

Cite as 2009 Ark. App. 118 (unpublished)

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR08-326

CORA HAMILTON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered FEBRUARY 25, 2009

APPEAL FROM THE DREW COUNTY
CIRCUIT COURT,
[NO. CR 2002-201-3]

HONORABLE ROBERT BYNUM
GIBSON, JUDGE

REVERSED AND REMANDED

ROBERT J. GLADWIN, Judge

Appellant Cora Hamilton appeals the December 6, 2007 order of the Drew County Circuit Court denying her petition to seal and expunge her criminal record. She contends on appeal that the trial court erred. We reverse and remand for further proceedings.

Appellant pled guilty to theft of public benefits, a violation of Arkansas Code Annotated section 5-36-202 (Repl. 2006), pursuant to a negotiated plea on October 28, 2002. The trial court accepted her plea of guilty and filed a judgment and disposition order on the same date suspending the imposition of sentence for forty-eight months, subject to terms and conditions. She was ordered to pay court costs of \$150 and restitution in the amount of \$2371.



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On October 1, 2007, appellant filed a petition to seal and expunge her criminal record alleging that she was sentenced under the provisions of Arkansas Code Annotated section 5-4-101 (Supp. 2001),¹ and insofar as this was a first offense and was a nonviolent felony, Arkansas Code Annotated section 16-90-602 (1987)² permits the expungement and sealing of her records. She claimed to have satisfactorily complied with the conditions and orders of the trial court, and asked that her records be expunged pursuant to Arkansas Code Annotated section 16-90-905 (Supp. 2001), which establishes a uniform petition and order to seal records.

On October 9, 2007, the trial court denied appellant's petition, finding that the sentencing did not include Arkansas Code Annotated section 16-93-303 (Supp. 2001), which provides the procedure for the sealing of a defendant's record in probationary cases upon compliance with certain provisions. Appellant then requested a hearing on her petition to seal, and a hearing was held on October 22, 2007. At the hearing, it was uncontested that appellant had met all of the conditions of her suspended imposition of sentence. She argued

¹Arkansas Code Annotated section 5-4-101 defines "suspension" or "suspend imposition of sentence" as a procedure in which a defendant who pleads or is found guilty of an offense is released by the court without pronouncement of sentence and without supervision.

²Arkansas Code Annotated section 16-90-602 allows a person who is convicted of a nonviolent felony committed while the person was under the age of eighteen years and whose sentence was suspended to petition to have their record expunged upon expiration of the suspension.



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that she was entitled to have the proceedings dismissed at the end of the term of suspension and to have her record sealed pursuant to Arkansas Code Annotated section 5-4-311 (Supp. 2001). She argued that pursuant to Arkansas Code Annotated section 5-4-101, she was never sentenced and was now entitled to have the record of the arrest sealed.

The State argued that a suspended imposition of sentence was a conviction, and because the provisions of the First Offenders Act of 1975 was not “checked” in the order and conditions of suspended imposition of sentence filed October 28, 2002, then appellant was not entitled to expungement. The trial court questioned what effect an order of restitution would have with regard to the status of an individual placed on suspended imposition of sentence, requested copies of the applicable law, and took the matter under advisement.

On December 6, 2007, the trial court denied appellant’s petition to seal giving no explanation. Appellant timely filed a notice of appeal on December 12, 2007. This appeal followed.

At the heart of appellant’s argument, she contends that the trial court was mistaken in determining that she had a judgment of guilt entered against her, and thus requiring the order to specify that she was sentenced under the First Offenders Act, or the Community Punishment Act found at Arkansas Code Annotated section 16-93-1201 to 1210 (Supp. 2001). Instead, appellant argues that she was never sentenced, and thus was never convicted.



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She maintains that at the end of her period of suspended imposition of sentence, without any violations of the conditions, it was mandated that her case be dismissed, pursuant to Arkansas Code Annotated section 5-4-311.

Arkansas Code Annotated section 5-4-311 states in pertinent part as follows:

(a) If a judgment of conviction was not entered by the court at the time of suspension or probation and the defendant fully complies with the conditions of suspension or probation for the period of suspension or probation, the court shall discharge the defendant and dismiss any proceedings against him or her.

(b)(1) Subject to the provisions of §§ 5-4-501–5-4-504, a person against whom proceedings are discharged or dismissed under subsection (a) of this section may seek to have the criminal record sealed, consistent with the procedures established in § 16-90-901 et seq.

Ark. Code Ann. § 5-4-311(a), (b)(1). Appellate courts review issues of statutory interpretation de novo. *State v. Sola*, 354 Ark. 76, 118 S.W.3d 95 (2003). We strictly construe criminal statutes and resolve any doubt in favor of the defendant. *Hagar v. State*, 341 Ark. 633, 19 S.W.3d 16 (2000).

Appellant contends that the order and conditions of suspended imposition of sentence entered on October 28, 2002, states that “sentencing is deferred for forty-eight months.” The judgment and disposition order filed the same day reflects that the imposition of her sentence was suspended for forty-eight months. She was not ordered to pay a fine, nor was she sentenced to a term of imprisonment. Appellant argues that, under *Baker v. State*, 318 Ark. 223, 884 S.W.2d 603 (1994), a trial court enters a judgment of conviction only if it (1)



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sentences the defendant to pay a fine and suspends imposition of sentence or places the defendant on probation, or (2) sentences the defendant to a term of imprisonment and suspends imposition of sentence as to an additional term of imprisonment.

Further, she maintains that under section 5-4-311, if a judgment of conviction was not entered by the court at the time of the suspension and the defendant complies with the conditions of suspension, the court shall discharge the defendant and dismiss all proceedings against her. *See State v. Burnett*, 368 Ark. 625, 249 S.W.3d 141 (2007). Appellant argues that, here, there was no judgment of conviction entered and she is entitled to discharge pursuant to section 5-4-311. We agree.

Under section 5-4-311, the legislature mandates that, upon compliance with the statute, the trial court shall discharge appellant and dismiss all proceedings against her. Once the proceedings were dismissed, appellant had the option to have the records of her arrest sealed and any criminal records expunged pursuant to Arkansas Code Annotated section 16-90-905 (Supp. 2001). Appellant maintains that she fulfilled all the requirements of that section.

The State claims that the trial court correctly denied appellant's petition to seal and expunge her criminal record. It argues that a circuit court "does not have the power to expunge a defendant's record when the defendant was not sentenced under one of the statutes which specifically provides for expunging the record." *Burnett*, 368 Ark. at 628, 249 S.W.3d



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at 143 (citing *Fulmer v. State*, 337 Ark. 177, 180, 987 S.W.2d 700, 701 (1999)). In *Burnett*, the defendant sought expungement under section 5-4-311, even though he had been sentenced to a term of sixty months' imprisonment pursuant to the entry of a judgment and commitment order. *Id.* Our supreme court held that Burnett could not avail himself of section 5-4-311 because he did not receive probation, but a judgment containing a prison sentence was entered. *Id.*

In *Fulmer, supra*, the defendant, having pled guilty to a driving-while-intoxicated (DWI) charge, was sentenced, and completed his twenty-four months' imprisonment in the Arkansas Department of Correction. He filed a petition to seal and expunge his DWI record pursuant to Arkansas Code Annotated section 16-93-1207 (Supp. 1997). The State stipulated that Fulmer had completed his sentence and paid his fine and costs. It further stipulated that section 16-93-1207 would apply to his case. However, the State argued that Fulmer's record could not be expunged because he had not been specifically sentenced under an expungement provision. The court held:

[Fulmer] was convicted of DWI, a target offense under the Act. *See* section 16-93-1202(1). The order also reflects that he was sentenced to twenty-four months in the Department of Correction, with a judicial transfer to the Department of Community Punishment for drug and alcohol treatment. *See* section 16-93-1207(a)(1)(B). Moreover, there is no dispute that Appellant successfully completed his sentence and that he did not have any prior felony convictions. Under the circumstances, it is irrelevant that the judgment and disposition order does not specifically recite that Appellant was sentenced under section 16-93-1207, as such recitation is not required to be eligible for expungement under the Act.



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Fulmer, 337 Ark. at 181, 987 S.W.2d at 701–02.

The State points out that appellant’s petition herein to seal and expunge her record did not identify the statute under which she was sentenced that permits expungement, so the trial court’s order denying it should be affirmed. However, this contention is in direct conflict with *Fulmer*. Therefore, we hold that the trial court erred in denying appellant’s petition on the basis of the underlying order’s lack of citation to the specific statute under which appellant would be eligible for expungement.

The State maintains that appellant is mistaken to suggest that either sections 5-4-311 or 16-93-303 supports the entry of an order to seal as a matter of right. We agree that section 16-93-303 is inapplicable. The State admits that section 5-4-311(a) does provide for the mandatory dismissal of proceedings against a defendant who successfully completes a term of suspension, but points out that section 311(b) provides for only the *permissive* pursuit of the sealing of the record of those proceedings consistently with section 16-90-901 et seq.

The State maintains that section 16-90-905 required appellant to file a petition demonstrating the statute under which her criminal record could be sealed, but she failed to do so. However, this is a misstatement of the law, as the statute requires the *order* to seal the records to contain the provision under which the individual was sentenced that provides for sealing or expungement. *See* Ark. Code Ann. § 16-90-905 (a)(3)(B)(v). Further, our supreme court has determined that if a uniform petition is not filed, substantial compliance with section 16-90-905 in reference to the petition is all that is necessary, so long as the



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resulting order to seal the records is uniform. *See Fulmer*, 337 Ark. at 184, 987 S.W.2d at 703.

Having determined that appellant is entitled under section 5-4-311 to be discharged, we remand to the trial court for further proceedings, recognizing that the trial court may now determine whether to seal the record. *See Ark. Code Ann. § 16-90-904 (Supp. 2001)*.

Reversed and remanded.

HENRY and BAKER, JJ., agree.