	: SUPERIOR COURT OF NEW JERSEY
	: APPELLATE DIVISION
STATE OF NEW JERSEY,	: DOCKET NO. A-2013-11T3
Respondent,	:
	: CRIMINAL ACTION
	:
v.	: ON APPEAL FROM A FINAL ORDER
	: OF THE SUPERIOR COURT OF NEW
	: JERSEY, LAW DIVISION, HUNTERDON
D.L.C.,	: COUNTY
Petitioner-Appellant	:
	: SAT BELOW:
	:
	: HON. STEPHEN B. RUBIN, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF PETITIONER-APPELLANT
Dxxxxx L. Cxxxxx

Law Offices of Allan Marain
100 Bayard Street
P.O. Box 1030
New Brunswick, NJ 08903
Telephone: 732-828-2020
Allan@NJExpungements.com
File No. 7091
Attorneys for Petitioner-Appellant Dxxxxx L. Cxxxxx

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES CITED

RULES OF COURT CITED

OTHER AUTHORITIES CITED

TABLE OF CONTENTS TO APPENDIX

PROCEDURAL HISTORY

Dxxxxx L. Cxxxxx ("Petitioner") filed a Verified Petition for Expungement on July 26, 2011 (Pa1)[1]. His Petition, in three numbered counts, prayed for expungement of one juvenile event in which he was taken into custody, and for expungement of two adult arrests. The juvenile charge for which Petitioner sought expungement was ultimately dismissed (Pa2). The first adult arrest for which Petitioner sought expungement was also ultimately dismissed (Pa2). The second adult arrest for which Petitioner sought expungement ultimately resulted in a conviction for burglary and theft (Pa3).

An additional adult arrest resulted in a conviction for a disorderly persons offense. Petitioner did not seek expungement of that matter (Pa6). There were also juvenile events in matters wherein Petitioner was either adjudicated delinquent, or for which Petitioner was unable to determine the disposition. Petitioner sought

[1] "P" refers to Petitioner.

expungement of none of these events (Pa3 through Pa6; T9-25 through T11-5).

Accompanying his Verified Petition was the Affidavit of Jill Westerberg (Pa12). Ms. Westerberg is counsel's paralegal. In her Affidavit, Ms. Westerberg detailed the extensive but, ultimately, fruitless efforts she had made to ascertain missing information concerning Petitioner's juvenile matters.

By Order entered July 27, the court fixed a hearing date of September 23, 2011 (Pa32). Because matters for which Petitioner sought expungement involved both Hunterdon and Somerset Counties, Petitioner duly served notice upon the Prosecutors of both counties.

By way of letter dated September 15, 2011, the Somerset County Prosecutor stated that Petitioner's application "must be denied at this time" (Pa34). His letter summarized Petitioner's court history, and recited various expungement statutes. The letter gave no indication how those statutes related to the application.

By way of letter dated September 16, 2011, Hunterdon County Asst. Pros. Dawn Solari similarly objected (Pa35).

Her letter indicated that she was objecting on behalf of both her office as well as New Jersey State Police. Like the letter from the Somerset County Prosecutor, Ms. Solari's letter specified particular expungement statutes and Petitioner's court history. In her letter, Ms. Solari objected on the additional ground that "Petitioner must also provide proof of disposition for the arrests of December 10, 1984 and July 18, 1987" (Pa35).

This matter was heard before Hon. Stephen B. Rubin, J.S.C., on November 9, 2011 (T1). On November 16, 2011, his Honor issued an Order Denying Expungement Petition in Part and Granting in Part (Pa45).

Petitioner filed a Notice of Appeal on December 27, 2011 (Pa54).

STATEMENT OF FACTS

As an adult, Petitioner had one indictable conviction, one disorderly persons conviction, and one additional charge that was eventually dismissed (Pa53). Petitioner did not seek expungement of his adult disorderly persons conviction (Pa6, Pa53). As a juvenile, Petitioner was adjudicated delinquent on four separate occasions (Pa3

through Pa6, Pa53). One of these adjudications involved several events. Petitioner was taken into custody as a juvenile on three additional occasions. Despite concerted efforts over a prolonged period (Pa12 through Pa16), Petitioner was unable to ascertain the outcome of those additional events (Pa12, Pa13). With respect to his juvenile matters, Petitioner sought expungement only of that event for which he was able to document dismissal (Pa53).

STATEMENT OF LAW

POINT ONE

PETITIONER'S JUVENILE ADJUDICATIONS DO NOT DISQUALIFY HIM FOR EXPUNGEMENT OF HIS ADULT CONVICTION

In Count Three, Petitioner sought expungement of an adult criminal conviction (Pa3). Pertinent to this application is N.J.S. 2C:52-2a. That statute 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, whether within this

> State or any other jurisdiction, and has not been adjudged a disorderly person or petty disorderly person on more than two occasions may, after the expiration of a period of 10 years from the date of his conviction, payment of fine, satisfactory completion of probation or parole, or release from incarceration, whichever is later, present a duly verified petition as provided in section 2C:52-7 to the Superior Court in the county in which the conviction was entered praying that such conviction and all records and information pertaining thereto be expunged.

Petitioner has not been convicted of any prior or subsequent crime (Pa11). Nor has he been adjudged a disorderly person or petty disorderly person on more than two occasions (Pa6, Pa7). More than ten years has passed since the date of Petitioner's conviction, payment of fine, or satisfactory completion of probation. That notwithstanding, the State maintains that Petitioner's record is not eligible for expungement. The primary reason for the State's objection is Petitioner's juvenile adjudications.

