

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

v.

LMQ,

Defendant

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**CR 02-11, 736; MD-213-2012;
MD-212-2012; MD-211-2012**

CRIMINAL DIVISION

OPINION AND ORDER

The Defendant filed four Petitions for Expungement on July 10, 2012. A hearing on the Petitions was held September 20, 2012.

Background

LQ (Petitioner) was charged with Possession of Drug Paraphernalia, a misdemeanor, which was filed to docket number 1736-2002. On November 4, 2002, the Petitioner pled guilty pursuant to a plea agreement to an amended count of Disorderly Conduct, which was a summary offense in exchange for the dismissal of the paraphernalia charge. Petitioner was sentenced to pay the costs of prosecution and a fine in the amount of one hundred (\$100) dollars.

Subsequently, on July 17, 2002, the Petitioner was arrested for an alleged Retail Theft. On Magisterial District Docket number NT-428-2002 and NT-429-2002, the Petitioner Plead guilty to a Retail Theft charge on each docket.¹ Both Retail Theft charges were graded as summary offenses.

On July 10, 2012, the Petitioner filed four (4) *pro se* Petitions for Expungement for the above mentioned cases. It appears the Petition filed to Docket Number 471-2002 is the same

¹ Petitioner pled guilty to both Retail Theft charges on November 4, 2002.

charge as on 1736-2012.² The Petitioner states in each Petition numerous reasons for the expungement request. She states the effect the convictions would have on her career and difficulties with joining the U.S. Army as an Officer. As the Commonwealth was opposed to the Petitioner's Expungement, this Court scheduled a hearing.

Petition for Expungement

The Commonwealth argues against the requests for expungement on the Possession of Drug Paraphernalia because it was the result of a plea agreement. "The decision to grant or deny a request for expungement of an arrest record lies in the sound discretion of the trial judge, who must balance the competing interests of the petitioner and the Commonwealth." Commonwealth v. Waughtel, 999 A.2d 623 (Pa. Super. 2010). The interests that the court should consider include: the strength of the Commonwealth's case against the petitioner, the reasons the Commonwealth gives for wishing to retain the records, the petitioner's age, criminal record, and employment history, the length of time that has elapsed between the arrest and the petition to expunge, and the specific adverse consequences the petitioner may endure should expunction be denied. Commonwealth v. Wexler, 431 A.2d 877, 879 (Pa. 1981). These factors, however, are only considered when the petitioner was acquitted or the charges were *not proessed*.

When a petitioner pled guilty or the Commonwealth agreed to dismiss charges as part of a plea agreement, a petitioner is not normally entitled to an expungement of the dropped charges under the Wexler factors. Commonwealth v. Lutz, 788 A.2d 993 (Pa. Super. 2001).

In such a scenario, the Commonwealth dismisses charges in connection with a plea arrangement and, accordingly, there is no implicit or express admission that it lacks evidence to convict a defendant of the crimes. The action of dropping the charges is

² Both docket numbers have the same Offense Tracking Number.

viewed as a contractual arrangement negotiated as part of the plea bargain. This situation is contrasted with that involved in the *nol pros* setting, where the Commonwealth concedes that there is insufficient evidence to support the dismissed charges. Thus, if expungement were permitted as to charges withdrawn pursuant to a plea bargain rather than due to a lack of evidence, there would not be an accurate record of the agreement reached by the defendant and the Commonwealth. Furthermore, “In the absence of an agreement as to expungement, Appellant stands to receive more than he bargained for in the plea agreement if the dismissed charges are later expunged.”

Commonwealth v. V.G., 9 A.3d 222, 226 (Pa. Super 2010) (citations omitted).

Further, a separate standard is used when the petitioner was convicted. When an individual has been convicted of the offense charged then the expungement of the criminal history records may be granted only under very limited circumstances that are set forth by 18 Pa.C.S. § 9122. Commonwealth v. Moto, 23 A.3d 989, 993 (Pa. 2011). Under 18 Pa.C.S. § 9122(b), criminal history record information may be expunged when:

- (1) An individual who is the subject of the information reaches 70 years of age and has been free of arrest or prosecution for ten years following final release from confinement or supervision.
- (2) An individual who is the subject of the information has been dead for three years.
- (3)(i) An individual who is the subject of the information petitions the court for the expungement of a summary offense and has been free of arrest or prosecution for five years following the conviction for that offense.

With the law in mind, the Court must now determine the disposition in each case and whether or not Wexler factors can be applied or whether the charges fall within the limited exceptions of 18 Pa.C.S. § 9122.

The Petitioner has two Retail Theft charges on docket # NT-428-2002 and NT-429-2002. The Petitioner has submitted a Pennsylvania State Police Criminal Record Check, which only displays the two Retail Thefts on NT-428-2002 and NT-429-2002. As a Pennsylvania Common

Pleas Court may expunge conviction records under 18 Pa.C.S. § 9122(b), the Court finds that the Petitioner qualifies under Pa.C.S. § 9122(b)(3)(i), in that the Petitioner was convicted of a summary offense and free of arrest or prosecution for five years. Here, the Petitioner has been free of arrest in excess of ten (10) years. Further, the Retail Theft charges were summary offenses. Therefore, the Court finds that the Retail Theft convictions under NT-428-2002 and NT-429-2002 shall be expunged.

At Common Pleas docket number 1736-2002, the Petitioner pled guilty to the summary offense of Disorderly Conduct in exchange for the dismissal of the Possession of Drug Paraphernalia charge. There is no implicit agreement on expungement with the Petitioner. In light of the plea agreement, the Court is unable to apply the Wexler factors to determine if an expungement is warranted. Therefore, the dropped charge of Possession of Drug Paraphernalia and the guilty plea on the Disorderly Conduct charge are not eligible to be expunged unless they fall within 18 Pa.C.S. § 9122(b).³

In Furrer, a defendant pled guilty to Simple Assault and Underage Drinking pursuant to a negotiated plea. Commonwealth v. Furrer, 48 A.3d 1279 (Pa. Super. 2012). The remaining charges were dropped, including the felony offense of Aggravated Assault. On appeal, the Superior Court determined whether the trial court properly denied the expungement request for the Simple Assault and Underage Drinking. Even though the plea was negotiated, the Superior Court still granted the defendant's expungement for the Underage Drinking because it qualified under 18 Pa.C.S. § 9122(b) (3) (1). Id. at 1282. Here, the Defendant's Disorderly Conduct

³ The Petitioner filed a separate Petition for Expungement in regards to Possession of Drug Paraphernalia on docket number CR-471-2002 but this has the same Offense Tracking Number as the other Petition for Expungement. As this appears to be the same charge as was denied above, this Petition for Expungement is also denied as it is not eligible for an expungement.

charge falls within the same statute and therefore is entitled to expungement, even though it was part of a negotiated plea. As the dismissed charge of Possession of Drug Paraphernalia does not fall within 18 Pa.C.S. § 9122(b), this Court finds that it is not entitled to expungement.

ORDER

AND NOW, this _____ day of November, 2012, based upon the foregoing Opinion, Defendant's Petition for Expungement is hereby GRANTED in part and DENIED in part. Pursuant to 18 Pa.C.S. § 9122(b), this Court finds that the Petitioner is entitled to expungement of the Retail Theft charges at NT 428-2002 and 429-2002 and the amended charge of Disorderly Conduct filed to CP docket number 1736-2002. As the misdemeanor offense of Possession of Drug Paraphernalia charge is not eligible under 18 Pa.C.S. § 9122(b) or current case law, Petitioner must seek other means to remove the charge from her record.

By the Court,

Nancy L. Butts, President Judge