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THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
GLOUCESTER COUNTY
LAW DIVISION, CRIMINAL PART
INDICTMENT NO. 12-06-00713

IN THE MATTER OF THE
EXPUNGEMENT OF J.S.

APPROVED FOR PUBLICATION

September 11, 2019

COMMITTEE ON OPINIONS

Decided: April 23, 2019

Frank P. Trosky, Assistant Deputy Public Defender, for petitioner (Joseph E. Krakora, Public Defender, attorney).

Rex E. Utuk, Assistant Prosecutor, for respondent (Charles A. Fiore, Gloucester County Prosecutor, attorney).

EASTLACK, J.S.C.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Petitioner, J.S., was arrested for and charged with various criminal offenses arising out of an incident which occurred on March 6, 2012. A negotiated plea agreement was reached wherein J.S. pled guilty to two charges: second degree eluding in violation of N.J.S.A. 2C:29-2(b) and third degree possession of CDS in violation of N.J.S.A. 2C:35-10A(1). He was sentenced into the Vicinage XV Drug Court Program for a term of special probation, not to exceed five years, on April 24, 2013. During his term on special probation, petitioner was arrested in Philadelphia, Pennsylvania and charged with driving

under the influence (DUI) on September 19, 2014, on Complaint No. VC-3802. J.S. was convicted of this charge on January 3, 2017. Under Pennsylvania law, this DUI charge is graded as a misdemeanor-level crime.

After this setback, J.S. was able to successfully move through the four phases of the drug court program; completed the court ordered treatment plan; obtained and maintained employment; and graduated from the program on October 23, 2018. He subsequently moved to have his record expunged pursuant to N.J.S.A. 2C:35-14(m) of the drug court statute. The Office of the Gloucester County Prosecutor opposed this petition for expungement on the basis that petitioner had been charged and convicted of a crime in the Commonwealth of Pennsylvania while a participant in the drug court program.

ANALYSIS

This case presents an issue of first impression: whether an out of state conviction for an offense classified as a crime in a foreign jurisdiction acts as a bar to an expungement petition of a successful graduate from the drug court program, when that same offense is classified as a motor vehicle offense in New Jersey.

N.J.S.A. 2C:35-14 sets forth the rigorous requirements of the New Jersey Drug Court Program. The New Jersey Legislature amended the statute in 2016 to provide for the expungement of all criminal records of successful

drug court graduates. That statute states, in pertinent part, as follows:

The Superior Court may order the expungement of all records and information relating to all prior arrests, detentions, convictions, and proceedings for any offense enumerated in Title 2C of the New Jersey Statutes upon successful discharge from a term of special probation as provided in this section, regardless of whether the person was sentenced to special probation under this section, section 2 of P.L. 2012, c. 23 (C.2C35-14.2) or N.J.S. 2C:45-1, if the person satisfactorily completed a substance abuse treatment program as ordered by the court and was not convicted of any crime, or adjudged a disorderly person or petty disorderly person, during the term of special probation. . . . The court shall grant the relief requested unless it finds that the need for the availability of the records outweighs the desirability of having the person freed from any disabilities associated with their availability, or it finds that the person is otherwise ineligible for expungement pursuant to paragraph (2) of this subsection. An expungement under this paragraph shall proceed in accordance with rules and procedures developed by the Supreme Court.

[N.J.S.A. 2C:35-14(m)(1) (emphasis added).]

Subsection (m)(2) sets forth exclusions from expungement which are not relevant to this analysis.

The courts of the State of New Jersey have recognized the benefits and successes of the drug court program. “Drug Courts are specialized courts within the Superior Court that target drug-involved ‘offenders who are most likely to benefit from treatment and do not pose a risk to public safety.’” State

v. Meyer, 192 N.J. 421, 428 (2007) (quoting Administrative Office of the Courts, Manual for Operation of Adult Drug Courts in New Jersey (July 2002)). As stated in Meyer:

[Drug] courts address the seemingly intractable social problem presented by the scourge of drugs that has devastated countless families and is the source of so many collateral crimes. What distinguishes Drug Courts from other courts is the “oversight and personal involvement of the drug court judge in the treatment process.” A team approach is a distinctive feature of Drug Court. The judge leads court staff, probation officers, treatment counselors, substance abuse evaluators, and the prosecutor and defense attorney to monitor a participant’s recovery. Participants in drug court programs are subject to intensive supervision, frequent drug testing, and regular court appearances, combined with treatment and recovery services.

[Id. at 429 (citations omitted).]

The Court in Meyer went on to analyze the achievements of drug court programs as of the date of that opinion noting achievements in recidivism, employment, drug free pregnancy, and the regaining of child custody by successful graduates in addition to the great cost savings that drug courts provide as an alternate to incarceration. The value of the drug court system was recently reaffirmed by the Supreme Court in In re Expungement of the Arrest/Charge Records of T.B., 236 N.J. 262 (2019). There, the Supreme Court stated as follows:

With the strong support of all three branches of government, the court system has operated a drug court program for more than two decades.

