THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2014-CP-10-2359

Milton P. Muckenfuss,

Appellant,

v.

South Carolina Law Enforcement Division,

Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On May 9, 1974, Appellant Milton P. Muckenfuss was arrested on charges of Grand Larceny and Housebreaking. Mr. Muckenfuss was 17 at the time, being born on July 16, 1956. On September 9, 1974, Mr. Muckenfuss, then 18 years old, pled guilty to Housebreaking. It was Mr. Muckenfuss's understanding at the time of his plea, and under the advice of his lawyer, he would be sentenced under the Youthful Offender Act such that his conviction would be eligible for expungement.

This case involves a conviction that is over 40 years old. The only records obtained by any party or the circuit court were produced by the Charleston County Clerk of Court. Included in that production was an indictment in which Mr. Muckenfuss and two other individuals were charged with Housebreaking and Larceny. There is no referenced statutory citation for the charges contained therein. Also on the indictment are the signatures of Mr. Muckenfuss and another individual under the phrase "**I/WE APPEAR IN PERSON AND PLEAD GUILTY TO . . .**" with the term "Housebreaking" handwritten in the place of "**THE WRITTEN INDICTMENT.**" Mr. Muckenfuss's signature is witnesses by a deputy clerk, who in turn dates his or her signature "9-9-74." The indictment does not note a statute under which Mr. Muckenfuss was to be sentenced.

The Youthful Offender Act in effect at the time, then codified under S.C. Code Ann. § 55-395, provided for expungement of certain convictions if the offender was "seventeen but less than twenty-five years of age at the time of conviction." S.C. Code Ann. § 55-395 (1962). It is undisputed that, based on his age and the nature of the offense, Mr. Muckenfuss met the definition of a

"Youthful Offender" under the Act. Mr. Muckenfuss was sentenced to eighteen (18) months of confinement suspended on the service of two (2) years' probation.

On January 29, 2013, Mr. Muckenfuss submitted the requisite information to the Ninth Judicial Circuit Solicitor seeking an expungement of his 1974 Housebreaking conviction. Ultimately, the Solicitor's Office notified Mr. Muckenfuss that his expungement application was deemed ineligible by SLED, noting that his arrest did not qualify under S.C. Code Ann. § 22-5-920, the current codification the Youthful Offender Act.

Mr. Muckenfuss appealed his eligibility determination to the South Carolina Administrative Law Court on January 16, 2014. By consent order filed April 8, 2014, Mr. Muckenfuss dismissed his appeal, as the Administrative Law Court appeared to lack subject matter jurisdiction under Section 1-23-320(3) of the South Carolina Administrative Procedures Act. On April 9, he filed this action, naming SLED as Defendant, to have the circuit court determine his eligibility for expungement pursuant to S.C. Code Ann. § 17-22-9.

SLED filed its Notice of Motion and Motion for Summary Judgment on July 18, 2014. A hearing was held before the Honorable J.C. Nicholson, Jr. in Charleston, South Carolina on November 19, 2014. The court granted SLED's Motion by Order dated March 19, 2015 and filed on March 20, 2015. The court held that, after an exhaustive search, no document was located that demonstrated what statute formed the basis of Mr. Muckenfuss's sentence, and therefore, there was

no evidence that Mr. Muckenfuss was sentenced under the Youthful Offender Act. (Order Granting Mot. for Summ. J. at 3.) Additionally, the Court held that S.C. Code Ann. § 22-5-920(B), as amended in 2010, controlled the court's ruling. (Id. at 4.) As a result, because Mr. Muckenfuss could not produce affirmative documentation of his sentence, he was therefore not sentenced under the Act. Id.

Mr. Muckenfuss received written notice of entry of this judgment on March 30, 2015 and served a Motion for Reconsideration under Rule 59(e) on April 6, 2015, which was filed on April 7, 2015. By Order dated April 19 and filed April 20, Mr. Muckenfuss's Motion for Reconsideration was denied. Appellant received written notice of entry of the Order on April 30, 2015. Mr. Muckenfuss served his Notice of Appeal on May 7, 2015.

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the circuit court pursuant to Rule 56, SCRCP." Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 42, 747 S.E.2d 178, 182 (2013) (citation omitted). "Determining the proper interpretation of a statute is a question of law, which [the] Court reviews de novo." Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) (citation omitted).

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a judgment shall be rendered "when it is clear no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law." Mollster v. Cnty. of Lexington, 336 S.C. 360, 362, 520 S.E.2d 620, 621 (1999) (citing Café Assoc., Ltd. V. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991)). "The evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Fleming v. Rose, 350 S.C. 488, 493-93, 567 S.E.2d 857, 860 (2002).

"[Even] where there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted." Hamilton v. Miller, 301 S.C. 45, 47, 389 S.E.2d 652, 653 (1990) (citing Jamison v. Howard, 271 S.C. 385, 386, 247 S.E.2d 450, 451 (1978)). When evidence is susceptible to more than one reasonable inference, the issue should be submitted to the fact-finder. Vaughan v. Town of Lyman, 370 S.C. 436, 448, 635 S.E.2d 631,638 (2006) (citation omitted). "At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by

a jury for summary judgment to be denied." Hill, 313 S.C. at 308. "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." USAA Property & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008) (citation omitted).

ARGUMENTS

I. BECAUSE APPELLANT QUALIFIED AS A YOUTHFUL OFFENDER AT THE TIME OF HIS CONVICTION, HE IS ENTITLED, AS A MATTER OF LAW, TO HAVE HIS EXPUNGEMENT APPLICATION CONSIDERED BY SLED.

Under the Youthful Offender Act as interpreted by our Supreme Court, a trial judge at the time of Mr. Muckenfuss's conviction for housebreaking was required to sentence an individual convicted as a youthful offender under the Youthful Offender Act. See generally Creel v State, 262 S.C. 558, 206 S.E.2d 825 (1974). Further, it remains the law of South Carolina as interpreted by the Supreme Court that an individual convicted as a youthful offender cannot be sentenced under any statute other than the Youthful Offender Act. See generally Gay v. Ariail, 381 S.C. 341, 673 S.E.2d 418 (2009). As such, at the time of Mr. Muckenfuss's plea and sentence, he was, as a matter of law, sentenced under the Youthful Offender Act and is entitled to have his expungement application considered by SLED.

In Creel, a young man entered a guilty plea to voluntary manslaughter and was sentenced to confinement for a term of fifteen (15) years. 262 S.C. at 561. In an action for post-conviction relief, he challenged the circuit court's failure to sentence him under the provisions of the Youthful Offender Act. Id. at 562. Affirming and adopting the circuit court's order in the case, the Supreme Court noted that S.C. Code Ann. § 55-392 defined a "youthful offender" as "all male and female offenders who are seventeen but less than twenty-five years of age at the time of conviction." Id. Section 55-395 set out the sentencing alternative available to the sentencing judge when a youthful offender was convicted. Id.

The Court went on to conclude that:

> . . . when a defendant between the ages of seventeen and twenty-five is convicted [,] he is before the Court for sentencing under the Youthful Offender Act. He must be sentenced in accordance with Section 55-395 of that Act and cannot be sentenced in any other fashion.

Id. at 563-64 (emphasis added).

The Court further held that:

> A person between the ages of seventeen and twenty-five is, by definition, a youthful offender and must be sentenced pursuant to that Act. The trial judge must sentence the youthful offender under one of the subsections of Section 55-395. He has no discretion in the matter.

Id. at 564 (emphasis added).

The Court issued its opinion in Creel on July 5, 1974, over two months before Mr. Muckenfuss, at 18, pled guilty to Housebreaking and was convicted. There is no dispute that Mr. Muckenfuss qualified as a youthful offender at the time of his conviction. (Mot. for Summ. J. at 2; Order Granting Mot. for Summ. J. at 3-4.) Therefore, under Creel, the sentencing judge was required by law to sentence him under the Youthful Offender Act.

Creel not only remains good law, but the Supreme Court recently reaffirmed its holding therein in 2009. In Gay v. Ariail, a young man sought expungement of a conviction for Assault and Battery of a High and Aggravated Nature entered when he was 22 years of age. 381 S.C. at 343. He received a sentence of ten (10) years suspended on the service of five (5) years' probation. Id. The State contended that the young man was sentenced as an adult, and as such, should not be entitled to expungement. Id. at 344.

The Court disagreed. Id. Under the terms of S.C. Code Ann. § 22-5-920(B), the modern citation for the Youthful Offender Statute, one must only be convicted as a youthful offender under the terms of the statute to be entitled to have his or her application for expungement considered. Id. at 346. Citing its opinion in Creel, the Court went on to hold that ". . . [a]lthough a trial judge has discretion to impose sanctions which are "outside" the [Youthful Offender Act], the sentencing nonetheless takes place pursuant to [Section] 24-19-50 of the [Youthful Offender Act]. Id. "The clear import of the [] statute is that a person who meets the definition of 'youthful offender' is 'convicted'regardless of the manner of sentencing, and is eligible to apply for expungement if the requirements of § 22-5-920(b) are met." Id.

The Court found further that:

> . . . the Legislature, in enacting [Section] 22-5-920(B), reasonably concluded that persons who had been convicted of non-violent, misdemeanor offenses at a young age (between 17-25), and who had committed no subsequent offenses over the course of the next fifteen years, were entitled to be considered for an expungement.

Id. at 346-47.

After review of Creel and Gay, it is clear that the Supreme Court has interpreted the Youthful Offender Act, in both 1974 and 2009, to require only that an individual be convicted as a youthful offender to be entitled to have an expungement application considered. If one is so convicted, then as a matter of law, the sentencing of that individual takes place pursuant to the terms of the Act.

In its Order, the circuit court failed to consider the applicable law on the issue of conviction under the Youthful Offender Act and refused to rule on reconsideration whether Creel and Gay apply. (See Order Granting Mot. for Summ. J.; Order Den. Mot. for Recons.). Instead, the court determined that, because there is no document preserved and produced by the Clerk of Court for Charleston County, the South Carolina Department of Corrections, or the South Carolina Department of Probation, Parole and Pardon Services conclusively demonstrating that Mr. Muckenfuss was sentenced under the Youthful Offender Act, that Mr. Muckenfuss is not eligible for expungement. (Order Granting Mot. for Summ. J at 3-4.) However, it is clear that under the applicable case law interpreting the Youthful Offender Act, Mr. Muckenfuss was sentenced under the Youthful Offender Act as a matter of law because he qualified as a youthful offender at the time of conviction. As such, the circuit court's Order Granting Summary Judgment should be reversed.

II. THE CIRCUIT COURT IMPROPERLY GRANTED RESPONDENT'S MOTION WHEN IT DID NOT CONSDIER MATERIAL FACTS IN DISPUTE.

In its Order, the circuit court determined that because the court, the parties, the Charleston Clerk of Court, the South Carolina Department of Probation, Parole and Pardon Service, and the South Carolina Department of Corrections were unable to produce Mr. Muckenfuss's sentencing records, there was no evidence that he was sentenced under the Youthful Offender Act. (Order Granting Mot. for Summ. J at 2.) However, the circuit court did not consider the factual dispute presented to it concerning under which statute Mr. Muckenfuss was sentenced. At oral argument, counsel for Mr. Muckenfuss attempted to present circumstantial evidence of Mr. Muckenfuss's sentence. (Hr'g Tr. at 11.) Counsel's arguments were denied. (Id.) Because there is a material factual dispute in this case, the circuit court's grant of summary judgment to Respondent should be reversed.

"At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied." Hill, 313 S.C. at 308. In this case, Respondent provided the circuit court with no evidence, by way of affidavit or otherwise, that Mr. Muckenfuss was sentenced under any statute other than the Youthful Offender Act. (Mot. for Summ. J. at 1.) Respondent further asserted that the burden of proof is on Mr. Muckenfuss. Id. However, Respondent provided no legal authority in South Carolina for this assertion. Id. The circuit court adopted this reasoning by holding that the lack of evidence was sufficient to affirmatively determine that Mr. Muckenfuss was not sentenced under the Act. (Order Granting Mot. for Summ. J. at 3.)

However, Mr. Muckenfuss has provided the only evidence of any kind through his affidavit and from his records in the General Sessions Journal, presumably written by the sentencing judge, the Honorable Theodore Stoney. In his affidavit, Mr. Muckenfuss testified that his attorney advised him that he would be convicted in accordance with the Youthful Offender Act. (Muckenfuss Aff. ¶ 4 .) Mr. Muckenfuss also testified that he was sentenced to eighteen (18) months in the custody of the Department of Corrections suspended on the service of two (2) years of probation. (Id. at ¶ 5.) Additionally, his sentence was specifically provided for under the Youthful Offender Act. See S.C. Code Ann. § 24-15-50 ("In the event of a conviction of a youthful offender the court may . . . (1) suspend the sentence and place the youthful offender on probation."). Mr. Muckenfuss's actual sentence is circumstantial evidence that he was sentenced under the Act, and penalizing him for the State's failure to physically record that which was assumed seems harsh indeed. Together with the testimony in his affidavit, Mr. Muckenfuss has produced more than the scintilla necessary to default Respondent's Motion for Summary Judgment. Therefore, the circuit court's Order in this matter should be reversed.

III. THE 2010 AMENDMENT TO THE YOUTHFUL OFFENDER ACT DOES NOT CHANGE THE NECESSARY APPLICATION OF OUR SUPREME COURT'S HOLDINGS IN CREEL AND GAY.

In 2010, Section 22-5-902(B) of the Youthful Offender Act was amended to add the following sentence:

> "A person eligible for a sentence pursuant to the provisions of Chapter 19, Title 24, Youthful Offender Act, and who is not sentenced pursuant to those provisions, is not eligible to have his record expunged pursuant to the provisions of this section."
>
> S.C. Code. Ann. § 22-5-902(B) (amended 2010).

Without reference to the Supreme Court's holdings in either Creel or Gay, the circuit court ruled that Mr. Muckenfuss had not been sentenced under the Youthful Offender Act. (Order Granting Mot. for Summ. J. at 4.) In effect, the circuit court can only be understood to hold that the amendment to the Youthful Offender Act altered common law as established under those precedents. Further, the circuit court did not discuss whether either case applied in the instant action after Mr. Muckenfuss's request. (Id. at 2-4; Mot. for Recons. at 3.) However, in South Carolina, a statute will not be construed to alter common law unless that disposition is clear. 16 Jade Street, LLC v. R. Design Const. Co., 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012). When comparing the text of the 2010 amendment to Section 22-5-902(B) to the Supreme Court's opinions in Creel and Gay, it is clear that the amendment does not derogate those holdings.

When considered together, Creel and Gay demonstrate the following points of law: (1) if an individual qualifying under the Youthful Offender Act is convicted, that individual is, as a matter of

law, "before the Court for sentencing under the [Act]." Creel, 262 S.C. at 563-64; (2) the circuit court has no discretion in sentencing the individual under any statute other than the Youthful Offender Act. Id. at 564; Gay, 383 S.C. at 364; and (3) even though a judge may impose sanctions outside of the Act, sentencing nonetheless takes place pursuant to the Act. Id.

The emphasis in both cases is conviction – if an individual meets the definition of a youthful offender at the time of conviction, sentencing follows automatically under the Act. The 2010 amendment addresses sentencing, not conviction, and serves to clarify that a sentence under the Act is a necessary prerequisite for expungement. The amendment does not, however, alter, amend, or otherwise change the Supreme Court's interpretation of the Act such that every sentence of a convicted youthful offender is held, as a matter of law, to occur under Act. As such, the circuit court's reliance on the Act in derogation of the Court's holdings in Creel and Gay was improper, and its Order should be reversed.

IV. THE 2010 AMENDMENT TO THE YOUTHFUL OFFENDER ACT DOES NOT APPLY TO APPELLANT'S 1974 CONVICTION FOR HOUSEBREAKING.

The circuit court's Order in this matter specifically applies Section 22-5-902(B) of the Youthful Offender Act in its amended form, which includes the provision that an individual not sentenced under the Youthful Offender Act is not eligible for expungement of a qualifying conviction. (Order Granting Mot. for Summ. J. at 4.) However, Mr. Muckenfuss's conviction and sentence took place in 1974, well before the 2010 amendment provided the specific language on which the circuit court cites in support of its Order. (Id. at 3-4.) If the 2010 amendment does alter the application of Section 22-5-902(B), then it is clear that such amendment would not apply to a 1974 conviction and sentence. The Amendment's application would be limited to those convictions and sentences rendered after its passage, and therefore, it improperly formed the basis of the circuit court's Order in this case.

It is well established that the interpretation and construction of a statute is a purely judicial function. Lindsay v. Nat'l Old Life Line Ins. Co., 262 S.C. 621, 629, 207 S.E.2d 75, 78 (1974). While the General Assembly has the power to amend a statute, an existing judicial interpretation of a statute is "determinative of its meaning and effect, and any subsequent legislative amendment to the contrary will only be effective from the date of its enactment and cannot be applied retrospectively." Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 399, 520 S.E.2d 142, 155 (1999). It is clear that under Creel, which was issued by the Supreme Court mere months before Mr. Muckenfuss's conviction, that when an individual "between the ages of seventeen and twenty-five is convicted [,] he is before the Court for sentencing under the Youthful Offender Act." Creel, 262 S.C.

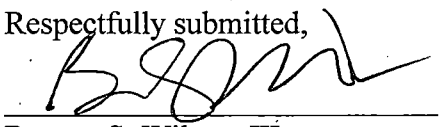
at 563-64. As a matter of law, Mr. Muckenfuss, who the circuit court and Respondent admitted qualified as a Youthful Offender at the time of his conviction, was sentenced under the Youthful Offender Act. If the 2010 amendment is indeed contrary to the Supreme Court's holding in Creel, the Amendment would not apply to Mr. Muckenfuss's conviction or sentence as the interpretation of the Youthful Offender Act in 1974 was "determinative" of the Act's "meaning and effect" at the time of conviction and sentence.

Additionally, there is no language in Section 22-5-902(B) that demonstrates a clear intent by the General Assembly for the amendment to operate retrospectively. See S.C. Code Ann. § 22-5-902(B). In the absence of such specific language or clear intent, there is a presumption that statutory enactments are considered exclusively prospective. South Carolina Dep't of Revenue v. Rosemary Coin Machines, Inc., 339 S.C. 25, 28, 528 S.E.2d 416, 418 (2000). Because the 2010 Amendment to Section 22-5-902(B) does not apply retroactively to Mr. Muckenfuss's conviction and sentence, the controlling meaning and effect of the statute, as presented in Creel, establishes that Mr. Muckenfuss was sentenced under the Youthful Offender Act as a matter of law. Further, because the 2010 Amendment applies only to convictions and sentences that are entered after its passage, the circuit court erred in relying on the Amendment in its Order. For those reasons, the circuit court's Order should be reversed.

CONCLUSION

For the reasons stated in the above paragraphs, this Court should reverse the judgment of the circuit court. Mr. Muckenfuss was entitled, as a matter of law, to have his expungement application considered by SLED as he qualified as a youthful offender under the Youthful Offender Act. Our Supreme Court has made clear that the sentence of a youthful offender only takes place under the Act. The circuit court also erred in not considering that there is a factual dispute as to under which statute Mr. Muckenfuss was sentenced. Finally, the 2010 amendment to the Act cited by the circuit court in its Order does not apply to Mr. Muckenfuss's 1974 conviction and sentence, and there is no indication from the General Assembly that it intended the amended Act to apply retrospectively to the 40-year-old conviction in this case.

Respectfully submitted,



July 2, 2015

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PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal on the South Carolina Law Enforcement Division by depositing a copy of it in the United States Mail, postage prepaid, on July 2, 2015, addressed to its attorneys of record, Kristin M. Simons and Courtney E. Lowell, Post Office Box 11549, Columbia, South Carolina 29211.

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July 2, 2015

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RE: Milton P. Muckenfuss v. South Carolina Law Enforcement Division, Case Appellate Case No: 2015-001031

Dear Ms. Gee:

Enclosed for filing, please find Appellant's Initial Brief, Designation of Matter to be Included in the Record of Appeal, and Proof of Service of the Initial Brief and Designation on the Respondent. If you would, please file the originals and return the time-stamped copies in the self-addressed pre-paid envelope included for your convenience.

Sincerely,

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