

IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOSEPH JOHN CORTESE,)	
Petitioner,)	
v.)	C.A. NO.: 09X-04-008
)	
STATE OF DELAWARE)	
Respondent.)	
)	
KATELYN LEA JOHNSON,)	
Petitioner,)	
v.)	C.A. NO.: 09X-01-010
)	
STATE OF DELAWARE)	
Respondent.)	
)	
JUSTIN WAGNER,)	
Petitioner,)	
v.)	C.A. NO.: 09X-01-021
)	
STATE OF DELAWARE)	
Respondent.)	

Submitted: August 19, 2009

Decided: October 21, 2009

MEMORANDUM OPINION

*Petitioner's Motion for Reconsideration of Commissioner's Order: **DENIED***

*Recommendation of the Commissioner to deny petition for Expungement: **ACCEPTED***

Appearances:

Mark D. Sisk, Esquire, Wilmington, Delaware, attorney for the petitioner

Kathryn Schulhaus Keller, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, attorney for State of Delaware

HERLIHY, Judge

The Court has before it three motions to reconsider rulings of a Commissioner denying petitions to expunge arrest records. The Commissioner ruled in each case that legal reasons prevented granting the expungement petitions.

When a motion to reconsider is made, the Court must make a de novo determination of the recommendation to which an objection is made.¹ The Judge may accept, reject or modify the Commissioner's recommendations.²

The issue presented for reconsideration arises from the fact that each of the three expungement petitioners was arrested for violating various City of Newark ordinances. As a defendant in each of those cases, they entered into an arrangement with the City for probation before judgment (PBJ) as set up under a separate City ordinance. Basically, that means there is an admission of guilt but the person is placed on "probation" for a specified period of time and subject to conditions. One primary condition is that there are no new arrests or convictions. If the probationary period is served successfully, the person is discharged from probation and there is no conviction.³

¹ Super. Ct. Civ. R. 132(a)(4)(iv).

² Id.

³ See City of Newark Ordinance 2.35.1(d).

The arrangement of probation before judgment was originally a creation of State law.⁴ That provision applied to violations of State law only. Newark enacted its PBJ provision subsequently.⁵ It applies, of course, only to violations of Newark's ordinances.

Each of the three expungement petitioners successfully fulfilled the "probation" requirements of his or her Newark PBJ. Each was discharged from probation and there is no conviction. Because there was then no conviction, each petitioned for expungement of his or her arrest record. The Office of Attorney General opposed the petitions because none of the petitioners had waited five years from the discharge of the PBJ to seek the expungement.

The five year waiting period is found in the statute authorizing Superior Court to expunge arrest records.⁶ Specifically where an expungement is sought in this Court for a PBJ matter, 11 Del. C. § 4378 requires the person to wait for five years after the discharge of PBJ to petition for expungement. That provision, however, only applies to those persons whose cases are resolved by PBJ in § 4378 and the violations were of State laws not local ordinances, such as Newark's.

The Commissioner, in each of the three matters for reconsideration, determined that the legislature did not intend that violators of State law had to wait five years to seek expungement but violators of Newark's ordinances had no such waiting period. He also determined that since § 4378 confers jurisdiction to expunge PBJ arrest records only for

⁴ 11 Del. C. §4218, enacted July 2, 1999

⁵ City of Newark Ordinance 2.35.1 enacted January 10, 2000.

⁶ 11 Del. C. §§ 4370-4378.

State law violations, this Court had no jurisdiction to expunge for PBJ undertaken under a municipal ordinance for violations of municipal ordinances.

It is that determination/recommendation each of the three petitioners challenge.

Parties' Contentions

The petitioners, all represented by the same counsel, make the same argument. They note that Newark has its own PBJ ordinance. They refer to the fact that Newark is a Home Rule municipality under Delaware law. Petitioners contend that because the five year waiting period to obtain another PBJ found in § 4218 is incorporated into § 4378, the waiting period only applies to violators of State statutes. Local PBJ ordinances and violators of the local ordinances are not mentioned in § 4378. Since that section makes no reference to local PBJ ordinances, they deduce, there is no five year waiting period to obtain expungement for such persons, such as themselves. Further, they assert, if the legislature in enacting §4378 meant to include local ordinance PBJ provisions, it could have done so. Its choice not to do so, they claim, meant local ordinance PBJ expungements need not wait five years.

The State's response is that the petitioners cannot have it both ways. They cannot, it asserts, take advantage of a State statute providing for expungement when their PBJs were under a local PBJ law. Even if the Newark PBJ ordinance is lawful, these and any other petitioners who receive a Newark PBJ must still wait the five years. Further, the State argues it would have been illogical for the Legislature to intend State law violators

receiving PBJ to wait five years but allow local ordinance PBJ persons to obtain expungement without waiting.⁷

Discussion

The motions for reconsideration require that a judge of this Court is to review de novo the Commissioner's recommendations. That review starts with a comparison of the State statute creating the PBJ procedure for violations of State laws to the City of Newark ordinance creating a PBJ procedure for violations of Newark ordinances.

Title 11, § 4218 is the State PBJ statute. For purposes of this opinion, the Court need not catalogue all of its components. But there are two which are relevant for the resolution of the issues presented. The first is that the statute sets up the PBJ process for only violations of State law.⁸ The second feature of the State statute is that the PBJ procedure is not available to anyone who has been admitted to PBJ within five years of the new offense.⁹

The City of Newark procedure is set up under its ordinance § 2-35.1. Its processes are not as elaborate as found in § 4218. Its coverage, of course, is limited to violations of City of Newark ordinances. It has a provision which mirrors the State statute's five year ineligibility provision: anyone who has been admitted to a PBJ within five years of the

⁷ One petitioner here, Katelyn Johnson, filed for expungement 24 days after her charge was dismissed under Newark's PBJ procedure.

⁸ 11 Del. C. § 4218 (a).

⁹ 11 Del. C. §4218 (d): § 4218 was enacted July 2,1999. 72 Del. Laws c. 126.

new offense is ineligible for another PBJ.¹⁰ Newark's PBJ ordinance was enacted in January 2000.

Each of the three petitioners was admitted to PBJ under the Newark ordinances. Joseph Cortese's charge was dismissed under that law on December 4, 2008. He filed his expungement petition on April 17, 2009. Katelyn Johnson's PBJ was dismissed on December 17, 2008. She filed her petition on January 20, 2009. Justin Wagner's charges were dismissed under the Newark PBJ law on October 26, 2008. He filed his petition on January 30, 2009.

The Supreme Court in Ryan v. State¹¹ and this Court in In re Armyer¹² held a person who has had his or her charges dismissed under the PBJ is entitled to have the arrest record expunged. Prior to the 2008 amendments to the statutes providing for the expungement procedure, a person could seek expungement of an arrest record in less than five years after discharge from his or her State PBJ.¹³

That, however, has changed as a result of the amendments. As of October 15, 2008, a person who was successfully discharged from a State PBJ has to wait five years for expungement from the date of discharge.¹⁴ That five year waiting period provision

¹⁰ City of Newark ordinance § 2-35.1 (d) (7) d.

¹¹ 791 A.2d 742 (Del. 2002).

¹² Del. Super., C.A. No. 05X-07-004, Graves, J. (Dec. 12, 2005).

¹³ Id.

¹⁴ 11 Del. C. §4378; 76 Del. Laws. C. 392

was tied directly to the State statute for PBJs, § 4218. There is no reference in § 4218 to PBJs under any county or municipal ordinance.

That five year waiting period was intentionally selected for several reasons. The Legislature was informed that the PBJ process was being abused and that persons whose prior arrest records were expunged after discharge under a PBJ were re-entering another PBJ in less than five years. This was due to the record keeping authorities respecting court orders to expunge. In short, the PBJ process, designed to benefit persons charged with offenses, which is a matter of grace, was being abused. Once the arrest record was destroyed there was no record. There was a blank slate. There was no record of an arrest and subsequent PBJ. This enabled people to obtain PBJs without regard to the five year disqualification provision in § 4218. The criminal justice community had no record to check to see if people had gone through a PBJ in the previous five years.

The Legislature was aware of Ryan and Armyer indicating expungement could occur in less than five years and enacted § 4378 to end the abuse. The five year waiting period was not idly chosen. It was chosen because of the five year ineligibility provision in § 4218. There was no push to either reconsider or amend the PBJ waiting period to a lesser number of years.

