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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.

FINAL REPLY BRIEF OF APPELLANT

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Arguments in Reply

The Appellant offers the following points of clarification and rebuttal to the arguments raised by Respondents without restating issues or making redundant arguments.

A. There Is No Clear, Unambiguous Legislative History or Legislative Intent, “Penalty” Is the Possibility that An Expungement Applicant Could Have Received More than 30 days confinement or the Maximum In A Penal Statute.

Respondents in their brief did not supply any legislative history or clear intent to define the word “*penalty*” because there is none. Respondents ignore that the word “penalty” is unclear and ambiguous. The courts must construe the vague definition of a word or ambiguous statute. *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Protection, L.L.C.*, 409 S.C. 331, 339, 762 S.E. 2d. 561, 565 (2014). The interpretation of a statute is a question of law the Court reviews de novo. *Hopper v. Terry Hunt Const.*, 383 S.C. 310, 314, 680 S.E. 2d 1, 3 (2009). Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Bennett v. Sullivan's Island Board of Adjustment*, 313 S.C. 455, 458, 438 S.E. 2d 273, 274 (Ct. App. 1993). The starting point in interpreting a statute is to decide legislative intent. "*The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.*" *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E. 2d. 578, 581 (2000).

Before June 2, 2009, the expungement statute on first-time convictions read in part as follows:

“Following a first offense conviction in a magistrates court or a municipal court, the defendant, after three years from the date of the conviction, 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.”

“As used in this section, “conviction” includes a guilty plea, a plea of nolo contendere, or the forfeiting of bail.”

On June 2, 2009, Act No. 36, Section 5 amended the statute. The 2009 version reads:

*“Following a first offense **conviction** for a crime carrying a penalty of not more than thirty days imprisonment or a fine of five hundred dollars, or both, the defendant, after three years from the date of the **conviction**, 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.*

However, this section does not apply to:

- (1) an offense involving the operation of a motor vehicle;*
- (2) a violation of Title 50 or the regulations promulgated pursuant to Title 50 for which points are assessed, suspension provided for, or enhanced penalties for subsequent offenses are authorized; or*
- (3) an offense contained in Chapter 25, Title 16, except first offense criminal domestic violence as contained in Section 16-25-20, which may be expunged five years from the date of the conviction”. Section 22-5-910 (A) (2009).*

*“As used in this section, **“conviction”** includes a **guilty plea**, a plea of nolo contendere, or the forfeiting of bail.” Section 22-5-910(D) (2009).*

Our State Legislature, if they intended expungement eligibility to be the “possibility,” Mr. Dippel could have received more than 30 days incarceration while ignoring the conviction entirely derived from a “**guilty plea**” and “**negotiated sentencing**,” would have certainly defined

“penalty” as such or included an added enumerated section in the exclusion section: *“However, this section does not apply to.”* They did not.

Section 22-5-910(A) has essentially remained the same since 2009, and there is no clear and unambiguous definition of what is meant by “penalty.”

The current version of the law reads:

*“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. However, this section does not apply to an offense involving the operation of a motor vehicle.” S.C. Code § 22-5-910 (A).*

When construing statutory language, a statute must be read as a whole, and sections which are a part of the same general statutory law must be construed together and each one given effect.” *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). **S.C. Code § 22-5-910 (E) is intertwined with S.C. Code § 22-5-910 (A) and, therefore, must be read and construed together. S.C. Code § 22-5-910 (E) supplies to the Court further insight into what is meant by the word “penalty” because Mr. Dippel’s conviction was entirely based upon a plea bargain in which there was a negotiated sentencing whereby the penalty, also known as punishment, would be to serve one day in jail with credit for time served and pay a \$128.75 fine. R. 97**

S.C. Code § 22-5-910 (E) says a guilty plea is a conviction:

*“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.**”*

Furthermore, because the word “penalty” contained in S.C. Code § 22-5-910 (A) is an undefined statutory term, this Court must interpret it by its usual and customary meaning. *Branch v. City of Myrtle Beach*, 340 S.C. 405, 409–10, 532 S.E. 2d. 289, 292 (2000). Black's Law Dictionary defines “penalty” as “**punishment imposed on a wrongdoer.**” *Black’s Law Dictionary*, 1368 (11th edition 2019). The word “imposed” originates from the Latin word “imponere,” to put upon. *Webster’s Collegiate Dictionary*, p. 571 (1981 ed.). “**Impose**” is to levy or exact a tax or duty. *Black’s Law Dictionary*, 908 (11th edition 2019). According to Meriam Webster's online dictionary, “imposed” is “to establish or apply by authority.” *Meriam Webster Online Dictionary* (<https://www.merriam-webster.com/dictionary/impose>).

According to Black's Law Dictionary, a “sentence” is the judgment that a court formally pronounces after finding a criminal defendant guilty, and the punishment, also known as a “penalty,” is imposed on a criminal wrongdoer. *Black’s Law Dictionary*, 1636 (11th edition 2019). “**Sentencing**” is “**the judicial**

determination of the penalty of the crime.” *Black’s Law Dictionary*, 1638 (11th edition 2019). A conviction is a judgment that a person is guilty of a crime. *Black’s Law Dictionary*, 422 (11th edition 2019). Based on the preceding, the usual and customary meaning of penalty is a punishment imposed by a judge on a convicted wrongdoer in a sentencing order.

