IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
Docket No.: 24-ICA-496

In Re: Expungement of Record of M.W.

(An appeal of the final order of the Circuit Court of Randolph County, 24-P-86)

PETITIONER'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ASSIGNMENT OF ERROR

The Circuit Court erred by determining that the Petitioner's conviction of the Elkins City Code battery ordinance, against a person with whom he had cohabited, was statutorily ineligible for expungement pursuant to W. Va. Code §61-11-26(c)(5).

STATEMENT OF THE CASE

The Petitioner was charged in Elkins City Court in 2006 with a count of domestic battery. Although the details of prosecution are murky, the scant written record of the conviction indicates that the domestic battery charge was dismissed, and the Petitioner pleaded guilty to battery. (A.R., at 8). He was fined $100.00 and assessed $70.00 in court costs. (A.R., at 8). Subsequently, in 2024, the Petitioner filed an expungement petition in Randolph County Circuit Court seeking the expungement of that Elkins battery conviction, and which averred that the conviction under the municipal battery ordinance was not disqualifying because W. Va. Code §61-11-26(c)(5) did not apply to municipal violations. (A.R., at 1-8). The Randolph County Prosecuting Attorney filed a response in which it did not object to the relief sought by the Petitioner. (A.R., at 13-14).

However, the West Virginia State Police filed a response objecting to the expungement on the theory that the municipal conviction was for a crime with the same elements as battery in the West Virginia Code, and that the victim in the case was the Petitioner's wife, with whom he "presumably cohabited," rendering him ineligible under W. Va. Code §61-11-26(c)(5). (A.R., at 19-21). The Petitioner filed a reply, in which he stated that the statutory language of that code section did not apply to exclude the Petitioner's conviction from eligibility for expungement because that statute tied ineligibility to prosecution under specific code sections

of the West Virginia Code, unlike other subparts that were not tied to specific code sections. (A.R., at 23-25).

The Circuit Court set the matter for hearing, which took place on October 22, 2024. (A.R., at 26). At the hearing, the Prosecuting Attorney's Office argued in favor of the Petitioner's eligibility for expungement:

> MR. HENNING: Your Honor, just to be clear, um, I did a report on this as directed by the Court regarding eligibility. And I could not conclude he was ineligible. I guess that is the way of saying he was eligible from my perspective. I did not object to it. So I would defer to Mr. Eates.

(A.R., at 31).

The attorney for the State Police began his argument as follows:

> I am the deputy attorney general here for the State Police. We are here on a very narrow point of law. Um, if you look at 61-11-26c, that's the list of – of offenses of convictions that are ineligible. Some of the itemized subsections there start with a violation of code. This violation of code is ineligible.
>
> Some would say an offense that violates a code section it's the conduct at issue that matters – I believe the conduct of the underlying conviction. So it doesn't really matter in our view that the conduct at issue was in a city court case as opposed to a magistrate court case. It was a battery. And a battery is a battery regardless of the forum. And it was a battery that involved either his wife or a cohabitant at the time, um -- and because of that -- there is nothing in the expungement code that -- that focuses on the forum. It's all what did the person do.
>
> And if you look at the city code of Elkins, the elements of the battery that he was convicted of or pled to, and you look at 61-29c, they're essentially identical. So our position would be that he is ineligible under C-5, 61-11-26c-5 because he did commit an offense that violates 61-29c. His conduct would violate that statute. It's the same conduct.

(A.R., at 31-32).

The Petitioner responded that the language of the statute refers to violations of specific

code sections, and that the Petitioner's conviction was under a city ordinance not described in the statute. (A.R., at 34-38). The parties differed on the meaning of the relevant statutory language: "or any offense which violates §61-2-9(b) or §61-2-9(c) of this code." The Petitioner argued:

> MR. TALBERT: Your Honor, I would say they are citing specific state code there. And the fact is if they wanted to, if the legislature desired to –to treat this as they did the other sections – for example, section 7, which involved driving under the influence, they could have simply said any violation, any battery under common law -- that is a commonly understood definition and they could have said battery.
>
> But instead the state chose to specifically cite state code; and, therefore, I think there is possible reasons why they would have done that. I believe that would involve a lot of speculation as to why they wouldn't give -- they wouldn't, or would allow municipal offenses to be expunged. But unfortunately, we can't really define what the legislature was specifically thinking when they created this code. I just think when you look at that entire section, it shows evidence that they treated certain areas different than others and that they considered, you know, drunk driving, sexually motivated offenses, or offenses against minors, so serious that they were going to cover any type of ordinance that was violated in that area. And they don't for this battery; and, therefore, it is eligible for expungement, Your Honor.

(A.R., at 37-38).

The attorney for the State Police responded:

> That statute starts off by saying that this statute bars from expungement for any violation of 61-2-28 of this code, comma, or any offense which violates battery statute or the assault statute. So I -- I don't know what the legislature meant then by putting the word offense in there, but they did that on purpose. And the way I read that is, I think -- I think the petitioner's argument would perhaps be stronger if 61-11-26c-5 said it bars from expungement any violation of 61-2-28. 61-2-9b, or 61-2-9c.
>
> But it puts that comma there that says for any offense which violates the battery statute of the assault statute. And if you look at -- that is what I started off with. If you look at what the

> offense was here, it was essentially a domestic battery. It was pled down to regular battery in city code. But the offense is still what the offense is. It's a domestic battery.

(A.R., at 39).

The Circuit Court followed up with the Petitioner in the following exchange:

> THE COURT: I understand. All right. Mr. Talbert, why would the legislature allow a magistrate court conviction for domestic battery or language of this type of thing to be expunged or not be expunged, but it would in municipal court to be expunged?
>
> MR. TALBERT: Your Honor, I believe that calls for speculation to be quite honest. But what I will say is that the municipal court is a lot more informal than the magistrate court. Um, and I've spoken to [the Petitioner] about that. I can go ahead and have him testify, but if I can proffer some facts about that specific case, Your Honor. The one issue that [the Petitioner] has is at no point in time -- he did not have counsel. Now they did offer for him to retain counsel from what I understand, um, but he did not have counsel at the time. And he was told, well, you just put this down to a battery and this will have no permanent effect on your record.
>
> And so, I think the issue here is does the legislature want to give the court with that level of informality the power to produce results that are unexpungable, Your Honor. The fact is our entire record from this specific case is a half sheet of paper. It is a half sheet of paper with a docket notice on it that's marked that he paid a fine, Your Honor.
>
> And at that time, according to my client, he was unaware of the long-term consequences of this plea. And I do quite honestly believe that if he was aware of the long-term consequences, he would have - he would have retained counsel and probably opposed this as vigorously as possible. Um, so given that fact, given the fact there is an extra level of formality of the magistrate and the circuit court, it is quite possible that the legislature said, you know, we want the state statutes, that the violation of state's statutes, to be given more gravitas than the violations of municipal courts. And that the fact is, is when you look at this, they are very clear in certain sections that all conduct – all conduct in a certain area is unexpungable. And I believe that is related to the seriousness of the conduct.
>
> If you look at that, you know, in the driving violations --

> while under the influence, you know, people can be hurt, crimes against minors, very serious conduct, crimes that are sexually motivated, very serious conduct, that, you know, that they – they've said that we don't want any of this to be expunged. But at the same time, they shift gears in different areas of these codes saying these are only violation of state code, Your Honor. And the fact is if they wanted to, they could have done that blanket statement for all sections of this code. But some areas they cited specific state code, and some areas they cited conduct. And -- and to be honest -- to be quite honest, Your Honor, when you're interpreting this the fact is if you take a strict interpretation of this I believe you would see the municipal code is expungable given that situation, Your Honor.
>
> I will say I have had conversations with my client about this. And there might be other ways to, you know, um, oppose this, given the exact same situation, Your Honor. But I still believe that given what the legislature said, and given a strict interpretation of the contextual language of this, that a violation of the municipal code is expungable.

(A.R., at 41-44).

The Circuit Court ruled as follows:

> THE COURT: All right. Well, from looking at it and looking at the language that is in the 61-11-26, it says that the -- well, not -- domestic battery, domestic assault under 61-2-28 is not eligible for expungement. And then it goes on to say the battery charge 61-29c would not be expungable if the victim was a spouse or a person with whom the person seeking the expungement had a child in common, or with whom the person seeking expungement ever cohabitated prior to the offense.
>
> Um, it doesn't say that Elkins Municipal Code Section 7-13-26 is not expungable because the legislature doesn't know what Elkins code, or Buckhannon code, or Weston code, or those other code sections about battery -- how they are cited or what they -- or if they even exist. Um, but I think it's clear from this 61-11-26 the legislature does not intend for domestic battery to be expunged from someone's record, um, because it doesn't authorize the violation of 61-2-28 to be expunged, and it does not authorize battery convictions to be expunged if the victim was -- would essentially be a domestic battery case.
>
> Um, I -- I don't know what the legislature intended specifically, but I can -- what I interpret from 61-11-26 is that if

> they don't want domestic battery in violation of the state code to be expunged or they don't want battery under the typical code where the victim would be a domestic battery case expunged, then they would not want an offense under a different ordinance expunged for the same reason because it's -- I agree with Mr. Eates -- it's the conduct, it's not the code section that is -- that it applies to. It applies to conduct which would be domestic battery, or the victim would be a domestic partner of some sort.
>
> So I am going to deny the request for expungement and I'm going to grant the State Police's objection to that. Um, and I invite Mr. Talbert, if he would, let the Supreme Court review my decision and see what they say. You may be – you may be correct. Mr. Eates may be correct. You both want direction. The State Police want direction. I have chimed in with my opinion. The Supreme Court may have a more reasoned opinion than I have. So I would encourage you to do that. And I will note your objection and preserve the record for you to do that.

(A.R., at 44-46).

The Circuit Court entered a written order denying the Petitioner relief. (A.R., at 27-29). It is from this order that the Petitioner now appeals.

SUMMARY OF ARGUMENT

Contrary to the ruling of the Circuit Court, and the position of the State Police, the Petitioner asserts that the language of the statute does not deprive an individual from eligibility for expungement when the conviction is for a municipal ordinance with the same elements as the battery offense set forth in the West Virginia Code. The language chosen by the Legislature, "any offense which violates §61-2-9(b) or §61-2-9(c) of this code," is limited to convictions of those specific code sections. The Petitioner was not convicted of those code sections. He was convicted of a municipal ordinance that carried only a fine as a possible sentence, and which therefore deprived him of certain procedural rights that would have accrued to him had he been charged under the code. There is no more than a single page worth

of information about his case. Although the Petitioner described the nature of the allegations in his expungement petition, there is no extant charging document from which it can be ascertained whether the Petitioner was charged with conduct that would disqualify him from expungement. Moreover, the limited record indicates that the original domestic battery charged was "dismissed"; not that he pleaded down to a lesser-included offense of battery encompassing the same conduct. If he had been charged under the West Virginia Code, he would have been entitled to counsel if he could not afford it, and it would be trivial to ascertain from a criminal complaint or indictment the specific allegations underlying the crime to which he pleaded guilty. The Legislature, elsewhere in the code, has shown no difficulty in specifying when it seeks to impose certain consequences upon a conviction for a crime containing the same offenses as an enumerated crime, including the Sex Offender Registration Act. The language used in the expungement statute does not demonstrate with any clarity that the Legislature intended the outcome advocated by the State Police. The expungement statute is a remedial statute, and should be construed broadly in favor of its purpose. This Court should reverse the Circuit Court, determine that the Petitioner is eligible for expungment, and remand the matter for further proceedings on the petition.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case presents a question of first impression concerning whether a conviction of a violation of a municipal ordinance is sufficient to exclude an individual for eligibility for expungement under the relevant statutory language, and is suitable for Rule 20 oral argument. This matter should be disposed by signed opinion.

ARGUMENT

The standard of review for the denial of an expungment petition on a statutory interpretation question has been set forth as follows:

> When presented with an appeal from an order denying a petition for expungement, we apply an abuse of discretion standard. "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). To the extent that we are called to interpret statutory provisions to resolve the issues herein raised, our consideration is plenary. "Where 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).

In Re: I.S.A., 852 S.E.2d 229, 232-33 (W. Va. 2020). The Petitioner has preserved the issue raised in this appeal in his petition, his reply, and on the record at the October 22, 2024 hearing. (A.R., at 1-8, 23-25, 34-38, 41-44). The Circuit Court noted the Petitioner's objection on the record, and in the final order. (A.R., at 28, 46).

This core of this case is the meaning of the following statutory language describing a portion of the universe of crimes not eligible for expungment under the statute:

> (c) Limitations on eligibility for expungement. — A person is not eligible for expungement pursuant to subsection (a) of this section for convictions of the following offenses:
>
> (5) Any violation of §61-2-28 of this code, or any offense which violates §61-2-9(b) or §61-2-9(c) of this code in which the victim was a spouse, a person with whom the person seeking expungement had a child in common, or with whom the person seeking expungement ever cohabited prior to the offense or a violation of §61-2-28(c) of this code[.]

