IN THE SOUTH CAROLINA COURT OF APPEALS

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SC Court of Appeals

Appellate Case No. 2023-000048

KENNETH D. DIPPEL,

Appellant,

v.

STATE OF SOUTH CAROLINA,
15TH CIRCUIT SOLICTOR'S OFFICE, & SLED,

Respondents.

Appeal from Horry County,
Court of Common Pleas,
George M. McFaddin, Jr., Circuit Court Judge
Case No. 2022-CP-26-00313

INITIAL BRIEF APPELLANT KENNETH D. DIPPEL

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TABLE OF CONTENTS

ARGUMENTS

TABLE OF CITATIONS

CASES **Page(s)**

OTHER AUTHORITY

RULES

TABLE OF CITATIONS (CONTINUED)

RULES **Page(s)**

STATUTES

CERTIFICATE OF COMPLIANCE

I **Kenneth D. Dippel**, the Appellant certifies this brief complies Rule 211(b), SCACR.

Kenneth D. Dippel
(Signature)

March 13, 2023
(Date)

STATEMENT OF ISSUES

1) What is the legal definition of the word *"penalty"* referenced in S.C. Code § 22-5-910 (A)?
2) Is eligibility expungement for a first-time conviction - S.C. Code § 22-5-910 (A) based upon the *"penalty"* decided by a presiding judge in a sentencing order?
3) Does South Carolina law prohibit the reconsideration of any criminal sentence following the end of the term of court the sentence imposed even when a post-conviction relief application have been submitted and newly discovered facts?

STATEMENT OF THE CASE

Mr. Dippel was charged in violation S.C. Code § 16-9-320(B) resisting arrest, assault, beat, or wound a police officer during the serving process on May 2, 2018**.** The Horry County Solicitor subsequently offered Mr. Dippel a plea bargain whereby if Mr. Dippel would plead guilty to misdemeanor resisting arrest, he would receive a penalty one day suspended in jail with credit for his confinement at J Reuben Long Detention Center, and pay a $128.75 fine. Mr. Dippel through Attorney Thomas Winslow accepted the Solicitor's plea bargain agreement. The Solicitor filed a Petition to transfer Mr. Dippel's case from General Sessions to the Magistrate's Court.

Mr. Dippel and his counselor appeared before Horry County Magistrate Brad Mayer for sentencing on December 7, 2018. Magistrate Brad Mayer accepted the plea bargain agreement. He decided Mr. Dippel's penalty would be to serve one day suspended in jail with credit for confinement at J. Reuben Long Detention Center and to pay a $128.75 fine.

Mr. Dippel on December 5, 2021, obtained a copy of his criminal record from SLED. The record details only the original felony resisting arrest, assault, beat, or wound a police officer during the serving process. Horry County Solicitor Employee Heather Bell received Mr. Dippel's application to expunge the misdemeanor resisting arrest conviction on December 7, 2021. The Horry County Solicitor Office prosecutes cases on behalf of the State, manages and processes expungement applications in Horry County. [1]

Horry County Solicitor employee Heather Bell predetermined Mr. Dippel was not eligible for expungement because the charge potentially carried a maximum penalty 1 year imprisonment. Nevertheless, she sent Mr. Dippel's expungement request to SLED without sending his application to a Horry County summary court judge. Mr. Dippel on January 18, 2022, filed a Summons and Complaint breach of contract, gross negligence, and an application for

[1] S.C. Code § 17-22-940(B) sets forth policies and procedures the solicitor's office must implement to ensure the expungement process is conducted properly.

post-conviction relief. Mr. Dippel on January 19, 2022, sent a fax to SLED requesting the felony charge - assault on a police officer while resisting arrest corrected. SLED in response later entered on Mr. Dippel's criminal record the final disposition reflecting Mr. Dippel plead guilty for misdemeanor resisting arrest and received a penalty 1 day in jail and a $128.75 fine.

The Horry County Solicitor filed a response to Mr. Dippel's complaint and a motion to dismiss on February 3, 2022. Heather Bell in the Horry County Solicitor's office on March 15, 2022, sent a responsive email to Mr. Dippel on stating: "*Although you received a time served sentence, the penalty or potential sentence you could have received for this offense was up to one year imprisonment and / or a $500 to $1000 fine."*

The Solicitor's employee Heather Bell forwarded to Mr. Dippel an email and an attachment from Kristen Mixon, Program Coordinator / Expungement Supervisor on March 18, 2022, saying: *"Please see attached". "This would not be eligible for expungement because the charge carries a penalty over 30 days".* The attachment entitled *"IN THE COURT OF GENERAL SESSIONS ORDER FOR DESTRUCTION OF ARREST RECORDS"* was initialized "KM" whom is Kristen Mixon at SLED on December 29, 2021.

