

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 0509

STATE OF LOUISIANA

VERSUS

L.C., III

Judgment Rendered: NOV 26 2013

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. 8-06-006

The Honorable Donald R. Johnson, Judge Presiding

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Hillar C. Moore, III
District Attorney
Monisa L. Thompson
Assistant District Attorney
Baton Rouge, Louisiana

Attorneys for Appellant,
State of Louisiana

James G. Knipe, III
Baton Rouge, Louisiana

Attorney for Appellee,
L.C., III

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BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

RHP by Edley concurs w/o Reasons

Guidry, D. dissents in part and assigns reasons.

DRAKE, J.

This is an appeal by the State of Louisiana from a judgment of the trial court expunging the arrest record of defendant, L.C., III, related to a July 19, 2006 date of arrest, charging domestic abuse battery and domestic abuse battery while a minor child, twelve years of age or younger, was present at the time of the offense in violation of La. R.S. 14:35.3 and La. R.S.14:35.3(I).

FACTS AND PROCEDURAL HISTORY

Defendant was arrested and charged with the misdemeanors of domestic abuse battery pursuant to La. R.S. 14:35.3 and domestic abuse child endangerment pursuant to La. R.S. 14:35.3 (I) arising from an incident on July 19, 2006. A trial was held before Judge Todd Hernandez, and the defendant was found guilty as charged. On November 14, 2007, the trial court sentenced defendant and imposed numerous special conditions which included a probationary period. After completion of the probationary conditions, the trial court terminated defendant's probation upon his motion on May 19, 2010. Defendant subsequently filed a motion to reconsider sentence and requested application of La. C.Cr.P. art. 894. After a hearing on the motion, the trial court issued an oral ruling on May 18, 2011, and a written ruling on August 27, 2011, consistent with the oral ruling, granting defendant's motion to reconsider sentence, and ordering a dismissal pursuant to La. C.Cr.P. art. 894. Defendant requested an expungement of his **arrest** pursuant to La. R.S. 44:9 on July 28, 2011. The trial court granted the expungement of the arrest record related to the July 19, 2006 incident on September 5, 2012, and signed a judgment on September 17, 2012.¹ It is from this judgment that the state has appealed.

¹ Judge Donald R. Johnson issued the judgment granting expungement after he assumed the position as trial court judge in criminal section VII of the Nineteenth Judicial District Court when Judge Todd Hernandez, the original trial court judge, moved from the criminal bench to the civil bench.

ASSIGNMENT OF ERRORS

The state assigns two errors, as follows:

- (1) The trial court erred in reconsidering defendant's imposed sentence for domestic abuse battery with child endangerment after that sentence was completed and erred in deferring sentence and dismissing the conviction.
- (2) Defendant, convicted of domestic abuse battery with child endangerment, was not eligible to have his conviction expunged under La. R.S. 44:9(A)(5).

APPLICATION OF LA. CODE CRIM. P. ART. 894(B)

The state claims that the trial court incorrectly reconsidered the sentence of defendant pursuant to La. C.Cr.P. art. 894. Defendant responds that the state did not file a timely appeal of the trial court's ruling, which vacated, deferred, and dismissed his original sentence. Therefore, defendant claims that the state is barred from asserting any argument regarding the correctness of the court's ruling of May 18, 2011, on this appeal of his expungement judgment. The trial court held a hearing on the defendant's motion for reconsideration of sentence and request for application of La. C.Cr.P. art. 894 on February 16, 2011.² The matter was taken under advisement. The trial court set the matter for ruling after both parties filed post hearing memorandums. In open court on May 18, 2011, the trial court granted defendant's motion.³ On August 27, 2011, the trial court issued a written ruling, consistent with his oral ruling, granting defendant's motion for reconsideration, ordering that the defendant's sentence on November 14, 2007, be vacated, and deferring the sentence originally imposed pursuant to the provisions of La. C.Cr.P. art. 894. The trial court further ordered "a dismissal pursuant to the provisions of La. C.Cr.P. [a]rt. 894 retroactive to the date of imposition of original

² Although the transcript of the hearing on February 16, 2011, is not contained in the Record, the ruling of the trial court references the contradictory hearing, as do the court minutes.

³ While the transcript of the hearing on May 18, 2011, is not contained in the Record, the court minutes reference the hearing and ruling.

sentence.” Even though the state objected on the record, there was no appeal of this ruling.

