

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

JAMES D. ANDERSON II

Appellant

No. 1866 MDA 2013

Appeal from the Order September 18, 2013
In the Court of Common Pleas of York County
Criminal Division at No(s): CP-67-CR-0004418-2001

BEFORE: PANELLA, J., DONOHUE, J., and MUNDY, J.

MEMORANDUM BY PANELLA, J.:

FILED JUNE 26, 2014

Appellant, James D. Anderson II, appeals from the order denying his petition to expunge arrest records, entered by the Honorable John H. Chronister, Court of Common Pleas of York County. After careful review, we affirm.

On July 9, 2001, the Commonwealth charged Anderson with one count of misdemeanor loitering and prowling, and one count of misdemeanor criminal trespass. On November 15, 2001, Anderson pled guilty to one count of summary harassment, and the Commonwealth *nolle prossed* the two misdemeanor charges.

On July 31, 2013, Anderson filed a petition to expunge the summary harassment charge pursuant to Pa.R.Crim.P., Rule 490. Anderson also requested that the court expunge the arrest records associated with the two

nolle prosequi misdemeanor charges. The trial court expunged the record of the summary harassment charge, but declined to expunge the arrest records for the misdemeanor charges. Anderson then filed this timely appeal.

On appeal, Anderson contends that the trial court erred in failing to expunge the misdemeanor arrest records. Our standard of review is well-settled:

The decision to grant or deny a request for expungement of an arrest record lies in the sound discretion of the trial judge, who must balance the competing interests of the petitioner and the Commonwealth. We review the decision of the trial court for an abuse of discretion.

Commonwealth v. A.M.R., 887 A.2d 1266, 1268 (Pa. Super. 2005) (citation omitted).

“In this Commonwealth, there exists the right to petition for expungement of a criminal arrest record. This right is an adjunct of due process and is not dependent upon express statutory authority.” ***Id.*** (citation omitted). In ***Commonwealth v. Wexler***, 494 Pa. 325, 431 A.2d 877 (1981), our Supreme Court held that the Commonwealth bears the burden of “proving why the arrest record should not be expunged” ***Id.***, 494 Pa. at 331, 431 A.2d at 880. The Court in ***Wexler*** also delineated the duty of the trial court in deciding whether to order expungement: “In determining whether justice requires expungement, the [c]ourt, in each particular case, must balance the individual’s right to be free from the harm

attendant to maintenance of the arrest record against the Commonwealth's interest in preserving such records." *Id.*, 494 Pa. at 329, 431 A.2d at 879.

The law requires that where a suspect is charged, but not convicted of charges it is the Commonwealth's burden to show at a hearing that expungement is improper. *See, e.g., Commonwealth v. D.M.*, 695 A.2d 770, 772 (Pa. 1997); *Wexler, supra*; *Commonwealth v. Waughtel*, 999 A.2d 623, 625 (Pa. Super. 2010); *Commonwealth v. Hanna*, 964 A.2d 923, 925 (Pa. Super. 2009); *Commonwealth v. Rodland*, 871 A.2d 216, 221 (Pa. Super. 2005); *A.M.R.*, 887 A.2d at 1269; *Commonwealth v. Maxwell*, 737 A.2d 1243 (Pa. Super. 1999); *Commonwealth v. G.C.*, 581 A.2d 221 (Pa. Super. 1990); *Commonwealth v. Chacker*, 467 A.2d 386 (Pa. Super. 1983).

In *A.M.R.*, we explained that [i]n *Wexler*, our Supreme Court set forth a non-exclusive list of the factors a court should examine in determining whether the Commonwealth has satisfied its burden of demonstrating why an arrest record should be retained:

These factors include [1] the strength of the Commonwealth's case against the petitioner, [2] the reasons the Commonwealth gives for wishing to retain the records, [3] the petitioner's age, criminal record, and employment history, [4] the length of time that has elapsed between the arrest and the petition to expunge, and [5] the specific adverse consequences the petitioner may endure should expunction be denied.

887 A.2d at 1269 (quoting *Wexler*, 494 Pa. at 330, 431 A.2d at 879).

(bracketed numbers in original). Where charges are dismissed pursuant to a negotiated plea agreement, a petitioner is not entitled to expunction of the

records of the dismissed charges. **See Commonwealth v. Lutz**, 788 A.2d 993 (Pa. Super. 2001).

Anderson argues that **Lutz** does not apply. First, Anderson contends that **Lutz** is not good law, citing to **Commonwealth v. Hanna**, 964 A.2d 923 (Pa. Super. 2009). The **Hanna** panel noted that “**Lutz** is arguably inconsistent with broad language from this Court and our Supreme Court, as well as the prevailing trend of our case law.” 964 A.2d at 928-929. However, the **Hanna** panel also acknowledged that **Lutz** is still controlling law until it is overruled by this Court *en banc* or by the Supreme Court of Pennsylvania. **See** 964 A.2d at 929. Furthermore, a subsequent panel of this Court applied **Lutz** mechanically to affirm the denial of a petition for expungement of charges withdrawn pursuant to a negotiated plea agreement. **See Commonwealth v. Waughtel**, 999 A.2d 623, 626-627 (Pa. Super. 2010). Anderson does not identify any controlling precedent that overrules **Lutz**, and our independent research has not revealed any such precedent. Thus, we conclude that we are still bound by **Lutz**.

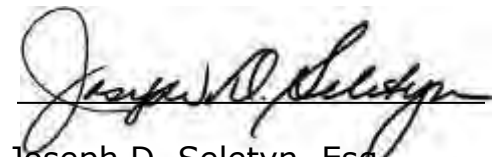
In the alternative, Anderson argues that **Lutz** is distinguishable from the present case. In **Lutz**, the defendant agreed to plead guilty to one count of aggravated assault in exchange for dismissal of all other pending charges. The **Lutz** panel found that expunction of the arrest records for the dismissed charges would leave no record for the basis of the plea agreement. **See** 788 A.2d at 1000. Furthermore, the **Lutz** panel concluded

that the defendant would receive more than he bargained for if the record of the dismissed charges was expunged. **See id.**

Here, Anderson argues, there is no need to preserve the basis of the plea agreement, as the conviction record for the summary charge he pled guilty to has been properly expunged. While we agree that **Lutz** is distinguishable on this basis, the alternative reasoning set forth in **Lutz**, that Anderson would receive more than he bargained for if expunction were granted, still applies to the instant case.¹ The trial court did not abuse its discretion in denying Anderson's petition.

Order affirmed. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/26/2014

¹ Judge Klein's concurring opinion in **Hanna** makes a strong argument that **Lutz** has the presumption backwards. "Absent something more, it should be assumed that there is no such agreement [to forgo expungement of arrest records.]" **Hanna**, 964 A.2d at 930. However, Judge Klein's concurrence does not overrule **Lutz**.