

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 0943

STATE OF LOUISIANA

VERSUS

THOMAS RUSSELL

Judgment Rendered: JAN 15 2015

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Appealed from the Twenty-Third Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Trial Court No. 11,490
Honorable Ralph Tureau, Judge

* * * * *

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BEFORE: McDONALD, WELCH, AND CRAIN, JJ.

Welch J. concurs without reasons
Crain J. concurs and assigns reasons

McDONALD, J.

The State of Louisiana, through the Department of Public Safety and Corrections, Public Safety Services, Office of State Police, Bureau of Criminal Identification and Information (Bureau), appeals a judgment of the trial court partially granting mandamus relief as prayed for by the defendant, Thomas Russell, and partially granting the Bureau's motion to annul that judgment. We reverse the judgment in part.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2000, the defendant, Thomas Russell, pled guilty to second degree battery and was sentenced to five years imprisonment at hard labor, which sentence was suspended on certain conditions, including payment of fines and costs, and five years of supervised probation. (R. 53, 57-58) In 2007, pursuant to the defendant's motion, the trial court amended his sentence to include the benefits of LSA-C.Cr.P. art. 893. (R. 15, 59) The defendant then filed a motion to set aside the conviction and dismiss the prosecution against him pursuant to LSA-C.Cr.P. art. 893. (R. 66) The trial court granted the defendant's motion, ordering that the defendant's conviction be set aside and the prosecution against him be dismissed pursuant to LSA-C.Cr.P. art. 893, and further ordering the destruction of any record of the defendant's conviction by all agencies and law enforcement officers. The trial court signed a judgment to that effect on November 13, 2007. No appeal was taken.

By letter dated March 18, 2009, the Bureau informed the court that it could not "fully process the [court's] expungement order . . . because . . . [t]he offense sought to be expunged is a crime of violence as defined in [LSA-R.S.] 14:2(B) and is ineligible for expungement under [LSA-R.S.] 44:9 and [LSA-C.Cr.P. art.] 893." (R. 70) The defendant petitioned the court for a writ of mandamus to compel Colonel Michael D. Edmonson, Superintendent of the Office of State Police, as the custodian of records, to destroy the record of his conviction in compliance with the trial court's November 13, 2007 judgment. The Bureau then filed a motion to annul the November 13, 2007 judgment, claiming it was a nullity, because the trial court lacked subject matter jurisdiction to: (1) set aside and dismiss the defendant's conviction under LSA-C.Cr.P.

art. 893, and (2) order the destruction of the defendant's arrest records. By judgment signed February 21, 2014, the trial court partially granted the defendant's petition for writ of mandamus and ordered that his conviction be set aside and dismissed pursuant to LSA-Cr.P. art. 893(1)(a)(ii), and partially granted the Bureau's motion to annul, clarifying that the trial court was not ordering the State to destroy the records of the defendant's conviction because to do so would compromise the integrity of the Bureau's records and the Bureau as a whole.

The Bureau now appeals, contending the trial court erred in ordering that the defendant's conviction for second degree battery be set aside and dismissed.

DISCUSSION

The February 21, 2014 judgment, issued pursuant to a petition for writ of mandamus directed to the Bureau, ordered that the defendant's conviction be set aside and dismissed pursuant to LSA-Cr.P. art. 893. As applicable in this case, mandamus is a writ directing a public officer to perform a ministerial duty required by law. LSA-C.C.P. arts. 3861 and 3863. A ministerial duty is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law. **Hoag v. State**, 04-0857 (La. 12/1/04), 889 So.2d 1019, 1024. Pertinent to this case, the Bureau has the duty to establish and maintain a central repository of criminal history record information. LSA-R.S. 15:578(A). As such, the Bureau has an interest in judgments ordering the expungement or destruction of criminal records, as those orders directly impinge on the Bureau's duty to maintain records. See **State v. Taylor**, 11-0373 (La. App. 1 Cir. 3/23/12), 91 So.3d 1065, 1067, n.2; **State v. Daniel**, 39,633 (La. App. 2 Cir. 5/25/05), 903 So.2d 644, 648-49. However, the Bureau does not have the legal duty, nor the authority, to set aside and dismiss convictions. See LSA-Cr.P. art. 893(E).

Mandamus will not issue commanding a public officer to do that which the law does not authorize him to do. See **State ex rel. Fitzpatrick v. Grace**, 187 La. 1028, 1037, 175 So. 656, 659 (1937); see also **Aberta, Inc. v. Atkins**, 12-0061 (La. 5/25/12), 89 So.3d 1161, 1163 (per curiam). The February 21, 2014 judgment does not order the Bureau to expunge or destroy a criminal record. Rather, it orders the

Bureau to set aside and dismiss the defendant's conviction, a task the Bureau has no authority to do. See LSA-C.Cr.P. art. 893(E). Thus, the trial court improperly ordered the Bureau to set aside and dismiss Mr. Russell's conviction, because such is not part of the Bureau's ministerial duties. Accordingly, we will reverse the judgment in part.

We note that, on appeal, the Bureau does not challenge the trial court's partial grant of its motion to annul and declaration that the Bureau was not being ordered to destroy the records of Mr. Russell's conviction, as this ruling is in the Bureau's favor. Thus, that portion of the February 21, 2014 judgment stands.

CONCLUSION

For reasons stated, that part of the February 21, 2014 judgment partially granting a writ of mandamus directed to the Bureau, and ordering the set aside and dismissal of Mr. Russell's conviction pursuant to LSA-C.Cr.P. art 893, is reversed. Costs in the amount of \$123.50 are to be equally shared by the Department of Public Safety and Corrections, Public Safety Services, Office of State Police, Bureau of Criminal Identification and Information, and Thomas Russell.

REVERSED IN PART.

STATE OF LOUISIANA

FIRST CIRCUIT

VERSUS

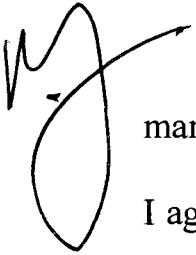
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CRAIN, J., concurring.



To the extent that the February 21, 2014 judgment issues a writ of mandamus ordering the Bureau to set aside and dismiss the defendant's conviction, I agree that it should be reversed. The Bureau has no legal duty or authority to set aside a conviction, and therefore cannot be ordered to do so by a writ of mandamus.

I do not believe, however, that reversal of the writ of mandamus in the February 21, 2014 judgment resolves all of the issues raised in this appeal. The Bureau additionally seeks appellate review of the trial court's denial of its motion to annul that portion of trial court's November 13, 2007 judgment setting aside and dismissing the defendant's conviction pursuant to Louisiana Code of Criminal Procedure article 893.¹ Article 893 authorizes the court to set aside and dismiss a criminal conviction, in certain circumstances, as part of the sentencing phase of the criminal prosecution. Thereafter, the defendant may follow appropriate procedures to have his conviction expunged. *See* La. Code Crim. Pro. art. 893E3(d).

The Bureau is charged with establishing and maintaining a central repository of criminal history record information, and therefore has a real and actual interest in maintaining the integrity of the public records relating to criminal offenses. *See*

¹ In its motion to annul, the Bureau asserted the nullity of the entire November 13, 2007 judgment, including its order that the defendant's conviction be set aside and dismissed. The trial court granted the motion in part and held that the records will not be destroyed, but the February 21, 2014 judgment was silent as to the Bureau's challenge to that portion of the November 13, 2007 judgment setting aside and dismissing the conviction. Silence in a judgment as to any issue that was placed before the court is deemed a rejection of that demand or issue. *Hooper v. Wisteria Lakes Subdivision*, 13-0050 (La. App. 1 Cir. 9/13/13), 135 So. 3d 9, 16 n.14.

La. R.S. 15:578A; *State v. Taylor*, 11-0373 (La. App. 1 Cir. 3/23/12), 91 So. 3d 1065, 1067 n.2. The Bureau has standing to challenge judgments ordering the *destruction* of criminal records, as those orders directly impinge on the Bureau's duty to maintain records. See *State v. Taylor*, 14-0217 (La. App. 4 Cir. 7/23/14), 146 So. 3d 862, 865; *Taylor*, 91 So. 3d at 1067; *State v. Daniel*, 39,633 (La. App. 2 Cir. 5/25/05), 903 So. 2d 644, 649; accord *State v. Labauve*, 05-1273 (La. App. 1 Cir. 9/20/06), 943 So. 2d 1186. In this case, the trial court has nullified its order that the records of the defendant's conviction be destroyed. While the order setting aside and dismissing the conviction may be a prerequisite to the additional steps of obtaining an order of expungement or an order that records be destroyed, the order setting aside and dismissing the conviction does not, standing alone, directly impinge on the Bureau's duty to maintain records.² Consequently, the Bureau lacks standing to challenge the order setting aside and dismissing the conviction.

² Since there has been no order of expungement in this case, the issue of the Bureau's standing to challenge an order of expungement is not at issue.