier "immediately" was not necessary in that portion of the statute because time was obviously of the essence due to the advanced age of the defendants seeking expungement. The language in § 9122(b)(3)(i), borrowed directly from § 9122(b)(1), did not contemplate the timing issues that were not present in § 9122(b)(1). It would defy legislative construction, however, for the latest addition of the statute to be interpreted in as defendant friendly a manner as possible when the previous portions of the statute required a defendant to be either deceased or elderly. By reading § 9122(b)(1) it becomes clear that the five-year window for expungement was intended to immediately follow a defendant conviction.

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[3] Of the two previous statutory exceptions for the expunging convictions, § 9122(b)(1) was inarguably the least restrictive option for defendants seeking record expungement. § 9122(b)(2) requires a defendant to wait three years *after* her death for expungement. Obviously, the legislature did not see the need for the temporal qualifier "immediately" for that section of the statute.

Additionally, Petitioner's reading of the statute creates an expungement windfall. *See generally*, *Commonwealth v. Merigris*, 681 A.2d 194, 195 (Pa. Super. 1996) (trial courts do not deal in "volume discounts" to allow defendants "to receive a windfall at sentencing..."). Under Petitioner's stance, a defendant could commit a years-long summary conviction crime-spree, end the spree, then apply for expungement after the five-year period of her last offense for all of her previous offenses. In fact, that is precisely what Petitioner seeks to do in the instant matter. She petitioned the court to expunge two separate and unrelated summary offense convictions from 1997 and 1998. The records indicate that she has been arrest- and prosecution-free since her 1998 offense. Since Petitioner fulfilled the obligations set forth under § 9122, the lower court was within its discretion to expunge the 1998 offense. She now seeks, however, credit for the time she was arrest-free since her second offense to be applied retroactively to her first offense. Petitioner failed to fulfill the statutory obligations for expungement for her 1997 offense because she did not remain arrest or prosecution free for five years after that conviction. In fact, Petitioner did not remain arrest-free for even two years. It would be nonsensical to apply a start

time that begins at a defendant's leisure. *See In re R.R.*, 57 A.3d 134, 139 (Pa. Super. 2012) (citing 1 Pa. C.S.A. § 1921(a) (additional internal citations omitted) (a court should presume that the legislature did not intend an absurd or unreasonable result). Thus, the lower court acted within its discretion by refusing to expunge the 1997 offense.

To bolster her argument, Petitioner mistakenly cites to *In re. A.B.*, a case about juvenile expungement. 987 A.2d 769 (Pa. Super. 2009). By relying on the *In re A.B.* Court's interpretation of § 9123, Petitioner essentially asserts a classic "apples and oranges" argument to support her position as any reference to that case forces an imagined parallel to the case at bar because, in Pennsylvania, "juvenile proceedings are not criminal proceedings." *Id.* at 775 (citing *In re S.A.S.*, 839 A.2d 1106, 1108 (Pa. Super. 2003) (internal citation omitted)). The aim of a juvenile proceeding differs greatly from criminal proceeding because the intent for juvenile prosecution is always rehabilitation and reformation. *Id.* Moreover, § 9123's language does not reflect the same apparent trial-level discretion articulated in § 9122. Under § 9123, the court "shall occur" after the court finds one of the facts enumerated in § 9123(1)-(4). 18 Pa. C.S.A. § 9123. The mere fact that both statutes appear under

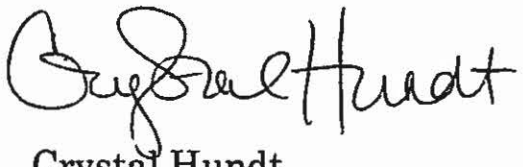
"expungement" in Title 18 does not impute duplicative intent to either statute.

Since the legislative intent clearly sets forth that a defendant must wait five years immediately following her summary offense conviction in order to apply for expungement, the trial court acted within its discretion in denying Petitioner's petition for expungement because she did not qualify for expungement.

V. Conclusion

WHEREFORE, the Commonwealth respectfully requests this Honorable Court affirm the finding of the lower courts entered against Petitioner.

Respectfully submitted,



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