

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

2023 Spring Term

No. 22-ICA-122

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INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

IN RE: PETITION OF D.K. FOR EXPUNGEMENT OF RECORD

Appeal from the Circuit Court of Randolph County
Honorable David H. Wilmoth, Judge
Civil Action No. 22-P-31

AFFIRMED

Submitted: April 26, 2023

Filed: June 15, 2023

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CHIEF JUDGE GREEAR delivered the Opinion of the Court.

JUDGE SCARR dissents and reserves the right to file a separate opinion.

GREEAR, Chief Judge:

Petitioner, D.K.¹ appeals the August 12, 2022, order of the Circuit Court of Randolph County denying his petition for expungement of certain criminal offenses. Based upon our review of the record and applicable law, we find that the circuit court did not abuse its discretion in denying D.K.’s petition for expungement, as D.K. was not eligible for expungement pursuant to West Virginia Code § 61-11-25(a) (2012). Accordingly, we affirm the circuit court’s August 12, 2022, order.

I. Background

On June 24, 2013, D.K. was indicted, by a grand jury, for three criminal offenses arising from a February 19, 2013, incident: (1) possession with intent to deliver a controlled substance (marijuana), in violation of West Virginia Code § 60A-4-401(a)(ii) (2011); (2) carrying a deadly weapon, in violation of West Virginia Code § 61-7-3 (1989); and (3) improper registration, in violation of West Virginia Code § 17A-9-3 (1951). On May 12, 2014, D.K. and the State entered into a plea agreement and a pre-trial diversion agreement (“PDA”) for disposition of the three charges in the June 24, 2013, indictment.

¹ Consistent with our practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in the case. *See* W. Va. R. App. P. 40(e)(1); *State v. Edward Charles L.*, 183 W. Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990).

As memorialized in the May 12, 2014, plea agreement, D.K. agreed, in part,

that:

2. That the [D.K.] agrees to plead guilty to one (1) count of [p]ossession with [i]ntent to [d]eliver a [s]chedule I [n]on-[n]arcotic [c]ontrolled [s]ubstance: [m]arijuana, a [f]elony, . . . as contained in [c]ount 1 of the [i]ndictment . . . and one (1) count of [i]mproper registration, a [m]isdemeanor Provided, however, that the State will move to defer prosecution for twenty-four (24) months for the offense of [p]ossession with [i]ntent to [d]eliver a [s]chedule I [n]on-[n]arcotic [c]ontrolled [s]ubstance: [m]arijuana, a [f]elony, . . . immediately following [D.K.'s] allocation and execution of the [c]ourt's plea entry form and immediately prior to the [c]ourt accepting the [D.K.'s] guilty plea to said offense. ***Said deferral of the offense shall be without prejudice to the State's interests and pursuant to a pretrial diversion agreement executed contemporaneously and in conjunction with this [p]lea [a]greement*** . . . [D.K.], in the event that he violates the terms and conditions of the [p]retrial [d]iversion [a]greement or the conditions of any alternative sentence imposed by the [c]ourt and the charges are re-instituted by the State, expressly waives any potential right to withdraw his plea of guilty to [p]ossession with [i]ntent to [d]eliver a [s]chedule I [n]on-[n]arcotic [c]ontrolled [s]ubstance: [m]arijuana, a [f]elony, The State is relying upon the [D.K.'s] waiver of his right to withdraw his plea of guilty to said charge in extending this plea offer and, absent such waiver, would not have been willing to extend this plea offer to [D.K.] in this case.

(Emphasis removed from original and different emphasis added).

Under the terms of the PDA, adjudication for the charge of possession with intent to deliver would be deferred for twenty-four months, and if D.K. successfully completed the PDA, said charge would be dismissed. Upon presentation by the parties, the court ratified the PDA and accepted the plea. Per the plea agreement and the PDA, the

court accepted the plea of guilty to the charge of improper registration, deferred adjudication on the charge of possession with intent to deliver, and dismissed the charge of carrying a deadly weapon without a license or other authorization. As specifically noted in the court's May 15, 2014, conviction and sentencing order, the deferral of D.K.'s charge of possession with intent to deliver "shall be without prejudice to the State's interests and *pursuant to a pretrial diversion agreement executed contemporaneously and in conjunction with the [p]lea [a]greement in this case.*" (Emphasis added). Similar language is contained within paragraph two of D.K.'s plea agreement.

On December 8, 2021, D.K. filed a motion to dismiss the charge of possession with intent to deliver based upon his successful completion of the PDA. On March 24, 2022, the circuit court entered a dismissal order, finding that D.K. had "abided by all terms and conditions of the [PDA]" Although entered on March 24, 2022, the order noted that it was dismissing the charge, with prejudice *nunc pro tunc* to May 12, 2016.

On April 4, 2022, D.K. filed a petition to expunge certain criminal offenses seeking an order "sealing and expunging all records in the custody of this [c]ourt, and the Randolph County Magistrate Court, which relate to, or were generated from [D.K.'s] arrest and charge" D.K. avers that he is entitled to expungement, pursuant to West Virginia Code § 61-11-25(a) (2012), as "the charges sought to be expunged herein were not dismissed in exchange for [D.K.'s] plea of guilty to any other criminal offense." In

response, the State argued that D.K.'s charges arising from the February 19, 2013, incident were resolved "in exchange for a guilty plea to another offense."

A hearing on D.K.'s petition for expungement was held before the circuit court on August 1, 2022. During the hearing, D.K.'s counsel stated, in pertinent part, that:

[p]ursuant to that May 2014 plea agreement, [D. K.] entered a plea of guilt to improper registration, a plea of guilt to the marijuana charge. And *in exchange for the improper registration, he was provided a dismissal of the weapons charges and a pretrial diversion*, deferred adjudication - - whichever you'd want to call it.

The State argued, in part, that D.K.:

is a defendant who pled guilty to a charge. He had a larger plea agreement and one section of that was this diversion which resulted in a dismissal. To his benefit, at this point, he is now attempting to get rid of those records which [the State] believe[s] goes against the intention of the [L]egislature, and also the statute, and also the plain meaning here.

During the August 1, 2022, hearing, the court found D.K. to be ineligible for expungement under West Virginia Code § 61-11-25, as the dismissal of the possession with intent to deliver charge stemmed from a "plea agreement where he pled guilty to another offense."

On August 12, 2022, the circuit court entered an order formally denying D.K.'s petition for expungement. The court reasoned that D.K. was not eligible for expungement pursuant to West Virginia Code § 61-11-25 (2012), as his charges of possession with intent to deliver and carrying of a deadly weapon without a license were

dismissed in exchange for his plea of guilty to the improper registration offense. It is from this order that D.K. now appeals.

II. Standard of Review

The Supreme Court of Appeals of West Virginia (“Supreme Court”) “reviews a circuit court's order granting or denying expungement of criminal records for an abuse of discretion.” Syl. Pt. 1, *In re A.N.T.*, 238 W. Va. 701, 798 S.E.2d 623 (2017). To the extent that it is necessary for this Court to interpret a statute, the Supreme Court has held that “[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). With these standards in mind, we now consider D.K.’s arguments.

III. Discussion

On appeal, D.K. alleges one assignment of error and argues that the circuit court erred in denying his petition for expungement by finding that the same was improper under West Virginia Code § 61-11-25 (2012).

West Virginia Code § 61-11-25 (2012) (emphasis added) provides that:

- (a) Any person who has been charged with a criminal offense under the laws of this State and who has been found not guilty of the offense, or against whom charges have been dismissed, and not *in exchange for* a guilty plea to another offense, may file a civil petition in the circuit court in which

the charges were filed to expunge all records relating to the arrest, charge or other matters arising out of the arrest or charge

. . . .

- (d) 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

. . . .

- (f) If the court finds that the interests of justice will be served by granting the petition, it may be granted.

D.K. contends that the circuit court erred by failing to grant his petition for expungement, as the single charge for which he seeks expungement (the charge of possession with the intent to deliver), was dismissed not because of a guilty plea to another offense, but because of his completion of the PDA.² Simply stated, D.K. asks this Court to take a narrow view of West Virginia Code § 61-11-25(a) (2012) to find that the dismissal of his charge of possession with the intent to deliver was not “in exchange” for his plea of guilty plea to the improper registration charge. We decline.

² In his brief on appeal, D.K. clarifies that he is seeking expungement of his records related only to his charge of possession with intent to deliver a controlled substance (marijuana), not his other charges arising from the February 19, 2013, incident. D.K. acknowledges that expungement of his guilty plea to improper registration and dismissal of the charge of “carrying a deadly weapon,” are not proper under West Virginia Code § 61-11-25(a).

The Supreme Court has long held that “[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” Syl. Pt. 1, *In re: I.S.A.*, 244 W. Va. 162, 852 S.E.2d 229 (2020) (citing Syl. Pt. 2, *Smith v. State Workmen’s Comp. Comm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975)). Further, the Supreme Court has determined that “[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” Syl. Pt. 3, *In re: I.S.A.* (citing Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951)). In *I.S.A.*, the Supreme Court discussed West Virginia Code § 61-11-25(a) and how that statute interacted with West Virginia Code § 61-11-22 (2010), (which addressed PDAs) and reasoned that while West Virginia Code § 61-11-22 allows for a plea to be part of a PDA, it does not require that the PDA include a guilty plea. In conclusion, the *I.S.A.* court held that

[t]he mere existence of a pretrial diversion agreement between (1) a prosecuting attorney of any county of this state or a person acting as a special prosecutor and (2) a person under investigation or charged with an offense against the State of West Virginia, entered into in accordance with West Virginia Code § 61-11-22 [2010] is not evidence that a plea of guilty or nolo contendere has been entered by the person who was under investigation or charged with an offense. The agreement is evidence of the entry of such plea only where it includes a provision requiring a plea of guilty or nolo contendere.

