

RECORD IMPOUNDED

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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4829-10T2

IN THE MATTER OF THE
EXPUNGEMENT OF THE
CRIMINAL RECORD OF R.K.,

Petitioner-Appellant.

Argued December 19, 2011 - Decided February 28, 2012

Before Judges Sabatino and Ashrafi.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County.

Brandy T. Malfitano argued the cause for
appellant (Law Offices of Brian J. Neary,
attorneys; Ms. Malfitano, on the brief).

Vered Adoni, Assistant Prosecutor, argued
the cause for respondent State of New Jersey
(John L. Molinelli, Bergen County Prosecutor,
attorney; Ms. Adoni, on the brief).

PER CURIAM

Petitioner R.K. appeals from a May 25, 2011 order of the
Law Division denying with prejudice his petition to expunge all
records of his prior arrests and offenses. The Bergen County
Prosecutor's Office opposed the petition in its entirety but now
concedes on appeal that R.K.'s 2001 conviction for violating a
municipal loitering ordinance should be expunged. It continues

to oppose the appeal as to the more serious charges. We affirm the order of the Law Division in part and reverse it in part.

From 2001 to 2004, when petitioner was in his twenties, he was arrested and charged with offenses three times. In July 2001, he was charged with disorderly persons criminal mischief, N.J.S.A. 2C:17-3a(1), and loitering, a violation of a municipal ordinance. On August 7, 2001, he pleaded guilty in the Lyndhurst Township Municipal Court to the loitering charge and the criminal mischief charge was dismissed.

In July 2004, petitioner was arrested and charged with disorderly persons simple assault, N.J.S.A. 2C:12-1a. That charge was dismissed in September 2004.

In October 2004, petitioner was arrested and charged with three indictable crimes: robbery, N.J.S.A. 2C:15-1, aggravated sexual assault, N.J.S.A. 2C:14-2a(3), and impersonating a public servant or law enforcement officer, N.J.S.A. 2C:28-8. The State alleged that petitioner posed as a police officer, displayed handcuffs to two women in a motel room, and then sexually assaulted them and robbed them of money. In 2005, petitioner applied for admission into the Pretrial Intervention Program (PTI) under Rule 3:28. The PTI Director denied the application because of the seriousness of the charges. On petitioner's

appeal of the denial to the Law Division, the court directed that petitioner be admitted to PTI over the State's objection.

The State took no appeal from the court's decision. Instead, it entered into a plea agreement with petitioner in December 2005 by which he agreed to plead guilty to an accusation charging fourth-degree impersonation of a police officer, N.J.S.A. 2C:28-8b, and third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3a. In exchange, the prosecutor agreed to postpone sentencing so long as petitioner complied with the conditions of PTI supervision for a period of three years, after which the charges would be dismissed. Petitioner successfully completed the PTI program, and all the charges were dismissed by order of the court on December 17, 2008.

In July 2009, petitioner filed a petition to expunge all records of his arrests and charges under N.J.S.A. 2C:52-1 to -32. After some delays not relevant to this appeal, the matter was scheduled for a hearing in January 2011 pursuant to N.J.S.A. 2C:52-9. The State objected to expungement of the 2001 ordinance conviction and the record of the October 2004 indictable charges. The State contended it had a need to maintain records of petitioner's involvement in several offenses that culminated in the very serious charges of October 2004.

The Law Division considered the written submissions and heard argument on May 25, 2011. It denied the petition for expungement, citing N.J.S.A. 2C:52-14b and stating orally from the bench that its decision was based on the factual circumstances of the October 2004 charges and petitioner's other contacts with law enforcement authorities.

Petitioner appeals the court's ruling, arguing:

POINT I

THE COURT BELOW ERRED IN DENYING THE EXPUNGEMENT OF THE CRIMINAL RECORDS OF R.K.

A. R.K. IS ELIGIBLE FOR EXPUNGEMENT OF CRIMINAL RECORDS UNDER N.J.S.A. 2C:52-6 AND N.J.S.A. 2C:52-4.

B. THE STATE FAILED TO SHOW A NEED FOR THE AVAILABILITY OF THE RECORDS OUTWEIGHED R.K.'S INTEREST IN AN EXPUNGEMENT BY A PREPONDERANCE OF THE EVIDENCE.

C. THE TRIAL COURT'S RELIANCE ON R.K.'S PREVIOUS ARRESTS IN DENYING THE EXPUNGEMENT PETITION WAS MISPLACED AND INAPPROPRIATE IN THIS MATTER.

POINT II

N.J.S.A. 2C:52-6 PERMITS EXPUNGEMENT OF A CRIMINAL ARREST WHERE PETITIONER PLEAD[ED] GUILTY TO A SEPARATE MUNICIPAL ORDINANCE VIOLATION AND WHERE A DISORDERLY PERSONS CHARGE IS DISMISSED.

The State now concedes Point II and agrees that, in accordance with N.J.S.A. 2C:52-4 and -6, petitioner is entitled to expungement of the records of the 2001 arrest and loitering

conviction. Additionally, the State has made no argument regarding petitioner's July 2004 arrest for simple assault, later dismissed. Although the more serious October 2004 charges did not result in convictions and therefore are eligible for expungement under N.J.S.A. 2C:52-6, the State objects to expungement of those records under N.J.S.A. 2C:52-14b.

N.J.S.A. 2C:52-6 is entitled "Arrests not resulting in conviction" and provides that, with exceptions not relevant here, a petition for expungement may be filed any time after criminal charges have been dismissed, a defendant has been acquitted of the charges, or there has been another disposition of the charges without a conviction or finding of guilt.

N.J.S.A. 2C:52-14 is entitled "Grounds for denial of relief" and provides in relevant part:

A petition for expungement filed pursuant to this chapter shall be denied when:

. . . .

b. The need for the availability of the records outweighs the desirability of having a person freed from any disabilities as otherwise provided in this chapter. . . .
[T]he burden of asserting such grounds shall be on the objector

In In re Petition for Expungement of XYZ Corporation, 119 N.J. 416 (1990), the Supreme Court held that the applicable standard of proof for an objection under N.J.S.A. 2C:52-14b is

the preponderance of the evidence standard, not clear and convincing proof. Id. at 422-24 (rejecting the contrary holding of State v. R.E.C., 181 N.J. Super. 79, 83 (Law Div. 1981)).

Here, petitioner argues that the State did not meet the preponderance of the evidence standard and that the Law Division erred in denying his application simply on the ground that he had been charged with serious offenses. He contends he was not convicted of any offenses arising from his 2004 arrests and the prosecutor's argument for denial of his petition is contrary to our holding in In re J.N.G., 244 N.J. Super. 605, 610 (App. Div. 1990). The State responds that we should affirm the trial court's decision because it was not an abuse of discretion.

We are uncertain that the abuse of discretion standard of review applies in these circumstances. The State cites only an unpublished decision of this court applying that standard of review, and the Supreme Court has granted certification in that case. In re Pet. for Expungement of Kollman, 207 N.J. 189 (2011) (order granting certification).

In In re Ross, 400 N.J. Super. 117, 123-24 (App. Div. 2008), we recognized a legislative intent to narrow judicial discretion by enactment of the current expungement statutes, N.J.S.A. 2C:52-1 to -32. Cf. In re Appl. of Fontana, 146 N.J. Super. 264, 267 (App. Div. 1976) (under the prior expungement

statute, N.J.S.A. 2A:164-28, trial court had discretion to grant or deny expungement). Under our current statutes, if the State fails to prove its ground for objection by a preponderance of the evidence, and petitioner is otherwise eligible, the law presumes that the expungement will be granted. In re LoBasso, 423 N.J. Super. 475, 488 (App. Div. 2011); J.N.G., supra, 244 N.J. Super. at 610.

Nevertheless, N.J.S.A. 2C:52-14b leaves some room for case-by-case judgment as to whether "[t]he need for the availability of the records outweighs the desirability of having a person freed from any disabilities." Because exercise of judgment is implicated in that language, some level of discretion may be best left to the trial court because it is often in a better position than an appellate court to review the facts of an individual case. On the other hand, when the trial court has not conducted an evidentiary hearing, has no historical knowledge of the case through prior proceedings, and has relied instead on the same documentary record and argument of counsel that is available to us on appeal, a plenary standard of review might be more appropriate. In this case, there was no credibility determination or prior knowledge of the case that informed the trial court's decision to deny expungement. We have the same opportunity as the trial court did to review the

written submissions and arguments of counsel. Therefore, we will consider the trial court's decision de novo.

Our independent review of the record leads us to conclude that the petition was correctly denied at this time as to the October 2004 charges but that petitioner should not be precluded from reapplying for expungement in the future.

The expungement statutes explicitly provide guidance to the courts with respect to legislative intent and proper construction. N.J.S.A. 2C:52-32, entitled "Construction" states:

This chapter shall be construed with the primary objective of providing relief to the one-time offender who has led a life of rectitude and disassociated himself with unlawful activity, but not to create a system whereby periodic violators of the law or those who associate themselves with criminal activity have a regular means of expunging their police and criminal records.

In In re Expungement Petition of D.H., 204 N.J. 7, 17 (2010), the Court cited this provision as expressing the clear legislative objective of the expungement statutes. "The purpose of the expungement statute is to give a one-time offender a second chance, so that [he or] she can carry on [his or] her life as if criminal proceedings had never occurred." In re L.B., 369 N.J. Super. 354, 363 (Law Div. 2004), cited with approval in In re G.R., 395 N.J. Super. 428, 431 (App. Div.),

certif. denied, 193 N.J. 275 (2007); accord State v. N.W., 329 N.J. Super. 326, 333 (App. Div. 2000); see also Appl. of V.S., 258 N.J. Super. 348, 349-51 (Law Div. 1992) (petitioner led a law-abiding life for nineteen years before applying for expungement of a conviction for child abuse based on aberrant behavior on one night).

Here, petitioner was not a one-time offender. He was arrested and pleaded guilty to a local charge in 2001. He was charged again in October 2004 with very serious offenses and pleaded guilty to some of those charges. The Law Division did not reject his petition only because the latter charges were serious. The judge stated he would have granted the petition if the record did not also establish that petitioner had been arrested two previous times and had been convicted in municipal court of violation of a local ordinance. It was the combination of petitioner's prior record of arrests and the nature of the indictable charges that led to the Law Division's ruling.

Furthermore, although the plea agreement permitted petitioner's admission into PTI and subsequent dismissal of the charges, his guilty plea distinguishes the circumstances here from successful completion of a supervisory period of PTI in cases where the petitioner's guilt is not authoritatively

established.¹ The record before us demonstrates both petitioner's admission of serious offenses and a prior conviction for violation of the law. Under these circumstances, the State reasonably contended that a need to maintain the records superseded petitioner's entitlement to expungement of the entirety of his criminal record.

We do not believe, however, that petitioner should be permanently barred from seeking expungement of the October 2004 charges. The need for maintaining the records may dissipate over time as petitioner continues to live a law-abiding life and proves himself a responsible citizen. In applying N.J.S.A. 2C:52-14b, the passage of time and a petitioner's long-standing personal commitment to an exemplary, law-abiding life may tip the balance in favor of freeing him from the disabilities of an arrest record. In that regard, although a conviction for aggravated sexual contact under N.J.S.A. 2C:14-3a is not eligible for expungement at any time, N.J.S.A. 2C:52-2b, petitioner has not been convicted of that crime, and the

¹ We have not been provided a transcript of the guilty plea entered in 2005, and the petition for expungement only states what the charges were rather than the "nature of the original charge[s]" as required by N.J.S.A. 2C:52-8c. Because petitioner has not contested the State's general factual description of the conduct that resulted in the October 2004 charges, we infer there is no dispute that he impersonated a police officer and engaged in criminal sexual contact with two women.

expungement statute otherwise sets a ten-year waiting period for convictions for other crimes, N.J.S.A. 2C:52-2a. See L.B., supra, 369 N.J. Super. at 357-58 (the petitioner led an exemplary, law-abiding life for fifteen years after being convicted of a drug offense at the age of nineteen).

Under the circumstances presented here, we believe the court should have moderated its denial of the petition. Upon appropriate passage of time or other significant change in the circumstances, petitioner should be permitted to renew his application.

Therefore, we will affirm the portion of the court's May 25, 2011 order that denied expungement of the October 2004 records but without prejudice to re-application after the passage of time or with a showing of changed circumstances. We reverse the order to the extent it denied expungement of the 2001 and July 2004 arrests and charges.

Reversed and remanded for entry of an order in conformity with our opinion.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION