IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2022 Term

No. 20-0325

FILED
April 15, 2022
released at 3:00 p.m.
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: PETITION OF MARIO PERITO II FOR EXPUNGEMENT OF RECORD

Appeal from the Circuit Court of Hancock County
The Honorable Jason A. Cuomo, Judge
Civil Action No. 19-P-34

AFFIRMED

Submitted: March 1, 2022
Filed: April 15, 2022

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JUSTICE ARMSTEAD delivered the Opinion of the Court.

JUSTICE WOOTON dissents and reserves the right to file a dissenting Opinion.

SYLLABUS BY THE COURT

1. "This 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).

2. "Before the prosecution of a lawsuit may be barred on the basis of res judicata, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." Syl. Pt. 4, *Blake v. Charleston Area Medical Center., Inc*., 201 W. Va. 469, 498 S.E.2d 41 (1997).

3. "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 the expungement of criminal history record information regarding a valid criminal conviction maintained by the State Police Criminal Investigation Bureau pursuant to W.Va. Code, 15-2-24 [1977]." Syl. Pt. 1, *State ex rel. Barrick v. Stone*, 201 W. Va. 569, 499 S.E.2d 298 (1997).

4. "An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and

coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits." Syl. Pt. 1, in part, *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983).

ARMSTEAD, Justice:

Petitioner, Mario Perito, II ("Petitioner"), appeals the circuit court's March 5, 2020, order denying his petition for expungement. In 1992, Petitioner was convicted of two counts of malicious assault after a jury found that he struck a man with an automobile and shot the man with a firearm. Petitioner was pardoned in 1996 and filed a petition for expungement in 1997. His 1997 petition for expungement was denied. He filed a second petition for expungement in 2019. The circuit court determined that the 2019 petition for expungement was barred by res judicata.

On appeal, Petitioner asserts that the circuit court erred by ruling that his petition was barred by res judicata. After review, and for the reasons stated herein, we affirm the circuit court's order.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner was convicted of two counts of malicious assault following a jury trial in 1992. According to the State, "the jury found that [Petitioner] struck [the victim] with a motor vehicle. Then after striking him with a motor vehicle, he shot him." While Petitioner was initially sentenced to a term of incarceration of two to ten years, he only served five days in the county jail, followed by less than one year on home confinement.[1] Thereafter, Petitioner was placed on probation for one year.

[1] During the hearing on Petitioner's 2019 expungement petition, the State noted the odd circumstances surrounding Petitioner's sentence. Petitioner was nineteen when he (continued . . .)

In 1996, then-Governor Gaston Caperton unconditionally pardoned Petitioner.[2] In March of 1997, Petitioner filed a petition for expungement ("1997 petition"). The circuit court held a hearing on the petition on May 12, 1997.[3] The victim appeared at the hearing, was asked his position on the expungement and replied: "I am against it. I am against it 100 percent, 200 percent." While there was no specific statutory authority addressing expungements following a pardon when Petitioner filed his 1997 petition, counsel for Petitioner argued that the circuit court had the authority and jurisdiction to entertain and grant the petition:

> As far as the jurisdiction of circuit courts, the rule[s] of civil procedure, the trial courts indicate that nothing within the rule of procedure, nor the statutory rules of pleading, pertaining to jurisdiction [of] the circuit courts in the Constitutional sense, the rules of civil procedure do not restrict the use – do not

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committed these crimes and his original sentence was modified pursuant to Rule 35 of the West Virginia Rules of Criminal Procedure. Under the modified sentence, Petitioner was to serve six months to two years under a youthful offender program at the Anthony Center. However, before Petitioner was scheduled to begin serving his sentence at the Anthony Center, he was admitted to a hospital for a heart condition. The State explained that "[a]s some time passed and no specifics were ever given of that [heart condition], the sentencing judge then called the youthful offender program and ordered [Petitioner] to do an additional 90 days on home confinement. He did the 90 days on home confinement and then was placed on probation." Petitioner did not serve any of his sentence at the Anthony Center.

