IN THE MATTER OF THE APPLICATION OF **MAX W. SMITH, JR.** FOR EXPUNGEMENT OF RECORDS	: SUPERIOR COURT OF NEW JERSEY : APPELLATE DIVISION : DOCKET NO. A-6087-08T4 : : CRIMINAL ACTION : : ON APPEAL FROM A FINAL ORDER : OF THE SUPERIOR COURT OF NEW : JERSEY, LAW DIVISION, MIDDLESEX : COUNTY : : SAT BELOW: : : HON. FRANK CIUFANNI, P.J. Ch.

BRIEF AND APPENDIX ON BEHALF OF **MAX W. SMITH, JR.**

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PRELIMINARY STATEMENT

Collateral consequences of a criminal conviction endure for years and decades after the court has moved on to the next case. Among other consequences, the convicted person is disqualified for jury service, N.J.S. 2C:51-3; he or she needs special approval to enlist in the armed forces, 10 U.S.C. 504; professional licenses become unavailable, N.J.S. 45:1-21(f); he or she can be evicted from public housing, N.J.S. 2A:18-61.1(e)(2); employability with a board of education vanishes, whether the position be as a teacher, school bus driver, cafeteria worker, or maintenance worker, N.J.S. 18A:6-7.1. Employability in the private sphere becomes severely limited, N.J.R.E. 201(b)(1); N.J.R.E. 202(b).

Mindful of consequences such as these, the Legislature established a mechanism whereby qualifying criminal convictions can be expunged. N.J.S. 2C:52-32 explains the purpose of that legislation:

> 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.

Not all convictions qualify. Where the nature of the crime does permit expungement, waiting times exist. For drug offenses, the duration of this waiting time depends on whether the Petitioner was or was not "21 years of age or younger."

This appeal presents two major issues. The first issue calls for statutory construction of the phrase, "21 years of age or younger." More particularly, how is that phrase to be construed with respect to a person who has passed his twenty-first birthday, but who has not yet reached his twenty-second?

The second major issue also involves statutory construction. As mentioned above, the nature of the offense will make certain convictions ineligible for expunction, regardless of passage of time. For most crimes that can never be expunged, expungement statutes also preclude expungement of attempts and conspiracies to commit those crimes.

Petitioner was convicted of conspiracy to commit drug offenses. Had Petitioner been convicted of the substantive offenses, his convictions would have been permanently ineligible for expungement. However, in listing substantive crimes that cannot be expunged, the Legislature omitted language that would preclude expungement for conspiracies to commit Petitioner's particular crimes. This appeal explores the implications of that omission.

PROCEDURAL HISTORY

On December 29, 2008, Appellant Max W. Smith, Jr. filed a Verified Petition for Expungement of Records (Da1). His Petition contained two counts.

Count One recited a 1992 arrest in North Brunswick, in which Mr. Smith was ultimately found not guilty (Da1). Count Two recited an April 1995 arrest, also in North Brunswick. This arrest ultimately resulted in guilty findings for conspiracy to commit various marijuana-related crimes (Da2, Da3).

Under "Additional Arrests," Mr. Smith also recited conviction of various North Brunswick municipal ordinances. His Petition specified that those recitations were solely for purposes of completeness, and that he did not seek expungement of those ordinance convictions.

The State opposed the application. All legal arguments submitted to the court were through written communications. There were no in-court hearings. Judge Ciufanni initially denied Mr. Smith's Petition in toto. His Honor explained his reasons in a letter dated June 9, 2009 (Da11). Ultimately, on July 22, 2009, his Honor issued an Amended Order (Da14). That Amended Order granted expungement on Count One of the Petition, relating to the matter in which Petitioner had been found not guilty (Da15), but denied expungement on Count Two, relating to Petitioner's conspiracy conviction (Da17).

Petitioner appeals from the Amended Order. He filed his Notice of Appeal on August 7, 2009 (Da19).

STATEMENT OF FACTS

On April 21, 1997, Max Smith was convicted on three counts of Indictment 1348-10-95 (Da9). All three counts arose from the same series of transactions (Da6, Da7). All three convictions were for conspiracy to commit various marijuana-related offenses, including conspiracy to distribute marijuana (Da9). None of the convictions were for the substantive offenses themselves.

The transactions at issue involved a time span extending from December 1, 1994, through April 16, 1995 (Da6). Mr. Smith was born on March 23, 1974. Accordingly, on the end date of the conspiracy period, Mr. Smith was twenty-four days past his twenty-first birthday.

Mr. Smith has additionally been convicted of various North Brunswick Municipal Ordinances, all arising from a single incident. In that matter, his unlicensed dog escaped from his home and injured a cat. Finally, he was charged with a disorderly persons marijuana offense on which he was found not guilty.

