

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2002-K-0235**
VERSUS * **COURT OF APPEAL**
DWIGHT LABRAN * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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ON APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 388-287, SECTION "J"
HONORABLE LEON CANNIZZARO, JUDGE

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Chief Judge William H. Byrnes, III

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(Court composed of Chief Judge William H. Byrnes, III, Judge James F. McKay, III, and Judge David S. Gorbaty)

EMILY BOLTON
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Counsel for the Defendant

WRIT GRANTED;
REMANDED

We grant the relator Dwight Labran's writ application to review the trial court's ruling that denied his motion for expungement of his conviction for first degree murder. We remand.

Labran was sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. His conviction and sentence were upheld by this court in *State v. Labran*, 97-2614 (La. App. 4 Cir. 5/26/99), 737 So.2d 903, writ denied 99-1981 (La. 1/7/00), 752 So.2d 175. The trial court granted Labran's January 2001 *pro se* application for post conviction relief, and in effect, vacated Labran's conviction and sentence on October 3, 2001. The trial court also granted Labran a new trial. Although the prosecution noted an objection with an intent to take a writ, the State did not file a writ application. On December 21, 2001, the trial court denied Labran's motion to expunge his conviction, and Labran's writ application followed.

Labran argues that La. R.S. 44:9B mandates the issuance of an expungement order once the criteria of that statute are met. Labran also asks

that the expungement costs be waived.

La. R.S. 44:9 provides in pertinent part:

B. (1) Any person who has been arrested for the violation of a felony offense or who has been arrested for a violation of R.S. 14:34.2, R.S. 14:34.3, or R.S. 14:37 may make a written motion to the district court for the parish in which he was arrested for the expungement of the arrest record if:

(a) The district attorney declines to prosecute, or the prosecution has been instituted, and such proceedings have been finally disposed of by acquittal, dismissal, or sustaining a motion to quash; and

(b) The record of arrest and prosecution for the offense is without substantial probative value as a prior act for any subsequent prosecution.

(2) If, after a contradictory hearing with the district attorney and the arresting law enforcement agency, the court finds that the mover is entitled to the relief sought for the above reasons, it shall order all law enforcement agencies to expunge the record of the same in accordance herewith. However, nothing in this Paragraph shall limit or impede the authority under law to consider prior arrests or convictions in pursuing prosecution under multiple offender provisions or impede the investigation of any law enforcement official seeking to ascertain or confirm the qualifications of any person for any privilege or license authorized by law.

C. (1) Any person who has been arrested for the violation of a state statute which is classified as a felony may make a written motion to the district court for the parish in which he was arrested for

expungement of the arrest record if the time limitation for the institution of prosecution on the offense has expired, and no prosecution has been instituted.

(2) If, after a contradictory hearing with the arresting agency, the court finds that the mover is entitled to the relief sought for any of the above reasons, it shall order all law enforcement agencies to expunge same [footnote omitted] in accordance herewith. However, the arresting agency may preserve the name and address of the person arrested and the facts of the case for investigative purposes only.

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E. (1)(a) No court shall order the destruction of any record of the arrest and prosecution of any person convicted of a felony, including a conviction dismissed pursuant to Article 893 of the Code of Criminal Procedure.

* * *

F. For investigative purposes only, the Department of Public Safety and Corrections may maintain a confidential, nonpublic record of the arrest and disposition. The information contained in this record may be released, upon specific request therefor and on a confidential basis, to any law enforcement agency, criminal justice agency, the Louisiana State Board of Medical Examiners, the Louisiana State Board of Nursing, the Louisiana State Board of Dentistry or the Louisiana State Board of Examiners of Psychologists. The receiving law enforcement agency, criminal justice agency, the Louisiana State Board of Medical Examiners, the Louisiana State Board of Nursing, the Louisiana State Board of Dentistry or the Louisiana State Board of Examiners of Psychologists shall maintain the confidentiality of such record.

G. "Expungement" means removal of a

record from public access but does not mean destruction of the record. An expunged record is confidential, but remains available for use by law enforcement agencies, criminal justice agencies, the Louisiana State Board of Medical Examiners, the Louisiana State Board of Nursing, the Louisiana State Board of Dentistry or the Louisiana State Board of Examiners of Psychologists.

* * *

I. Except to those agencies listed in Subsection G of this Section, no person whose record of arrest and conviction has been expunged pursuant to the provisions of this Section shall be required to disclose that he was arrested or convicted for the subject offense or that the record of the arrest and conviction has been expunged, unless otherwise provided in this Section.

It is noted that under the above statute, “expungement” and “destruction” of the record are not the same. La. R.S. 44:9(G) provides that “expungement” means removal of a record from public access but does not mean destruction of the record. See also *State v. Savoie*, 92-1586 (La. 5/23/94), 637 So.2d 408. An expunged record is confidential, but remains available for use by the agencies listed under the statute.

In *State v. B.P.C.*, 96-879 (La. App. 5 Cir. 3/25/97), 693 So.2d 178, the Fifth Circuit reviewed an expungement request for the charge of criminal damage to property in violation of La. R.S. 14:56. Following full restitution to the victim, the appellant’s ex-girlfriend, the prosecution dismissed the charge. The trial court also met the requirement that the district attorney and

the arresting agency were given the opportunity to engage in an evidentiary hearing. When the appellant, through counsel, asked that the record of his arrest be expunged, the Jefferson Parish Sheriff's Office, the arresting agency, was ordered to show cause why the motion to expunge should not be granted. The Fifth Circuit stated:

The matter was set for hearing on July 17, 1996, at which time no representative of the Sheriff's Office made an appearance or sent any written objection to appellant's motion. The trial court denied the appellant's motion.

The Fifth Circuit held that:

The applicable provision of La. R.S. 44:9 is Section (B), which requires two elements to be proven before a record can be expunged: (1) that the proceedings have been fully disposed of by acquittal, dismissal, or sustaining a motion to quash and (2) that the arrest and prosecution for the offense are without substantial probative value as a prior act for any subsequent prosecution.

The first element is clearly met, as the record amply demonstrates that the district attorney dismissed the charges against the defendant herein. However, the second element was never addressed by the trial court. Accordingly, we set aside the trial court's judgment, which denied the appellant's Motion to Expunge, and we remand the matter for further proceedings consistent with the views expressed herein.

In the present case, two requirements for expungement were met

under La. R.S. 44:9B: the trial court vacated the conviction and sentence, and the State subsequently *nolle prosequied* the murder charge against Labran.

In *State v. B.P.C., id.*, the trial court had ordered the arresting law agency to show cause why the motion to expunge the record of the appellant should not be granted. In the present case, the trial court held a hearing on the Labran's motion for expungement at which the prosecutor was present, and the trial court denied the motion. However, there is no indication from the December 21, 2001 transcript or the record that an evidentiary hearing was held in which the district attorney **and** the arresting law enforcement agency had notice and had an opportunity to participate pursuant to La.R.S. 44:9B(2).

Further, there is no showing that the trial court addressed the element that the arrest and prosecution for the offense are without substantial probative value as a prior act for any subsequent prosecution.

Accordingly, the matter is remanded for an evidentiary hearing to be held with the presence of the district attorney **and** the arresting law enforcement agency pursuant to La.R.S. 44:9B(2). The trial court is to address the element of whether arrest and prosecution of the offense is without substantial probative value as a prior act for any subsequent

prosecution under La. R.S. 44:9B(1)(b)

Because the case is remanded, a review of relator Dwight Labran's request for a waiver of expungement costs is precluded.

WRIT GRANTED;
REMANDED