

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :  
 :  
 vs. : NO. MD-5-2007  
 :  
 DANIEL ZELL, : CRIMINAL ACTION - LAW  
 :  
 Defendant : Petition for Expungement

**DATE: June 11, 2007**

**OPINION and ORDER**

Before the court for determination is the Application for Expungement of Summary Conviction filed by Daniel Zell on April 30, 2007. The Application for Expungement is denied. Since the matter involves a criminal conviction, Section 9122 of the Pennsylvania Crimes Code governs. Zell does not meet the criteria for expungement set forth in Section 9122 in that: (1) he has not attained the age of seventy and he has not been crime free for ten years; and (2) he has not been dead for three years.

**I. BACKGROUND**

On April 9, 2003, Zell entered a *nolo contendere* plea to the summary offense of Defiant Trespass, 18 Pa.C.S.A § 3503(b)(1). That same day, Zell paid a total of \$417 in fines and costs of prosecution with regard to that offense. The charges against Zell stemmed from an incident that occurred at the Flagstone Tavern. The barmaid from the Tavern was of the opinion that Zell and another individual had been barred from the establishment. The Jersey Shore Police Department was notified, and Officer Bartlow charged Zell with trespass. Zell was likely charged with a misdemeanor three level Defiant Trespass, since he defied an order personally communicated to him by the Tavern's owner or authorized personnel and entered the Tavern. *See*, 18 Pa.C.S.A. §

3503(b)(2) (an offense under the Defiant Trespass section constitutes a misdemeanor of the third degree if the offender defies an order to leave personally communicated to him by the owner of the premises or other authorized person).

## **II. ISSUE**

The Application for Expungement presents one issue. It is:

Can the court grant Zell's Application for Expungement and expunge his summary conviction for defiant trespass?

## **III. DISCUSSION**

The court cannot grant Zell's Application for Expungement and expunge his summary conviction for Defiant Trespass. On April 9, 2003, Zell entered a *nolo contendere* plea to the summary offense of Defiant Trespass, 18 Pa.C.S.A. § 3503(b)(1). When dealing with expungement of criminal record information, Pennsylvania law treats situations where charges have resulted in a conviction different from those that have not.

In situations where a criminal conviction has resulted, expungement may only occur if the criteria set forth in Section 9122 of the Crimes Code is met. *Commonwealth v. Whiteford*, 786 A.2d 286, 299 (Pa. Super. 2001) (emphasis added); *Commonwealth v. Wolfe*, 749 A.2d 507, 508 (Pa. Super. 2000) (same). Pursuant to Section 9122, criminal record information may be expunged if:

- (1) the individual who is the subject of the information has reached seventy years of age and has been free from arrest or prosecution for ten years following final release from confinement or supervision; or
- (2) the individual who is the subject of the information has been dead for three years.

18 Pa.C.S.A. § 9122(b).

Zell has not met the criteria for expungement set forth in Section 9122. Zell has not reached the age of seventy years old as he is currently forty years old (DOB – 6/22/66). Zell has not been free from arrest or prosecution for ten years. He entered the *nolo contendere* plea and paid a fine and the costs of prosecution on April 9, 2003, which was only four years ago. Finally, Zell is not dead.

Accordingly, the court has no authority to grant Zell's Application for Expungement, and it must be denied.

The court would note that at the May 21, 2007 hearing held before this court regarding the Application for Expungement Zell indicated that part of the difficulties he was experiencing concerning his criminal record was that when a criminal background check was done on him the check would indicate the presence of a misdemeanor three grade Defiant Trespass. It is unclear whether the background check indicates that Zell was convicted or if he was charged with such an offense. In any event, the court cannot provide Zell with relief in this regard.

The court has not been provided with any documentation as to what information the criminal record history of Zell contains. If the background check indicates that Zell was convicted of a misdemeanor three Defiant Trespass, then his recourse is to challenge the accuracy of his criminal history record information through the procedures set forth in 18 Pa.C.S.A. § 9152. If the background check indicates that Zell was charged with a misdemeanor three Defiant Trespass, but not convicted, then he would have to file a new petition for expungement requesting that criminal record information related to non-conviction offenses be expunged.

The Application for Expungement as filed restricts its relief to expungement of the summary conviction. As such the court can only address that request at this time. Furthermore, the court does not have sufficient information to decide whether to expunge non-conviction information had the issue been raised in the Application for Expungement. For instance, it is unclear whether the misdemeanor three Defiant Trespass was dismissed or *nol prossed* as part of the plea agreement. This fact would impact on whether the court could grant the expungement. *See, Commonwealth v. Rodland*, 871 A.2d 216, 219-20 (Pa. Super. 2005) (“Where *nol pros* is the reason for a termination without conviction, the trial court is to analyze the case according to factors set forth in a controlling statute or in *Commonwealth v. Wexler*, 494 Pa. 325, 431 A.2d 877 (Pa. 1981)”; *Commonwealth v. Lutz*, 788 A.2d 993 (Pa. Super. 2001) (a court may not expunge criminal record information related to offenses that were dismissed as part of a plea agreement unless the criteria of 18 Pa.C.S.A. § 9122 is met).

#### **IV. CONCLUSION**

Zell’s Application for Expungement of Summary Conviction is to be denied.

**ORDER**

It is hereby ORDERED that the Application for Expungement of Summary Conviction filed by Daniel Zell on April 30, 2007 is DENIED.

BY THE COURT,

William S. Kieser, Judge

cc: Mark S. Drier, Esquire  
District Attorney  
Judges  
Gary L. Weber, Esquire (Lycoming Reporter)  
Christian J. Kalas, Esquire