

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: ***John W. Truluck v. State of Delaware***
C.A. No. 04X-10-017 RRC

Submitted: January 28, 2005
Decided: April 13, 2005

On Petitioner's Motion for Expungement of Criminal Record. **DENIED.**

Dear Counsel:

Currently before this Court is a petition for expungement of criminal record filed by John W. Truluck ("Petitioner") pursuant to 11 *Del. C.* §4372.

The State of Delaware (“the State”) opposes this petition.

Petitioner was arrested in February 1990 and charged with a violation of 21 *Del. C.* §4177(a)(1), “Driving Under the Influence of Alcohol”.

Petitioner appeared before a magistrate in Justice of the Peace Court 11, at which time Petitioner plead guilty and elected to enter the First Offender Program (“FOP”) pursuant to 21 *Del. C.* §4177B. Petitioner successfully completed the requirements of the FOP and the Court discharged Petitioner from probation and further proceedings against Petitioner were dismissed. Petitioner has not accrued any additional criminal arrests, nor has he been convicted of any crimes as defined in Title 11 or Title 21 of the Delaware Code since 1990.

The Parties Contentions

Petitioner argues that records relating to his arrest for his violation of §4177 should be expunged because he successfully completed the FOP for “Driving Under the Influence”. Petitioner contends that because a successful completion of the FOP results in a “discharge” from probation and dismissal without an entry of judgment of guilt, he should be treated in the same manner as a criminal defendant whose criminal action has been terminated in favor of the defendant and thereby be eligible for expungement

pursuant to 11 *Del. C.* §4372.¹ Petitioner argues that “the underlying rationale of [11 *Del. C.* §4218 and 21 *Del. C.* §4177B, two somewhat similar statutes] giv[es] first time offenders a chance to complete [a] rehabilitation program in order to have their charges dismissed, is the same.”² Petitioner also argues that “[i]t would be illogical to assume that the [General Assembly] intended” that individuals charged with drug offenses, and who successfully complete the “First Offenders Controlled Substance Diversion Program,” (a statute similar to 11 *Del. C.* §4218) should be eligible for expungement under §4372 while denying the same privilege to individuals charged with a DUI offense.³ Petitioner has conceded, however, that this Court would still be “left with the discretion of whether or not to grant the expungement based on the standard set forth in 11 *Del. C.* §4373.”⁴

Petitioner, replying to the State’s argument that expungement would defeat the purposes of sentencing under 21 *Del. C.* §4177(d), asserts that

¹ 11 *Del. C.* §4372: Termination of criminal action in favor of accused

(a) If a person is charged with the commission of a crime and

(1) Is acquitted; or

(2) A nolle prosequi is taken, or the charge is otherwise dismissed, the person may file a petition setting forth the relevant facts and requesting expungement of the police records, and the court records relating to the charge.

² Petitioner’s reply at 3-4.

³ Petitioner’s Reply at 5.

⁴ State’s Supp. Reply at 6.

applying §4177(d)(4)⁵ would be an improper ex post facto violation of Article I, §9 & 10 of the United States Constitution.⁶ Petitioner further argues that applying §4177(d)(4) would be a due process violation under Article I, §7 of the Constitution of the State of Delaware and the 5th Amendment of the United States Constitution.⁷

The State responds that an expungement of Petitioner’s arrest record and attendant court proceedings would frustrate the intent of the DUI sentencing statute (21 *Del. C.* §4471(d)) because all prior DUI offenses, including the “First Offense Election,” are used to determine enhanced sentencing under the statute. The State argues that, unlike the “Probation Before Judgment” statute and the “First Offenders Controlled Substance Diversion Program” statute, the FOP contemplates that the offense subject to the FOP dismissal may nevertheless count as a prior offense in later DUI proceedings.⁸ The State contends that there is no ex post facto violation because Art. I, §§9 and 10 applies to retroactive penal statutes that

⁵ §4177(d)(4) states that “[w]hoever is convicted of a violation of subsection (a) of this section shall . . . For a fourth or subsequent offense occurring any time after 3 prior offenses, be guilty of a class E felony.”