STATEMENT OF LAW

POINT ONE

PETITIONER SATISFIED THE AGE REQUIREMENT OF N.J.S. 2C:52-5[1]

The State contends that Mr. Smith's application is premature (Da11). The State bases that contention on N.J.S. 2C:52-2. That section requires that an applicant wait ten years before he may present his Petition. Mr. Smith, however, did not proceed under N.J.S. 2C:52-2. Rather, he proceeded as a young drug offender under N.J.S. 2C:52-5 (Da12). That section specifies that the waiting period is one year, not ten.

The offenses at issue occurred during a range of dates. The end date of that range was April 16, 1995 (Da6). Mr. Smith was born on March 23, 1974 (Da1, Da9). On April 16, 1995, therefore, he was "21 years of age or younger," in compliance with N.J.S. 2C:52-5. The State, however, contends that Mr. Smith was not "21 years of age or younger." Rather, contends the State, Mr. Smith was 21 years plus 24 days.

No New Jersey published decision construes "21 years of age or younger" in the context of expungements. However, this Court did address this issue head-on in a

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[1]Judge Ciufanni resolved this issue in Appellant's favor. This brief addresses this age issue, however, inasmuch as Mr. Smith's appeal subjects all issues below to review, Mills v. J. Daunoras Const., Inc., 278 N.J. Super. 373 (App. Div., 1995). See also, State v. Kashi, 180 N.J. 45 (2004).

slightly different context. Abdul Aziz Shabazz was convicted under N.J.S. 2C:35-6 of employing a juvenile in a drug distribution scheme. That statute criminalized certain behavior when the person "...knowingly uses, solicits, directs, hires or employs a person 17 years of age or younger" to perform particular acts. Shabazz employed one "S.G." in his enterprise. S.G., at the time, was some months past his seventeenth birthday. S.G. had not yet reached his eighteenth birthday. On appeal, Shabazz argued that because S.G. was seventeen years old plus several months, he was no longer "17 years of age or younger." This Court, in State v. Shabazz, 263 N.J. Super. 246, 252 (App. Div., 1993), rejected that argument:

> Defendant contends that the statute is not applicable where the juvenile employed has passed his 17th birthday. In essence, defendant argues that once an individual celebrates his 17th birthday, he is over the age of 17 and his employment in a drug distribution scheme is not within the statutory proscription. We disagree.
>
> While the statute is not a model of clarity, we read it as proscribing the employment of a juvenile under 18 years of age in a drug distribution scheme. In common parlance, a juvenile becomes 17 years of age upon reaching his 17th birthday, and remains 17 years of age until he reaches his 18th birthday. The simple and overriding fact is that most people state their ages in yearly intervals. Although such expressions are perhaps linguistically flawed, we doubt that the Legislature intended to depart from the common, everyday meaning of the words used and engage in a metaphysical analysis of the aging process. Instead, we believe that the Legislature in drafting the statute, intended to "talk the way regular folks do." (citation omitted).

Although not cited in the opinion, other precedent supported this construction. Thus, State v. Zeidell, 154 N.J. 417 (1998) observed that terms used in criminal statutes must be accorded their ordinary meaning, absent indication of some special meaning.

So, here. Mr. Smith had passed his twenty-first birthday, but was far from reaching his twenty-second. Using the common parlance discussed in Shabazz, Mr. Smith was "21 years of age or younger." Judge Ciufanni agreed: "Petitioner's application is not premature" (Da12).

POINT TWO

CONSPIRACY TO DISTRIBUTE A CONTROLLED DANGEROUS SUBSTANCE CAN BE EXPUNGED

N.J.S. 2C:52-2 provides in pertinent part:

> In all cases, except as herein provided, wherein a person has been convicted of a crime under the laws of this State and who has not been convicted of any prior or subsequent crime...may, after the expiration of a period of 10 years...present a duly verified petition...praying that such conviction and all records and information pertaining thereto be expunged.

The general rule that N.J.S. 2C:52-2 establishes is that a petition may be presented for a crime "except as herein provided." Thus, absent exception "herein

provided," presentation of the petition is in order. Under N.J.S. 2C:52-5, the waiting time for young drug offenders is reduced from ten years to one.

Judge Ciufanni ruled, however, that the nature of Mr. Smith's offense precludes expungement, regardless of how much time has passed (Da13). Mr. Smith disagrees.

N.J.S. 2C:52-5, like N.J.S. 2C:52-2, by their own terms, disqualify convictions for sale, or distribution, or possession with intent to sell. Mr. Smith, however, was never convicted of any of those substantive offenses. Rather, his convictions were limited to *conspiracy* to commit those offenses. But conspiracy to commit those offenses is not disqualifying.

