

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff below, Respondent**

vs.) No. 101239 (Cabell County 05-F-44)

**Tanya D. Harden,
Defendant Below, Petitioner**

FILED

February 25, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the circuit court’s order denying a motion for expungement filed by the petitioner, Tanya Harden (“Ms. Harden”). The appeal was timely filed by Ms. Harden with a portion of the record designated for purposes of the appeal. A timely response was filed by the respondent, the State of West Virginia (“the State”). Ms. Harden seeks a reversal of the circuit court’s decision and a remand for entry of an order granting her motion for expungement.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Upon consideration of the standard of review, as well as the parties’ briefs and the record, the Court finds no substantial question of law nor does the Court disagree with the decision of the lower tribunal as to the question of law. Moreover, the Court finds no prejudicial error. For these reasons, and having reviewed the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument and that a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On June 4, 2009, this Court issued its opinion in *State of West Virginia v. Tanya D. Harden*, 223 W.Va. 796, 679 S.E.2d 628 (2009), wherein it vacated Ms. Harden’s first degree murder conviction and sentence and remanded the matter to the circuit court for entry of a judgment of acquittal and Ms. Harden’s immediate release from incarceration. Pursuant to the Court’s mandate, the circuit court entered a judgment of acquittal, and Ms. Harden was released.

On November 10, 2009, Ms. Harden filed a motion to expunge all records relating to her arrest and prosecution in this matter pursuant to West Virginia Code §61-11-25. An amended motion was filed on May 6, 2010. Ms. Harden stated that following her release from prison, her efforts to find employment have been difficult when a criminal background check discloses the existence of a murder indictment and conviction.

On June 8, 2010, the circuit court held a hearing on the motion. At the

hearing, the State opposed the motion based on the “seriousness of the offense” and the “totality of all of the circumstances.” The State argued that West Virginia Code §61-11-25 did **not** make expungement mandatory—that it was permissive. The circuit court stated during the hearing that it was going to deny expungement based upon “the seriousness of the offense” and noted that “. . . there was a person who died as a result of her actions that night.” On June 14, 2010, the circuit court entered its Order denying expungement and, again, noted the “severity of the offense.”

“In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.’ Syllabus Point 2, *Walker v. West Virginia Ethics Com’n*, 201 W.Va. 108, 492 S.E.2d 167 (1997). Syl. Pt. 2, *Black v. State Consol. Public Retirement Bd.*, 202 W.Va. 511, 505 S.E.2d 430 (1998).” Syl. Pt. 2, *McKneely v. West Virginia Consolidated Public Retirement Board*, W.Va., 703 S.E.2d 524 (2010) (*per curiam*).

Under West Virginia Code §61-11-25, a court has the statutory authority to expunge a criminal offense from a citizen’s record if that person has been found not guilty of the offense charged. There is nothing in the statutory language that mandates expungement even when the criteria for expungement are met. In fact, subsection (d) of the statute, which provides that the court “may” grant the motion for expungement, clearly signals that expungement is ultimately at the court’s discretion.

Having reviewed the record on appeal and the arguments of counsel, the Court is unable to state that the circuit court abused its discretion in this instance. Accordingly, the circuit court’s order denying expungement is affirmed.

Affirmed.

ISSUED: February 25, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh