2015 IL App (1st) 142012-U

SIXTH DIVISION
December 30, 2015

No. 1-14-2012

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RAUL EISEMAN, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. Nos. 09 CR 5848 09 CR 7777 Honorable Thomas Byrne, Judge Presiding

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 ***Held:*** We vacate the order denying expungement of defendant's arrests following his acquittals on various charges, and remand the case for the State to provide proper written notice of its objections to defendant's expungement petition and for the court to hold a new hearing on it.

¶ 2 Following two separate jury trials, defendant Raul Eiseman was acquitted of armed robbery and false personation of a police officer. Defendant filed a *pro se* petition to expunge the arrests on the acquitted charges, which the trial court subsequently denied. The court, did,

however, seal the records in question. Defendant now appeals the trial court's denial of expungement of his arrest records. We vacate and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 In March, 2009, defendant Raul Eiseman was arrested and charged with armed robbery and false personation of a police officer. In April 2009, he was again arrested and charged with the same two offenses, but for actions allegedly occurring at a different time involving a different victim. The facts alleged in both cases were strikingly similar. In the first case, defendant allegedly represented himself to the victim as being a Chicago police officer, pointed a gun at his head, threatened to kill him, and then released the victim only after he paid money. In the second case, defendant allegedly wore a weapon in a holster and a police badge around his neck and informed the victim he was a police officer and a lawyer, and demanded money from the victim. He was acquitted of each set of charges at two separate jury trials.

¶ 5 On December 2, 2013, defendant filed a *pro se* verified petition to expunge the arrest records corresponding to both of his acquittals. The form petition merely contained citations to the records in question and nothing in it mentioned the defendant's professional background or any specific reasons for requesting expungement. On March 4, 2014, the defendant appeared before the trial court on his petition. The beginning of the transcript, which lists the appearances of counsel, reflects that he was represented by an attorney from the Cabrini Green Legal Aid Clinic who was staffing the expungement call. However, the transcript attributes comments which were obviously made by an advocate for defendant to an "UNIDENTIFIED ATTORNEY." An assistant state's attorney orally objected to the petition, arguing that the facts of the arrest should not be expunged from the public records because of the nature of the charges against defendant.

¶ 6 Both the defendant and his unidentified attorney argued against the objection on the merits. Neither defendant nor his attorney, however, objected to the fact that the State failed to provide defendant with notice of the State's objection prior to the expungement hearing. Defendant's attorney noted that defendant was a private investigator by trade and that the arrest records created problems with respect to his license and employability. After a brief informal discussion and argument between the judge, the attorneys, and defendant, during which no testimony was taken under oath, the court denied defendant's petition to expunge the record of the two arrests. The court did, however, order that the record of defendant's arrests be sealed so that the records would be available to law enforcement agencies but not potential employers.

¶ 7 On May 20, 2014, the court again heard the defendant's petition on a motion to reconsider. No copy of any such motion is in the record, but there is a full transcript of the hearing on the motion. The trial judge indicated that he remembered the case and defendant from the prior appearance. Defendant, this time represented by a private attorney, argued that merely sealing the record was insufficient because without an expungement, his arrests still prevented him from obtaining employment. Defendant's attorney also complained about the fact that defendant was not notified that the State would orally object at the first hearing. Counsel noted that by doing so, the State had violated the statutory procedures for objecting to an expungement petition, and he contended that defendant had proceeded *pro se* during the first hearing "because he wasn't advised there was going to be an objection."

¶ 8 In response, the State raised, for the first time, an objection on the basis that it had never been served with the petition for expungement before the original hearing. However, the State did not request any relief based on this lack of notice. The State claimed that defendant had forfeited his ability to object to the State's statutorily-deficient objections by not objecting at the

first hearing. The assistant state's attorney minimized the prejudice to defendant caused by the State's failure to follow the statute with respect to its objections, stating that "at the time of the hearing," defendant "became aware of our objection and he knew that from the moment that he came into court because he wasn't handed a presigned order." By proceeding at the first hearing without objecting to lack of notice, the ASA argued that defendant "waive[d] his right to that notice requirement * * * ."

¶ 9 At the second hearing, the court again entertained informal discussion about the merits of the motion by the attorneys and defendant. No one testified under oath. After the discussion, the court denied defendant's motion to reconsider, discussing defendant's profession at some length and stating: "The petitioner's livelihood has been affected and that's clear * * *. My concern is his employment and I think that ordering that the records be sealed to all but law enforcement suffices to address that issue." The court continued, "I think it's prudent that those – that incident be left for law enforcement to have access to. * * * I don't want to seal the records from law enforcement."

¶ 10 Defendant appeals, arguing that: (1) he was fundamentally prejudiced by the State's failure to provide advance written notice of its objections; and (2) the court abused its discretion when it denied the expungement of his arrests.