Louisiana Code of Criminal Procedure article 914 states:

- A. A motion for an appeal may be made orally in open court or by filing a written motion with the clerk. The motion shall be entered in the minutes of the court.
- B. The motion for an appeal must be made no later than:
 - (1) Thirty days after the rendition of the judgment or ruling from which the appeal is taken.
 - (2) Thirty days from the ruling on a motion to reconsider sentence filed pursuant to Article 881.1, should such a motion be filed.

No motion to appeal was filed by the state within thirty days after the trial court’s ruling in open court on May 18, 2011.

The Louisiana Supreme Court squarely addressed the issue of a timely appeal in *State v. Veazey*, 337 So. 2d 1163 (La. 1976), wherein the state filed a motion for appeal over four months after the order to quash the defendant’s indictment was recorded in the court minutes. The state argued that its appeal was timely because it was taken within fifteen days of the date on which it received written notice of the trial judge’s ruling.⁴ The supreme court disagreed, noting:

It is the state’s contention that when a matter is taken under advisement, written notice of the judgment or ruling subsequently rendered should be sent to the interested parties. The state further argues that the time for appealing from such judgments or rulings should commence running only from the date of receipt of notice thereof. We are asked to engraft these rules, borrowed from the Code of Civil Procedure (Code Civ.P. arts. 1911, 1913 and 2123), onto the clear statutory language of Code Crim.P. art. 914. This we cannot do. While the provisions suggested by the state might indeed prove beneficial supplements to the Code of Criminal Procedure, that is a matter which addresses itself to the legislature. In the absence of statutory authority to the contrary, we will continue to follow the directive of article 914 that motions for appeal must be made no later than fifteen days after the rendition of the judgment or ruling from which the appeal is taken.

⁴ At the time of *Veazey*, La. C.Cr.P. art. 914 permitted only fifteen days after the ruling to file an appeal. La. C.Cr.P. art. 914 was amended by 2003 La. Acts, No. 949, § 1 to permit thirty days to file an appeal following a trial court ruling.

Veazey, 337 So.2d at 1164.

Relying upon *Veazey*, *State v. Hall*, 09-1 (La. App. 5 Cir. 5/12/09), 28 So. 3d 281, *writ denied*, 09-2660 (La. 10/19/10), 48 So. 3d 270, found that an appeal filed by the state more than fifteen days following the rendition of the judgment granting a motion to quash based on double jeopardy was untimely. *See also State v. Gray*, 98-2902 (La. 5/7/99), 740 So. 2d 1291. This court relied upon *Veazey* in holding that the appeal delays in a criminal matter run from the time of the ruling, not when the defendant receives notice of the judgment. *State v. Ginn*, 98-1184 (La. App. 1 Cir. 6/19/98), 718 So. 2d 984, 985.

The state did not file an appeal following the May 18, 2011 ruling of the trial court on defendant's motion to reconsider sentence and requesting application and dismissal under La. C.Cr.P. art. 894. The trial court's ruling became final when the state failed to take a timely appeal on the disputed ruling. *See Gray*, 740 So. 2d at 1291. Therefore, this court cannot overturn the trial court's ruling of May 18, 2011. The state's first assignment of error is without merit.

EXPUNGEMENT

Defendant filed a written motion requesting an expungement of his arrest record on July 28, 2011, which the trial court granted, signing the judgment on September 17, 2012. The state asserts that the trial court incorrectly permitted a case involving domestic abuse to be expunged. The state and defendant argue that different provisions of La. R.S. 44:9 apply to the facts of this case. The state claims that La. R.S. 44:9(A)(5) applies, which does not permit expungement of domestic violence cases. Defendant claims that La. R.S. 44:9(A)(1) and La. R.S. 44:9(E)(3) apply, which contain no restrictions regarding domestic violence cases.

The expungement of criminal records is provided for in La. R.S. 44:9, which allows only specified criminal arrest and conviction records to be expunged. *State*

v. Gerchow, 09-1055 (La. App. 1 Cir. 3/11/10), 36 So. 3d 304. Louisiana Revised Statute 44:9 has been amended numerous times. At the time defendant's motion for expungement was filed, La. R.S. 44:9(A)(1) stated:

(1) Any person who has been arrested for the violation of a municipal or parish ordinance or for violation of a state statute which is classified as a misdemeanor may make a written motion to the district, parish, or city court in which the violation was prosecuted or to the district court located in the parish in which he was arrested, for expungement of the arrest record, under either of the following conditions:

...

(b) If prosecution has been instituted, and such proceedings have been finally disposed of by dismissal, sustaining of a motion to quash, or acquittal.

