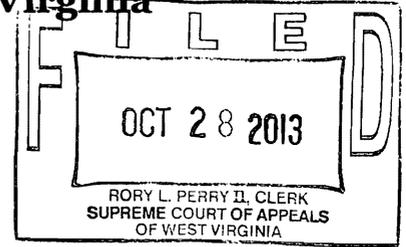


In the Supreme Court of Appeals of West Virginia

Docket No. 13-0765



Jeremy Dale Humphrey, Petitioner

vs.)

West Virginia Division of
Corrections

Appeal from a final order
of the Circuit Court of Kanawha
County (13-P-192)

Petitioner's Brief

Counsel for Petitioner, Jeremy Dale Humphrey

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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. 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.

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

STATEMENT OF THE CASE

Petitioner sought, and was granted, the expungement of misdemeanor charges for which he was never convicted. A.R. 1, 4. His former employer, the West Virginia Department of Corrections, filed a Motion to Set Aside the Order of Expungement, so that they could use the records of the criminal charges against Petitioner at an administrative employment grievance hearing. A.R. 7. The Circuit Court granted the Motion, holding that the grievance hearing was a “proceeding” which, under §61-11-25 of the West Virginia State Code, the Petitioner was required to disclose in his Petition for Expungement of Records. A.R. 16. Petitioner appeals from this Final Order setting aside the Order of Expungement.

SUMMARY OF ARGUMENT

The statute regarding expungement, found at §61-11-25, in subsection (d) states that “ If the court finds that there are no current charges or proceedings pending relating to the matter for

which the expungement is sought, the court may grant the petition and order the sealing of all records in the custody of the court and expungement of any records in the custody of any other agency or official including law enforcement records.” In the context of the expungement statute, it seems obvious that the phrase “no current charges or proceedings pending relating to the mater for which the expungement is sought” is intended to mean that there are no further criminal proceedings pending on the charges. To interpret the phrase to include a hearing regarding employment matters is to give too broad a meaning to the phrase “proceeding” and is not the intention of the statute.

Further, the expungement statute exists to prevent an individual from being unfairly treated and/or inconvenienced by a criminal “record” of charges for which he has been wrongly accused. To allow an employer to use such records is contrary to the intent of the statute and should not be permitted.

Lastly, the Petitioner’s former employer did not have standing to ask the Court to set aside the Order. §61-2-25 states that, if a circuit court holds a hearing on a petition for expungement, the court must notify the prosecuting attorney and the arresting agency in order to give them an opportunity to respond. Those agencies are, by statute, the only agencies with a viable interest in an expungement petition and the only agencies which should be entitled to intervene.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that the record and briefs in this case will provide the Court with all necessary information needed to decide the issues, and therefore oral argument under Rev. R.A.P. 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a

Rule 19 argument and disposition by memorandum decision.

ARGUMENT

I. The Circuit Court erred in expanding the phrase “charges and proceedings” to include administrative employment matters.

The Petition for Expungement filed by the Petitioner requested the expungement of four misdemeanor battery charges appearing on his record, stemming from a drive-by pepper-spraying incident, to which Petitioner continues to assert his innocence. A.R. 20. He originally agreed to a pre-trial diversion as a resolution to the charges. Therein, he admitted no guilt but agreed to remain law-abiding for three months, after which the charges would be dismissed. However, just a few days later, on the 26th of November, Magistrate Halloran dismissed the charges on the motion of the State. A.R. 22. As required by §61-2-25, Petitioner waited 60 days thereafter to file his petition for expungement, 13-MISC-89, *pro se*. At this time, there were no more pending charges, no indication that the charges would be refiled, and no appeal or other action by the prosecuting attorney seeking to reinstate the charges. The criminal case was over. Petitioner thus stated in his Petition for Expungement that there were “no current charges or proceedings pending in this matter.” A.R. 2.

At the time the criminal charges were instituted, Petitioner was a corrections officer at the state penitentiary in Mount Olive. When his supervisors learned of his criminal case, he was discharged from employment. He filed a grievance challenging his termination,¹ which was set for hearing on May 3, 2013. After the Petition for Expungement was granted, the Department of Corrections by the Attorney General’s Office, 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”, 13-P-92, asking the circuit court to allow the

¹*Humphrey v. DOC/MOCC*, Docket No 2013-0366-MAPS. The matter is still pending and the grievance hearing has not been held.

WV DOC to use the documents relating to the criminal charges, otherwise ordered expunged, against the Petitioner in his grievance hearing. A.R. 7. The administrative hearing was continued.

Finding that the Petitioner had wrongly failed to disclose the existence of the grievance matter as a “pending proceeding” and calling the expungement petition “disingenuous”, the circuit court ordered the previous order granting the expungement set aside. A.R. 16.

Petitioner argues that the expungement statute, in requiring that the court find that there are no “pending charges or proceedings” regarding the matters to be expunged, is not intended to encompass anything beyond the prosecution of the criminal charges or appeals thereof. The criminal proceedings were over with no expected resurrection on the horizon. Clearly “charges or proceedings” related only to criminal charges or criminal proceedings; otherwise, subsection (c) would have included more than just the prosecuting attorney or arresting agency as parties with an interest in a hearing on the matter.

II. Setting aside the Order of Expungement to allow the records to be used in an employment grievance matter is at odds with the intention of the expungement statute.

If employers or other non-law enforcement related entities are permitted to have a say in expungement proceedings, this would run contrary to an individual’s presumption of innocence. In this case, Petitioner’s charges were dismissed. However, had he gone to trial and been acquitted by a jury, the result would still be the same, and allowing the criminal documents relating to a crime for which an individual is otherwise entitled to expungement to be used against him or her in civil or administrative proceedings is contrary to the intention of the expungement statute.

III. The WV DOC lacked standing to ask for the Order of Expungement to be set aside

As stated above, the controlling expungement statute provides that, if a circuit court sets a hearing on a petition for expungement, notice must be given to the prosecuting attorney and the arresting agency so that they may attend to protect their interests. The statute does not say “any interested party or entity” may attend and protect its interest. Indeed, had the Petitioner been fired from a job with, for example, WalMart, and was challenging that termination in Court, one would not expect that WalMart would be given the opportunity to step in and intervene. The fact that the Petitioner was employed by the State as a corrections officer should not give the DOC a special privilege to intervene in a proceeding such as this.

The DOC claims that it should be allowed to intervene and ask for the Order to be set aside because the inability to use the criminal records “materially affects” its ability to defend itself before the grievance board. However, per their own motion, the DOC interviewed alleged witnesses and others involved in the incident for which Petitioner was charged. A.R. 9-10. Inasmuch as the DOC has other evidence available to use in the grievance hearing, it would not suffer an undue hardship to be prohibited from using the arrest records. To prevent the Petitioner from having this blemish removed from his record as is permitted by statute simply to bolster an employer’s side of a grievance matter is unfair and improper.

CONCLUSION

The circuit court's Order Setting Aside the Order of Expungement should be reversed and the original Order granting expungement reinstated.

Signed: 
Richelle K. Garlow (WV #9662)
Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2013, a true and accurate copy of the foregoing **Petitioner's Brief** was deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

West Virginia Division of Corrections
Patrick Morrissey, Attorney General
1409 Greenbrier Street
Charleston, WV 25311

Signed: 

Richelle K. Garlow (WV Bar # 9662)
Counsel of Record for Petitioner