I.S.A. 244 W. Va. at 168, 852 S.E.2d at 235.

D.K. relies on *I.S.A.* for the proposition that since PDAs are not generally mandated to require a guilty plea, the ultimate dismissal of a charge upon completion of a PDA should not be regarded as “in exchange for” the guilty plea under West Virginia Code

§ 61-11-25(a) (2012). However, unlike *I.S.A.*, in the instant case, D.K. was required to enter a plea of guilty in the resolution of all of his pending charges, which were addressed together in one plea agreement. Here, D.K. was offered a PDA as part of his agreement to plead guilty to two of the three charges against him. Namely, as particularly noted in the plea agreement and the sentencing order, D.K. pled guilty to the charge of possession with the intent to deliver but his adjudication on that charge was deferred to permit him to participate in a PDA. As part of the plea agreement, D.K. was also required to plead guilty to the charge of improper registration. With these two guilty pleas made, the State agreed to dismiss the remaining charge (carrying a deadly weapon). Thus, while the PDA in *I.S.A.* did not require a guilty plea, the overall agreement in this instant case is distinguishable as, here, D.K. was required to plead guilty to both the possession with intent to deliver charge and the improper registration charge in exchange for the possibility of the PDA.

In essence, D.K. argues that each individual step of the plea process should be evaluated separately without consideration of the entirety of the plea agreement reached between the prosecutor and D.K. However, such a narrow view and piecemeal consideration does not properly reflect the reality of the plea process, as outlined by the specific statements in D.K.'s conviction and sentencing order and plea agreement that the PDA was executed "contemporaneously and in conjunction with" the plea agreement. Here, D.K. obtained the benefit of the plea bargain by having the opportunity to participate in a PDA program leading to the dismissal of one of his three charges referenced in the plea agreement. We find that given the express language of the plea agreement and

conviction and sentencing order, and when considering the plea agreement in its entirety, D.K.'s guilty plea to two of the three charges against him (one of which provided the opportunity to participate in a PDA which ultimately led to the dismissal of said charge) was clearly in exchange for dismissal of the third charge. Accordingly, we find that expungement of D.K.'s charge for possession with intent to deliver is not proper under West Virginia Code § 61-11-25(a) (2012). We note that such conclusion is in line with the statement made by D.K.'s own counsel during the August 1, 2022, hearing on D.K.'s petition for expungement, that "*in exchange for [D.K.'s guilty plea to] the improper registration [charge], he was provided a dismissal of the weapons charges and a pretrial diversion.*" If this Court accepted D.K.'s interpretation of the phrase "in exchange for" in West Virginia Code § 61-11-25(a) (2012), it would allow for the expungement of records clearly not contemplated by the plain language of that statute. Further, it is our belief that with adoption of the construction of West Virginia Code § 61-11-25(a) (2012) advocated by D.K., that criminal defendants who are required to cooperate with the prosecution in further criminal proceedings would be able to argue that any additional charges dismissed, as a result of their overall plea agreement, were dismissed "in exchange for" further cooperation and not for a guilty plea to another offense.

Throughout his brief, D.K. references the need for this Court to enforce the rule of lenity as it applies to ambiguous criminal statutes is necessary to fulfill the Legislature's rehabilitative and remedial purpose in facilitating expungements. We disagree. The Supreme Court of Appeals has held, in part, that "[a] circuit court, absent

extraordinary circumstances and to protect constitutional rights or some other compelling public policy imperative, does not in the absence of statutory authority have the power to order expungement of criminal history” Syl. Pt. 2, *In re A.N.T.*, 238 W. Va. 701, 798 S.E.2d 623 (2017) (citing *State ex rel. Barrick v. Stone*, 201 W. Va. 569, 570, 499 S.E.2d 298, 299 (1991)). In the case *sub judice*, we have established that the court below did not have the statutory authority to expunge D.K.’s criminal record, pursuant to West Virginia Code § 61-11-25(a). Thus, absent any “extraordinary circumstance” necessitating the expungement of D.K.’s criminal record, expungement was improper. *See generally In re A.N.T.*, 238 W. Va. 701, 798 S.E.2d 623. Here, the circuit court did not identify any extraordinary circumstances requiring the expungement of D.K.’s criminal record. As such, we find no error in the circuit court’s denial of D.K.’s petition for expungement and find that the circuit court did not abuse its discretion.

IV. Conclusion

Based on the foregoing, we find that the circuit court did not abuse its discretion in denying D.K.’s petition for expungement and the court’s August 12, 2022, order is affirmed.

Affirmed