

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
Case No.: 2022-CP-26-0313

Kenneth Dippel,)

Petitioner, **RECEIVED**

v.

JAN 12 2023

ORDER GRANTING SUMMARY
JUDGMENT

State of South Carolina, et al.,)

SC Court of Appeals

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Respondents.)

This matter came before me on August 29, 2022, for a motion hearing on the cross motions for summary judgment filed by each of the parties in this matter. The Petitioner was present at the hearing and represented himself *pro se*. Respondent South Carolina Law Enforcement Division (SLED) was represented at the hearing by Paul T. Ahearn, III, the Deputy General Counsel for SLED. The State of South Carolina and the 15th Circuit Solicitor’s Office were represented at the hearing by the Honorable Jimmy A. Richardson, II, the 15th Judicial Circuit Solicitor. Based upon the filings in this matter, the arguments presented at the hearing, and the applicable South Carolina law; I hereby GRANT the Respondents’ motions for summary judgment and hereby deny the Petitioner’s motion for summary judgment.

STANARD OF REVIEW

“Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law.” Rules Civ. Proc., Rule 56; Knight v. Austin, 396 S.C. 518, 521-2, 722 S.E.2d 802, 804 (2012). “The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder.” Englert, Inc. v. Leafguard USA, Inc., 377 S.C. 129, 133-4, 659 S.E.2d 496, 498 (2008).

LAW/ANALYSIS

Based on the following, there is no genuine issue of material fact in dispute in this matter. Further, there is no factual dispute requiring the services of a fact finder. Accordingly, the Respondents are entitled to a judgment as a matter of law. *See* George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001); Rule 56(c), SCRPC

The facts relevant to this case are largely undisputed. The Petitioner was arrested for felony Assault on Police Office While Resisting Arrest (S.C. Code Ann. § 16-9-320(B)) on or about May 2, 2018. The Petitioner pled guilty to the lesser included offence of misdemeanor Resisting Arrest in violation of S.C. Code Ann. § 16-9-320(A) on or about December 7, 2018, in Transfer Court. S.C. Code Ann. § 16-9-320(A) provides “A person who violates the provisions of this subsection is guilty of a misdemeanor and, upon conviction, must be fined not less than five hundred dollars nor more than one thousand dollars or imprisoned not more than one year, or both.”. It appears that during this plea, the Petitioner was sentenced to 1 day but was given credit for time served and ordered to pay a fine of \$128.75. Petitioner subsequently sought an expungement of this conviction pursuant to S.C. Code Ann. § 22-5-910. At that time, the Petitioner’s conviction did not appear on his SLED criminal history record. SLED was subsequently made aware of the missing disposition information from this conviction and SLED promptly updated Petitioner’s criminal history record accordingly. Currently, the Petitioner’s criminal history record accurately reflects his May 2018 arrest for felony Resisting Arrest, and his December 2018 conviction for misdemeanor Resisting Arrest. However, I find and conclude the Petitioner’s misdemeanor Resisting Arrest conviction is not eligible for expungement pursuant to S.C. Code Ann. § 22-5-910. Accordingly, this entire action fails as a matter of law and summary judgment for the Respondents is appropriate.

In South Carolina, expungement eligibility pursuant S.C. Code Ann. § 22-5-910 is clearly limited to “a crime *carrying* a penalty of not more than thirty days imprisonment....”(emphasis added). I find that this is clear and unequivocal statutory language that the potential penalty of the charge of conviction is the appropriate consideration for eligibility pursuant to S.C. Code Ann. § 22-5-910. However, the Petitioner’s conviction was of a crime that *carried* a sentence of imprisonment of “not more than one year”, which clearly exceeds the “not more than thirty days” eligibility requirement of S.C. Code Ann. § 22-5-910. Petitioner’s argument that he is entitled to an expungement because he was sentenced to less than 30 days simply does not comport with the plain language of S.C. Code Ann. § 22-5-910. I note also that South Carolina courts have long acknowledged that expungement is a privilege and not a right, such that the Petitioner has no entitlement to an expungement. *See Gay v. Ariail*, 381 S.C. 341, 344, 673 S.E.2d 418, 419 (2009). (“The mere fact that Gay is entitled to have his application considered does not mean expungement necessarily follows; Gay concedes expungement is a privilege and not a right.”). As such, I find and conclude that Petitioner’s claim in this matter fails as a matter of law and summary judgment is appropriate.

Comparing the language of S.C. Code Ann. § 22-5-910 and S.C. Code Ann. § 22-5-920 is also instructive on this issue. S.C. Code Ann. § 22-5-910 is clearly limited to crimes “carrying a penalty of not more than thirty days imprisonment...” and does not include a reference to the actual sentence received. In contrast, in S.C. Code Ann. § 22-5-920, the South Carolina Legislature specifically provided that the actual sentence should be incorporated into the analysis as it contains the following language “[f]ollowing a first offense conviction as a youthful offender for which a defendant *is sentenced* pursuant to the provisions of Chapter 19, Title 24, Youthful Offender Act,....” (emphasis added).

I note that had the South Carolina Legislature intended for the actual sentence to be the determining factor in a S.C. Code Ann. § 22-5-910 expungement analysis, they would have surely included similar language to that used in S.C. Code Ann. § 22-5-920. However, they did not. As such, Petitioner's arguments regarding his expungement eligibility fails as a matter of law. *See Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' Black's Law Dictionary 602 (7th ed. 1999).").

