

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2019-001252

Charles F. Burton,.....Appellant.

v.

Lexington County Solicitor,.....Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Circuit Court erred in granting summary judgments to the Respondents where there is no genuine issue of material fact?
2. Whether the Appellant is eligible to receive an expungement for his 2005 conviction of Lewd Act on a Minor?

STATEMENT OF THE CASE

On January 5, 2018, in Lexington County, Mr. Burton filed a Summons and Petition for Destruction of Arrest Records (Expungement). (Petition, R. pp. 28-30). The petition states that on February 18, 2005, Mr. Burton pled guilty under the Youthful Offender Act to one count of Lewd Act on a Minor, S.C. Code Ann. §16-15-140. (Petition, R. pp. 28-30; Sentencing Sheet, R. p. 31). He was sentenced by the Honorable William P. Keesley to a suspended sentence not to exceed six (6) years upon five (5) years probation. (Sentencing Sheet, R. p. 31).

At the time of his plea, S.C. Code Ann. § 22-5-920 would have required Mr. Burton to wait fifteen years to seek expungement, and did not allow expungements for violent crimes. S.C. Code Ann. § 22-5-920 (2005). (“Following a first offense conviction as a youthful offender, the defendant after fifteen 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 ... an offense classified as a violent crime in Section 16-1-60.”) In 2005, Lewd Act on a Minor was not yet defined as a violent crime. *See* S.C. Code Ann. § 16-1-60 (2005). Also at the time of the plea, Mr. Burton was required to register as a sex offender, and still does, though that did not yet preclude him from being eligible to receive an expungement.

Mr. Burton successfully completed his probationary sentence in 2010. In 2010, S.C. Code Ann. § 22-5-920 required him to wait five years from the date of completion of his sentence to be eligible for an expungement. S.C. Code Ann. § 22-5-920 (2010). (“Following a first offense conviction as a youthful offender, the defendant after five years from the date of completion of his sentence, including probation and parole, 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 ... an offense classified as a violent crime in Section 16-1-60...”) Also, on June 2, 2010, Lewd Act became defined as violent crime. S.C. Code Ann. § 16-1-60. At that time, Mr. Burton was no longer eligible for an expungement. In 2010, S.C. Code Ann. § 22-5-920 did not yet preclude him from being eligible for an expungement due to his sex offender registry requirement.

In 2012, Lewd Act on a Minor was recodified as Criminal Sexual Conduct with a minor, third degree. *See* South Carolina Bill History, 2012 Reg. Sess. H.B. 3667. The recodification specifically also amended Section 16-1-60 relating to violent crimes. *Id.* In 2012, Mr. Burton was no longer eligible to have his conviction expunged pursuant to S.C. Code Ann. § 22-5-920, because his conviction was a violent crime. The recodification did not impact Mr. Burton’s sex offender registration requirement, and he was still required to register as a sex offender, though that was not yet a bar to expungement.

In 2016, Mr. Burton applied to have his charge expunged. The Eleventh Circuit Solicitor’s Office refused to consent to the expungement request. At the time he applied to have his charge expunged, he was not eligible for expungement because his conviction became a violent crime in 2012. *Id.*

On January 5, 2018, the Mr. Burton filed an action in Circuit Court seeking an expungement of his Lewd Act on a Minor conviction. On October 8, 2018, the Solicitor’s Office filed a motion for summary judgment asserting that Mr. Burton was not eligible for expungement because his conviction was a violent crime. On December 11, 2018, the Respondent’s motion for summary judgment was denied. In the order denying Summary Judgment, “[t]he court reason[ed] that the sentencing judge would not have committed Mr. Burton under the YOA if that court did not desire him to have the opportunity to seek expungement of the offense from his

record in the event that he could complete the program.” (December 11, 2018 Order Denying Summary Judgment, R. p. 24).

On December 27, 2018, S.C. Code Ann. § 22-5-920 was amended to provide that youthful offender convictions that require an individual to register as a sex offender are not eligible for expungement. *See* South Carolina Bill History, 2018 Reg. Sess. H.B. 3209; S.C. Code Ann. § 22-5-920(B)(2) (“However, this section does not apply to... an offense for which the individual is required to register in accordance with the South Carolina Sex Offender Registry Act.”) At the time of his plea, Mr. Burton was and is still required to register as a sex offender, which bars him from being eligible to receive an expungement.

On January 29, 2019, the Respondent filed another motion for summary judgment in light of the December 27, 2018 amendment arguing that Mr. Burton was now legally barred from receiving an expungement both because his conviction requires him to register as a sex offender and because it is a violent crime. Judge Keesley denied the motion stating only that “[t]he record should be allowed to develop since this appears to be a novel issue of law.” (April 2, 2019 Order Denying Summary Judgment, R. p. 11).

