

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5592-15T1

IN THE MATTER OF THE
EXPUNGEMENT OF B.K.¹

Submitted November 28, 2017 — Decided December 26, 2017

Before Judges Leone and Mawla.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Docket No. M-
151-15.

B.K., appellant pro se.

Christopher S. Porrino, Attorney General,
attorney for respondent State of New Jersey
(Sarah E. Miller, Deputy Attorney General, of
counsel and on the brief).

PER CURIAM

Petitioner B.K. appeals from a July 25, 2016 order denying with prejudice his motion to add the New Jersey State Parole Board (Board) and Executive Clemency Assistant (CA) in the Division of

¹ We utilize petitioner's initials, therefore his reserved motion M-5567-16 is granted.

Criminal Justice to an expungement order the trial court had previously entered. We affirm.

The following facts are taken from the record. In December 1991, B.K. pled guilty to N.J.S.A. 2C:35-10(a)(3) for possession of marijuana in excess of 50 grams. B.K. filed three petitions for clemency. Specifically, on January 17, 2006, Governor Richard Codey denied B.K.'s first petition for clemency. On January 22, 2010, Governor Chris Christie denied B.K.'s second petition for clemency. On November 10, 2010, Governor Christie denied B.K.'s third petition for clemency.

B.K. then filed a petition for expungement, which was granted by the trial court on June 6, 2015. The order stated the:

[1] Attorney General of New Jersey

[2] Superintendent of the New Jersey State
Police, c/o Expungement Unit

[3] Prosecutor of Middlesex County

[4] Chief(s) of the Highland Park and
Jamesburg Police Department(s)

[5] Clerk of the New Jersey Superior Court,
Appellate Division

[6] Deputy Clerk/Trial Court Administrator,
Middlesex County Superior Court

[7] Middlesex County Family Courthouse,
Division Manager

[8] Clerk(s) of the Highland Park and
Jamesburg Municipal Court(s)

[9] Chief Probation Officer of the Middlesex
County Probation Department

[10] Division of Criminal Justice, c/o Records
and Identification Unit

[11] Middlesex County Sheriff, c/o Records
Unit

shall remove from their records all
information relating to [B.K.]'s adult
record[.]

In November 2015, B.K. filed a motion to add the Board and the CA to the expungement order. The trial court dismissed the motion without prejudice concluding "no legal basis exists that would substantiate granting said amendment."

In May 2016, B.K. filed a second motion seeking the same relief. On July 25, 2016, the trial court dismissed the motion with prejudice for the same reasons as in the earlier order. This appeal followed.

A trial court's adjudication of an expungement order is an issue of law subject to de novo review. See E.A. v. N.J. Real Estate Comm'n, 208 N.J. Super. 65, 66-67 (App. Div. 1986). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995).

When the question of law turns on the interpretation of a statute, we look to the language and plain meaning of the statute to resolve any ambiguities in the statute's interpretation. See State v. K.M., 220 N.J. Super. 338, 339-40 (App. Div. 1987). "When a statute is clear on its face, a court need not look beyond the statutory terms to determine the legislative intent." State v. Churchdale Leasing, 115 N.J. 83, 101 (1989).

Petitioner argues his expungement order should be amended to include the Board and the CA. B.K. asserts his records with both entities should be expunged pursuant to N.J.S.A. 2C:52-1, 2C:52-11, and 2C:52-15.

"The purpose of expungement is to eradicate the stigma of a record of an arrest and prosecution." K.M., 220 N.J. Super. at 340. Applications that do not fall within the aforementioned statutory parameters are not subject to expungement. See ibid.

N.J.S.A. 2A:167-5 addresses clemency petitions and states:

Any person who has been convicted of a crime and by reason thereof has been deprived of the right of suffrage or of any other of his civil rights or privileges . . . may make application for the restoration of the right of suffrage or of such other rights or privileges.

