

PMC by FR
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STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2020 CA 0066

STATE OF LOUISIANA

VERSUS

MARTY GREEN

Judgment Rendered:

DEC 30 2020

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. 06-14-0911

Honorable Bonnie Jackson, Judge Presiding

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BEFORE: GUIDRY, McCLENDON AND LANIER, JJ.

Guidry, J. Concurs.

McCLENDON, J.

The State of Louisiana, through the Department of Public Safety and Corrections Bureau of Criminal Identification and Information, the East Baton Rouge Parish District Attorney's Office, and the Baton Rouge Police Department appeal the trial court's judgment granting a motion to expunge defendant's record of arrest and conviction of attempted first degree feticide. For the following reasons, we reverse the judgment of the trial court.

FACTUAL AND PROCEDURAL HISTORY

On June 24, 2014, Marty Green was charged by felony bill of information with attempted first degree feticide, in violation of LSA-R.S. 14:32.6 and 14:27, for an offense committed on December 23, 2013. On August 7, 2014, Green pled not guilty. On January 4, 2016, the charge was amended to second degree battery in violation of LSA-R.S. 14:34.1. Green withdrew his former plea of not guilty to the original charge of attempted first degree feticide and pled guilty to the amended charge of second degree battery.

On April 5, 2016, the matter came before the trial court for sentencing. With no objection from the State, Green withdrew his former plea of guilty to the amended charge of second degree battery and entered a plea of guilty to the original charge of attempted first degree feticide. Pursuant to LSA-C.Cr.P. art. 893, the trial court deferred the imposition of sentence and placed Green on active supervised probation for a period of two years, with special conditions. Green's probation was terminated early on January 17, 2018. On November 14, 2018, the conviction was set aside and the prosecution was dismissed in accordance with LSA-R.S. art. 893.

Green filed a motion to expunge his record of arrest and conviction of attempted first degree feticide on February 22, 2019 (motion to expunge). The State of Louisiana, through the Department of Public Safety and Corrections Bureau of Criminal Identification and Information (DPSC), the East Baton Rouge Parish District Attorney's Office (District Attorney's Office), and the Baton Rouge Police Department (BRPD) (sometimes collectively "appellants") each filed an opposition to Green's motion to expunge. Appellants argued that the record of Green's arrest and conviction are

ineligible for expungement, because LSA-C.Cr.P. art. 978(B) precludes expungement of crimes of violence as defined by or enumerated in LSA-R.S. 14:2(B), and attempted first degree feticide constitutes a crime of violence pursuant to the provisions of LSA-R.S. 14:2(B). In response, Green argued that he is entitled to expungement because LSA-R.S. 14:2(B) did not specifically enumerate attempted first degree feticide as a crime of violence at the time of his conviction.

Following a contradictory hearing on September 26, 2019, the trial court granted the motion to expunge. A judgment to that effect was signed on October 4, 2019. The DPSC, the District Attorney's Office, and the BRPD have appealed.

DISCUSSION

Appellants' sole assignment of error is that the trial court erred in granting Green's motion to expunge his record of arrest and conviction of attempted first degree feticide. Expungement matters are reviewed by this court under its civil appellate jurisdiction. **State v. A.R.W.**, 2017-1162 (La.App. 1 Cir. 2/16/18), 242 So.3d 648, 651, reh'g denied (Mar. 2, 2018), reh'g denied (Apr. 5, 2018).

The law governing expungement is set forth in LSA-C.Cr.P. art. 971, *et seq.* Expungement is defined to mean removal of a record from public access, but it does not mean destruction of the record. An expunged record is confidential but remains available for use by law enforcement agencies and other specified persons and agencies. **State v. A.R.W.**, 242 So.3d at 650-51. Only certain specified criminal arrest and conviction records may be expunged under the authority of LSA-C.Cr.P. art. 971, *et seq.* Criminal records that do not meet the particular circumstances described in the statute are not eligible for expungement. **State v. Gerchow**, 2009-1055 (La.App. 1 Cir. 3/11/10), 36 So.3d 304, 305-06.

The proper interpretation of a statute is a question of law. **First Transit, Inc. v. Barfield**, 2014-0596 (La.App. 1 Cir. 11/13/14), 177 So.3d 333, 338, writ denied, 2014-2587 (La. 2/27/15), 159 So.3d 1072. Questions of law are reviewed *de novo*, with the judgment rendered "on the record, without deference to the legal conclusions of the tribunals below." **Wooley v. Lucksinger**, 2009-0571 (La. 4/1/11), 61 So.3d 507, 554. Legislation is the solemn expression of the legislative will; thus, the interpretation of

legislation is primarily the search for the legislative intent. **Cat's Meow, Inc. v. City of New Orleans Through Dept of Finance**, 98-0601 (La. 10/20/98), 720 So.2d 1186, 1198. The starting point in the interpretation of any statute is the language of the statute itself. **Id.**

As stated above, attempted first degree feticide is a felony offense in violation of LSA-R.S. 14:32.6 and 14:27. Louisiana Code of Criminal Procedure article 978(B) governs the expungement of arrests and convictions for felony offenses, and provides, in, pertinent part:

No expungement shall be granted nor shall a person be permitted to file a motion to expunge the record of arrest and conviction of a felony offense if the person was convicted of the commission or attempted commission of any of the following offenses:

(1) A crime of violence as defined by or enumerated in R.S. 14:2(B), unless otherwise authorized in Paragraph E of this Article.

The plain language of LSA-C.Cr.P. art. 978 unambiguously precludes expungement of the record of arrest and conviction for a felony offense if the offender is convicted of the commission or attempted commission of a crime of violence, "as defined by or enumerated in R.S. 14:2(B)," unless LSA-C.Cr.P. art. 978(E) specifically provides otherwise.¹ Article 978(E) is not invoked in this matter.

Louisiana Revised Statute 14:2(B) sets forth both a general definition of the term "crime of violence,"² and a list of crimes that are explicitly included and identified as crimes of violence. First degree feticide was not specifically enumerated as a crime of violence on April 5, 2016, when Green pled guilty. However, La. Acts 2018, No. 674,

¹ Louisiana Code of Criminal Procedure article 978(E)(1) authorizes the expungement of certain enumerated crimes of violence, if particular circumstances are met, and provides in pertinent part:

Notwithstanding any other provision of law to the contrary, after a contradictory hearing, the court may order the expungement of the arrest and conviction records of a person pertaining to a conviction of aggravated battery, second degree battery, aggravated criminal damage to property, simple robbery, purse snatching, or illegal use of weapons or dangerous instrumentalities if all of the following conditions are proven by the petitioner...

Louisiana Code of Criminal Procedure article 978(E) does not authorize the expungement of attempted first degree feticide. Therefore, this provision is inapplicable to the matter before us.

² At all pertinent times herein, LSA-R.S. 14:2(B) has provided a general definition of the term "crime of violence" as follows:

In this Code, "crime of violence" means an offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense or an offense that involves the possession or use of a dangerous weapon.

enacted LSA-R.S. 14:2(B)(52) and thereby added first degree feticide to the specifically enumerated list of crimes of violence effective June 1, 2018. Thus, attempted first degree feticide was a specifically enumerated crime of violence under LSA-R.S. 14:2(B)(52), ineligible for expungement pursuant to LSA-Cr.P. art. 978(B), at the time Green filed his motion to expunge on February 22, 2019, and at the time the trial court granted the motion to expunge on October 4, 2019. Said version of LSA-R.S. 14:2(B)(52) remains in effect at present.

Green correctly points out that LSA-R.S. 14:2(B) did not specifically enumerate attempted first degree feticide as a crime of violence at the time he pled guilty to the charge, or at the time the prosecution was dismissed. Further, Green argues that attempted first degree feticide does not fall within the general definition of a crime of violence. Green posits that it would be improper to deny his expungement based on the recent change in enumerated violent offenses, and that his motion to expunge should be considered under the law in effect at the time he pled guilty to the charge or when the prosecution was dismissed. We disagree.

The Louisiana Supreme Court in **State v. Cardenas**, 2013-2982 (La. 7/1/14), 145 So.3d 362, 368, considered the propriety of an expungement based on the law in effect at the time the trial court granted the expungement, recognizing that the latest expression of legislative will controls. **Id.** at 368-69. The **Cardenas** Court also acknowledged that changes to the law would be effective a month from their decision, but expressed no opinion as to “whether [Cardenas would] be entitled to expungement of his record of arrest and conviction for domestic abuse battery under [that] latest expression of legislative will.” **Id.** at 369. Moreover, additional decisions by the Louisiana Supreme Court and this Court have indicated that a motion to expunge is subject to the law in effect at the time the motion is considered. See **State v. Allah**, 2017-0785 (La. 1/9/18), 232 So.3d 554 (“[D]efendant was not entitled to an expungement of these convictions under the provisions in effect at the time he filed his motion, though he may be in the future”); **State v. A.R.W.**, 242 So.3d at 654; **State v. Gerchow**, 2009-1055 (La.App. 1 Cir. 3/11/10), 36 So.3d 304, 307. This

jurisprudence would indicate that Green's motion to expunge is subject to the law in effect at the time the motion to expunge was filed or ruled on.

The plain language of LSA-C.Cr.P. art. 978(B) precludes expungement of the attempted commission of a crime of violence as enumerated by LSA-R.S. 14:2(B). Attempted first degree feticide was a specifically enumerated crime of violence under LSA-R.S. 14:2(B)(52), ineligible for expungement pursuant to LSA-C.Cr.P. art. 978(B), at the time Green filed his motion to expunge on February 22, 2019, and at the time the trial court granted the motion to expunge on October 4, 2019.³ Consequently, Green's conviction is ineligible for expungement pursuant to LSA-C.Cr.P. art. 978(B)(52) and LSA-R.S. 14:2(B). The trial court erred in granting Green's motion to expunge his conviction of attempted first degree feticide.⁴

CONCLUSION

For the foregoing reasons, we reverse the October 4, 2019 judgment of the trial court, which granted Green's motion to expunge the record of his arrest and conviction of attempted first degree feticide. Total costs of this appeal are assessed against Green.

REVERSED.

³ We express no opinion regarding which version of the statute controls in the event the law is amended after the motion to expunge is filed and before expungement is granted or denied.

⁴ The record, as well as Green's appellate brief, appear to reflect that Green pled guilty to attempted first degree feticide because he believed it was not a crime of violence and was therefore eligible for expungement. This is consistent with statements made by both the trial court and Green's attorney during the hearing on the motion to expunge. Additionally, counsel for the District Attorney's Office stated at the hearing that he "[didn't] know what was and was not contemplated at the time of the plea" and "I don't think anybody foresaw the potential expungeability or lack of expungeability of what they were pleading to at the time." A guilty plea is constitutionally infirm when a defendant is induced to enter that plea by a plea bargain or by what he justifiably believes was a plea bargain, and that bargain is not kept. In such a case a defendant has been denied due process of law because the plea was not given freely and knowingly. **State v. Dixon**, 449 So.2d 463, 464 (La.1984). However, Green never presented the trial court with a motion to withdraw his guilty plea. As such, the claim is not properly before this court. See generally, LSA-C.Cr.P. art. 841; **State v. Houston**, 2019-0615 (La.App. 1 Cir. 11/15/19), 291 So.3d 223, 226.