W. Va. Code §61-11-26(c)(5).

The Supreme Court has long held that unambiguous statutory language shall be adhered

to in the enforcement of statutes by the courts:

> 8. "'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. 2, *State v. Epperly*,135 W.Va. 877, 65 S.E.2d 488 (1951)." Syl. Pt. 6, *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 782 S.E.2d 223 (2016).

Syl. Pt. 8, *State ex rel. St. Clair v. Howard*, 856 S.E.2d 638 (W. Va. 2021).

Conversely:

> 1. A statute that is ambiguous must be construed before it can be applied.
> 2. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syllabus Point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975).

Syl. Pts. 1 & 2, *Farley v. Buckalew*, 186 W.Va. 693, 414 S.E.2d 454 (1992).

It is the position of the State Police and the Circuit Court that the language "any offense which violates §61-2-9(b) or §61-2-9(c) of this code" means that a conviction of a crime that contains the same elements, but which is not codified at those code sections, is sufficient to deny eligibility for expungement. It is conceded that the relevant Elkins municipal ordinance under which the Petitioner was convicted, Elkins City Code § 130.002(B),[1] has (and had during the relevant time frame) the same elements as W. Va. Code §61-2-9(c): "If any person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally causes physical harm to another person, he or she shall be guilty of a misdemeanor[.]" *Id*.

Where the statutes differ is the punishment. In Elkins City Code § 130.999, a

1 The Elkins municipal code can be accessed at: https://codelibrary.amlegal.com/codes/elkinswv/latest/elkins_wv/0-0-0-6194 .

conviction for battery carries only a variable fine. By contrast, under W. Va. Code §61-2-9(c), a convicted defendant may be sentenced to up to twelve months in jail and/or a $500.00 fine. The Petitioner was never in that kind of jeopardy. He was not facing jail time. Because he was not facing jail time, he was not entitled to counsel. *See*, *State ex rel. Kees v. Sanders*, 453 S.E.2d 436, 192 W.Va. 602 (1994); W.Va.Code, 29-21-2(2). His prosecution was substantively distinct from a prosecution in Magistrate Court under W. Va. Code §61-2-9(c). During the hearing, the Petitioner discussed the summary nature of the proceedings and the lack of advice he received about the implications of his plea. (A.R., at 42-43). It should be noted that there is no charging document available, either for the original domestic battery charge, nor (after that charge was dismissed) the battery charge that replaced it. Although the Petitioner described the circumstances of the crime in his petition (A.R., at 5-7), the State Police and the Circuit Court made assumptions about the nature of the allegations against the Petitioner that are not borne out on any document of record of the Elkins City Court. If he had been charged in Magistrate Court, the documentation would not be so scant. It must be noted that the Prosecuting Attorney took the correct approach in light of the nature of the record: "Because the State is unable to make a determination regarding eligibility due to the lack of clarity in the records of the municipal court regarding this conviction, the State does not object to the petition and does not request a hearing in this matter." (A.R., at 14).

Below, the Petitioner advanced the argument that, judging from the statutory language of the other subparts of subsection (c), if the Legislature intended to deny eligibility for *any* offense, irrespective of codification or forum, it would have stated as much explicitly. For example, the Legislature chose to remove eligibility for "[a]ny offense in which the petitioner

used or exhibited a deadly weapon or dangerous instrument" without specification of the specific statute in W. Va. Code §61-11-26(c)(4). Similar language, without the limitation of a reference to a code section, is found in §61-11-26(c)(1), (2), (7), and (13). If the Legislature intended to preclude eligibility for all conduct, no matter how charged, in which a person causes injury or an offensive touching to a person with whom he or she has cohabited, it could have said as much. It did not, instead anchoring ineligibility to specific code sections.

"When two statutes relate to the same general subject, and the two statutes are not in conflict, they are to be read in pari materia." Syl. pt. 2, *Tug Valley Recovery Ctr., Inc. v. Mingo Cty. Comm'n*, 164 W. Va. 94, 261 S.E.2d 165 (1979). "Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in pari materia to assure recognition and implementation of the legislative intent." Syl. pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975). "The rule that statutes which relate to the same subject should be read and construed together is a rule of statutory construction and does not apply to a statutory provision which is clear and unambiguous." Syl. Pt. 1, *State v. Epperly*, 65 S.E.2d 488, 135 W.Va. 877 (1951). Viewing the various subparts of W. Va. Code §61-11-26(c) *in pari materia,* it is apparent the Legislature made a specific proscription relating to the specified code sections rather than a broad, general one.