[2] As the circuit court in the instant matter noted, "it appears that the Governor issued his pardon based upon sentencing facts which this Court cannot verify – such as, the Petitioner was sentenced to a term of two to ten years; the Petitioner was incarcerated for one year of his sentence and then was placed on probation for the remainder of his sentence." As previously noted, the State has represented that Petitioner was not incarcerated for one year of his sentence.

[3] The Honorable Ronald E. Wilson presided over Petitioner's 1997 petition.

> restrict the original and jurisdiction [of] the court of record in this state. They do not remove any class of cases or restricted type of statutes, which the circuit court has jurisdiction to hear and adjudicate. And I think that the fact that the statutes, the legislature has not forbidden such actions, this court does have the power to entertain it.

Regarding the substance of the petition, counsel for Petitioner noted that Petitioner had obtained a degree, accepted his punishment, and that he was seeking the expungement because he had limited employment opportunities due to his conviction. The circuit court asked Petitioner's counsel if there was any law requiring it to grant an expungement petition following a pardon. Petitioner's counsel stated, "No, there isn't." The circuit court then stated that it was denying the petition:

> I am not going to reach the issue as to whether I have the authority to do so or not because I am not going to grant it[] if the victim objects. I can't see that I can do that.
>
> Here we have a person convicted of a felony and the victim objecting to it. . . . You may, if you wish, explore whatever there is, any body of law between pardons and expungement and bring it on again. But absent that, *exercising any discretion* that I might have, the prayer of the petition is denied.

(Emphasis added.)

While this hearing occurred in 1997, a written order denying the petition was not entered until September 1, 1999. The 1999 order provides that the petition "relates to felony convictions which occurred after a jury trial, that the victim of the offense objected to said petition, and the [c]ourt does therefore deny the relief granted and does ADJUDGE and ORDER that the petition be denied." Petitioner did not appeal this order.

During the two-year gap between the 1997 hearing and the September 1, 1999, written order, the Legislature enacted West Virginia Code § 5-1-16a (1999).[4] This

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[4] West Virginia Code § 5-1-16a provides:

Expungement of criminal record upon full and unconditional pardon:

(a) Any person who has received a full and unconditional pardon from the governor, pursuant to the provisions of section eleven, article VII of the constitution of West Virginia and section sixteen of this article, may petition the circuit court in the county where the conviction was had to have the record of such conviction expunged. The petition shall be served upon the prosecuting attorney of the county where the petition was filed. Any person petitioning the court for an order of expungement shall publish a notice of the time and place that such petition will be made, which notice shall be published as a Class I legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the county where the petition is filed. The circuit court, upon verification of the act of pardon and after a hearing to determine that good cause exists, may enter an order directing that all public record of the petitioner's conviction be expunged.

(b) The record expunged pursuant to the provisions of this section may not be considered in an application to any education institution in this state or an application for any licensure required by any professional organization in this state.

(c) No person shall be eligible for expungement pursuant to this section until two years after having been pardoned.

(d) No person shall be eligible for expungement pursuant to this section until twenty years after the discharge of his or her sentence upon the conviction for which he or she was pardoned.

(e) No person shall be eligible for expungement of a record of conviction of first degree murder, as defined in section one, article two, chapter sixty-one of this code; treason, as defined in section one, article one of said chapter;

(continued . . .)

statute went into effect on May 26, 1999. It provided that one who had received a full and unconditional pardon from the governor could petition for expungement of the pardoned conviction, and the circuit court, "upon verification of the act of pardon and after a hearing to determine that good cause exists, may enter an order directing that all public record of the petitioner's conviction be expunged." *Id.* § 5-1-16a.

On July 10, 2019, approximately twenty years after the circuit court denied his original petition, Petitioner filed a second petition for expungement ("2019 petition"). The State moved to dismiss the 2019 petition, arguing that it was barred by res judicata. Petitioner argued that res judicata did not apply because the statutory authority he relied on in the 2019 petition did not exist when he filed his 1997 petition. Petitioner also argued that the circuit court in 1997 did not have jurisdiction to consider his 1997 petition since West Virginia Code § 5-1-16a had not been enacted at that time.

