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SC Court of Appeals

**IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM HORRY COUNTY
Court of Common Pleas

George M. McFaddin, Jr., Circuit Court Judge

Case No. 2023-CP-26-0313

(Appellate Case No. 2023-000048)

Kenneth Dippel, Appellant

v.

State of South Carolina, 15th Circuit Solicitors Office,
And SLED, Respondents.

INITIAL BRIEF OF APPELLANT

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The Appellant, **Kenneth Dippel**, certifies that this brief complies with Rule 211(b), SCACR.

Kenneth Dippel

Signature

April 10, 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 on the '*penalty*' a presiding judge decides 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 penalty imposed even when a post-conviction relief application has newly discovered facts?

STATEMENT OF THE CASE

Mr. Dippel was charged with violating S.C. Code § 16-9-320(B), resisting arrest, assault, beating, or wounding 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 pleaded guilty to misdemeanor resisting arrest, he would receive a penalty of 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 of resisting arrest, assaulting, beating, or wounding a police officer during serving. 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's Office prosecutes cases on behalf of the State and manages and processes expungement applications in Horry County. *S.C. Code § 17-22-940(B)* sets forth policies and procedures the Solicitor's office must implement to ensure the expungement process is correctly done.

Mr. Dippel, on January 18, 2022, filed a Summons and Complaint for breach of contract, gross negligence, and an application for post-conviction relief. Horry County Solicitor employee Heather Bell predetermined Mr. Dippel was not eligible for expungement because the charge potentially carried a maximum penalty of 1-year imprisonment. 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 pleaded guilty to misdemeanor resisting arrest and received a penalty of 1 day in jail and pay a fine of \$128.75.

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: *"Although you received a time served sentencing, the penalty or potential sentence you could have received for this offense was up to one-year imprisonment and 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 by "K.M.," who is Kristen Mixon at SLED on December 29, 2021. Mr. Dippel, in response, sent a *"Motion to Alter or Amend"* per Rule 15, SCRCP, on

March 22, 2022. Judge Christi Curtis granted Mr. Dippel's "Motion to Alter or Amend" on June 1, 2022.

Mr. Dippel filed his Amended Complaint and Motion for Summary Judgment on June 9, 2022. The Solicitor filed an answer on July 8, 2022, and a summary judgment motion for dismissal. SLED filed a summary judgment asserting that 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 saying he was granting the Defendant's summary judgment motion and was denying Mr. Dippel's summary judgment motion. In his letter, Judge George M. McFaddin, Jr. requested SLED Attorney Mr. Whitsett to prepare the order. Mr. Dippel, in response, filed a timely "*Motion to Alter, Amend, Vacate Judgment*" on September 15, 2022.

On November 29, 2022, the Horry County Clerk of Court entered an order granting Respondents' summary judgment and dismissing Mr. Dippel's "Expungement Petition" and post-conviction. Mr. Dippel, in response, filed on December 2, 2022, a timely reconsideration motion. Rule 59(f), SCRCF states: "*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.*"

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

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 there are cross-motions for summary judgment. *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E. 432, 434 (2011).

Furthermore, this Honorable Court's review involves the interpretation of a statute. Interpretation of a statute is a question of law for the Court to review de novo. *S. C. Pub. Int. Found. v. Calhoun County. Council*, 432 S.C. 492, 495, 854 S.E. 2d 836, 837 (2021). Deciding the proper interpretation of S.C. Code § 22-5-910 (A) is a question reviewed de novo without deference to the lower Court. The Appellate Court can settle the question based on its assessment of which interpretation and reasoning would best comport with this State's law and public policies and the Court's sense of law, justice,

and right. *Lambries v. Saluda County Council*, 409 S.C. 1, 7-8, 760 S.E. 2d 785, 788 (2014).

ARGUMENTS

1. The Lower Court Committed Error in Dismissing the 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 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 a crime that carried a sentence of imprisonment of "not more than one year," which 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 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):

*"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."*

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 outlined in a penal statute such as in this case, 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".*

Furthermore, there is no clear, unambiguous legislative history whereby our State Legislature intended "*penalty*" as the "*possibility*" of receiving the maximum punishment in a penal statute without sentencing order consideration. The Court should look to the standard dictionary meaning to supply the definition of "*penalty*." *Lee v. Thermal Engineering 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 annexed by law or judicial decision to the commission of a crime or public offense." *Penalty, Black's Law Dictionary* 1368 (11th ed. 2019) defines '*penalty*' as punishment

imposed on a wrongdoer, 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.