. . . .

Drug court is designed to rid participants of drug dependency, help them develop skills and get job experience, encourage them to continue their education, and equip them to advance in other ways. At its core, the program tries to keep participants drug free and empower them to lead productive lives.

According to the Administrative Office of the Courts, more than 5400 individuals have successfully completed drug court since 2002, when the program went operational statewide. Administrative Office of the Courts, New Jersey Adult Drug Court Program: New Jersey Statistical Highlights (Aug. 6, 2018), <https://www.njcourts.gov/courts/assets/criminal/njstats.pdf>. Nine out of ten participants are employed when they graduate. Ibid. Two out of three have a driver's license at graduation. Ibid. More than half have medical benefits. Ibid. And participants must have clean drug tests for one continuous year to be able to graduate.

[T.B., 236 N.J. at 265.]

In T.B., the Court analyzed three consolidated appeals regarding the issue of whether or not expungements should be afforded to successful drug court graduates who had been convicted of certain third or fourth degree offenses related to the sale and distribution of CDS. While the Court found that the language of the expungement law, N.J.S.A. 2C:35-14(m)(1) “requires judges to determine whether expungement would be consistent with the public

interest,” the Court found that, “successful graduates who have committed certain offenses and apply for expungement are entitled to a rebuttable presumption that expungement is consistent with the public interest.” T.B., 236 N.J. at 266. The Court in T.B. also recognized that the 2016 amendment to the drug court statute “favors expungement in a number of ways that go beyond the approach in the general expungement statute.” Id. at 275. The Court identified four important distinctions from the general expungement statute under N.J.S.A. 2C:52-2:

(1) The drug court expungement statute allows judges to order the expungement of the person’s entire criminal record;

(2) It dispenses with the formal application process required by N.J.S.A. 2C:52-7 to -14 and instead directed that expungement proceed under rules and procedures developed by the Supreme Court, which were to be implemented by the Director of the Administrative Office of the Courts;

(3) It states that drug court judges “shall grant” expungement unless the need for the records outweigh the benefits of expungement or if the graduate is otherwise statutorily ineligible; and

(4) It places the burden on the State to not only notify the court of any disqualifying convictions, but “any other factors related to public safety that should be considered by the court.” Id. at 275-76 (citing N.J.S.A. 2C:35-

14(m)(2)).

Noting that the “expungement statute tends to favor expungement for successful graduates,” id. at 277, the Court held as follows:

In light of the rigorous monitoring that is the hallmark of drug court, as well as the new law's overall policy in favor of expungement for successful graduates, we find that participants are entitled to a rebuttable presumption that expungement is consistent with the public interest. As an integral part of the drug court team, prosecutors may draw on their knowledge of an applicant’s character and conduct after conviction, as well as other information, to try to rebut the presumption. That approach dovetails with the obligation imposed on prosecutors "to notify the court of . . . factors related to public safety that should be considered by the court when deciding to grant an expungement.”

[Id. at 278-79 (quoting N.J.S.A. 2C:35-14(m)(2)).]

It is with this background of the recognized value of the drug court program, the rigors of the program’s requirements, and favorability of the expungement process to successful and eligible drug court graduates that this court views the petition for expungement of graduate, J.S. Here the prosecutor, as required by the statute, advised the court of its opposition to the petition due to petitioner’s conviction of DUI in Pennsylvania on January 3, 2017. As specifically stated in subsection (m)(1) of N.J.S.A. 2C:35-14, an expungement of criminal records can be ordered “if the person [successful drug court graduate] satisfactorily completed a substance abuse treatment

program as ordered by the court and was not convicted of any crime, or adjudged a disorderly person or petty disorderly person, during the term of special probation.” Was J.S. convicted of an offense which would bar him from successfully petitioning this court for expungement? The clear answer here must be “no.”

The definition of what constitutes a criminal offense is found within the New Jersey Code of Criminal Justice at N.J.S.A. 2C:1-4. That statute states in pertinent part as follows:

- a. An offense defined by this code or by any other statute of this State, for which a sentence of imprisonment in excess of 6 months is authorized, constitutes a crime within the meaning of the Constitution of this State. Crimes are designated in this code as being of the first, second, third or fourth degree.
- b. An offense is a disorderly persons offense if it is so designated in this code or in a statute other than this code. An offense is a petty disorderly persons offense if it is so designated in this code or in a statute other than this code. Disorderly persons offenses and petty disorderly persons offenses are petty offenses and are not crimes within the meaning of the Constitution of this State.

[N.J.S.A. 2C:1-4.]

The State of New Jersey has clearly classified the offense of driving while intoxicated in violation of N.J.S.A. 39:4-50 as a motor vehicle offense, even when considering the enhanced penalties provided for in the statute for

second, third or subsequent offenders. See State v. Ferretti, 189 N.J. Super. 578, 580-581 (Law Div. 1983) (finding that the authorized statutory maximum sentence of 180 days in the county jail for a third or subsequent offender does not give rise to the right of indictment and trial by jury). See also State v. Denelsbeck, 225 N.J. 103, 126 (2016); State v. Hamm, 121 N.J. 109, 127 (1990) (“[O]ur courts have considered to be the undoubted legislative intention to continue to treat DWI as a motor-vehicle offense, not a crime.”).

The State has argued that the Interstate Driver License Compact (DLC) codified in New Jersey under N.J.S.A. 39:5D-1 to -14 requires New Jersey to give full faith and credit to the grading of motor vehicle convictions in foreign jurisdictions and to impose the penalty provided for in either the foreign jurisdiction or this state. The State relies specifically upon N.J.S.A. 39:5D-4 in support of this position. That section of the statute reads in pertinent part as follows:

(a) The licensing authority in the home State, for the purposes of suspension, revocation or limitation of the license to operate a motor vehicle, shall give the same effect to the conduct reported, pursuant to Article III [N.J.S.A. 39:5D-3] of this compact, as it would if such conduct had occurred in the home State, shall apply the penalties of the home State or of the State in which the violation occurred, in the case of conviction for:

. . . .

(2) Driving a motor vehicle while under the

influence of intoxicating liquor or a narcotic drug, or under the influence of any other drug to a degree which renders the driver incapable of safely driving a motor vehicle;

. . . .

(c) If the laws of a party State do not provide for offenses or violations denominated or described in precisely the words employed in subdivision (a) of this article, such party State shall construe the denominations and descriptions appearing in subdivision (a) hereof as being applicable to and identifying those offenses or violations of a substantially similar nature and the laws of such party State shall contain such provisions as may be necessary to ensure that full force and affect is given to this article.

[N.J.S.A. 39:5D-4.]

The DLC has been interpreted, in a variety of contexts, to have application in the State of New Jersey. See State v. Regan, 209 N.J. Super. 596, 604 (App. Div. 1986) (holding that the legislature intended an out of state conviction for an offense equivalent to DWI to be considered as a prior offense for enhanced sentencing purposes on a subsequent DWI conviction); State v. Cromwell, 194 N.J. Super. 519, 520-22 (App. Div. 1984) (wherein the court held that the DLC required New Jersey to “give the same effect to the conduct reported [in the foreign state] . . . as it would if such conduct had occurred in [New Jersey]” for the purposes of considering enhanced penalties) (quoting N.J.S.A. 5D-4(a)). See also State v. Colley, 397 N.J. Super. 214, 216 (App.

Div. 2007) (wherein the court determined that New York convictions for driving while intoxicated should be treated as the equivalent of a conviction under N.J.S.A. 39:4-50 for sentencing purposes). In each of the above cited Appellate Division opinions, the court utilized the out of state convictions to apply the New Jersey state statute enhanced penalties provided for under N.J.S.A. 39:4-50 for repeat offender drunk drivers.

The purpose of the DLC is spelled out in the statute itself. N.J.S.A. 39:5D-1(b) states in pertinent part as follows:

It is the policy of each of the party States to:

- (1) Promote compliance with the laws, ordinances and administrative rules and regulations relating to the operation of motor vehicles by their operators in each of the jurisdictions where such operators drive motor vehicles.
- (2) Make the reciprocal recognition of licenses to drive and eligibility therefor more just and equitable by considering the over-all compliance with motor vehicle laws, ordinances and administrative rules and regulations as a condition precedent to the continuance or issuance of any license by reason of which the licensee is authorized or permitted to operate a motor vehicle in any of the party States.

[N.J.S.A. 39:5D-1(b).]

The enactment of the DLC was “to encourage the reciprocal recognition of motor vehicle violations that occurred in other jurisdictions, thereby increasing

the probability that safety on highways would improve overall.” Colley, 397 N.J. Super. at 219 (citing Regan, 209 N.J. Super. at 602-04).

The issue of whether convictions in a foreign jurisdiction for offenses would serve to defeat a petitioner’s petition for expungement of his New Jersey convictions has been considered by the courts of the State of New Jersey. In State v. Ochoa, 314 N.J. Super. 168 (App. Div. 1998), the court affirmed the decision of the trial court denying a petitioner’s petition for expungement of her record of three convictions for disorderly persons and petty disorderly persons offenses that she committed in New Jersey since she was also convicted of four offenses in other jurisdictions that would have been classified as disorderly persons or petty disorderly persons offenses in New Jersey. In Ochoa, the petitioner sought expungement pursuant to N.J.S.A. 2C:52-3. The Appellate Division agreed with the trial court’s determination that “it would be inconsistent with the ‘spirit and letter of the expungement statute’ and with what ‘the legislature meant to accomplish when it enacted that laudable statute’” to grant expungement to petitioner where she had four convictions in other jurisdictions. Id. at 171. The court held as follows:

It would be manifestly inconsistent with this legislative intent to expunge the New Jersey convictions of a habitual petty offender who has committed numerous petty offenses in other jurisdictions but no more than three such offenses in New Jersey.