¶ 11 ANALYSIS

¶ 12 Section 5.2(b) of the Criminal Identification Act (Act) allows defendants who have been arrested or charged with certain crimes to expunge the relevant records if they have been acquitted. 20 ILCS 2630/5.2(b) (West 2012). "Expungement creates a legal fiction, in that the law says that the defendant has never been arrested while reality says that he has." *People v. Carroccia*, 352 Ill. App. 3d 1114, 1128 (2004) (O'Malley, J., specially concurring.) The

expungement statute balances the legitimate interests of law enforcement to keep arrest records for use in crime investigation and prevention, and the equally legitimate privacy concerns of persons falsely accused of crimes "and the potential problems that an arrest, alone, can cause an individual." *Young v. Keefe ex rel. People*, 64 Ill. App. 3d 824, 825 (1978). Expungement is an opportunity granted by the legislature and not a constitutional right. *People v. Howard*, 233 Ill. 2d 213, 217-218 (2009). This is true even if the defendant has been acquitted, because an acquittal does not necessarily demonstrate innocence, but "indicates simply that the prosecution has failed to meet its burden of proof." *People v. Smith*, 185 Ill. 2d 532, 545 (1999).

¶ 13 We first address the defendant's contentions regarding the State's failure to file its objections in writing 60 days after service. The State does not dispute that it failed to do so, but contends that the defendant forfeited this objection by not making it at the first hearing, relying strongly on *Chesler v. People*, 309 Ill. App. 3d 145, 152-53 (1999), which held that a defendant's failure to timely object on this basis results in a forfeiture. This presents a question of statutory construction which we consider *de novo*. *People v. Simpson*, 2015 IL 116512, ¶ 29.

¶ 14 When construing a statute, we must "give effect to the legislative intent, the surest and most reliable indicator of which is the statutory language itself, given its plain and ordinary meaning." *Howard*, 233 Ill. 2d at 218. A statute should be interpreted so that no part is rendered meaningless or superfluous. *Simpson*, 2015 IL 116512, ¶ 29. An amendment to an existing statute is an appropriate source for determining legislative intent, and amending existing language creates a presumption that the legislature intended to change the statute as it previously existed. *People v. Jackson*, 2011 IL 110615, ¶ 18.

¶ 15 When the *Chesler* court construed the expungement statute, the law provided that the State could object to a defendant's expungement petition, but it did not specify that the

objections would have to be filed, be in writing, or be filed on a particular schedule. Likewise, it did not address the details of judicial hearings on expungement petitions. See 20 ILCS 2630/5(d) (West 1998). The prior version of the statute merely stated that "the court shall enter an order granting or denying the petition." *Id.*

¶ 16 The General Assembly has substantially rewritten and expanded the expungement statute interpreted in *Chesler*, requiring us to re-examine its forfeiture holding against the backdrop of a host of new requirements that did not exist in 1999 when *Chesler* was issued. In the last eleven years alone, sections 5 and 5.2 of the Act, which have contained the provisions regarding hearing of expungement petitions, have been amended over 20 times. One of the first amendments to the Act added provisions requiring the court clerk to serve expungement petitions on the State's Attorney and other interested parties, allowing records to be sealed if no objection is filed within 90 days, and requiring a hearing to be held on any objection so filed. See Pub. Act 93-211 (eff. Jan. 1, 2004) (amending 20 ILCS 2630/5, *et seq.* (West 2002)). Another new provision regarding the hearing to seal records stated, in part: "If an objection is filed, the court shall set a date for hearing. At the hearing, the court shall hear evidence on whether the sealing of the records should or should not be granted." 20 ILCS 2630/5(h)(2) (West 2004).

¶ 17 After a host of even more substantial amendments and a comprehensive recodification, the law governing expungement hearings is now found at 20 ILCS 2630/5.2(d)(7) (West 2012). The current law requires the State or other governmental objector to file any objections within 60 days of service of the petition to expunge. 20 ILCS 2630/5.2(d)(5) (West 2012). The 60-day period was reduced from the prior period of 90 days. See ¶ 16, *supra.* It also provides:

> "If an objection is filed, the court shall set a date for a hearing and notify the petitioner and all parties entitled to notice of

> the petition of the hearing date at least 30 days prior to the hearing. Prior to the hearing, the State's Attorney shall consult with the Department as to the appropriateness of the relief sought in the petition to expunge or seal. At the hearing the court shall hear evidence on whether the sealing of the records should or should not be granted, and shall grant or deny the petition to expunge or seal the records based on the evidence presented at the hearing."

The same section, equally applicable to both sealing and expungement, also sets forth five specific factors the court may consider when determining whether to grant or deny the petition.

¶ 18 This series of amendments demonstrates the General Assembly's intent to formalize the expungement and sealing process, to make it more orderly, and to facilitate meaningful appellate review in those cases through the establishment of a written evidentiary record memorializing any objections and the evidence submitted regarding them.

¶ 19 It is true that a court retains plenary authority to grant or deny a particular petition for expungement, as it sees fit. *Howard*, 233 Ill. 2d at 220. However, the current expungement statute repeatedly uses the words "evidence" and "shall" when discussing the notice and hearing requirements on objections. It dictates that upon the filing of an objection, the court *shall* set a hearing date, notify the parties of the hearing date at least 30 days before the hearing, and that "[a]t the hearing, the court *shall* hear *evidence* on whether the petition should or should not be granted, and *shall* grant or deny the petition to expunge or seal the records based on the *evidence* presented at the hearing." (Emphasis added.) 20 ILCS 2630/5.2(d)(7) (West 2012). Language in a statute issuing a procedural command to a government official, and the word "shall" both indicate the legislature intended that the particular procedural requirement is mandatory, "when

the right the provision is designed to protect would generally be injured under a directory reading." *In re M.I.*, 2013 IL 113776, ¶ 17.

¶ 20 We thus return to the questions of whether the requirement that the State (or other interested party) put any objections in writing no more than 60 days after service is mandatory, and a defendant can forfeit his own objection to the State's failure to abide by that procedure if he does not object at the subsequent hearing. The *Chesler* court held that a defendant who fails to object to a non-timely objection by the State in an expungement hearing forfeits the issue if he raises it only for the first time on appeal. *Chesler*, 309 Ill. App. 3d at 154. However, that court interpreted a manifestly different statute than the one in force today, one that neither required that objections to an expungement petition be "file[d]" nor provided for any hearing. See 20 ILCS 2630/5 *et seq.* (West 1998). Additionally, Eiseman did raise his objection for the first time only on appeal. He specifically objected to the lack of notice of the State's objection at the second hearing below.

¶ 21 One commentator has summarized the manner in which expungement petitions are heard in Cook County as follows: "The state's attorney's office has no consistent procedure in the various districts for sending the petitioner a copy of [its objection.] Most often, a copy of the response is sent to the petitioner along with either the letter setting a court date or an order denying the petition." Marjie M. Nielsen, *Expungement and Sealing in Cook County*, in Illinois Criminal Records: Expungement and Other Relief, § 4S.35 (Ill. Inst. For Cont. Legal Educ. 2010). Along the same line, the Clerk of the Circuit Court of Cook County explains to defendants that: "If an objection is filed, the law requires that a court hearing be scheduled and that you, the arresting agency, the prosecutor, the Chief legal officer of the unit of local government that arrested you, and the Illinois State Police receive notice of the hearing at least

30 days prior to the hearing date. *On the court hearing date, not prior, the petitioner will find out if the State's Attorney has an objection to the petition for expungement*." Clerk of the Circuit Court of Cook County, IL, 2015 Criminal & Traffic Expungement & Sealing Procedural Guide at 21 (emphasis added).

¶ 22 Our supreme court recently noted that it is a "familiar proposition that waiver and forfeiture rules serve as an admonition to the litigants rather than a limitation upon the jurisdiction of the reviewing court and that courts of review may sometimes override considerations of waiver or forfeiture in the interests of achieving a just result and maintaining a sound and uniform body of precedent." *Jackson v. Bd. of Election Comm'rs of City of Chicago*, 2012 IL 111928, ¶ 33. In light of the legislature's manifest intent to formalize sealing and expungement proceedings, we believe that it would be inappropriate to resolve this case on forfeiture grounds. To hold otherwise would allow the State to unfairly surprise defendants, many of whom are without benefit of counsel, by eliminating the statutorily-required 60-day deadline after service for the State to file its objections and the required 30-day period before a hearing can be held on the objections. Both of these periods facilitate defendants' ability to prepare their defenses to the objections.

¶ 23 In so holding, we acknowledge that at the second hearing below, the State complained that it was not served with the defendant's petition, and that therefore the 60-day period for it to file a written objection was never triggered. The form expungement petition used by defendant contains a proof of service section which is to be completed by the Clerk of the Circuit Court of Cook County. See 20 ILCS 2630/5.2(d)(5)(B)(West 2012) (providing that "the court" shall notify the petitioner of any filed objections and send notice of the court hearing date at least 30 days in advance). The proof of service on the copy of the petition in the record is completely

blank, a fact which corroborates the State's position. This might explain what happened here, but it also supports why a remand is appropriate to ensure that all parties involved properly comply with the Act.

¶ 24 CONCLUSION

¶ 25 Accordingly, we vacate the order denying the expungement of defendant's arrests and remand for further proceedings at which: (1) the clerk of the circuit court shall serve the State and other required parties with a copy of the petition for expungement promptly upon receipt of our mandate (20 ILCS 2630/5.2(d)(4) (West 2012); (2) the State shall file any objections within 60 days of service of the petition (20 ILCS 2630/5.2(d)(5)(B) (West 2012), and transmit a copy thereof to defendant; (3) the court shall set a date for a hearing on the objections, and notify the defendant and other parties entitled to notice of the hearing date at least 30 days prior to the hearing (20 ILCS 2630/5.2(d)(7) (West 2012).

¶ 26 Nothing in this order should be interpreted as addressing the merits of whether, in light of the nature of the offenses in question, defendant's expungement petition should be granted. Additionally, nothing herein affects the sealing order, since the State did not cross-appeal it.

¶ 27 Vacated and remanded with instructions.