Mr. Dippel in response sent a *"Moton to Alter or Amend"* per Rule 15, SCRCP on March 22, 2022. Rule 15, SCRCP. Judge Christi Curtis

granted Mr. Dippel's "Motion to Alter or Amend" in a June 1, 2022, hearing. Mr. Dippel filed his Amended Complaint and Motion for Summary Judgment on June 9, 2022. The Solicitor filed a summary judgment motion for dismissal and answer on July 8, 2022. SLED filed a summary judgment asserting the charge Mr. Dippel was seeking expunged carries a penalty greater than 30 days in jail.

Judge George M. McFaddin, Jr. on September 12, 2022 sent the parties a letter indicating he was granting the Defendant's summary judgment motion and was denying the Plaintiff, Mr. Dippel's summary judgement motion. Judge George M. McFaddin, Jr. in his letter requested for SLED Attorney Mr. Whitsett to prepare the order. Mr. Dippel in response filed a prompt *"Motion to Alter, Amend, Vacate Judgment"* on September 15, 2022. On November 29, 2022, the final order granting summary judgment dismissing Mr. Dippel's "Expungement Petition" and post-conviction relief was entered. Mr. Dippel in response filed another prompt reconsideration motion on December 2, 2022.[2]

Judge George M. McFaddin denied Mr. Dippel's reconsideration motion on December 20, 2022. Mr. Dippel filed his timely notice of appeal

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[2] Rule 59(f), SCRCP: *"The time for appeal for all parties shall be stayed by a timely motion under this Rule and shall run from the receipt of written notice of entry of the order granting or denying such motions".*

at the lower court on January 11, 2023 and his timely notice of appeal to the South Carolina Court of Appeals was received on January 12, 2023.

STANDARD OF REVIEW

This matter is before the Court on Appellant Kenneth Dippel's motion for summary judgment, and Respondents' Horry County Solicitor and SLED's motion for summary judgment. The issue becomes a question of law for the Appellate Court to decide de novo because when there are cross-motions for summary judgment. *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E. 2d 432, 434 (2011). Furthermore, this Honorable Court's review involves interpretation of statutes. Interpretation of statutes is a question of law for the Court to review de novo. *S.C. Pub. Int. Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 495, 854 S.E. 2d 836, 837 (2021). Determining the proper interpretation S.C. Code § 22-5-910 (A) is a question reviewed de novo without deference to the lower court, and the Appellate court is free is to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the court's sense of law, justice, and right. *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 7-8, 760 S.E. 2d 785, 788 (2014).

ARGUMENTS

1. The Lower Court Committed Legal Error Dismissing Appellant's Expungement Petition By Summary Judgement

The lower court ruling typed up by SLED Attorney Mr. Whitsett and signed by Judge George M. McFaddin, Jr. dated November 29, 2022, granted Appellees' summary judgment by concluding:

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".*

This rationale is based upon a mistaken interpretation of S.C. Code § 22-5-910(A).[3] Nowhere in S.C. Code § 22-5-910(A) is there a clear unambiguous legal definition defining the word *"penalty"* as the potential maximum punishment

[3] S.C. Code § 22-5-910(A): *"Following a* ***conviction*** *for a crime* ***carrying a penalty*** *of not more than thirty days imprisonment or a fine of one thousand dollars, or both, the defendant after three years from the date of the conviction, including a conviction in magistrates or general sessions court, may apply, or cause someone acting on his behalf to apply, to the circuit court for an order expunging the records of the arrest and conviction and any associated bench warrant".*

set forth in a penal statute such as in this case S.C. Code § 16-9-320(A).[4] Furthermore, there is no clear unambiguous legislative history to support the word *"penalty"* is the potential maximum punishment set forth in a particular penal statute, and there is no legislative history expungement eligibility must be based upon the *"possibility"* or *"potential"* receiving the maximum punishment contained only in a penal statute without sentencing order consideration.

This Appellant Court in defining *"penalty"* should look to the usual dictionary meaning to supply its meaning. *Lee v. Thermal Eng'g Corp.*, 352 S.C. 81, 91-92, 572 S.E. 2d 298, 303 (Ct. App. 2002) ("where a word is not defined in a statute our appellate courts have looked to the usual dictionary meaning to supply its meaning"). The Miriam Webster Dictionary defines penalty as "the suffering in person, rights, or property that is annexed by law or **judicial decision** to the commission of a crime or public offense". Black's Law Dictionary defines *"penalty"* as **punishment imposed on a wrongdoer,**

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[4] S.C. Code § 16-9-320(A)*: "It is unlawful for a person knowingly and willfully to oppose or resist a law enforcement officer in serving, executing, or attempting to serve or execute a legal writ or process or to resist an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not. 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".*

[usually] in the form of imprisonment or fine. Black's Law Dictionary further defines punishment as the ***"penalty"*** **inflicted upon a person** by the authority of the law and **the judgment and sentence of a court**, for a crime or offense committed by him.