⁶ Petitioner’s Reply at 6.

⁷ Petitioner’s Reply at 6.

⁸ State’s Memorandum Response at 4-5.

disadvantage a defendant.⁹ The State argues that Delaware courts have “consistently held that the DUI sentencing statute . . . is not a violation of the ex post facto clause.”¹⁰ The State further argues that Petitioner does not have standing to allege an ex post facto violation since he is not now before the Court being sentenced on a subsequent DUI offense.¹¹

The Issue in This Case

The issue before this Court is whether Petitioner is eligible to have records relating to his 1990 DUI arrest and subsequent FOP proceedings expunged pursuant to 11 *Del. C.* §4372 when Petitioner has successfully complete the “First Offenders Program” under 21 *Del. C.* §7177B. For the reasons stated below, Petitioner is not eligible for expungement under 11 *Del. C.* §4372 and his petition for expungement is **DENIED**.¹²

⁹ State’s Memorandum Response at 2.

¹⁰ State’s Memorandum Response at 2. *See Roberts v. State*, 494 A.2d 156 (Del. 2002) (holding that “the mandatory sentencing provision of the statute [21 *Del. C.* §4177(d)(2) is not an *ex post facto* law . . . since the enhanced punishment could be invoked only after a second offense, and, in this case, the second offense took place after the statute had been amended’); *State v. Green*, 1996 Del. Super. LEXIS 104(holding that “Delaware Supreme Court and other Courts have consistently held that such statutes [as 21 *Del. C.* §4177(d)] do not violate the *ex post facto* clause, even in cases where one of the predicate offenses occurred prior to the enactment of the statute’).

¹¹ State’s Memorandum Response at B.

¹² This Court holds that Petitioner’s ex post facto and due process claims, to the extent

Discussion

Petitioner, a correctional officer, apparently desires to erase arrest records of what he has called a “poor judgment exercised during youth,” and has represented that he is pursuing this action to promote his wish for a “career in law enforcement.”¹³ The purpose, presumably, of the FOP is to allow individuals who drove while under the influence of alcohol and or drugs to avoid the stigma of a conviction and possible jail time, provided that they successfully complete the program and, most importantly, do not commit a subsequent offense pursuant to 21 *Del. C.* §4177. The tiered sentencing structure of the DUI statute acts as both a warning to first time offenders and an enhanced punishment for repeat offenders. Because a prior offense, including an offense disposed under the FOP, must be considered under the DUI sentencing statute, the two statutes must be read together.

It is not for this Court to read into a statute wording that is not there,

that these claims have been raised, to have been abandoned. Petitioner has made only conclusory statements to the effect that applying §4177(d)(4) would be a constitutional violation under the ex post facto clause of the United States Constitution and a due process violation under the Delaware State Constitution and the United States Constitution without providing any case law or even secondary sources to support these arguments. *See Freeman v. State*, 705 A.2d 243 (Del. 1998) (holding that “[t]o the extent that the defendant has not briefed the other claims raised in his . . . motion and later filings . . . those claims are deemed waived and abandoned and will not be addressed by this Court”).

¹³ Petitioner’s Reply at 4-5.

or to disregard the clear intent of a statute. The Delaware Supreme Court has held that “the fundamental rule of statutory construction [is] that all statutes must be read as a whole and all words must be given effect. [Citation omitted.] Furthermore, any interpretation of a statute must give full effect to all of the pertinent statutory language and produce the most consistent, harmonious result.”¹⁴ The Supreme Court has also stated that

[t]he goal of statutory construction is to determine and give effect to legislative intent. If a statute is unambiguous, there is no need for judicial interpretation, and the plain meaning of the statutory language controls. If a statute is ambiguous, it should be construed in a way that will promote its apparent purpose and harmonize with other statutes.¹⁵

“In the construction of a statute,” the Supreme Court “has established as its standard the search for legislative intent . . . [and] [w]here the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls.”¹⁶ This Court finds that 21 *Del. C.* §4471B is not ambiguous and should be read by this Court to give meaning to the intent of the General Assembly.