During the hearing on the 2019 petition, counsel for Petitioner argued that he was seeking the expungement because "he has been restricted greatly in his ability to find a job in his field." The circuit court noted that res judicata was the threshold issue. It asked the parties to file supplemental briefs on whether res judicata applied. The circuit court

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> kidnaping, as defined in section fourteen-a, article two of said chapter; or any felony defined in article eight-b of said chapter.

The foregoing is the 1999 version of this statute. It has been amended since 1999.

stated that if it determined res judicata did not apply, it would have another hearing to determine whether there was "good cause" to grant the expungement petition.

By order entered on March 5, 2020, the circuit court found that res judicata applied because both the 1997 petition and the 2019 petition sought expungement of the malicious assault convictions and were based on the same grounds—that Petitioner had become a productive member of society and having a criminal record limited his employment opportunities. The circuit court noted that the only difference between the 1997 petition and the 2019 petition was Petitioner's reliance on West Virginia Code § 5-1-16a. It observed that this statute "does nothing more than provide a circuit court with discretion to expunge a felony following a governor's pardon in the event the court finds 'good cause' to do so."

The circuit court also considered and rejected Petitioner's claim that the court in the 1997 petition lacked jurisdiction. The court noted that the 1997 petition was resolved in a written order and that the 1997 petition was not dismissed based on a lack of jurisdiction. Additionally, the circuit court noted that during the hearing on the 1997 petition, Petitioner argued that the circuit court had jurisdiction to consider the petition for expungement. However, in 2019, Petitioner argued that the circuit court in 1997 lacked jurisdiction over the 1997 petition. The circuit court's order concludes, "[t]his is intellectually inconsistent." After entry of this order, Petitioner filed the instant appeal.

II. STANDARD OF REVIEW

Petitioner appeals the circuit court's order denying his petition for expungement. "This 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).

III. ANALYSIS

Petitioner's single assignment of error is that the circuit court erred by finding that his 2019 petition was barred by res judicata. Petitioner's main argument is that res judicata does not apply because West Virginia Code § 5-1-16a had not been enacted when he filed his 1997 petition. Petitioner notes that this statute was passed more than a year after the court's oral ruling and he would not have been able to seek relief under the version initially enacted (and in effect when the court entered its written order in 1999) because it provided that "[n]o person shall be eligible for expungement pursuant to this section until twenty years after the discharge of his or her sentence upon the conviction for which he or she was pardoned." W. Va. Code § 5-1-16a(d) (1999). Conversely, the State argues that the circuit court correctly determined that the 2019 petition for expungement is barred by res judicata.

We begin our analysis with a review of our res judicata law. In syllabus four of *Blake v. Charleston Area Medical Center., Inc*., 201 W. Va. 469, 498 S.E.2d 41 (1997), this Court set forth a three-part test for determining whether res judicata bars a cause of action:

> Before the prosecution of a lawsuit may be barred on the basis of res judicata, three elements must be satisfied. First,

> there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Id. at 471, 498 S.E.2d at 43.

The first prong of our res judicata test has two elements: 1) was there a final adjudication on the merits 2) by a court having jurisdiction. The first element is clearly met. The circuit court entered a final order denying Petitioner's 1997 petition on the merits, finding that the petition "relates to felony convictions which occurred after a jury trial, [and] that the victim of the offense objected to said petition." Having determined that there was a final adjudication on the merits, we proceed to examine whether the circuit court in 1997 had jurisdiction.

When Petitioner filed his 1997 petition, there was no statutory authority permitting or prohibiting a circuit court from considering a petition for expungement following a pardon. A law review article examining West Virginia's expungement jurisprudence prior to 2008 noted that this Court, as well as the Handbook on West Virginia Criminal Procedure, concluded that West Virginia courts had jurisdiction in equity to order the expungement of a record in limited cases:

> Introduced in 2008, West Virginia Code § 61-11-26 governs expungement. Before § 61-11-26, the availability and the scope of expungement were uncertain. Certain isolated code provisions allowed for the expungement of records related to specific offenses. Other statutes authorized

> expungement upon exoneration or upon a full and unconditional executive pardon.
>
> Notwithstanding the Code's piecemeal approach, former West Virginia Supreme Court Justice Franklin Cleckley, relying primarily on federal case law, concluded in his *Handbook on West Virginia Criminal Procedure* that West Virginia courts have jurisdiction in equity to "order the expungement of a record in an appropriate case." Although Justice Cleckley acknowledged that expungement should be "confined to 'exceptional circumstances'" such as "flagrant violations of the Constitution" or a prosecution intended only to harass the accused, he also noted that a court may consider the "economic hardship" that accompanies a criminal record in considering whether expungement is appropriate.
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> The Supreme Court of Appeals similarly acknowledged a limited capacity of judges to grant expungements in *State ex rel. Barrick v. Stone*. In *Barrick*, while the Court ultimately reversed the expungement of a shoplifting conviction, its opinion referenced the circuit court's inherent capacity to grant an expungement in "extraordinary circumstances and to protect constitutional rights or some other compelling public policy narrative."

Valena E. Beety, Judge Michael Aloi, Evan Johns, *Emergence from Civil Death: The Evolution of Expungement in West Virginia*, 117 W. Va. L. Rev. Online 63, (https://wvlawreview.wvu.edu/west-virginia-law-review-online/2015/05/19/emergence-from-civil-death-the-evolution-of-expungement-in-west-virginia) (May 19, 2015) (footnotes omitted).

Likewise, this Court has observed that "[t]here are two bases for judicial expungement of criminal records: statutory authority and *the inherent power of the courts*." *In re A.N.T.*, 238 W. Va. at 704, 798 S.E.2d at 626 (emphasis added). While expungement is largely "a creature of statute[,] this Court has recognized that the inherent powers of the

Court may permit expungement as a remedy under certain circumstances." *Mullen v. Div. of Motor Vehicles*, 216 W. Va. 731, 733 n.2, 613 S.E.2d 98, 100 n.2 (2005). Moreover, this Court has held that a circuit court may grant an expungement in the absence of statutory authority where "extraordinary circumstances" exist:

> 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 the expungement of criminal history record information regarding a valid criminal conviction maintained by the State Police Criminal Investigation Bureau pursuant to W.Va. Code, 15-2-24 [1977].

Syl. Pt. 1, *State ex rel. Barrick v. Stone*, 201 W. Va. 569, 499 S.E.2d 298 (1997).

Based on the foregoing, it is clear that the circuit court had jurisdiction over Petitioner's 1997 petition.[5] Therefore, we find that the first prong of the res judicata test has been satisfied.

The second prong of the res judicata test is whether the two actions involve either the same parties or persons in privity with those same parties. There is no dispute that this prong is satisfied—the parties in the 1997 and 2019 petitions are the same.

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[5] We agree with the circuit court that Petitioner has taken inconsistent positions on this issue. In 1997, counsel for Petitioner argued that because there was no statutory authority *specifically prohibiting* a circuit court from considering a petition for expungement following a pardon, the circuit court had jurisdiction. In 2019, counsel for Petitioner argued that the court in 1997 lacked jurisdiction because there was no statutory authority *specifically authorizing* a circuit court to consider a petition for expungement following a pardon in 1997.

The third and final prong of the res judicata test is whether the causes of action in the two matters are identical. The third part of the test is "most often the focal point, since the central inquiry on a plea of res judicata is whether the cause of action in the second suit is the same as the first suit." *Beahm v. 7 Eleven, Inc*., 223 W. Va. 269, 273, 672 S.E.2d 598, 602 (2008) (internal citation and quotation omitted). Further, this Court has explained,

> [f]or purposes of res judicata, "a cause of action" is the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief. . . . The test to determine if the . . . cause of action involved in the two suits is identical is to inquire whether the same evidence would support both actions or issues. . . . If the two cases require substantially different evidence to sustain them, the second cannot be said to be the same cause of action and barred by res judicata.