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

The penalty definition in S.C. Code § 22-5-910(A) as being the punishment imposed by a judge in a sentencing order is 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 a plea bargain and negotiated sentence whereby if the Appellant pleaded guilty to a 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 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 Jr., ignores the Horry County Solicitor offered Mr. Dippel the plea bargain and negotiated sentence. No conviction would have occurred without Mr. Dippel and his Attorney's acceptance. It would be at this point a travesty of injustice in place of the plea bargain and negotiated sentencing for this Court to rule that Mr. Dippel is not eligible for expungement because the crime he pleaded guilty carries a penalty greater than 30 days. Also, it would violate the plea agreement and be a breach of contract.

Furthermore, it would contradict the magistrate's jurisdictional statute. There was a transfer order per the plea bargain and negotiated sentence whereby the Solicitor endorsed Mr. Dippel's case transfer 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.”

Therefore, common sense dictates the crime Mr. Dippel pleaded guilty misdemeanor of resisting arrest, carries a “penalty” of less than 30 days. Mr. Dippel's case would never transfer 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) were greater than 30 days. Also, Mr. Dippel and his Attorney would never accept the Solicitor's plea bargain if the “penalty” specified in the first-time conviction statute S.C. Code § 22-5-910(A) was greater than 30 days. In summary, the “penalty” set 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 when considering the dictionary definition of penalty, the plea bargain with the sentence negotiated agreement, and the magistrate's jurisdictional statute.

The Respondent's typed order, endorsed by Judge George M. McFaddin Jr., concluded 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 to due process of law, to have their expungement eligibility fairly and correctly decided by the proper interpretation of S.C. Code § 22-5-910(A), and 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 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 an error of law controls it. *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: *"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) mandates lower court review when evidence of newly discovered facts not previously presented and heard requires a vacation of the conviction or sentence. S.C. Code§ 17-27-45(C) allows application filings 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 writs, 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).

The Appellant has claimed post-conviction relief because of the newly discovered evidence whereby the Horry County Solicitor did not honor the plea bargain afforded to him. The Appellant asserts

the Solicitor, by not sending a modification order for the judge to sign, the Horry County Clerk of Court could not give SLED the final disposition of his case, resulting in the **original felony charge** being left on his criminal record. The Appellant contends this was only discoverable with due diligence on December 5, 2021, when he began pursuing the misdemeanor resisting arrest expungement.

SLED's Computerized Criminal History (CCR) Manual states that a modification/change form **must be** received and processed by SLED before the Court's issuance of an order of expungement of the original charge. 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 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 than the felony resisting arrest and assault on a police officer, which upon receiving a modification order from Horry County, required SLED to remove the original felony charge resisting arrest/assault on a police officer. The Appellant's criminal history still has never been updated by SLED correctly. **The felony**

charge is still on Mr. Dippel's criminal history. However, he never pled guilty to felony assault on a police officer and was given a Solicitor plea bargain whereby if he pleaded guilty to the misdemeanor resisting arrest, he would receive a suspended sentence serving one day in jail with credit for time served, and pay a \$128.75 fine. The Solicitor, SLED, and the State of South Carolina have not honored the plea bargain to date.

Furthermore, Mr. Dippel, at the hearing before Judge M. McFaddin Jr., specifically told the Court his Attorney, Thomas W. Winslow had conversations with the Solicitor's prosecuting Attorney whereby if Mr. Dippel accepted the plea bargain, the charge would be on his criminal history for three years. The charge would be eligible for expungement after three years from the date of conviction if Mr. Dippel did not have any other convictions within three years after conviction. Mr. Dippel knowing now the Solicitor and SLED have reneged on the plea bargain by claiming the misdemeanor resisting arrest is not eligible for expungement, would have never pleaded guilty to misdemeanor resisting arrest in the first instance. For all these reasons, the Court should enforce the plea bargain against the Solicitor, SLED, and the State by issuing an order directing SLED to remove the felony charge from Mr. Dippel's criminal record history.

CONCLUSION

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

Respectfully submitted,

Kenneth Dippel

Kenneth Dippel

PROOF OF SERVICE

I, Kenneth Dippel, provided a copy of the Appellant's brief by depositing it in the United States Postal Service priority certified mail with proof of receipt signature confirmation to the following individuals:

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