The 2008 expungement legislation clarified another matter. That related to the duties and authority of the State Bureau of Identification regulating the dissemination of conviction data. The duty which existed prior to the 2008 amendments is set out, in part, as follows:

(C) Upon application the Bureau may, based upon the availability of resources and priorities set by the Superintendent of State Police, furnish information pertaining to the identification and conviction data of any person or persons of whom the Bureau has record, provided that the requesting agency or individual submits to a reasonable procedure established by standard set forth by the Superintendent of State Police to identify the person whose record is sought. These provisions shall apply to the dissemination of conviction data to:

- 1) Individuals and agencies for the purpose of employment of the person whose record is sought, provided:
 - a. The requesting individual or agency pays a reasonable fee as set by the Superintendent, payable to the Delaware State Police, and
 - b. The use of the conviction data shall be limited to the purpose for which it was given;
- 2) Members of the news media, provided that the use of conviction data shall be limited to the purpose for which it was given, and the requesting media or news agency pays a reasonable fee as set by the Superintendent, payable to the Delaware State Police.¹⁵

The 2008 provision added this subsection regarding the duties and authority of the SBI to clarify what that organization can and cannot do with PBJs and first offender programs:

(h) Notwithstanding any law or court rule to the contrary, criminal history record information disseminated pursuant to subsection (c) of this Section shall not include information pertaining to any charge resolved by Probation Before Judgment as set forth in § 4218 of this Title, or by the First Offenders Controlled Substances Diversion Program as set forth in § 4764 of Title 16 of this Code, once all terms and conditions of any period of probation imposed pursuant to said Sections have been completed to the satisfaction of the Court and the defendant is discharged from probation. Nothing in this subsection shall prevent the dissemination of such information to any criminal justice agency.¹⁶

This was done to protect those persons who had successfully completed their PBJs. The purpose was to insure criminal record history which might be disseminated

¹⁵ 11 Del. C. § 8513(c).

¹⁶ 11 Del. C. § 8513(h).

under subsection (c) did not include persons who were arrested and undertook PBJ or first offender programs. It was done also to address a nettlesome problem of “data miners” searching for information involving persons who had completed their PBJs or first offender programs. The House Judiciary Committee, which crafted the expungement legislation, was very concerned about data miners and what could be done to address that concern.

The Legislature’s intent regarding expungement and PBJs and first offender programs is expressed in the synopsis to the 2008 expungement legislation:

This Act also will facilitate the rehabilitative efforts of defendants who resolved their cases by successful completion of Probation Before Judgment of the First Offenders Controlled Substances Diversion Program by prohibiting the State Bureau of Identification from including information about the arrest on the version of the defendant’s criminal history record that is released to persons or entities outside of the criminal justice system. The information will remain available to judges, prosecutors and the police. Expungement will be available after enough time has passed to permit enforcement of the time limits promulgated in the various first offender programs.

This synopsis also demonstrates that the Legislature knowingly tied the five year eligibility waiting period for expungement to the five year period in § 4218.

What is also presented here, therefore, is whether the three petitioners, and others similarly situated, are potentially to receive a benefit through expungement, unavailable to persons charge with identical violations of State law?

The Legislature carefully chose to end abuses of PBJs under the State statute and the then existing expungement law by linking the two waiting periods together. It also tied several pre-existing shorter waiting periods of different first offender drug and

diversion programs and eligibility for expungement.¹⁷ All of this shows an explicit and clear Legislative intent to recognize the need to tie together the various waiting periods and eligibility for expungement.

It would be utterly inconsistent that persons such as these petitioners could receive the additional benefit of an expungement which persons identically situated but who violated State statute could not enjoy. No such intention can be gleaned or extracted from the statutes creating the expungement procedure. There is even a suggestion of a constitutional issue, perhaps denial of equal protection, with such a scenario.

Further, such a scenario would elevate the benefits of a local ordinance over that of a state statute. This cannot be.

There is another part to the issue raised by these three petitions. Section 4378 refers to § 4218 and not to any local ordinances. That strongly suggests this Court lacks jurisdiction to entertain expungement petitions where the discharge was not under the State statute and where the underlying violation was not of a State law. After all, the financial obligations imposed by the State statute flow to the State, but the financial obligations imposed for a local PBJ do not.

Conclusion

For the reasons stated herein the Recommendations of the Commissioner to deny the three petitions for expungement are accepted for the reasons stated therein and as modified in this opinion.

¹⁷ 11 Del. C. § 4378 (b)

/s/ Jerome O. Herlihy _____
J.