B. Respondents Reliance on S.C. Code § 22-5-920 does Not Provide Any Clear Meaning to The Word “Penalty”

Respondents in their brief rely on S.C. Code § 22-5-920 to make the point that the penalty contained in the sentencing order is not the deciding factor in expungement eligibility in S.C. Code § 22-5-910 (A). S.C. Code § 22-5-920 (A) says a **guilty plea is a conviction and refers to a single sentencing.**¹

¹ S.C. Code § 22-5-920 (A): **“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 which the individual received a youthful offender sentence at a single sentencing proceeding for offenses 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.”**

Furthermore, SC Code § 22-5-920 is only applicable when there is a conviction for a crime as a youthful offender when there is sentencing.² The Court should reject Respondent's nebulous ad hoc argument for these reasons.

C. The Summary Judgment Dismissal Order Is Contradictory

It is interesting and noteworthy that the order granting summary judgment contradicts itself. The lower court ruling in dismissal on post-conviction relief admits that when there is a conviction the “*penalty*” imposed, also known as punishment, is in a sentencing order.³

Respondents and the lower Court want to have it both ways. They want expungement eligibility based on a first-time conviction to be based upon

² S.C. Code § 22-5-920 (B)(1): *“Following 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, the defendant, who has not been convicted of any offense, including an out-of-state offense, while serving the youthful offender sentence, including probation and parole, and for a period of five years from the date of completion of the defendant's sentence, including probation and parole, may apply, or cause someone acting on the defendant's behalf to apply, to the circuit court for an order expunging the records of the arrest and conviction”.*

³ “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** from seeking to modify the same at this time.” **R.**

their ad hoc interpretation of S.C. Code § 22-5-910 (A), whereby a sentence resulting entirely from a plea bargain with a negotiated sentencing ignored along with the penalty in a sentencing order while at the same time acknowledging in post-conviction relief a penalty is imposed in a sentencing order. The law of contradiction, also known as the principle of non-contradiction (P.N.C.), says contradictory propositions cannot be true in the same sense. The law of contradiction prohibits Respondents and the lower Court from having it both ways.

Respondents' ad hoc interpretation whereby first-time expungement eligibility must be based solely upon a conviction for a crime while disregarding a plea bargain is a conviction, ignoring a sentencing order, and relying upon an expungement applicant could have "possibly" received more than 30 days incarceration for violating a penal statute is not the legislative intent of our legislators.

Respondent's broad interpretation, if this Honorable Court were to endorse by affirming the lower court ruling, would create absurd decisions on first-time conviction whereby expungement eligibility will not be based upon **limited objective evidence** contained in a sentencing order which has the actual penalty resulting from a sentence. Expungement eligibility on a first-time conviction will be based on speculation and conjecture, resulting in plea bargain negotiated sentencing being disregarded. The approach emphasized

by Respondents is not the legislative intent of our legislators. See *State v. Taylor*, 436 S.C. 28, 34 (S.C. 2022) (the Court must reject a statutory interpretation if it leads to an absurd result that the legislature could not possibly intend).

D. Mr. Dippel Didn't Abandon His Post Conviction Relief Claim

Respondents argue in their brief that Mr. Dippel abandoned his post-conviction relief claim when he did not include this in the “**Amended Petition.**” This Honorable Court should soundly reject this argument. Rule 15, SCRCP allows a party to amend and supplement an original complaint or pleading. Rule 15(b), SCRCP states:

*“Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but **failure to amend does not affect the result of the trial of these issues.**”*

Rule 15(c), SCRCP states:

*“Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be outlined in the original pleadings, **the amendment relates to the date of the original pleading.**”*

Furthermore, the evidence proving the post-conviction relief was never abandoned is the judge issued order continuing the post-conviction relief claim. The June 4, 2022, Form 4 order held: “**Defendants Motion/Dismiss is**

continued to the next available non-jury term. Plaintiff's Motion/Alter and/or amend is granted with 30 days to file an Amended Complaint. R. 1

CONCLUSION

Abraham Lincoln once asked, *“If you call a dog’s tail a leg, how many legs does it have?”* He answered his query: *“Four because calling a tail a leg doesn't make it one.”* The fact that Respondents claim it was not error, the lower Court dismissing Mr. Dippel's first-time conviction expungement eligibility and post-conviction relief claims is like counting a dog’s tail as a leg.

The Appellant prays this Honorable Court will reject the Respondent's arguments by vacating and reversing the lower court order that summarily dismissed first-time conviction expungement eligibility and post-conviction relief claims. Also, the Appellant prays this Honorable Court will grant any equitable relief the Court deems necessary.

Respectfully submitted,

Kenneth Dippel

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CERTIFICATE OF COMPLIANCE

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

Kenneth Dippel

Signature

May 15, 2023

(Date)