White v. SWCC, 164 W. Va. 284, 290, 262 S.E.2d 752, 756 (1980) (citations omitted).

Finally, this Court has held:

> An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits.

Syl. Pt. 1, in part, *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983).

In the instant case, we find that the factual background of Petitioner's 1997 petition and his 2019 petition are the same. In both petitions, Petitioner 1) sought

expungement of his malicious assault convictions; 2) detailed his convictions, sentence, and pardon; and 3) asserted that he was leading a "law-abiding life," and that the malicious assault convictions had "seriously affected his employment opportunities."

Petitioner has not argued that the two causes of action are factually distinguishable. Instead, he asserts that the two causes of action are not identical because his 2019 petition relies on West Virginia Code § 5-1-16a, a statute that had not been enacted when he filed his 1997 petition. While this statutory authority was not present when Petitioner filed his 1997 petition, it was in effect at the time that the circuit court entered its written order resolving that matter on September 1, 1999. Even if West Virginia Code § 5-1-16a had not taken effect until after Petitioner's 1997 petition had concluded, "this Court has never adopted an intervening law exception to res judicata. Indeed, we have long recognized the importance of the finality of decisions." *Cabot Oil & Gas Corp. v. Beaver Coal Co., Ltd.*, Nos. 16-0904 and 16-0905, 2017 WL 5192490, *8 (W. Va. Nov. 9, 2017)(memorandum decision).[6] Therefore, we find that the third prong of the res judicata test has been satisfied.

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[6] Petitioner relies on *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855), to argue that res judicata yields to legislative action. The State asserts that *Wheeling Bridge* does not provide authority for a general change of law exception to res judicata; rather, it establishes that Congress can alter prospective relief such as an injunction. We agree with the State. W*heeling Bridge* "stands for the proposition that when Congress changes the law underlying a judgment awarding prospective injunctive relief, the judgment becomes void to the extent that it is inconsistent with the amended law." *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 184 (3rd Cir. 1999). Clearly, that factual (continued . . .)

Finally, we emphasize that one policy goal underlying res judicata is to promote finality.[7] In the present case, the need for finality is great. Petitioner was convicted of striking the victim with his automobile and shooting him with a firearm approximately thirty years ago. The victim of this crime appeared at the 1997 hearing and voiced his strong opposition to Petitioner's expungement petition. The circuit court in 1997 afforded significant weight to the victim's statement: "I am not going to grant it[] if the victim objects. I can't see that I can do that." During the hearing on the 2019 petition, the State described the victim's response upon being informed that another expungement petition had been filed: "When I told him about this, he kept telling me, 'I've already done this, it's over.' And I said, 'No, they're doing it again.'" The victim appeared at the hearing on the 2019 petition, voiced his opposition at the beginning of the hearing, and stated that he was leaving and could not remain in the courtroom "because I'm getting stressed." It is clear that this victim deserves finality and should not be forced to endure another hearing

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situation is not present in the instant matter. Thus, we find that Petitioner's reliance on *Wheeling Bridge* is misplaced.

[7] This Court has observed that

> [o]ur prior cases have recognized that the principles undergirding res judicata serve to advance several related policy goals—(1) to promote fairness by preventing vexatious litigation; (2) to conserve judicial resources; (3) to prevent inconsistent decisions; and (4) to promote finality by bringing litigation to an end.

State v. Miller, 194 W. Va. 3, 10 n. 8, 459 S.E.2d 114, 121 n. 8 (1995) (citations omitted).

on a matter that was decided on the merits twenty-five years ago. The circuit court correctly exercised its discretion in denying Petitioner's 1997 petition and its decision bars the 2019 petition.

Based on all of the foregoing, we agree with the circuit court's conclusion that res judicata bars Petitioner's 2019 petition.

IV. CONCLUSION

We affirm the circuit court's March 5, 2020, order.

Affirmed.