Given that this is an issue of law, and there was no discovery to be conducted, Respondent again filed a motion for summary judgment, still alleging that Mr. Burton is legally barred from receiving an expungement both because his conviction requires him to register as a sex offender and because it is a violent crime. There was a hearing before Judge McIntosh on June 18, 2019. Judge McIntosh granted Respondent’s motion for summary judgment stating that “the legislature clearly and equivocally has provided that the Expungement Act shall operate retroactively. Accordingly, under the current version of the Expungement Act, Petitioner is barred from seeking expungement because of the classification of his charge as being violent and

because of his sex offender registration requirement.” (June 20, 2019 Order Granting Summary Judgment, R. p. 8).

The Respondent attempted to appeal on July 23, 2019, and ultimately served his amended notice of appeal on November 12, 2019.

STANDARD OF REVIEW

“This Court reviews all questions of law de novo.” *Lollis v. Dutton*, 421 S.C. 467, 477, 807 S.E.2d 723, 728 (Ct. App. 2017) (quoting *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009); *see also Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) (“Questions of law may be decided with no particular deference to the trial court.” (quoting *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008))). Whether the Court erred by granting Respondent’s motion for summary judgment is a question of law; therefore, the proper standard of review is *de novo*.

ARGUMENT

1. **Summary Judgment was appropriate because there is no genuine issue of material fact**

Appellant attempts to argue that the question of whether Mr. Burton is legally able to have his 2005 conviction for lewd act on a minor expunged is a question of fact not appropriate for summary judgment. The Respondent respectfully disagrees. “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.” Rule 56, SCRPC; *Knight v. Austin*, 396 S.C. 518, 521–22, 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, 133–34, 659 S.E.2d 496, 498 (2008). In determining whether summary judgment is appropriate, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). Despite Appellant’s assertions in his brief, the parties do actually agree to the facts in this case. They do not agree with the application of the law to the facts. The only material fact is that Mr. Burton was convicted of lewd act on a minor in 2005. The question at issue here, whether Mr. Burton’s conviction meets the statutory requirements to be eligible for expungement, is purely a legal question and is appropriate for summary judgment.

2. **Mr. Burton is not eligible for an expungement**

a. **Mr. Burton’s 2005 Lewd Act on a Minor conviction is a “violent crime,” and thus his conviction is not eligible for expungement.**

Lewd Act on a Minor is a “violent crime,” precluding expungement under S.C. Code Ann. § 22-5-920 (“the Expungement Statute”). This conclusion is derived from the logical connection between Mr. Burton’s prior conviction and the current statutory scheme. Under the

Expungement Statute, violent crimes are ineligible for expungement. *See* S.C. Code Ann. § 22-5-920(B)(2) (citing S.C. Code Ann. § 16-1-60). Under S.C. Code Ann. § 16-1-60, “criminal sexual conduct with minors, first, second, and third degree” are considered to be violent crimes. *See also* S.C. Code Ann. § 16-3-655(C).¹ Here, Mr. Burton was convicted of Lewd Act on a Minor, which was repealed and re-codified as S.C. Code Ann. § 16-3-655(C), Criminal Sexual Conduct with a Minor – Third Degree (“CSCM-Third”). *Compare* S.C. Code Ann. § 16-15-140 (repealed) with S.C. Code Ann. § 16-3-655(C).² Thus, Lewd Act on a Minor is indistinguishable from CSCM-Third, and should be considered a violent crime.

Legislative history confirms this logical conclusion. To begin, prior to Lewd Act on a Minor being repealed and re-codified, it was included as a violent crime in prior versions of S.C. Code Ann. § 16-1-60. *See* S.C. Code Ann. § 16-1-60 (2010) (current version at S.C. Code § 16-1-60 (2015)) (“For purposes of definition under South Carolina law, a violent crime includes the offenses of: . . . lewd act upon a child under sixteen (Section 16-15-140) . . .”). What is more, when Lewd Act on a Minor was repealed, the legislature made clear that CSCM – Third was replacing it in nearly every respect:

AN ACT TO AMEND SECTION 16-3-655, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO CRIMINAL SEXUAL CONDUCT WITH A MINOR OFFENSES, SO AS TO CREATE THE

1 “A person is guilty of criminal sexual conduct with a minor in the third degree if the actor is over fourteen years of age and the actor wilfully and lewdly commits or attempts to commit a lewd or lascivious act upon or with the body, or its parts, of a child under sixteen years of age, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child. . . .” S.C. Code Ann. § 16-3-655(C).

2 “It shall be unlawful for any person over the age of fourteen years to wilfully and lewdly commit or attempt any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child” *State v. Hardee*, 279 S.C. 409, 412, 308 S.E.2d 521, 524 (1983) (quoting S.C. Code Ann. § 16-15-140).

OFFENSE OF CRIMINAL SEXUAL CONDUCT IN THE THIRD DEGREE . . . ; TO AMEND SECTION 16-1-60, AS AMENDED, RELATING TO VIOLENT CRIMES, . . . , ALL SO AS TO MAKE CONFORMING AMENDMENTS TO REFERENCE APPROPRIATE CRIMINAL SEXUAL CONDUCT WITH A MINOR OFFENSES AND TO DELETE REFERENCES TO THE FORMER LEWD ACT UPON A CHILD UNDER THE AGE OF SIXTEEN; AND TO REPEAL SECTION 16-15-140 RELATING TO COMMITTING OR ATTEMPTING TO COMMIT A LEWD ACT UPON A CHILD UNDER THE AGE OF SIXTEEN.

