

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

v.

**AUSTIN ERNST,
Defendant**

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**CR: 714-2012
CRIMINAL DIVISION**

OPINION AND ORDER

The Defendant filed a Motion to Compel Placement into ARD on September 13, 2012. A hearing on the Motion was held October 22, 2012.

Background

Austin Ernst (Defendant) has been charged with Driving Under Influence of Alcohol or Controlled Substance, Driving Under the Influence of Controlled Substance, and Driving Vehicle at Safe Speed. The Defendant filed an Application for Accelerated Rehabilitative Disposition (ARD) or Other Non-Criminal Settlement with the Commonwealth, which the Defendant signed on April 25, 2012. Under the Prior Criminal History section of the Application states:

List any and all criminal arrests and/or convictions in chronological order below. Include juvenile offenses, motor vehicle violations and all summary, misdemeanor and felony charges in this or any other state. (Please note if a record has been dismissed or expunged or if you have NO prior record.)

In the Prior Criminal History section, the Defendant stated “expunged juveni[l]e record.” On May 29, 2012, the Commonwealth sent a letter to the Defendant that stated that his request for ARD was denied because a prior consent decree, which had not been expunged and occurred while the Defendant was a juvenile. On July 30, 2012, after the ARD Application was filed and

denied, the Berks County Court of Common Pleas issued an Order of Expungement – Juvenile Record.

On August 10, 2012, the Defendant filed another Application for ARD with the Commonwealth. In the second Application, the Defendant stated in the Prior Criminal History Section only “speeding ticket.” On August 16, 2012, the Commonwealth sent a letter to the Defendant that stated that his request for ARD was denied for “failure to fully disclose prior arrest history prior consent decree.” On August 17, 2012, the Defendant asked the Commonwealth to reconsider the ARD Application and the Commonwealth subsequently sent a letter to Defendant’s counsel stating that the denial of the ARD Application was based on proper grounds.

Whether the Commonwealth improperly denied the Defendant’s ARD Application base don an expunged juvenile record

The Defendant argues that the District Attorney improperly considered expunged juvenile records when denying the ARD Application. The decision on whether a defendant receives ARD is in the discretion of the district attorney. “[A]bsent an abuse of that discretion involving some criteria for admission to ARD wholly, patently and without doubt *unrelated* to the protection of society and/or the likelihood of a person’s success in rehabilitation, such as race, religion or other such obviously prohibited considerations, the attorney for the Commonwealth must be free to submit a case or not submit it for ARD consideration based on his view of what is most beneficial for society and the offender. Commonwealth v. Lutz, 495 A.2d 928, 935 (Pa. 1985) (emphasis in original). The district attorney, however, may not rely on considerations for ARD if they are prohibited by a specific statute. See Commonwealth v. Benn, 675 A.2d 261 (Pa. 1996) (finding that the Controlled Substance, Drug, Device and Cosmetic Act requires that

certain facts be excluded from consideration of ARD); Commonwealth v. Fleming, 955 A.2d 450 (Pa. Super. 2008) (determining that the issue of whether an expungement can be considered in an ARD application is whether the statute of the offense prohibited such consideration).

In Belville, the Superior Court of Pennsylvania specifically addressed whether an expunged ARD could be used in consideration for ARD. Commonwealth v. Belville, 711 A.2d 510 (Pa. Super. 1998).

Based upon our examination of the record and the provisions governing ARD and criminal history record information, we find it both proper and completely appropriate for the district attorney to have considered appellant's prior ARD, notwithstanding its expunction from her record. Section 9122 makes explicit the prosecutions ability to maintain the ARD information when it is expunged for the precise purpose for which it was used in this case, that is 'determining subsequent eligibility for ARD.'

Id. at 513. In addition, the Superior Court determined whether failure to disclose an expunged ARD is barred from consideration by the district attorney. It was stated that "a dishonest response might in turn result in a decision which will neither rehabilitate the applicant nor protect the public" and that "the question and its response are rationally related to the objectives sought to be achieved by ARD" Id.

Importantly, in this case, 18 Pa.C.S. § 9123 does not have language that states that an expunged juvenile record may not be used to assess an ARD application.

(a) Expungement of juvenile records. –Notwithstanding the provisions of section 9105 (relating to other criminal justice information) and except upon cause shown, expungement of records of juvenile delinquency cases wherever kept or retained shall occur after 30 days' notice to the district attorney, whenever the court upon its motion or upon the motion of a child or the parents or guardian finds:

- (1) a complaint is filed which is not substantiated or the petition which is filed as a result of a complaint is dismissed by the court;
- (2) six months have elapsed since the final discharge of the person from supervision under a consent decree and no proceeding seeking adjudication or conviction is pending;

- (3) five years have elapsed since the final discharge of the person from commitment, placement, probation or any other disposition and referral and since such final discharge, the person has not been convicted of a felony, misdemeanor or adjudicated delinquent and no proceeding is pending seeking such conviction or adjudication;
- (4) the individual is 18 years of age or older, the attorney for the commonwealth consents to the expungement and a court orders the expungement after giving consideration to the following factors:

...

- (b) Notice to prosecuting attorney. –The court shall give notice of the applications for the expungement of juvenile records to the prosecuting attorney.
- (c) Dependent children. –All records of children alleged to be or adjudicated dependent may be expunged upon court order after the child is 21 years of age or older.

Without any indication that an expunged juvenile record cannot be considered for ARD, the Court finds that the District Attorney was proper in considering the consent decree in this case. In addition, the Defendant did not state his expunged juvenile record on his second Application, even though it specifically states to list a record if expunged. The failure to disclose and to properly answer the Application indicates dishonesty and has already been determined by the Pennsylvania courts to be a proper consideration for an ARD application. Therefore, based upon the abovementioned case law, this Court finds that the District Attorney did not abuse his discretion when considering the expunged juvenile record or the failure to disclose the expunged record on the ARD Application.

ORDER

AND NOW, this _____ day of November, 2012, based upon the foregoing Opinion, the Court finds that the District Attorney properly consider the Defendant's expunged juvenile records to determine ARD eligibility. Therefore, the Commonwealth's Motion to Compel ARD is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

xc: DA
Edward J. Rymysz, Esq.