Approximately one year prior to defendant's request for expungement, La. R.S. 44:9 was amended by 2010 La. Acts, No. 609 § 1, effective August 15, 2010, to add section (A)(5), which states, in pertinent part:

(a) Any person who has been convicted for the violation of a ... state statute which is classified as a misdemeanor may make a written motion to the district, parish, or city court in which the violation was prosecuted ..., for expungement of the arrest record if five or more years has elapsed between the date of the motion and the successful completion of any sentence, deferred adjudication, or period of probation or parole. Notwithstanding the provisions of Code of Criminal Procedure Article 892.1 or 894, or any other provision of law to the contrary regarding the set aside of a conviction or the dismissal of a prosecution, an expungement shall occur only once with respect to any person during a five-year period,

(b) **No person shall be entitled to an expungement if the misdemeanor conviction arose from circumstances involving a sexual act or act of domestic violence.** [Emphasis added.]

The state asserts that the defendant is not entitled to have his arrest record expunged since he was convicted of domestic abuse battery. Defendant argues that the trial court correctly granted the expungement pursuant to either La. R.S. 44:9(A)(1) or La. R.S. 44:9(E)(3) because his case was **dismissed** pursuant to La. C.Cr.P. art. 894.

The supreme court, observing the “convoluted nature” of La. R.S. 44:9 and its related statutes, has noted that “[o]ur observation that the clarity of these laws, as amended, leaves much to be desired is an understatement.” *State v. Expunged Record (No.) 249,044*, 03-1940 (La. 7/2/04), 881 So. 2d 104, 108 (quoting *State v. Savoie*, 92-1586, 93-1955 (La. 5/23/94), 637 So.2d 408, 409). Since the purpose of La. R.S. 44:9 is remedial, rather than penal, it is to be liberally construed to make the statutory rule apply in more situations than would be the case under strict construction. *State v. Boniface*, 369 So. 2d 115, 116 (La. 1979).

Louisiana Revised Statute 44:9(A)(1) applies to one who has been arrested for a misdemeanor and is seeking expungement of his **arrest** record. The defendant sought expungement of his **arrest** record. Furthermore, La. R.S. 44:9(E)(3)(a) specifically addresses a case dismissed pursuant to La. C.Cr.P. art. 894 and states:

A court may order the destruction or the expungement of the record of a misdemeanor conviction dismissed pursuant to Article 894 of the Code of Criminal Procedure. However, no destruction of the record shall be ordered for any conviction for a first or second violation of any ordinance or statute making criminal the driving of a motor vehicle while under the influence of alcoholic beverages or narcotic drugs, as denounced by R.S. 14:98 or 98.1.

Either La. R.S. 44:9(E)(3)(a), which applies to misdemeanor convictions dismissed pursuant to La. C.Cr.P. 894, or La. R.S. 44:9(A)(1), which applies to misdemeanor arrests wherein prosecution is instituted and is finally disposed of by acquittal, dismissal, or sustaining of a motion to quash, permits the expungement of a defendant’s arrest record. Louisiana Revised Statute 44:9(E)(3)(a) allows the court to order **expungement or destruction** of the records of a defendant whose case is dismissed pursuant to La. C.Cr.P. 894. The word “expungement” is distinct from the word “destruction,” and the two words cannot be used interchangeably or to mean the same thing. Public records that may be “expunged” need not be “destroyed.” *State v. Expunged Record (No.) 249,044*,

881 So. 2d at 108. Expungement is defined to mean removal of a record from public access, but it does not mean destruction of the record. An expunged record is confidential, but remains available for use by law enforcement agencies and other specified persons and agencies. *See* La. R.S. 44:9(G); *State v. Taylor*, 11-0373 (La. App. 1 Cir. 3/23/12), 91 So. 3d 1065, 1069-70. Therefore, La. R.S. 44:9(E)(3)(a) permits expungement or destruction after a misdemeanor conviction is dismissed pursuant to La. C.Cr.P. art. 894. La. R.S. 44:9(A)(1) permits only expungement of a misdemeanor arrest record.

