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Jun 09 2023

SC Court of Appeals

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

Appellate Case No.: 2023-000048

Kenneth Dippel,

Appellant,

v.

State of South Carolina, 15th
Circuit Solicitor's Office, and
SLED

Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

- I. **The trial court did not err in granting Respondents' summary judgment in this matter.**
- II. **The trial court did not err in finding that Appellant did not seek post-conviction relief in his amended pleadings in this matter.**

STATEMENT OF THE CASE

This action commenced on January 18, 2022 when Appellant filed a pleading entitled “Application for Post Relief Conviction”. (Application)(R. pp. 79-91). The parties to that action were Appellant and the “State of South Carolina”, and the causes of action set forth in that pleading were for breach of contract, gross negligence, and post-conviction relief. *Id.* The 15th Circuit Solicitor’s Office filed a Response and Motion Pursuant to Rule 12(b), SCRCP on behalf of the State of South Carolina seeking dismissal of the pleadings. (Motion to Dismiss)(R. pp. 105-6). This motion also indicated that the Attorney General’s Office would be “preparing and filing a response in this case.” *Id.* Subsequently, Appellant filed a Motion to Amend Petition for Expungement. (Motion to Amend)(R. p. 112). Appellant also filed a “Petition for Expungement” naming the “State of South Carolina – Horry County Solicitor’s Office & SLED” as Defendants. (Initial Petition)(R. pp. 187-95). before The Honorable Kristi F. Curtis heard the 12(b) Motion and the Motion to Amend on June 1, 2022. Judge Curtis granted Appellant’s Motion to Amend, directed Appellant to file an Amended Complaint within 30 days, and continued the 12(b) Motion. (Curtis Order)(R. pp. 1-3). Thereafter, Appellant filed the present action entitled “Amended Complaint: Petition Expungement / Motion Summary Judgment” (Amended Complaint)(R. pp. 115-26). This amended pleading does not seek post-conviction relief. *Id.*

Respondents' SLED and the 15th Circuit Solicitor's Office filed respective Motions for Summary Judgment on behalf of all Respondents. (Respondents' Motions for Summary Judgment)(R. pp. 147-153). The Honorable George M. McFaddin, Jr. heard these motions on August 29, 2022, and granted summary judgment on all causes of action in an order filed on November 29, 2022. (McFadden Order) (R. pp. 4-11). Appellant subsequently filed a Rule 59 – Motion Reconsideration, Alter, Amend, Judgment, which was denied on December 20, 2022. (Reconsideration Motion)(R. pp. 12-14). This appeal follows.

STATEMENT OF THE FACTS

Appellant was arrested for felony Assault on Police Officer While Resisting Arrest (S.C. Code Ann. § 16-9-320(B)) on or about May 2, 2018. (Order p. 2)(R. p. 5). Appellant pled guilty to the lesser included offence of misdemeanor Resisting Arrest in violation of S.C. Code Ann. § 16-9-320(A)¹ on or about December 7, 2018, in Transfer Court. *Id.* Appellant was sentenced to 1 day but was given credit for time served and ordered to pay a fine of \$128.75. *Id.* Appellant subsequently sought an expungement of this conviction pursuant to S.C. Code Ann. § 22-5-910. *Id.* At that time, Appellant's December 2018 misdemeanor conviction did not appear on his SLED criminal history record. *Id.* After learning of the missing disposition, SLED promptly updated Appellant's criminal history record to accurately reflect Appellant's May 2018 arrest for felony Resisting Arrest, and December 2018 conviction for misdemeanor Resisting Arrest. *Id.* However, Appellant's expungement request was denied based upon S.C. Code Ann. § 22-5-910.

¹ 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."

STANDARD 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).

When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts. WDW Properties v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000) (citing J.K. Constr., Inc. v. Western Carolina Regional Sewer Authority, 336 S.C. 162, 519 S.E.2d 561 (1999)).

ARGUMENTS

I. The trial court did not err in granting Respondents' summary judgment in this matter.

In South Carolina, expungement eligibility pursuant S.C. Code Ann. § 22-5-910 is specifically limited to “*a crime carrying* a penalty of not more than thirty days imprisonment...”(emphasis added). This is clear and unequivocal statutory language that the *potential* penalty of the charge of conviction (*i.e.* what penalty the *crime* itself *carries*) is the appropriate consideration for eligibility pursuant to S.C. Code Ann. § 22-5-910. In this case, Appellant’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 limitation of S.C. Code Ann. § 22-5-910. Appellant’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 or the intent of S.C. Code Ann. § 22-5-910. It is axiomatic that “[i]f the legislature’s intent is clearly apparent from the statutory language, a court may not embark upon a search for it outside the statute.” Hodges v. Rainey, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000); Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956). Accordingly, the trial court’s decision should be upheld.

Further, Appellant’s argument regarding the lack of a specific definition of the word penalty in S.C. Code Ann. § 22-5-910 is unavailing. The South Carolina Legislature drafted S.C. Code Ann. § 22-5-910 to specifically provide that the crime of conviction is the determining factor regarding eligibility. The language involved demonstrates a clear intent that the determination is not based on circumstances of the individual in question or the sentence that the individual received. Rather, the determination is based solely on the crime of conviction. *See* Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)

citing Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992) (“What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.”)

Comparing the language of S.C. Code Ann. § 22-5-910 and S.C. Code Ann. § 22-5-920 demonstrates this point. To that end, S.C. Code Ann. § 22-5-910 applies to *crimes* “carrying a penalty of not more than thirty days imprisonment...” and does not include a reference to the actual sentence an individual received. In contrast, in S.C. Code Ann. § 22-5-920, the South Carolina Legislature specifically provided that the actual sentence the individual received 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). Had the South Carolina Legislature intended for the actual sentence (*i.e.* “the penalty”) 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, the Legislature did not. As such, Appellant’s arguments regarding his expungement eligibility fail 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).”). Accordingly, the trial court’s grant of summary judgment should be affirmed.

Similarly, Appellant's other claims set forth in the Amended Complaint also failed as a matter of law and the trial court should be affirmed in the entirety. At the time of Appellant'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. A plain reading of this statute precludes any action against the solicitor's office on this issue. As such, Appellant's reliance on S.C. Code Ann. § 17-1-40(B)(4) is misplaced and unavailing because this statute does not supersede or shift the responsibility provided in S.C. Code Ann. § 14-17-325, which again provides that a clerk of court – not the solicitor's office shall report dispositions to SLED.²

In addition, S.C. Code Ann. § 17-1-40(B)(4) does not have any application to this action. For starters, this provision is 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 in this instance does not create a viable cause of action in this matter. As such, Appellant's reliance on S.C. Code Ann. § 17-1-40(B)(4) is unavailing and the trial court properly held that this claim fails as a matter of law.

² It is noteworthy that the language S.C. Code Ann. § 14-17-325 creates no private action.

Similarly, Appellant'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" 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 either SLED or the Solicitor's Office to provide an expungement applicant with a "formal written decision", nor does any provision of the state or federal constitution. Nevertheless, as correctly noted by the trial court, the record demonstrates that both SLED and the Solicitor's Office provided ample notice of the reasoning for the expungement denials in this matter. As such, the trial court properly held that this claim failed as a matter of law, and summary judgment was appropriate. Accordingly, the trial court's decision should be upheld.

Appellant’s magistrate court jurisdictional arguments are also without merit. South Carolina Code Ann. § 22-3-545 sets forth the authorization and procedures for the transfer of certain general sessions court cases to magistrate’s court for disposition. The Appellant’s case was resolved in Transfer Court pursuant to this provision. (McFadden Order p.)(R. p. 5). Further, this argument has no bearing on the application of S.C. Code Ann. § 22-5-910 to Appellant’s expungement request. Accordingly, the trial court’s decision should be upheld.

II. The trial court did not err in finding that Appellant did not seek post-conviction relief in his amended pleadings in this matter.

In addition, Appellant failed to raise any claim for post-conviction relief in his Amended Complaint / Petition Expungement / Motion Summary Judgment filed on June 9, 2022. (Amended Complaint)(R. pp. 115-26). In granting Appellant’s Motion to Amend his Complaint, Judge Curtis did not put any limitation on the causes of action that could be brought. (Curtis Order)(R. pp. 1-3). As such, Appellant was not foreclosed from attempting to bring such claims; however, Appellant chose to limit his amended filing to the causes of action set forth in the “Amended Complaint: Petition Expungement / Motion Summary Judgment” (Amended Complaint)(R. pp. 115-26). Appellant cannot now rely on his January filing, which he chose to supersede by filing an Amended Complaint with different causes of action. *Id.*³ Appellant also did not seek additional leave to further amend his Amended Complaint. As such, Respondents contend that Appellant has abandoned any post-conviction relief arguments in this action. (Amended Complaint)(R. pp. 115-26). Accordingly, the trial court’s decision should be upheld.

³ Notably, the requirements of South Carolina’s Uniform Post-Conviction Procedure Act (S.C. Code Ann. §§ 17-2-10 et seq.) were not followed in either filing or action.

Further, Appellant's after-discovered evidence post-conviction complaint appears related to the fact that his misdemeanor conviction did not initially appear on his SLED criminal history record. This is not after-discovered evidence that would give rise to a viable post-conviction relief action. *See generally* S.C. Code Ann. §§ 17-2-10 et seq. Further, this claim is now moot because SLED has in fact corrected Appellant's criminal history record to accurately reflect Appellant's May 2018 arrest for felony Resisting Arrest, and December 2018 conviction for misdemeanor Resisting Arrest. (Order p. 2)(R. p. 5). As such, the trial court's decision should be upheld in its entirety.

Moreover, to the extent Appellant's Amended Complaint can be read as a challenge to his original underlying sentence, Respondents would assert that South Carolina law prohibits the reconsideration of the same at this time. South Carolina law prohibits a challenge to the criminal sentence beyond the expiration of the term of court at which the sentence is imposed, to wit: a term of court occurring and expiring in 2018 in this instance. As such, Respondents aver that Appellant 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). Accordingly, the trial court's decision in this matter should be upheld in its entirety.

CONCLUSION

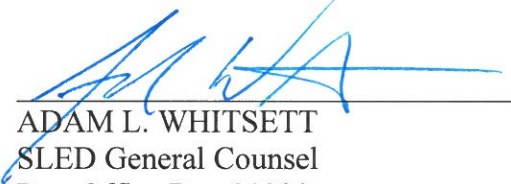
In conclusion, based on the foregoing and the applicable laws of the State of South Carolina, this Court should uphold and affirm the trial court's decision in its entirety.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed June 9, 2023, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 607, 757 S.E.2d 421 (2014) (requiring redaction of social security numbers, names of minor children, financial account numbers, home addresses, and date of birth).

This 9th day of June, 2023.


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