The non-disqualification for conspiracies relating to controlled dangerous substances is perhaps better understood by analysis of N.J.S. 2C:52-2. N.J.S 2C:52-2b lists a variety of offenses that can never be expunged. This list begins with now-repealed Title 2A offenses. It specifies that attempts and conspiracies to commit those Title 2A offenses similarly cannot be expunged. Subsection "b" then proceeds to specify particular Title 2C offenses that can never be expunged. That list, too, specifies that conspiracies and attempts to commit those Title 2C offenses are ineligible.

N.J.S. 2C:52-2c is a separate subsection. That subsection deals exclusively with offenses relating to controlled dangerous substances. It specifies what offenses relating to controlled dangerous substances can be expunged, and which such offenses cannot.

With exceptions not pertinent here, distribution of controlled dangerous substances can never be expunged. Conspicuous by their absence, however, are references to *attempts and conspiracies* to commit such offenses. Where attempts and conspiracies are recited for all subsection "b" prohibitions, they are omitted entirely from subsection "c".

N.J.S. 2C:52-5 limits itself to drug offenses. Like N.J.S. 2C:52-2c, N.J.S. 2C:52-5, omits attempts and conspiracies. Omission of "attempts and conspiracies" from those two sections may be attributable to legislative oversight. A more plausible interpretation, however, is that these omissions were intentional. This interpretation is suggested, first, by this omission from not just one statute but, rather, from both statutes that deal with controlled dangerous substances. Just as the Legislature decided to differentiate intent to distribute from intent to sell, State v. P.L., 369 N.J. Super. 291 (App. Div., 2004), so did it also decide to differentiate when attempts and conspiracies would be disqualifying, and when they would not.

Principles of statutory construction support this interpretation. Thus State v. Alexander, 136 N.J. 563 (1994), tells us that ambiguities in criminal statutes cannot inure to benefit the State. Penal statutes open to more than one reasonable construction must be construed strictly against the State, State v. Churchdale Leasing, Inc., 115 N.J. 83 (1989); State v. Valentin, 105 N.J. 14 (1987). When interpreting a penal statute, if plain meaning and extrinsic sources are inadequate, statutory construction counsels

courts to construe ambiguities in favor of defendant, State v. Drury, 190 N.J. 197 (2007).

POINT THREE

PETITIONER'S MUNICIPAL COURT CONVICTIONS ARE NOT DISQUALIFYING

The Law Division denied expungement for an additional reason. Relying upon State v. A.N.J., 98 N.J. 421, 427 (1985), Judge Ciufanni held that Mr. Smith's conviction of municipal ordinances precluded expungement of a criminal conviction. N.J.S. 2C:52-5 requires that the applicant "...has not been convicted of any previous or subsequent criminal act....".

The court below misread A.N.J. N.J.S. 2C:52-5 does preclude expungement when a person has been convicted of more than one criminal act. Municipal ordinances, however, are not crimes within the meaning of Title 2C. Crimes within the meaning of Title 2C are offenses that have been designated of the first, second, third, or fourth degree, N.J.S. 2C:1-4a. Less serious acts are characterized as disorderly persons or petty disorderly persons offenses, N.J.S. 2C:1-4b. Municipal ordinances are not defined in Title 2C. Chapter 52 does, however, consider them.

Particular provisions in Chapter 52 distinguish between crimes on the one hand, and municipal ordinances, on the other. N.J.S. 2C:52-4 allows expungement of ordinance convictions when the applicant satisfies particular conditions. One of those conditions is that the applicant has not been convicted of a prior or subsequent crime[2]. Another condition is that the applicant has not been adjudged a disorderly person or petty disorderly person on more than two occasions. Conspicuously absent is any disqualification based upon the number of municipal ordinance convictions. Nothing in N.J.S. 2C:52-2, N.J.S. 2C:52-5 (or for that matter, N.J.S. 2C:52-3, N.J.S. 2C:52-4 itself, or N.J.S. 2C:52-4.1) precludes expungement on account of previous convictions of municipal ordinances. Simply stated, Chapter 52 draws a distinction between municipal ordinances and crimes. Convictions of municipal ordinances are not convictions of crimes.

[2]In this instance, of course, Mr. Smith has been convicted of a crime. It is for that reason that his Petition did not seek expunction of his municipal court conviction.

CONCLUSION

Petitioner satisfies all requirements for expunction of his April 16, 1995, arrest. This matter should be remanded to the Law Division for Expunction on both Counts of his original Petition.

Respectfully submitted,

ALLAN MARAIN