¹⁴ *Williams v. State*, 818 A.2d 906, 912 (Del. 2002).

¹⁵ *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1998).

¹⁶ *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989).

While the General Assembly has not spoken explicitly to the issue in this case of whether arrest records should be potentially expunged in FOP cases, the language of the FOP statute indicates a legislative intention that those records should not be expunged. The General Assembly included a successful completion of the FOP as a “prior or previous” offense in terms of the DUI sentencing statute.¹⁷ The inclusion of a FOP offense in the enhanced sentencing statute indicates a legislative intent that the arrest and surrounding court proceedings should not be potentially expunged pursuant to 11 *Del. C. Ch. 43* because such expungement would frustrate the purpose of the DUI sentencing statute. Additionally, upon successful completion of the FOP, 21 *Del. C. §4177B(c)* requires the Court to “submit to the Division of Motor Vehicles a written report specifying the name of the person and the nature of the proceedings against the person which report shall be retained by the Division of Motor Vehicles for further proceedings, if required,”¹⁸ which is further evidence of the General Assembly’s intent that arrest and surrounding court proceedings would not be potentially expunged for

¹⁷ 21 *Del. C. §4177B(e)(1)(c)* Prior or previous conviction or offense . . . Participation in a course of instruction or program of rehabilitation or education pursuant to §4175(b), §4177 or §4177B of this title.

¹⁸ 21 *Del. C. §4177B(c)*.

persons who successfully completed the FOP for a Driving Under the Influence offense.

While Petitioner is correct that §4471B does not define the term “discharge” in the statute, this Court does not agree with Petitioner’s reading of the term “discharge” to mean that he is eligible for expungement.¹⁹ Petitioner relies on only one of seven definitions for “discharge” found in Black’s Law Dictionary.²⁰ However, another definition of “discharge” found in Black’s is “[t]he release of a prisoner from confinement.”²¹ Neither definition from Black’s is entirely on point because a defendant under §4177B is neither released from confinement or the case dismissed in the traditional sense. The American Heritage Dictionary gives one definition of “discharge” as “to release or dismiss: *discharge a patient; discharge an employee.*”²² In *Ryan v. State* this Court used “discharge” to mean “release from probation.”²³ Because §4471B(c) reads “[u]pon fulfillment of the

¹⁹ Petitioner argues that “discharge” should be defined in §4177B(c) as “the dismissal of a case.” Petitioner’s Reply at 2.

²⁰ Petitioner’s Reply at 2, citing Black’s Law Dictionary, 7th ed. (1999).

²¹ Black’s Law Dictionary, Abridged 7th ed. (1999).

²² American Heritage Dictionary, 243, 3rd ed. (1994).

²³ *Ryan v. State*, 791 A.2d 742, 744 (Del. 2002) (holding that that a person who is discharged from probation before judgment pursuant to 11 *Del. C.* §4218 is eligible to seek expungement pursuant to 11 *Del. C.* §4372).

terms and conditions of probation . . . the court shall discharge the person,” this Court finds that “discharge” refers to the release of the defendant/probationer from his or her probation pursuant to a successful completion of the terms and conditions of §4471B.

Allowing an individual to potentially repeatedly become a “first offender” by successfully completing a first offenders program and then having his or her record expunged would render the concept of a first offender program meaningless. In *Tusio*, a case holding that arrest records expungement was potentially available to a person who had successfully completed a first offenders program for a Title 16 drug offense, this Court

note[d] that expungement is available for drug arrest records to persons who admit guilt and participate in the First Offender's Program (16 Del. C. § 4764) or to persons who admit guilt in an "Attorney General's Probation" agreement whereby drug charges are also *nolle prossed*. The Court sees no reason why participants in the Drug Diversion program who stipulate to facts which are tantamount to an admission of guilt and who also receive a *nolle prosequi* of the charges, should not be afforded the same opportunity for expungement of their arrest record. Therefore, the Court finds that the Petitioner is presumptively eligible for expungement of his arrest record under 11 Del. C. §4372.²⁴

²⁴ *Tusio v. State*, 1997 Del. Super. LEXIS 132 *4-5.

The issue before the *Tusio* court, however, was whether defendants who had been processed by the Delaware Drug Court pursuant to 16 *Del. C.* §4764 were eligible for expungement under §4372. Although *Tusio* allowed potential expungement of arrest records after successful completion of the “First Offenders Controlled Substance Diversion Program,” it does not follow that *Tusio* is precedent for petitions for expungement of arrest records of successful DUI first offenders under §4177B because of the interplay between §4177B and the DUI sentencing statute, §4177(d).

This Court holds that the FOP cannot be analogized with either the “Probation Before Judgment” statute or the “First Offenders Controlled Substance Diversion Program.” The “Probation Before Judgment” statute specifically states that “[t]his section may not be substituted for . . . Section 4177B of Title 21. First offenders; election in lieu of trial,” which indicates the clear intent of the General Assembly not to treat defendants charged with DUI offenses who take advantage of §4177B the same as defendants who accept probation under §4218.²⁵ In addition, the language of §4218 contemplates that successful completion of the probation will be “the final disposition of the matter.”²⁶ In *Ryan v. State*, this Court held that a

²⁵ 11 *Del. C.* § 4218(b)(4).

²⁶ 11 *Del. C.* § 4218(f).

defendant who had successfully completed the “Probation Before Judgment” program was eligible for expungement because “[t]he successful completion of probation before judgment . . . ‘blot[s] out the existence of guilt.’”²⁷ However, successful completion of the FOP pursuant to 21 *Del. C.* §4471B is not a “the final disposition of the matter” and does not “blot out the existence of guilt” because the subject offense will be used for purposes of enhanced sentencing under 21 *Del. C.* §4477.

Similarly, the “Controlled Substance Diversion Program” is similar to the FOP under §4177B in that a first time offender can elect a program of probation, along with other conditions, in lieu of trial. However, the General Assembly specifically stated that successful completion of the Controlled Substance Diversion Program “is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.”²⁸ Notably, the FOP for Driving Under the Influence does not contain such or similar language.

²⁷ *Ryan v. State*, 791 A.2d 742, 744 (Del. 2002) (holding that that a person who is discharged from probation before judgment pursuant to 11 *Del. C.* §4218 is eligible to seek expungement pursuant to 11 *Del. C.* §4372).

²⁸ 16 *Del. C.* §4764(d).

The FOP statute does not contemplate that a successful participant would be eligible for expungement of his or her record. Other decisions of this Court have, albeit without analysis, denied petitions for expungement of arrest records in connection with FOP records for Driving Under the Influence offenses.²⁹ For the foregoing reasons, Petitioner's motion for expungement is **DENIED**.

Very truly yours,

cc: Prothonotary

²⁹ See, e.g., *Breckin v. State*, Del. Super., C.A. No. 02X-11-021, Silverman, J. (January 27, 2003), ORDER (holding that “the Court cannot expunge the record of an arrest that results in a conviction and [while] the First Offender Program [is not a conviction it] is [also] not a dismissal or a not guilty”); *Stephen R. Shenk v. State of Delaware*, Del. Super., C.A. No. 04X-04-055, Scott, J. (August 3, 2004), ORDER (denying petition for expungement), *William McCracken v. State of Delaware*, Del. Super., C.A. No. 04X-04-054, Scott, J. (August 3, 2004), ORDER (denying petition for expungement).