

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JEREMY DALE HUMPHREY,
Petitioner,

v.

Docket No. 13-0765

WEST VIRGINIA DIVISION OF CORRECTIONS,
Respondent.

**BRIEF OF RESPONDENT
THE WEST VIRGINIA DIVISION OF CORRECTIONS**

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STATEMENT OF THE CASE

This is an Appeal from an Order on June 24, 2013, entered by Judge Jennifer Bailey in the Circuit Court of Kanawha County In re: Petition of Jeremy Dale Humphrey For Expungement of Records, Case No. 13-P-192. This Order set aside the Court's previous Order granting expungement in Civil Action No. 13-Misc-89 finding that the petitioner Jeremy Humphrey did have a proceeding pending at the time he moved for expungement under West Virginia Code, Section 61-11-25 and that the petitioner had not disclosed to the Court the existence of such a proceeding at the time the Court granted expungement.

Factual and Procedural History

On August 3, 2012, the Mt. Olive Correctional Complex ("Mt. Olive") learned that one of its Correctional Officers, the petitioner Humphrey, had been arrested and charged with four counts of misdemeanor battery for his participation in spraying several civilians with "pepper" spray while off-duty. (Appendix at p. 7). Mt. Olive interviewed the petitioner as to the arrest. The petitioner informed Mt. Olive that he had bought pepper spray for himself and friends, but had not been involved in the spraying of anyone. Mt. Olive subsequently obtained a copy of the petitioner's recorded interview with the Charleston Police Department. In this interview, the petitioner admitted to police that he bought the pepper spray and that he had been driving the vehicle when he and a friend drove by several pedestrians in the Charleston area and sprayed them in the face with the pepper spray. (Appendix at pp. 8-9, 19).

At Mt. Olive, correctional officers use pepper spray as a necessary method of subduing inmates who refuse to comply with orders, threaten potential violence and

cannot otherwise be safely approached by officers. A correctional officer who is willing to use pepper spray in a completely gratuitous manner on vulnerable persons, whether on an inmate or a pedestrian, has no place within the West Virginia Division of Corrections (“Corrections”). See *Harrah v. Leverette*, 165 W.Va. 665, 681, 271 S.E.2d 322, 332 (1980) (“Those found psychologically unsuited for employment as guards shall not be or continue to be employed.”). Based upon the petitioner’s involvement in the gratuitous pepper spraying of pedestrians and his false statements given to Mt. Olive about his involvement, the petitioner was dismissed from his employment as a Correctional Officer II at Mt. Olive. (Appendix at p. 9).

On September 17, 2012, the same date he was informed he was being dismissed, the petitioner filed a grievance with the West Virginia Public Employees Grievance Board, West Virginia Code, Section 6C-2-1 et seq., challenging his dismissal and seeking reinstatement to his correctional officer position.

On November 20, 2012, the Magistrate Court of Kanawha County, West Virginia entered a pre-trial diversion order placing the petitioner in the pre-trial diversion program pursuant to West Virginia Code, Section 61-11-22 et seq., for a period of three months. The petitioner subsequently moved to dismiss the misdemeanor charges without the three month pre-trial diversion program based upon the petitioner’s assertion he had obtained gainful employment but was unable to begin such employment while in the pre-trial diversion program. (Appendix at p. 20). On November 27, 2012, the Magistrate Court granted the motion to dismiss on the four misdemeanor charges. (Appendix at p. 7).

On February 19, 2013, the petitioner filed a Petition for Expungement of Records regarding the four misdemeanor battery charges with the Kanawha County Circuit Court,

Civil Action 13-Misc-89. In this Petition, the Circuit Court was informed that there were “no current charges or proceedings pending in this matter.” (Appendix at p. 2). At the time of the Petition, however, the petitioner’s grievance with the West Virginia Public Employees Grievance Board was still pending. Corrections was not noticed on this Petition and was not informed of the Petition by either the petitioner, the prosecuting attorney’s office or the Circuit Court. (See Appendix at p. 3). On March 1, 2013, the Circuit Court entered an Order granting expungement of the four misdemeanor battery charges. (Appendix at pp. 4-5). More specifically, the Order set forth “[t]hat any records in the custody of any agency or official including law-enforcement records shall be expunged. Every agency with records relating to the arrest, charge or other matters arising out of the arrest or charge, shall certify to this Court, within 60 days of the entry of this Order, that the required expungement has been completed.”