This court addressed a situation similar to the present matter in *State v. Carmen*, 08-1769 (La. App. 1 Cir. 3/27/09)(unpublished opinion), *rev'd on other grounds*, 09-1213 (La. 5/7/10), 34 So. 3d 259.⁵ In *Carmen*, the state argued that the defendant, who had been convicted of domestic abuse battery, was not entitled to expungement pursuant to La. R.S. 44:9(A)(1)⁶ because he had been **convicted**. The court determined that expungement of misdemeanor convictions were within the purview of La. R.S. 44:9(E)(3), which had the prerequisite of dismissal pursuant to La. C.Cr.P. art. 894. Since the defendant in *Carmen* had had his conviction dismissed pursuant to La. C.Cr.P. art. 894, he was eligible for expungement pursuant to La. R.S. 44:9(E)(3). The Louisiana Supreme Court reversed the appellate court because it found the defendant had a pending charge of felony theft, causing him to be ineligible to have his conviction set aside pursuant to La. C.Cr.P. art. 894. *Carmen*, 34 So. 3d at 259.

⁵ Defendant relies upon *Carmen*, erroneously claiming that it stands for the proposition that La. R.S. 44:9(A)(1) applies to the present situation, rather than the provision of the statute upon which the state relies, La. R.S. 44:9(A)(5), which was added to the statute by 2010 La. Acts, No. 609 § 1, effective August 15, 2010, after *Carmen* was decided. Therefore, *Carmen* did not decide that La. R.S. 44:9(A)(1) applied, rather than La. R.S. 44:9(A)(5). Instead, this court reads *Carmen* to have determined that La. R.S. 44:9(E)(3) was the applicable provision to apply when a conviction and dismissal pursuant to La. C.Cr.P. art. 894 had taken place.

⁶ La. R.S. 44:9(A)(5) had not yet been enacted.

The remaining issue is whether La. R.S. 44:9(A)(5), which was added by 2010 La. Acts, No. 609 § 1, after *Carmen* was decided, applies or whether either La. R.S. 44:9(A)(1) or La. R.S. 44:9 (E)(3)(a) applies, as the defendant argues.

It is presumed that every word, sentence, or provision in law was intended to serve some useful purpose, that some effect is to be given to each such provision, and that no unnecessary words or provisions were used. *Citywide Testing & Inspections, Inc. v. Bd. of Ethics for Elected Officials*, 96-1656 (La. App. 1 Cir. 5/9/97), 693 So. 2d 1312, 1315, *writ denied*, 97-1509 (La. 10/3/97), 701 So. 2d 198. The Legislature added paragraph (A)(5) to La. R.S. 44:9 without removing paragraph (A)(1) or (E)(3)(a). Therefore, the Legislature intended paragraphs (A)(1) and (E)(3)(a) to continue to have meaning. Legislative intent is the fundamental question in all cases of statutory interpretation, and rules of statutory construction are designed to ascertain and enforce the intent of the statute. *State v. Campbell*, 03-3035 (La. 7/6/04), 877 So. 2d 112, 117. It is presumed that the Legislature enacts each statute with deliberation and with full knowledge of all existing laws on the same subject. *Id.* Thus, legislative language will be interpreted on the assumption that the Legislature was aware of existing statutes, rules of construction, and judicial decisions interpreting those statutes. It is further presumed that the Legislature intends to achieve a consistent body of law. *Id.*

It is a well-recognized principle of statutory construction that legislation addressing a more particularized subject matter prevails over more generalized legislation. See *Corbello v. Sutton*, 446 So. 2d 301 (La. 1984); *Louisiana Land Acquisition, LLC v. Louisiana Dep't of Environmental Quality*, 11-2037 (La. App. 1 Cir. 7/18/12), 97 So. 3d 1144, 1148, *writ granted in part*, 12-1872 (La. 11/16/12), 103 So. 3d 358.

The starting point in the interpretation of any statute is the language of the statute itself. When a law is clear and unambiguous and its application does not

lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the Legislature. *In re Clegg*, 10-0323 (La. 7/6/10), 41 So. 3d 1141, 1154. The meaning and intent of a law is determined by considering the law in its entirety and all other laws on the same subject matter and by placing a construction on the law that is consistent with the express terms of the law and with the obvious intent of the Legislature in enacting the law. *Id.*

Louisiana Revised Statute 44:9(E)(3)(a) applies to the expungement of misdemeanor convictions that are dismissed pursuant to La. C.Cr.P. art. 894. Louisiana Revised Statute 44:9(A)(1) applies to the expungement of arrest records when a misdemeanor prosecution is instituted and dismissed. There is no limit in either La. R.S. 44:9(E)(3)(a) or La. R.S. 44:9(A)(1) disallowing expungement of cases involving domestic violence. Louisiana Revised Statute 44:9(A)(5) applies to any person convicted of a misdemeanor, whether or not a case has been dismissed pursuant to La. C.Cr.P. art. 894, "if five or more years has elapsed between the date of the motion and the successful completion of any sentence, deferred adjudication, or period of probation or parole." Therefore, five years after the completion of the sentence, including the probation period, a person convicted of a misdemeanor may apply for expungement of the arrest record pursuant to La. R.S. 44:9(A)(5).