Thus, *"penalty"* is the punishment imposed by a judge in a sentencing order. Furthermore, S.C. Code § 16-9-320(A) like any other South Carolina penal statute serves only as sentencing guideline for judges. Our State Legislatures clearly intended to leave the penalty determination left to the sound discretion of a judge in a sentencing order when there is a conviction for a penal statute violation. Therefore, it is only common-sense expungement eligibility must be based an objective determination whereby the *"penalty"* is the punishment determination by a judge in a sentencing order.

The penalty being defined as the punishment imposed by the judge in a sentencing order is further supported by the words *"following a conviction"* contained in S.C. Code § 22-5-910(A) when factoring in the Appellant's conviction was predicated upon plea bargain and negotiated sentencing whereby if the Appellant plead guilty misdemeanor arrest, he would receive a suspended 1-day jail sentence credit for time served and a $128.75 fine. There is a moral obligation for the Court in this case to enforce the plea bargain against the Respondents. S.C. Code § 22-5-910(E) states:

"As used in this section, ***"conviction"*** ***includes a guilty plea****, a plea of nolo contendere, or the forfeiting of bail. For the purpose of this section, any number of offenses for crimes carrying a penalty of not more than thirty days imprisonment or a fine of one thousand dollars, or both, for which the individual received sentences at a single sentencing proceeding that are closely connected and arose out of the same incident may be considered as one offense and treated as one conviction for expungement purposes.*

The typed-up order by SLED Attorney Mr. Whitsett endorsed by Judge George M. McFaddin ignores it was the Horry County Solicitor who offered Mr. Dippel the plea bargain and negotiated sentencing, and without Mr. Dippel and his Attorney's acceptance there would have been no conviction. It would be at this point a travesty of injustice in lieu of the plea bargain and negotiated sentencing for this Court to rule Mr. Dippel is not eligible for expungement because the crime he plead guilty carries a penalty greater than 30 days. Also, it would be a violation of the plea agreement and be a breach of contract.

Furthermore, it would not be in harmony with the magistrate's jurisdictional statute. There was a transfer order per the plea bargain and negotiated sentence whereby the Solicitor endorsed to transfer Mr. Dippel's case from General Sessions to Magistrate Court as in the plea agreement and negotiated penalty for sentencing. S.C. Code § 22-3-550(A) specifically says:

"Magistrates have jurisdiction of all offenses which may be subject to the penalties of a fine or forfeiture ***not exceeding five hundred dollars****, or* ***imprisonment not exceeding thirty days****, or both."*

It is common sense the crime Mr. Dippel plead guilty (misdemeanor resisting arrest) carries a *"penalty"* less than 30 days when considering the

magistrate jurisdictional statute. Mr. Dippel's case would have never been transferred from General Sessions to Magistrate Court in the first instance if the *"penalty"* specified in the first-time conviction statute S.C. Code § 22-5-910(A) was greater than 30 days. Also, Mr. Dippel and his Attorney would have never accepted the Solicitor's plea bargain if the *"penalty"* specified in the first-time conviction statute S.C. Code § 22-5-910(A) is greater than 30 days.

Furthermore, S.C. Code § 22-5-910(E) specifically mentions individual received **sentences** at a single sentencing proceeding which viewed in context with the dictionary definition of penalty, the plea bargain and negotiated sentencing, and the magistrate's jurisdictional statute it is *"common sense"* the *"penalty*" specified in the first-time conviction statute S.C. Code § 22-5-910(A) is the *"penalty"* decided by the magistrate judge in the sentencing order. Therefore, Mr. Dippel is expungement eligible for the crime he pled guilty (misdemeanor resisting arrest) so long as he has not had any other convictions within the three years following his first-time conviction.

The Respondent's typed order endorsed by Judge George M. McFaddin, Jr. erroneously assumes expungement is a privilege and not a right, such that Mr. Dippel has no entitlement to expungement fails as a matter of law. Individuals seeking to have a first-time conviction expunged are entitled due process of law, to have their expungement eligibility fairly and properly decided by the proper interpretation S.C. Code § 22-5-910(A), and do have a right to appeal to

the Circuit Court to seek a judicial determination of eligibility when the Solicitor in his discretion does not consent to the expungement. S.C. Code § 17-22-940 (E) specifically says:

"Nothing in this article precludes an applicant from retaining counsel to apply to the solicitor's office on his behalf or precludes retained counsel from initiating an action in circuit court seeking a judicial determination of eligibility when the solicitor, in his discretion, does not consent to the expungement."

2. South Carolina Law Allows Review Post-Conviction Relief Based on Newly Discovered Evidence

This Court gives deference to the PCR judge's findings of fact, and will uphold the findings of the PCR court when there is any evidence of probative value to support them. *Jordan v. State,* 406 S.C. 443, 448, 752 S.E. 2d 538, 540 (2013). However, this Court reviews questions of law de novo and must reverse a lower court decision on post-conviction relief when it is controlled by error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E. 2d 1, 3 (2012).

The typed up order by Respondents endorsed by Judge M. McFaddin Jr., dismissed the Appellant's post-conviction relief on the grounds: *"South Carolina law prohibits the reconsideration of any criminal sentence following the expiration of the term of court occurring and expiring in 2018".* However, the South Carolina Uniform Post–Conviction Procedure Act (PCR Act) allows an applicant to file an application for relief if the applicant contends there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence. S.C. Code § 17–27–45(C) ("allowing

applications to be filed within one year of the date of actual discovery of the facts or from the date when the facts "could have been ascertained by the exercise of reasonable diligence"). *Jamison v. State*, 765 S.E. 2d 123 (S.C. 2014)

S.C. Code § 17-27-20 (A) states any person may institute a post-conviction proceeding and seek relief who claims there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice - S.C. Code § 17-27-20 (A)(4), and that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. S.C. Code § 17-27-20 (A)(6).

Appellant has claimed to be entitled to PCR because of the newly discovered evidence whereby the Horry County Solicitor did not honor the plea bargain afforded to him. Appellant asserts this was the result of the Horry County Solicitor's own negligence because the Solicitor did not submit a modification order for the judge to sign resulting in the original felony charge not being removed off his record and final disposition of his case not being submitted by the Horry County Clerk of Court to SLED. The Appellant further contends this fact was only discoverable with due diligence on December 5,

2021 right about at the same time he began pursuing expunging the misdemeanor resisting arrest charge.

An Order of Offense Modification / Lesser Offense must first be given by the Solicitor's prosecuting officer to the presiding judge to sign, and without it the Horry County Clerk of Court is unable to forward the modification order to SLED so that SLED could properly update the Appellant's Criminal History. SLED's Computerized Criminal History (CCH) Manual specifically states a modification / change form **must be** received and processed by SLED prior to the Court's issuance of an order of expungement of the original charge. There has never been a modification / change from Horry County Clerk's Office.

Furthermore, SLED's Computerized Criminal History (CCH) Manual states:

"*However, when a defendant is charged with an offense which required incarceration and booking, and that the charge is reduced or changed to an offense which also would have would have required incarceration and booking, the defendant's criminal record at SLED **must be** amended to reflect the subsequent charged*".

"When SLED receives the completed, the original charge will be deleted from the defendant's record and the original UTT number will be applied to the new lesser included offense pled to or convicted of".

The misdemeanor resisting arrest is a reduced or lesser offense compared to felony resisting arrest and assault on a police officer which mandatory would require SLED upon the receiving of a modification order from Horry County, to delete the original charge felony resisting arrest /

assault on a police officer. The Appellant, Kenneth Dippel's criminal history still has not been correctly updated by SLED by the fact the felony charge remains on his criminal record history despite the fact he never pled guilty to felony assault on a police officer and was given a plea bargain by the Solicitor to pled guilty to the misdemeanor resisting arrest with a suspended sentence to serve 1 day in jail with credit for time served. The Solicitor, SLED, and the State of South Carolina has to date not honored the plea bargain. It is imperative for this Court to enforce the plea bargain against the Solicitor, SLED, and the State. This requires this Court to issue an order directing SLED to remove the felony charge off Mr. Dippel's criminal record history.

Furthermore, Mr. Dippel at the hearing before Judge M. McFaddin Jr., specifically told the Court his Attorney, Thomas W. Winslow had several conversations with the Solicitor's prosecuting attorney, and that he was assured that if Mr. Dippel accepted the plea bargain the charge of misdemeanor resisting arrest would not be on his record permanently because he would be sentenced to just a suspended one day in jail credit time served and a $128.75 fine, and it would be eligible for expungement provided Mr. Dippel did not have any other convictions within three years after conviction. Attorney Thomas W. Winslow re-iterated the same thing to the Appellant, Mr. Dippel. The Appellant knowing now the Solicitor and SLED have apparently reneged on the plea bargain by claiming the misdemeanor resisting arrest Mr.

Dippel pled guilty to is not eligible for expungement would have never pled guilty to misdemeanor resisting arrest in the first instance.

CONCLUSION

The Appellant, Kenneth Dippel prays to God and the Lord this Honorable Court will vacate and reverse the granting of summary judgment to the Respondents and will grant equitable relief.

Sincerely,

Kenneth D. Dippel

Kenneth Dippel

PROOF OF SERVICE

I, **Kenneth D. Dippel** certify I provided a copy of the Appellant's brief by depositing in the United States Postal Service by certified mail with return receipt signature confirmation to the following:

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March 13, 2023
Date