[Id. at 172.]

Subsection (m)(1) of N.J.S.A. 2C:35-14 differs from the provisions of the expungement statute under N.J.S.A. 2C:52-7 in that a successful graduate from drug court who petitions the Superior Court for expungement, and does not have a disqualifying conviction which would preclude expungement when entering the program, can have their entire record of “all prior arrests, detentions, convictions and proceedings for any offense enumerated in Title 2C of the New Jersey Statutes” expunged. Two requirements are spelled out in this section in order to obtain the expungement:

(1) The person must satisfactorily complete a substance abuse treatment program ordered by the court; and

(2) The successful graduate “was not convicted of any crime, or adjudged a disorderly person or petty disorderly person, during the term of special probation.” N.J.S.A. 2C:35-14(m)(1).

Crimes that pose a serious threat to the public interest such as homicide, aggravated sexual assault and robbery are barred from expungement under N.J.S.A. 2C:52-2(b). First and second degree drug sale offenses are also barred under N.J.S.A. 2C:52-2(c). However, third and fourth degree CDS sale or distribution offenses may be expunged “where the court finds that expungement is consistent with the public interest, giving due consideration to

the nature of the offense and the petitioner's character and conduct since conviction." N.J.S.A. 2C:52-2(c)(3).

The Supreme Court's recent decision in T.B. determined that there is a rebuttable presumption in favor of expungement. Utilizing the principles of statutory construction, "[i]t is well established that in construing a statutory provision, courts must seek to fulfill the statutory objective 'so far as the terms of the legislation and proper consideration of the interests of those subject to it will fairly permit.'" Ochoa, 314 N.J. Super. at 171 (quoting State v. Haliski, 140 N.J. 1, 9 (1995)). See also State v. Gill, 47 N.J. 441, 444 (1966). The expungement provision within N.J.S.A. 2C:35-14 bars a successful drug court graduate's petition for expungement if "convicted of any crime, or adjudged a disorderly person or petty disorderly person, during the term of special probation." N.J.S.A. 2C:35-14(m)(1). A conviction in New Jersey of driving while intoxicated is not a crime, disorderly persons or petty disorderly persons offense as defined by the statutes of this state. N.J.S.A. 2C:1-4. While the DLC does require that New Jersey give full faith and credit to out of state motor vehicle violations, including convictions for DWI (N.J.S.A. 39:5D-4), where the statutes are substantially similar to New Jersey's, the public policy behind the DLC was to encourage reciprocal recognition of motor vehicle violations and promote compliance with regulations relating to the operation of

motor vehicles in the participating states. The purpose was not to elevate New Jersey's classification of a DWI conviction from a motor vehicle violation to the equivalent of an indictable criminal offense, disorderly persons or petty disorderly persons offense.

While in the Vicinage XV Drug Court Program, petitioner here successfully moved through all four phases of the program. He successfully completed a course of substance abuse treatment, gained employment and was substance free for at least one year prior to his graduation from the program. As conceded by the Assistant Prosecutor at oral argument, there were no other bars to petitioner's application for expungement asserted by the Prosecutor other than the out of state conviction for driving while intoxicated. When examining petitioner's application against the rationale of T.B., it is clear that petitioner's application for expungement must be granted. As indicated by the Court, the law directs that judges "shall grant" expungement unless the need for availability of the records is outweighed by the benefits of expungement or the person is otherwise ineligible. T.B., 236 N.J. at 276-77. There is therefore a presumption that expungement should be granted. Id. at 266. The law also places the burden upon the Prosecutor to come forward with disqualifying convictions or other factors which would somehow bear upon public safety. Id. at 277-78. Here, the Pennsylvania DUI conviction is not a statutory bar to

this drug court graduate's expungement. Such an offense, under the laws of the State of New Jersey, does not constitute a crime, disorderly persons or petty disorderly persons offense. N.J.S.A. 2C:1-4. The State has not presented any factors that demonstrate that petitioner, a graduate of the drug court program, is a public safety risk.

In light of petitioner's completion of the rigorous monitoring program "that is the hallmark of drug court" as well as the policy favoring expungement of successful graduates, T.B., 236 N.J. at 278, this court will grant the application of J.S. and enter an order expunging the whole of petitioner's past criminal record.