

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2019-001252

Charles F. Burton,

Appellant,

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SC Court of Appeals

v.

Lexington County Solicitor,

Respondent.

INITIAL BRIEF OF APPELLANT

Charles T. Brooks, III
S.C. Bar No. 11762
Post Office Box 3512
Sumter, South Carolina 29151
803-418-5708
803-934-9618 [Facsimile]
cbrooks@ctbrooks.com
Attorney for Appellant

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STATEMENT OF ISSUES ON APPEAL

DID THE TRIAL COURT ERR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WHEN A GENUINE ISSUE OF MATERIAL FACT EXIST, THEREBY DENYING APPELLANT THE RIGHT TO SEEK AN EXPUNGEMENT WHEN APPELLANT WAS ELIGIBLE FOR SUCH EXPUNGEMENT?

STATEMENT OF THE CASE

This case began on or about January 5, 2018, when Appellant filed a Summons and Petition for Destruction of Arrest Records (Expungement). Respondent, on or about February 9, 2018, filed an Answer asserting that Appellant was not "entitled" to an expungement.

Respondent then filed a Motion for Summary Judgment. A hearing regarding the Summary Judgment Motion was held on November 15, 2018, before the Honorable Walton J. McLeod. Judge McLeod denied the Respondent's Motion for Summary Judgment concluding that Appellant's conviction as a youthful offender entitled him to petition the court for expungement of Appellant's conviction, and that the court would not retroactively enforce public policies codified in the Youthful Offender Act (YOA) and the Sexual Offender Registry (SOR) subsequent to a guilty plea in 2005 and a sentence completion in 2010. An Amended Order was filed on December 11, 2018 to correct the names of counsel for Respondent.

Respondent filed another Summary Judgment Motion. A hearing was conducted. The court concluded the matter on a Form 4 Disposition, denying Respondent's Motion for Summary Judgment and instructing the record to be "develop since this appears to be a novel issue of law." This Order was filed with the Court on April 3, 2019.

The Respondent filed a third Motion for Summary Judgment. The Court granted Respondent's Motion concluding that the legislature "clearly and unequivocally" provided that "the

Expungement Act shall operate retroactively.” Further, the Court declared that Appellant was barred from seeking an expungement because of the classification of his charge as being violent and because of the requirement to register on the Sexual Offender Registry.

This appeal follows.

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Gist v. Berkeley County Sheriff's Dept.*, 336 S.C.611, 521 S.E.2d 163 (S.C. App. 1999). Summary judgment is not appropriate where further inquiry into the facts is desirable to clarify the application of the law. *Id.* When determining whether any triable issue of fact exists, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. *Id.* All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant. *Id.*

FACTS

On February 18, 2005, at age seventeen (17), the Appellant pled guilty to the crime of Lewd Act on a Minor, which was codified in S.C. Code Ann. §16-15-140 as a non-violent offense. (Complaint, R. at). Since the offense was classified as non-violent, the Appellant was eligible to be sentenced under the Youthful Offender Act (YOA). S.C. Code Ann. §§ 22-5-920 (1976, as amended). The Appellant was committed to the terms and provisions of the YOA, which resulted in a five-year probationary sentence. (Complaint, R. at). The Appellant successfully completed his probationary sentence in 2010 and has not reoffended. At the time of completion of his sentence, Appellant's offense was still classified as non-violent.

Sometime after the Appellant completed his sentence in 2010, the offense of Lewd Act with a Minor was reclassified as a violent crime. See 2010 S.C. Act 289 (H.B. 4202). The General Assembly then amended the applicable law of Lewd Act on a Minor, repealing and replacing it with the offense of Criminal Sexual Conduct with a Minor – Third Degree (“CSC-Third”). See 2012 S.C. Act 255 (H.B. 3667)(repealing and replacing S.C. Code § 16-15-140 with S.C. Code Ann. § 16-3-655(C)).

The elements of the repealed and replaced offense of Lewd Act on a Minor and the current offense of CSC-Third are essentially the same. Compare S.C. Code § 16-15-140 (2012) with S.C. Code § 16-3-655(C)(2017). As of 2017, CSC-Third is now considered a violent crime. S.C. Code Ann. § 16-1-60 (2017).

As of 2017, persons convicted of violent offenses are not eligible for expungement under the YOA. S.C. Code Ann. §§ 22-5-920 (B)(2)(b) and 24-19-10(d)(2017).

On June 16, 2016, the Appellant applied to the Respondent’s office to have his offense expunged. (Appellant’s Letter, R. at). Well over some sixteen (16) months later, the Respondent’s office denied Appellant’s request to have his records expunged. (Respondent’s Letter, R. at).

Thus, the hearings referenced above in the Statement of the Case were conducted and this appeal follows.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WHEN A GENUINE ISSUE OF MATERIAL FACT EXIST, THEREBY DENYING APPELLANT THE RIGHT TO SEEK AN EXPUNGEMENT WHEN APPELLANT WAS ELIGIBLE FOR SUCH EXPUNGEMENT.

Summary judgment is not appropriate where further inquiry into the facts is desirable to clarify the application of the law. Here, the facts regarding when the Appellant pled and completed his sentence are not in contention. However, further inquiry into those facts as they relate to when the Appellant became eligible to receive an expungement are required to clarify the application of the law as to whether and when the Appellant became eligible to receive an expungement. Therefore, there is a genuine issue as to material fact and the moving party is not entitled to judgment as a matter of law. As a result, the trial court erred in granting Respondent's Summary Judgment Motion.

In 2005, the Appellant pled to an offense that was then classified as non-violent. See S.C. Code Ann. § 16-15-140. Since the offense was classified as non-violent, the Appellant was eligible to be sentenced under the YOA. The YOA Statute applicable at the time of Appellant's plea allowed for expungement after five years from the date of completion of Appellant's sentence. See S.C. Code Ann. § 22-5-920 (1976, as amended). Appellant successfully completed his sentence in 2010 and waited the required five years to apply for expungement.

On or about June 16, 2016, Appellant applied to Respondent (Solicitor's Office) for an expungement. (Appellant's Letter, R. at). The applicable law at the time provided that Appellant was eligible for an expungement. On or about October 30, 2017, some sixteen (16) months later, Respondent (Solicitor's Office) denied Appellant's expungement request. (Respondent's Letter,

R. at). Respondent did not provide an explanation as to the unusually long delay in processing Appellant's expungement request.

The provisions of the YOA in effect at the time Appellant made his expungement request provided that expungement was an available relief. See S.C. Code Ann. §§ 22-5-920 (particularly June 16, 2016). In *Gay v. Ariail*, the South Carolina Supreme Court concluded that a person sentenced under the YOA was eligible for expungement. 381 S.C. 341, 673 S.E.2d 341 (S.C. 2009). The provisions of the YOA applicable at the time of Appellant's expungement request provided that as long as a defendant had not re-offended within five years of his completed sentence, the defendant would be eligible for an expungement. Accordingly, Appellant was eligible for an expungement. As such, the trial court erred in granting Respondent's Motion for Summary Judgment because a genuine issue as to a material fact existed regarding Appellant's eligibility for expungement. A trier of fact was necessary to determine Appellant's eligibility for expungement, therefore summary judgment was not appropriate. See *Gist*.

Respondent denied Appellant's expungement request after the law changed. Appellant's pled offense had then been re-classified as a violent offense by the time of Respondent's denial, but not at the time of Appellant's expungement request. In addition, the re-classification of Appellant's offense occurred after Appellant successfully completed his sentence. Based on the time frames established above, Appellant did have a favorable opportunity based on the then existing law to support the position that Appellant was eligible for the expungement. Respondent's unexplained and unjustified delay in processing Appellant's expungement request resulted in several intervening factors that changed Appellant's eligibility, such as the re-classification of Appellant's offense, after Appellant completed his sentence, and the change in the expungement statute. See S.C. Code Ann. § 16-15-140. There is a genuine issue as to material fact regarding

when Appellant was eligible for the expungement and exactly what law governed Appellant's eligibility period, and whether Respondent's delay unjustified and intentional. Therefore, the moving party is not entitled to judgment as a matter of law. As a result, the trial court erred in granting Respondent's Summary Judgment Motion. See *Gist*.

Respondent relies on the position that the new Expungement Law bars Appellant from being eligible. At the time Appellant made his expungement request, the expungement law was favorable to Appellant and he was eligible. Respondent waited approximately sixteen (16) months to process Appellant's expungement request and denied it after the law had changed. A genuine issue as to the material fact regarding when Appellant was eligible for expungement and which law governed at the time, therefore summary judgment was not an appropriate ruling. See *Gist*.

Compare *State v. Dawson*, where the South Carolina Supreme Court ruled that a defendant was not entitled to the benefit of a lesser sentence when a new law became effective after defendant committed the crime, but before sentencing. 402 S.C. 160, 740 S.E.2d 501 (S.C. 2013). The Court concluded that the defendant in *Dawson* was properly sentenced under the law that existed at the time of the commission of her crime. Here, Appellant pled to a non-violent offense under the YOA that provided for expungement. The same conditions were in effect at the time Appellant made his expungement request and only became different after a sixteen (16) month processing delay by the Respondent. As such, a genuine issue as to the material fact of when Appellant was eligible for the expungement exist and summary judgment was not an appropriate ruling by the trial court. See the Form 4 Order denying Summary Judgment in which the Court ruled that the "record should be allowed to develop since this appears to be a novel issue of law." (Summary Judgment Order of April 2019, R. at). See *Gist*.

Respondent also contends that the New Expungement Law applies retroactively, thereby barring Appellant from being eligible for an expungement. While it is true the New Expungement Law does have retroactive application, made clear by the intent of the General Assembly, the issue herein is if the Appellant's expungement request had been properly and timely processed, it would have been before the enactment of the new law. A genuine issue as to material fact exists as to the reason and intended consequence of the Respondent's delay in processing Appellant's expungement request. As a result, granting summary judgment was not proper. See *Gist*. A trier of fact is needed to determine if Appellant's expungement request was properly and timely processed, if Appellant would have been eligible for the expungement.

CONCLUSION

For the reason outlined above, this Court should reverse the trial court's grant of summary judgment and remand the case for proper proceedings.

Respectfully submitted,

Charles T. Brooks, III
Charles T. Brooks, III
S.C. Bar No. 11762
Post Office Box 3512
Sumter, South Carolina 29151
803-418-5708
803-934-9618 [Facsimile]
cbrooks@ctbrooks.com
Attorney for Appellant

January 17, 2020

THE STATE OF SOUTH CAROLINA

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R. Lawton McIntosh, Circuit Court Judge

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PROOF OF SERVICE

I do hereby certify that I have this 17th day of January 2020, served a copy of the **INITIAL BRIEF OF APPELLANT** and **DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL**, and a **PROOF OF SERVICE**, by depositing a copy of the same in the United States mail, with first class postage affixed thereto, addressed as follows:

Ms. Harley Littleton Kirkland
Attorney at Law
Office of SC Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

January 17, 2020

Charles T. Brooks, III
Charles T. Brooks, III
S.C. Bar No. 11762
Post Office Box 3512
Sumter, South Carolina 29151
803-418-5708
803-934-9618 [Facsimile]
cbrooks@ctbrooks.com
Attorney for Appellant

The Brooks Law Office, LLC

CHARLES T. BROOKS, III, ATTORNEY AT LAW

IRMA R. BROOKS, ATTORNEY AT LAW

309 BROAD STREET ~ SUMTER, SOUTH CAROLINA 29150
POST OFFICE BOX 3512 ~ SUMTER, SOUTH CAROLINA 29151
(803) 418-5708

FAX: (803) 934-9618

Email: cbrooks@ctbrooks.com
brooksirbrooks@aol.com

January 17, 2020

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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SC Court of Appeals

RE: Charles Burton v. Lexington County Sol.
Appellate Case No. 2019-001252

Dear Clerk Kitchings:

Enclosed, please find for filing the original copies of the Initial Brief of Appellant, the Designation of Matter to be Included in the Record on Appeal, and the Proof of Service.

Thank you in advance for your assistance with the filing of these documents.

If your office requires anything else at this time, please let me know.

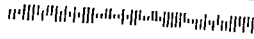
Sincerely,

Charles T. Brooks, III
Charles T. Brooks, III

Enclosures as stated

cc: Ms. Harley Littleton Kirkland
Attorney at Law
Office of SC Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Charles T. Brooks, III
Post Office Box 3512
Sumter, South Carolina
29151



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The Honorable Jenny A. Kitchings
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