The State Police and Circuit Court interpretation of the statute is unlikely to be correct given that the Legislature has demonstrable experience making it crystal clear when a condition relies upon not simply a particular code section in the West Virginia Code, but all other possible codifications of the same elements, irrespective of forum. Consider the clarity of the

following language in the Sex Offender Registration Act:

> (b) Any person who has been convicted of an offense or an attempted offense or has been found not guilty by reason of mental illness, mental retardation, or addiction of an offense under any of the following provisions of this code or under a statutory provision of another state, the United States Code or the Uniform Code of Military Justice which requires proof of the same essential elements shall register as set forth in §15-12-2(d) of this code and according to the internal management rules promulgated by the superintendent under authority of §15-2-25 of this code[.]

W. Va. Code §15-12-2(b).

That language, unlike the language at issue in this case, is abundantly clear. If the Legislature intended, as advocated by the State Police and held by the Circuit Court, that other crimes with the same essential elements would remove eligibility, it could have, and would have, said so. It did not. It is not for the Circuit Court or this Court to write language into the statute that does not exist. "This Court does not sit as a superlegislature, commissioned to pass upon the social, political, or scientific merits of statutes pertaining to proper subjects of legislation." *State v. Louk*, 237 W.Va. 200, 786 S.E.2d 219, 220-21 (2016).

The expungement statute is also remedial, and should be construed broadly in favor of its stated purpose. "A remedial statute improves or facilitates remedies already existing for the enforcement or rights of redress of wrongs, as opposed to an enactment extinguishing a cause of action or barring a party from prosecuting a cause of action that affects substantive rights and, therefore, is not remedial. 73 Am. Jur. 2d Statutes § 7; see also *Langston v. Riffe*, 359 Md. 396, 754 A.2d 389, 395-96 (2000)." *Martinez v. Asplundh Tree Expert Co.*, 803 S.E.2d 582, 588 (W. Va. 2017). Expungement statutes are remedial in nature. See, *State v. A.D.*, 242 W.Va. 536, 836 S.E.2d 503, 509 (2019) (recognizing remedial purpose of expungement provisions in

W. Va. Code § 60A-4-407). "'The policy that a remedial statute should be liberally construed in order to effectuate the remedial purpose for which it was enacted is firmly established.' 3 N. Singer, Sutherland [on] Statutes and Statutory Construction § 60.01, at 55 (Sands 4th ed. rev. 1986)." *State ex rel. City of Wheeling Retirees Ass'n, Inc. v. City of Wheeling*, 407 S.E.2d 384, 185 W.Va. 380, 383 (1991). "Where a statute contains provisions which are both remedial and penal, such statute should be considered remedial when seeking to enforce the purpose for which it was enacted, and should be considered penal when seeking to enforce the penalty provided therein." Syl. Pt. 1, *State ex rel. Dept. of Transp., Div. of Highways v. Sommerville*, 412 S.E.2d 269, 186 W.Va. 271 (1991). "That which is plainly within the spirit, meaning, and purpose of a remedial statute, though not therein expressed in terms, is as much a part of it as if it were so expressed." Syllabus, in part, *Hasson v. City of Chester*, 67 W.Va. 278, 67 S.E. 731 (1910). The broad remedial purpose of the expungement statute can be vindicated by the more inclusive interpretation of who is eligible for relief.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests that this Court grant the following relief:

1. Vacate the judgment of the Circuit Court;
2. Determine that the Petitioner is indeed eligible for expungement;
3. Remand the matter for further proceedings on the expungement petition; and
4. Grant any other relief the Court deems just and proper.

Respectfully submitted,

M.W., Petitioner, by counsel,

/s/ Jeremy B. Cooper
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(An appeal of the final order of the Circuit Court of Randolph County, 24-P-86)

CERTIFICATE OF SERVICE

On this 11th day of February, 2025, I, Jeremy Cooper, hereby certify to this Court that I have delivered a copy of the foregoing Petitioner's Brief to the Office of the Attorney General via e-service through File&ServeXpress.

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