The petitioner subsequently presented the Order to Mt. Olive and Corrections and requested that all of the records relating to the incident involving his participation in pepper spraying pedestrians be expunged. Absent such records, Mt. Olive and Corrections would have no evidence to present regarding the petitioner’s involvement in pepper spraying pedestrians or the petitioner’s false representations made to Mt. Olive regarding his involvement and would be unable to defend the petitioner’s dismissal at a hearing in front of the West Virginia Public Employees Grievance Board.

On April 1, 2013, Corrections filed a “Motion to Intervene and to Set Aside Order of Expungement for the Limited Purpose of the Pending Administrative Grievance Being Heard by the Public Employee Grievance Board” in the Kanawha County Circuit Court. (Appendix at pp. 6-11). The Motion was given an initial civil action number of 13-P-192

as a new civil action and assigned to Judge Carrie Webster. Upon a motion by Corrections, Judge Webster transferred the case to Judge Bailey and a hearing on the Motion was held on May 28, 2013. The Circuit Court found that the “Petitioner has a proceeding pending relating to the matter for which the expungement was sought, which was not disclosed to the Court prior to the expungement initially being ordered.” The Circuit Court then ordered that its expungement order in Civil Action No. 13-MISC-89 be set aside. It is from this Order setting aside the order of expungement that the petitioner appeals.

SUMMARY OF ARGUMENT

West Virginia Code, Section 61-11-25 provides that if there are no current charges and no pending proceedings, a circuit court may grant a petitioner expungement of any records relating to the dismissed misdemeanor criminal charges. A circuit court has discretion in the matter and may deny a petition for expungement of records even if there are no pending proceedings, if expungement would contravene public policy. In the present case, the Circuit Court properly permitted Corrections/Mt. Olive to intervene in the matter and present information that it had dismissed the petitioner from employment based upon the substance of the misdemeanor criminal charges and that there was a pending proceeding in front of the West Virginia Public Employees Grievance Board in which the petitioner sought an order reinstating him to a correctional officer position. The Circuit Court did not abuse its discretion when it set aside its order of expungement on the ground that there was a pending proceeding in which Corrections needed to

present evidence related to the petitioner’s misdemeanor charges and that it had not known of this proceeding when it issued the prior order of expungement.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The West Virginia Division of Corrections does not believe oral argument is necessary.

ARGUMENT

I. **STANDARD OF REVIEW**

This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*. Syl. Pt. 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).

Assignment of Error I: The Circuit Court erred in setting aside the Order of Expungement because Petitioner was not required to disclose an ongoing administrative employment matter in the Petition for Expungement, because the grievance hearing was not a “proceeding” as contemplated by the expungement statute.

II. **WEST VIRGINIA CODE 61-11-25 PROVIDES THE CIRCUIT COURT WITH THE DISCRETION TO DENY A PETITION FOR EXPUNGEMENT OF CRIMINAL RECORDS IN CIRCUMSTANCES WHERE THERE ARE NO CURRENT CHARGES OR PROCEEDINGS PENDING RELATING TO THE MATTER FOR WHICH EXPUNGEMENT IS SOUGHT.**

West Virginia Code, Section 61-11-25(d) sets forth that in the event there are no current charges or proceedings pending “the court **may** grant the petition and order ... expungement of any records in the custody of any other agency or official including law enforcement records.” (emphasis added). The statute contemplates that the court has

discretion in the matter and that expungement may not be warranted or ordered even though there are no pending proceedings or current criminal charges. The Circuit Court, here, does not need the proceedings in front of the West Virginia Public Employee Grievance Board to be a statutorily recognized “proceeding” under West Virginia Code, Section 61-11-25(d) in order to find that expungement should not have been granted.

Discretion is generally provided so that the court may refuse to grant expungement where such an Order would jeopardize public safety or other important public policy grounds, or would cause substantial injustice. A court may legitimately deny expungement under West Virginia Code, Section 61-11-25 where it concludes that expungement would allow a person to return to work as a Correctional Officer over the objections of the correctional facility and in contravention of sound public policy of providing inmates with a safe and secure prison environment. In the present case, the Circuit Court did not abuse its discretion.

III. THE TERM “PROCEEDINGS” INCLUDES STATE ADMINISTRATIVE LAW PROCEEDINGS AND PROCEEDINGS OF THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD.

The petitioner argues that a “proceedings” as used in West Virginia Code, Section 61-11-25(d) refers only to criminal charges and no other proceedings.¹ The statutory language used, however, does not support such an interpretation. Had the statute contemplated such a narrow interpretation, the legislature could have easily written the statute to set forth “no current charges or criminal proceedings.” “[I]t is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not

¹ The petitioner’s interpretation is based upon the statute requiring that the prosecuting attorney’s office receive notice and an opportunity to respond.

to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.’ “*Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 491, 647 S.E.2d 920, 927 (2007) (citations omitted); see also *State ex rel. Frazier v. Meadows*, 193 W.Va. 20, 24, 454 S.E.2d 65, 69 (1994) (“Courts are not free to read into the language what is not there, but rather should apply the statute as written.”). The term “proceedings” is not defined or modified in West Virginia Code, Section 61-11-25. Instead, the legislature used the term “proceedings,” a general term which has been used in a wide variety of statutes, including statutes which use the term “proceeding” to describe actions in administrative law. See, for example, W.Va. Code, Sections 5-3-2a, 5-11A-13, and 5-14A-5. More specifically, West Virginia Code, Section 6C-2-2(j) sets forth in its definitions “‘Grievance proceeding,’ ‘proceeding’ or the plural means a conference, level one hearing, mediation, private mediation, private arbitration or level three hearing, or any combination, unless the context clearly indicates otherwise.” An administrative law hearing in front of the West Virginia Public Employees Grievance Board is referred to by statute as a “proceeding” and would fall within “proceedings” contemplated by West Virginia Code, Section 61-11-25.

Moreover, had the statute contemplated that a circuit court could not consider a wide variety of pending proceedings but could only consider criminal proceedings, it would not have provided the court with discretion as to whether to grant a petition. A circuit court, for example, could certainly consider an on-going civil action as a pending proceeding and deny expungement. If one of the pedestrians who was pepper sprayed had filed a civil action against the petitioner, a circuit court would be well within its

authority to determine that expungement would unfairly defeat the pedestrian's attempt to seek justice and deny the motion for expungement. Similarly where a pending state administrative proceeding involves public safety, the circuit court may deny expungement and allow the pending proceeding to be heard on the merits. In *Mullen v. W.Va. Div. of Motor Vehicles*, 216 W.Va. 731, 613 S.E.2d 98 (2005), the West Virginia Supreme Court found that West Virginia Code, Section 61-11-25 did permit the consideration of how an order of expungement affected a proceeding which had occurred in an administrative setting, there, a suspension of license by the Division of Motor Vehicles. While *Mullen* involved a completed as opposed to a pending administrative proceeding, the case found that expungement was not intended to create results which ran contrary to public policy, including public safety on the roads, absent specific intent of the legislature to do so. *Mullen*, 216 W.Va. at 734, 613 S.E.2d at 101.

Assignment of Error II: To set aside the Order of Expungement so that the expunged records may be used against the Petitioner in an employment/administrative hearing is contrary to the purposes of the expungement statute.

IV. WEST VIRGINIA CODE, SECTION 61-11-25 CONTEMPLATES THAT A CIRCUIT COURT MAY CONSIDER PUBLIC POLICY IN ITS DECISION WHETHER TO GRANT EXPUNGEMENT.

West Virginia Code, Section 61-11-25 gives a circuit court discretion whether to grant a petition or not. In using such discretion, a circuit court may balance public policy considerations against the petitioner's interests in having a clean criminal record. See *Mullen*, supra. Such public policy consideration may include public safety, including the protection of inmates from harm. A circuit court is not limited to determining whether a pending criminal proceeding exists, and, if no such proceeding exists, automatically

entering an order of expungement and permit the petitioner to escape the consequences of his admitted actions.²

Assignment of Error III: The Department of Corrections had no standing to challenge the Order of Expungement, and its action in doing so was untimely.

V. THE CIRCUIT COURT PROPERLY ALLOWED THE WEST VIRGINIA DIVISION OF CORRECTIONS TO INTERVENE IN THE MATTER.

Rule 24(a) of the West Virginia Rules of Civil Procedure provide that “[u]pon timely application anyone shall be permitted to intervene in an action ... when the applicant claims an interest relating to the property or transaction which is the subject or the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.”

Corrections has a cognizable interest in the expungement

In the present case, the applicant/Corrections did have an interest in the transaction, to-wit: the expungement motion, and the granting of such an expungement motion would as a practical matter impair or impede Corrections ability to protect its interest in not having in its facilities correctional officers who practice acts of gratuitous violence against vulnerable persons. See *Harrah*, supra. The petitioner filed a grievance challenging his dismissal with the West Virginia Public Employees Grievance Board, in which Corrections had the burden of proving the acts underlying its decision to dismiss the petitioner, and the petitioner sought to use the expungement order to prevent Corrections from proving the underlying conduct justifying the dismissal.

² Here, the petitioner admitted involvement to the Police and his charges were not dismissed because he was innocent of the charges.

Corrections moved to intervene in a timely manner

“While Rule 24 of the West Virginia Rules of Civil Procedure provides for the intervention of parties upon a timely application, the timeliness of any intervention is a matter of discretion with the trial court.” Syl. Pt. 1, *Pauley v. Bailey*, 171 W.Va. 651, 301 S.E.2d 608 (1983). “Timeliness” does not bar motions to intervene after an order has been entered. See *W. Va. Pub. Emp. Ins. Board v. Blue Cross Hospital Service, Inc.*, 180 W.Va. 177, 375 S.E.2d 809 (1988) (Consideration of a Motion to Intervene made three months after dismissal order entered); *Pauley*, supra (Consideration of a Motion to Intervene made one year after evidentiary hearings and seven months after court’s orders). In both cases this Court contemplated the possibility that intervention may still be timely after a dispositive motion has been granted and looked to a number of factors, including whether the party requesting to intervene could have intervened prior to disposition and whether the party’s interests were adequately represented in the matter. *W.Va. Pub. Emp. Ins. Board*, 180 W.Va. at 182, 375 S.E.2d at 812.

In the present case, Corrections did not know about the Motion for Expungement until after it was presented the Order of Expungement and subsequently filed its Motion to Intervene with due diligence. The Motion for Expungement had not set forth that the petitioner had grieved his dismissal in the West Virginia Public Employees Grievance Board and neither the prosecuting attorney’s office nor the Circuit Court were aware of this proceeding. The Circuit Court did not abuse its discretion in allowing Corrections to intervene in the matter and present evidence that there did exist a pending proceeding.

The Circuit Court’s action in permitting intervention or treating the motion as a separate legal action was consistent with Rule 60, which contemplates that judgments

based upon either fraud or newly discovered evidence may be challenged within one year of entry and that parties who were not part of the original action are not barred from seeking justice in the matter. W.Va.R.C.P, Rule 60(b), in part (“This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant statutory relief in the same action to a defendant not served with a summons in that action, or to set aside a judgment for fraud upon the court.”).

Corrections has standing

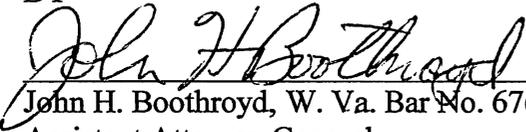
While West Virginia Code, Section 61-11-25 designates the prosecuting attorney’s office as a mandatory party to the action, it does not exclude the possibility of other parties joining the matter under West Virginia Rules of Civil Procedure, Rule 24, or filing a separate action to vindicate their interests in the matter. See *Mullen*, supra (The West Virginia Division of Motor Vehicles is the respondent and the appellant in the action and not the prosecuting attorney’s office).

CONCLUSION

WHEREFORE, for the above stated reasons the West Virginia Division of Corrections requests that this Court affirm the Circuit Court of Kanawha County's order setting aside its prior order granting the petitioner's petition for expungement, as well as, any additional relief that this Court deems proper.

RESPECTFULLY SUBMITTED,
WEST VIRGINIA DIVISION OF CORRECTIONS,
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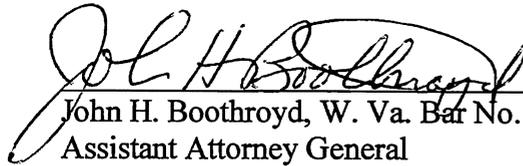
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WEST VIRGINIA DIVISION OF CORRECTIONS,
Respondent.

CERTIFICATE OF SERVICE

I, John H. Boothroyd, counsel for respondents, do hereby certify that I have served the foregoing BRIEF OF RESPONDENT THE WEST VIRGINIA DIVISION OF CORRECTIONS by mailing a true copy thereof by U.S. mail First class postage prepaid, on December 12, 2013 to the following:

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