Louisiana Revised Statute 44:9(A)(5) is one method for obtaining expungement of the arrest record regarding a misdemeanor conviction. Another method of obtaining expungement of the record of a misdemeanor conviction is pursuant to La. R.S. 44:9(E)(3)(a), which requires the defendant to have his conviction dismissed pursuant to La. C.Cr.P. art. 894. A third method of expungement for misdemeanors applies only to arrest records, and a defendant

must comply with La. R.S. 44:9(A)(1), which requires dismissal, acquittal, or the sustaining of a motion to quash after the institution of the prosecution.

In this case, either La. R.S. 44:9(A)(1) or (E)(3)(a) is more particular, as each one applies to misdemeanors that have been dismissed. Louisiana Revised Statute 44:9(E)(3)(a) even applies once the defendant is convicted if the case is dismissed pursuant to La. C.Cr.P. art. 894, the exact situation of the present case. Louisiana Revised Statute 44:9(A)(5) applies to any misdemeanor conviction if five years has passed since the completion of the sentence or probation, even if the case was **not** dismissed by La. C.Cr.P. art. 894. The present case does not involve a situation in which the defendant has waited five years since the serving of his sentence or probation to seek expungement. The sentence in this case was complete on May 19, 2010, when the trial court terminated defendant's probation, and the motion for expungement was filed on July 28, 2011. Therefore, La. R.S. 44:9(A)(5) does not apply to the present situation and neither does the limitation contained in La. R.S. 44:9(A)(5)(b), with regard to domestic violence. The defendant in the present case had his case dismissed pursuant to La. C.Cr.P. art. 894. Louisiana Revised Statutes R.S. 44:9(A)(1) and (E)(3)(a) are more directly applicable to the present situation and have no limitation on domestic violence cases being ineligible for expungement. Therefore, the trial court correctly granted defendant's expungement of his arrest record pursuant to La. R.S. 44:9(A)(1).

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of the appeal in the amount of \$1,199.50 are assessed to appellant, State of Louisiana.

AFFIRMED.

NOT DESIGNATED FOR PUBLICATION

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COURT OF APPEAL

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VERSUS

L.C., III

GUIDRY, J., dissents in part and assigns reasons.

 **GUIDRY, J., dissenting in part.**

I respectfully dissent from the portion of the majority opinion affirming the trial court's granting of defendant's request for expungement of his arrest record. In the instant case, the defendant requested expungement of a July 19, 2006 misdemeanor arrest, *for which he was ultimately convicted*. Louisiana Revised Statute 44:9(A)(1) provides that any person *who has been arrested* for violation of a municipal or parish ordinance or for violation of a state statute which is classified as a misdemeanor may make a written motion for expungement of the arrest record if prosecution has been instituted, and such proceedings have been finally disposed of by dismissal, sustaining of a motion to quash, or acquittal. However, contrary to the majority's assertion, La. R.S. 44:9(A)(1) makes no reference to expungement of an arrest record when the proceedings conclude with a conviction nor when a conviction is subsequently dismissed under La. C.Cr.P. art. 894.

Additionally, although La. R.S. 44:9(E)(3)(a) permits expungement of the record of the *misdemeanor conviction* dismissed pursuant to La. C.Cr.P. art. 894, it does not state that a court may order expungement of an *arrest record* when a misdemeanor conviction is dismissed pursuant to La. C.Cr.P. art. 894.

Rather, La. R.S. 44:9(A)(5)(a) relates specifically to obtaining expungement of an arrest record *after a conviction* of a misdemeanor and allows for expungement “if five or more years have elapsed between the date of the motion and the successful completion of any sentence, deferred adjudication, or period of probation or parole.” However, “no person shall be entitled to an expungement if the misdemeanor conviction arose from circumstances involving a sexual act or act of domestic violence.” La. R.S. 44:9(A)(5)(b). Because the defendant in the instant case was charged and convicted of domestic abuse battery and domestic abuse child endangerment, he is not entitled to seek expungement of his arrest record. Therefore, I respectfully dissent from the majority’s opinion, affirming the trial court’s granting of defendant’s request for expungement of his arrest record.