South Carolina Bill History, 2012 Reg. Sess. H.B. 3667 (emphasis added).³ See also *State v. Nation*, 408 S.C. 474, 477, 759 S.E.2d 428, 430 (2014), *abrogated on other grounds by State v. Ross*, 423 S.C. 504, 815 S.E.2d 754 (2018) (“At the time of Appellant’s indictment, section 16–15–140 codified the crime of ‘lewd act upon a child under sixteen.’ S.C. Code Ann. § 16–15–140 (1996). However, the General Assembly later renamed this crime CSCM–Third and re-codified it in S.C. Code Ann. § 16–3–655(C) (Supp. 2010). For ease of reference, we refer to ‘lewd act upon a child under sixteen’ as CSCM–Third.”).

In sum, Mr. Burton’s sex offense, committing a Lewd Act on a Minor is, for all intents and purposes, the same thing as CSCM–Third: a violent crime precluding expungement. Not only has such equivalency been recognized by the South Carolina Supreme Court, but it was also the clear intent of the General Assembly to replace § 16-15-140 with § 16-3-655(C). Thus, to find Mr. Burton is even eligible to have his conviction considered for expungement would be in contradiction to binding precedent and legislative intent. Stated plainly, Mr. Burton’s conviction is precluded from expungement in this case as a violent crime.

³ Instructively, the General Assembly also included CSCM–Third as a sex offense requiring registration and incorporated it into the definition of a youthful offender. South Carolina Bill History, 2012 Reg. Sess. H.B. 3667 (“TO AMEND SECTION 23-3-430, AS AMENDED, RELATING TO THE SEX OFFENDER REGISTRY, . . . , TO AMEND SECTION 24-19-10, AS AMENDED, RELATING TO DEFINITIONS FOR PURPOSES OF CORRECTION AND TREATMENT OF YOUTHFUL OFFENDERS, . . .”).

b. Mr. Burton's underlying offense requires him to "register in accordance with the South Carolina Sex Offender Registry Act," and thus his conviction is not eligible for expungement.

Mr. Burton's conviction requires him to register as a sex offender and thus precludes him from obtaining expungement of the conviction. Mr. Burton's sex offense, formerly called Lewd Act on a Minor and now recognized as CSCM-Third, requires him to register as a sex offender. See S.C. Code Ann. § 23-3-430(C)(6). Under the 2018 amendment to the expungement statute, this precludes the offense from being expunged. See S.C. Code Ann. § 22-5-920(B)(2)(d). ("However, this section does not apply to... an offense for which the individual is required to register in accordance with the South Carolina Sex Offender Registry Act.")

c. The current expungement law applies to the Mr. Burton, not any previous version of the law.

The expungement law that went into effect on December 28, 2019, applies to this case. S.C. Code Ann. § 22-5-920 states that "...a person who was convicted prior to June 2, 2010, and was a youthful offender as that term is defined in Section 24-19-10(d) is eligible to have his record expunged pursuant to the provisions of this section." S.C. Code Ann. § 22-5-920(C). Mr. Burton was convicted in 2005, therefore the provisions of this section were meant to apply to his conviction, not the expungement law as it existed in 2005 or in 2018 when this action was filed.

Furthermore, "[s]everal acts *in pari materia*, and relating to the same subject, are to be taken together, and compared in the construction of them, because they are considered as having one object in view, and as acting upon one system." 1 James Kent, *Commentaries on American Law* 433 (1826). When courts construe statutes dealing with the same subject matter, the courts must endeavor to construe them harmoniously. "It is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Joiner ex rel. Rivvas v. Rivvas*, 342 S.C. 102, 109, 535 S.E.2d 372,

375 (2000) (citing *Home Health Servs., Inc. v. South Carolina Dept. of Health and Environmental Control*, 298 S.C. 258, 379 S.E.2d 734 (Ct. App. 1989)).

When the legislature amended Section 22-5-910, they also amended the Uniform Expungement of Criminal Records Act, specifically Section 17-22-910(C), which provides that “[t]he provisions of this section apply retroactively to allow expungement as provided by law for each offense delineated in subsection (A) by persons convicted prior to the enactment of this section or the addition of a specific item contained in subsection (A).” S.C. Code Ann. §17-22-910(C). The Legislature passed amendments to both statutes at the same time and in the same legislative Act; clearly, the Legislature intended cooperative application of the statutes, and for both sections to be applied retroactively.

CONCLUSION

The determination of whether Mr. Burton is legally eligible to be considered for an expungement is purely a question of law. There are no genuine issues of material fact in this case. Furthermore, Mr. Burton is not eligible for an expungement. Mr. Burton's conviction has been defined as a violent crime since 2010, well before the expungement request was initially made in 2016. Furthermore, the law regarding expungements changed in 2018 with retroactive effect, further precluding Mr. Burton from being eligible for an expungement because his conviction requires him to register as a sex offender. The Circuit Court's order should be upheld.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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