The effect of clemency is to "remove[] the legal disabilities attendant to the conviction" and restore a person's civil rights. Brezizecki v. Gregorio, 246 N.J. Super. 634, 639 (Law Div. 1990);

see also Hozer v. Treasury Dep't, 95 N.J. Super. 196, 230 (App. Div. 1967). When clemency is granted, "[t]he guilty offender is discharged and released from the penalties suffered as a result of the transgression." Brezizecki, 246 N.J. Super. at 638. Clemency grants the offender "a new credit and capacity." In re Court of Pardons, 97 N.J. Eq. 555, 567 (E. & A. 1925).

Nothing in the expungement statute indicates the Legislature contemplated including either the agencies or documents involved in the clemency process. The Supreme Court has stated "the breadth of the expungement statute – on its face – is limited to those government agencies that are statutorily required to be served with the expungement order." G.D. v. Kenny, 205 N.J. 275, 297 (2011) (citing N.J.S.A. 2C:52-10, -15). N.J.S.A. 2C:52-10 specifies the agencies that must be served:

A copy of each petition . . . shall be served pursuant to the rules of court upon the Superintendent of State Police; the Attorney General; the county prosecutor of the county wherein the court is located; the chief of police or other executive head of the police department of the municipality wherein the offense was committed; the chief law enforcement officer of any other law enforcement agency of this State which participated in the arrest of the individual; the superintendent or warden of any institution in which the petitioner was confined; and, if a disposition was made by a municipal court, upon the magistrate of that court.

Neither the Board nor the CA are included on the list of agencies that must be served. Their omission from the list is crucial. Expungement may be summarily granted if "there is no objection from those law enforcement agencies notified or from those offices or agencies which are required to be served under N.J.S.A. 2C:52-10," N.J.S.A. 2C:52-11, or denied "following objection of a party given notice pursuant to 2C:52-10," N.J.S.A. 2C:52-14(b). The statute requires records "shall be removed from the files of the agencies which have been noticed of the pendency of petitioner's motion and which are, by the provisions of this chapter, entitled to notice." N.J.S.A. 2C:52-15.

Moreover, clemency applications are wholly distinct from the criminal records delineated in the expungement statute. Clemency petitions are not mentioned among the documents which must be expunged under N.J.S.A. 2C:52-1. N.J.S.A. 2C:52-1(a) provides "expungement shall mean the extraction and isolation of all records on file . . . concerning a person's detection, apprehension, arrest, detention, trial or disposition of an offense within the criminal justice system." Those criminal records do not encompass records from a separate clemency application which come after the disposition of the offense within the criminal justice system. N.J.S.A. 2C:52-1(b).

As noted by the State in its brief, "any search of a person's criminal case history . . . will not reflect if that person applied for a civil pardon." N.J.S.A. 2C:52-1(b) provides: "Expunged records shall include complaints, warrants, arrests, commitments, processing records, fingerprints, photographs, index cards, 'rap sheets' and judicial docket records."

We recognize N.J.S.A. 2C:52-1(b) contains the word "include" thereby indicating that the records it enumerates are not exhaustive. However, as noted, clemency applications are not of the same category of record nor do they possess the same characteristics of the sort of record contemplated by the Legislature as subject to expungement.² Therefore, based on the plain language of the statute, clemency applications are not subject to expungement under N.J.S.A. 2C:52-1.

Beyond the plain language of the aforementioned statutes, B.K. contends the expungement statute should be read to include the clemency applications maintained by the CA and the Board so as to eliminate "the collateral consequences imposed upon otherwise law-abiding citizens who have had a minor brush with the

² "Under the ejusdem generis principle of statutory construction, when specific words follow more general words in a statutory enumeration, we can consider what additional items might also be included by asking whether those items are similar to those enumerated." Bd. of Chosen Freeholders v. State, 159 N.J. 565, 576 (1999).

criminal justice system." In re Expungement Petition of J.S., 223 N.J. 54, 66 (2015) (quoting In re Kollman, 210 N.J. 557, 568 (2012)). B.K. argues we should "examine [the statute] . . . in the context of the overall scheme in which the Legislature intended the provision to operate[.]" N.J. Dept. of Env'tl. Prot. v. Huber, 213 N.J. 338, 365 (2013) (citing Merin v. Maqlaki, 126 N.J. 430, 436 (1992)). He argues because N.J.S.A. 2C:52-1 is ambiguous as to whether it applies to clemency applications, "the Court may supply terms omitted by the Legislature if it is clear that they are necessary to manifest the legislative intent" to allow for the expungement of his clemency applications. State v. Froland, 193 N.J. 186, 196 (2007) (citing Bd. of Chosen Freeholders v. State, 159 N.J. 565, 576 (1999)).

However, we have refused to extend the expungement statute to encompass civil records, even if held by state agencies, merely to eliminate the collateral consequences of criminal convictions. E.A., 208 N.J. Super. at 68. We have held:

Where the Legislature has been so meticulous in establishing what is within the scope of a statute, a court is hard-pressed to expand that coverage by divining a legislative purpose that is more inclusive. It is clear, from both the specific provisions of the expungement statute and its general tenor, that the Legislature intended it to encompass only criminal charges and their consequences.

[In re M.D.Z., 286 N.J. Super. 82, 86 (App. Div. 1995).]

A "remote factual connection with an arrest [or] a criminal charge" does not cause civil records to be "subject to [the same] treatment as . . . criminal [records]." Id. at 87. In M.D.Z., we declined to extend the expungement statute to include civil records, stating: "Indeed, the concern over unwarranted stigma is at the basis of the expungement statute, yet the Legislature has not seen fit to extend its effacing effect to civil matters." Id. at 88.

Although N.J.S.A. 2C:52-1 requires the "extraction and isolation" of criminal records upon receiving an order for expungement, for agencies with an administrative component and responsibilities, not all records are subject to an expungement order. See Zemak, 304 N.J. Super. at 384. Therefore, in determining whether the records of a law enforcement agency are subject to an expungement order, we must review the functional purpose of the records. Id. at 384-85.

Pursuant to the New Jersey Constitution, "[t]he Governor may grant pardons and reprieves in all cases other than impeachment and treason, and may suspend and remit fines and forfeitures. A commission or other body may be established by law to aid and

advise the Governor in the exercise of executive clemency." N.J. Const. art. V, § 2, ¶1.

The Legislature designated the Board as the entity responsible for advising the Governor in the granting of clemency pursuant to N.J.S.A. 2A:167-7, which provides:

The governor, in his discretion, may, prior to granting or denying any such application, refer the same to the state parole board for its investigation, and in such case the board shall make a full and complete investigation and report thereon in writing to the governor with its recommendation in the case.

Thus, because an application for clemency is one whereby the petitioner seeks civil relief, it is not the same as the criminal records created for the criminal justice function. Although the Board may exercise law enforcement responsibilities, its function in the clemency process is a civil, administrative, and advisory one. To extend the reach of N.J.S.A. 2C:52-1(b) would contradict the plain meaning of the statute and the Legislature's intent.

Even where administrative files contain information regarding criminal proceedings, those records are not subject to N.J.S.A. 2C:52-1. M.D.Z., 286 N.J. Super. at 86-88. Moreover, if an agency is subject to an expungement order, administrative records that fall outside the scope of N.J.S.A. 2C:52-1(b) are not subject to the order. Zemak, 304 N.J. Super. at 384.

Furthermore, the legislative history of N.J.S.A. 2C:52-1 is silent and reveals no intent by the Legislature to include clemency petitions in the records subject to expungement. Indeed, since the enactment of the statute, nearly three decades ago, neither administrative documents nor clemency petitions have been added or contemplated for inclusion into the language of the statute. It is for the Legislature to amend the statute to include clemency applications as records subject to expungement.

Therefore, we do not find the statutory language for expungements to be ambiguous. The clemency application records for B.K. maintained by the Board and the CA are not subject to an expungement order under N.J.S.A. 2C:52-1 based upon the statute's plain language. The trial court did not err in denying B.K.'s motion.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION