

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

v.

**JODY LEE LIVZIEY,
Defendant**

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CR: 341-2012

CRIMINAL DIVISION

OPINION AND ORDER

The Defendant filed a Petition for Expungement of Arrest Record on April 10, 2013. A hearing on the Petition was held July 11, 2013.

Background

In 2009, Jody Lee Livziey (Petitioner) was arrested by Pennsylvania State Police and charged with Simple Assault, a misdemeanor of the second degree; and Harassment, a summary offense.¹ On April 1, 2009, in accordance with a plea agreement, the Petitioner pled guilty to Harassment and in exchange the Commonwealth withdrew the Simple Assault charge. The Petitioner pled guilty in front of Magisterial District Judge (MDJ) Jerry C. Lepley.

On April 10, 2013, the Petitioner filed a Petition for Expungement for the above charges. During the hearing the Petitioner raised the question whether the Simple Assault charge was “withdrawn” or “nolle prossed.” The Petitioner’s criminal history record states that the disposition of her Simple Assault charge was “nolle prossed/withdrawn.” By agreement of the parties, the Court contacted MDJ Lepley’s office and had them forward information via facsimile regarding the Petitioner’s guilty plea. MDJ Lepley’s office provided the notes made by the MDJ

¹ The Commonwealth is unopposed to an expungement of the Defendant’s 2010 charges that were *nolle prossed* in their entirety.

that there was an agreement for the Commonwealth to withdraw count 1 in exchange for the Petitioner to plead guilty to count 2, Harassment. The Defendant was to pay the costs and fines the day of the guilty plea.

Petition for Expungement

The Commonwealth contends that the Petitioner is not entitled to an expungement because it was pursuant to a plea agreement. The disposition of a case determines the reasons for and how a charge can be expunged. First, “[I]n cases terminated by reason of a trial and acquittal, a petitioner is automatically entitled to the expungement of his arrest record.”

Commonwealth v. Lutz, 788 A.2d 993 (Pa. Super. 2001). Second, when the charges were *nolle prossed* the Court must balance the competing interests of the parties. “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).

When a petitioner pled guilty or the Commonwealth agreed to withdraw charges as part of a plea agreement, a petitioner is not normally entitled to an expungement of the dropped charges under the Wexler factors. Lutz, 788 A.2d at 993.

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 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).

Finally, 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 of the 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.

Based upon the information provided to the Court, the Petitioner pled guilty to the summary offense of Harassment in exchange for the withdrawal of the Simple Assault charge.

Because the Petitioner pled guilty pursuant to a plea agreement the Court may not consider the Wexler factors and the Petitioner is not entitled to an expungement. Further, at the time of the guilty plea there was no implicit agreement on expungement with the Petitioner and the Commonwealth. The Petitioner may still seek a pardon with the Pennsylvania Board of Pardons, which would entitle the Petitioner to an expungement.

ORDER

AND NOW, this _____ day of August, 2013, based upon the foregoing Opinion, Defendant's Petition for Expungement is hereby DENIED. The Petitioner's Simple Assault charge was withdrawn by the Commonwealth pursuant to a plea agreement.

By the Court,

Nancy L. Butts, President Judge

xc: DA
Christian Lovecchio, Esq.