Petitioners' other claims also fail as a matter of law. At the time of Petitioner's conviction S.C. Code Ann. § 14-17-325 (1989) provided that

Every **clerk of court** shall report the disposition of each case in the Court of General Sessions to the State Law Enforcement Division within thirty days of disposition. The disposition report must be in a format approved by representatives of the State Law Enforcement Division and the office of court administration. With the approval of the State Law Enforcement Division and the office of court administration, this reporting requirement may be satisfied by use of General Sessions docket information transmitted to the office of the court administration. (emphasis added).

This provision sets forth the statutory responsibility for disposition reporting of general sessions cases and places that responsibility on the clerk of court – not the solicitor nor the solicitor's office. I find that this provision precludes any action against the solicitor's office on this issue and that Petitioner's reliance on S.C. Code Ann. § 17-1-40(B)(4) is misplaced.¹ Simply put, S.C. Code Ann. § 17-1-40(B)(4) does not supersede or shift the responsibility provided in S.C. Code Ann. § 14-17-325, which again provides that a clerk of court shall report dispositions to SLED.

¹ I note that the language S.C. Code Ann. § 14-17-325 creates no private action in any event.

Moreover, S.C. Code Ann. § 17-1-40(B)(4) is clearly predicated and solely contingent on solicitor discretion. In fact, S.C. Code Ann. § 17-1-40(B)(4) plainly states “[i]f a person pleads guilty to a lesser offense **and the solicitor deems it appropriate...**” (emphasis added). The existence of this prosecutorial discretion to have SLED modify a charge of arrest to match the charge of conviction does not in any way create a viable cause of action in this matter. As such, Petitioner’s reliance on S.C. Code Ann. § 17-1-40(B)(4) is unavailing and this claim fails as a matter of law.

In addition, Petitioner’s 5th Amendment claim is based on SLED “resorting to ‘lip service’ and not supplying Mr. Dippel a copy of a formal written decision setting forth the reasons and bases (sic) of their decision violated Mr. Dippel’s 5th Amendment constitutional right to due process of law which includes the right of notification.” This claim fails as a matter of law. S.C. Code Ann. § 17-22-940(B)(4) requires the solicitor’s office to coordinate “with the South Carolina Law Enforcement Division (SLED) and, in the case of juvenile expungements, the Department of Juvenile Justice, **to confirm that the criminal charge is statutorily appropriate for expungement...**” (emphasis added). Further, S.C. Code Ann. § 17-22-940(E) provides that

SLED shall verify and document that the criminal charges **in all cases**, except in cases when charges are sought to be expunged pursuant to Section 17-1-40, Section 17-22-150(a), Section 17-22-530(A), Section 17-22-330(A), or Section 44-53-450(b), **are appropriate for expungement before the solicitor or his designee, and then a circuit court judge, or a family court judge in the case of a juvenile, signs the application for expungement.** If the expungement is sought pursuant to Section 34-11-90(e), Section 22-5-910, Section 22-5-920, Section 63-19-2050, or Section 56-5-750(f), the conviction for any minor traffic-related offense that is not related in any way to driving under the influence of alcohol or other drugs will not be considered as a bar to expungement. (emphasis added).

However, no provision of South Carolina law requires SLED to provide the Petitioner with a “formal written decision”, nor does any provision of the state or federal constitution. Nevertheless, SLED noted in its motion for summary judgment that Exhibits 9 and 10 to the Petitioner’s

Amended Complaint are in fact the Petitioner's denied Expungement Order containing SLED's formal denial of eligibility in this matter, and an email from SLED's Expungement Supervisor indicating the specific language contained in S.C. Code Ann. § 22-5-910 that prohibits the Petitioner. Similarly, SLED has filed two summary judgment motions in this matter containing SLED's legal position on this matter. As such, I find that this claim fails as a matter of law, and summary judgment is appropriate. Further, I find that the elected solicitor for the Fifteenth Judicial Circuit has no authority to expunge the Petitioner's conviction in this matter.

In addition, while Petitioner failed to raise any challenge to his underlying conviction in his Amended Complaint / Petition Expungement / Motion Summary Judgment filed on June 9, 2022, he nevertheless argued the merits of this argument at the hearing. Respondents contend this argument was abandoned when Petitioner failed to raise it in his amended pleadings. However, regardless of whether this argument was properly raised by the filings in this matter, South Carolina law prohibits the reconsideration of any criminal sentence following the expiration of the term of court at which the sentence is imposed, to wit: a term of court occurring and expiring in 2018. As such, the Petitioner is prohibited from attacking the legality of his 2018 conviction or sentence, or from seeking to modify the same at this time. *See State v. Best*, 257 S.C. 361, 368, 186 S.E.2d 272, 275 (1972) (citing *State v. Thompson*, 122 S.C. 407, 115 S.E. 326 (1922); 24 C.J.S. Criminal Laws 1590, p. 607; 21 Am.Jur.(2d) Criminal Law, Section 569, p. 537).

CONCLUSION

Therefore, based on the foregoing and all applicable South Carolina law, it is hereby ORDERED, DECREED, and ADJUDGED that the Defendant's Motion for Summary Judgment is GRANTED.

AND IT IS SO ORDERED.

The Honorable George M. McFaddin, Jr.
Presiding Judge
Court of Common Pleas
15th Judicial Circuit

_____, South Carolina
_____, 2022



Horry Common Pleas

Case Caption: Kenneth D Dippel VS South Carolina State Of , defendant, et al

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So Ordered

S/George M. McFaddin, Jr., #2759