Juvenile adjudications are not convictions: They are dispositions, N.J.S. 2A:4A-43. Just as N.J.S. 2C:52-2a imposes no limit on the number of municipal ordinance convictions, so does it place no limit on the number of juvenile adjudications. In pari materia with such absence of limit, the New Jersey Code of Juvenile Justice, N.J.S. 2A:4A-20 et seq., directly refutes the State's contention. N.J.S. 2A:4A-48 provides:

> No disposition under this act shall operate to impose any of the civil disabilities ordinarily imposed by virtue of a criminal conviction, nor shall a juvenile be deemed a criminal by reason of such disposition.
>
> The disposition of a case under this act shall not be admissible against the juvenile in any criminal or penal case or proceeding in any other court except for consideration in sentencing, or as otherwise provided by law.

The State, however, fixates upon and rips from context one sentence in N.J.S. 2C:52-4.1a:

> For purposes of expungement, any act which resulted in a juvenile being adjudged a delinquent shall be classified as if that act had been committed by an adult.

The State contends that that is a generalized sentence, the force of which reaches all of Chapter 52. That contention is manifestly incorrect. The Legislature has unambiguously and amply demonstrated its ability to enact statutes of general application. In the specific context of expungements, it did exactly that in N.J.S. 2C:52-14e. That statute, subject to specified exceptions, makes records of all convictions ineligible for expunction once an applicant has had a previous criminal conviction expunged. Had the Legislature similarly intended that the sentence in N.J.S. 2C:52-4.1a have global application, it could (and would) have made a place for it in N.J.S 2C:52-14.

As explained in colloquy below, the sentence in question is in complete harmony with N.J.S. 2C:52-2 and, for that matter, all of Chapter 52 (T5-1 through T6-1):

> Here's what the sentence says. ["]For purposes of expungement, any act which resulted in a juvenile being adjudged a delinquent shall be classified as if that act had been committed by an adult.["] Here is the explanation for that sentence, Your Honor. There are certain acts that a juvenile can commit that will result in an adjudication of delinquency but if that same act had been committed by an adult would not constitute an

> offense at all. I will give Your Honor two examples.
>
> Example number one is truancy, N.J.S. 18A:38-27. The other example is possession of a firearm by a minor, N.J.S. 2C:58-6.1. Both of these are both what is called status offenses. They are offenses only because the actor was a juvenile.
>
> It is in light of those status offenses that this sentence falls into place. [“]For purposes of an expungement, any act which resulted in a juvenile being adjudicated a delinquent shall be classified as if that act had been committed by an adult.[”] Therefore, a truancy act would be classified as if committed by an adult. In other words, it would not be an offense at all. And the same thing with possession of firearms, 2C: – firearms by a minor, 2C:58-6.1. That explains why that sentence is in 2C:52-4.1 and it also explains why it is not surplusage.

Moreover, the State’s global interpretation of N.J.S. 2C:52-4.1a is refuted by N.J.S. 2C:52-4.1 itself. Its “b” subsection contains alternative ways in which juvenile adjudications can qualify for expungement. That subsection begins with the word “Additionally.” Thus, regardless of the State’s global interpretation of the “a” sentence, an unspecified number of juvenile adjudications can be

expunged under "b" when b's other requirements are satisfied. To thus extend a's reach to unrelated sections when it does not preclude expungements in the "b" half of its own section defies reason.

Higgins v. Pascack Valley Hospital, 158 N.J. 404, 419 (1999) states this exact principle. Higgins tells us that where the Legislature specifically includes a requirement in one subsection of a statute but not in another, the term should not be supplied where it has been omitted. The Third Circuit construes federal statutes and regulations similarly. Marshall v. Western Union Telegraph Co., 621 F.2d 1246, 1251 (3d Cir., 1980)(footnote omitted) holds, "Under the usual canons of statutory construction, where Congress, or in this case an administrative agency, has carefully employed a term in one place and excluded it in another, it should not be implied where excluded." Under ordinary statutory construction, therefore, the sentence in question in N.J.S. 2C:52-4.1a does not extend to subsection b. A fortiori, its reach should not be even further elongated to a completely different section.

Historical analysis strongly suggests that the Legislature did not invest N.J.S. 2C:52-4.1 with the meaning that the State urges. N.J.S. 2C:52-2, -3, -4, -5, and -6 all arose from L. 1979, c. 178. N.J.S. 2C:52-4.1, on the other hand, was a legislative afterthought. Our Legislature enacted it the following year, L. 1980, c. 163. Apparently the Legislature became aware that, under its original enactment, no provision existed to expunge juvenile matters. It was the purpose of N.J.S. 2C:52-4.1, therefore, to expand, not limit, the kinds of matters that could be expunged. Had the Legislature intended to limit that which it had enacted only the previous year, it would have clearly specified such.

Statutes are to be construed as written, and not according to some unexpressed intention, Dacunzo v. Edgye, 19 N.J. 443 (1955). New Jersey explicitly affirms this principle in the context of applications for expungement, In re P.A.F., 176 N.J. 218, 224 (2003):

> The third paragraph of N.J.S.A. 2C:52-2b is an exception to the general rule permitting expungement of criminal records of first-time offenders. That exception should be construed narrowly

> in accordance with the overall objective of N.J.S.A. 2C:52-2a to provide expungement to first-time criminal offenders and, therefore, we are not inclined to expand the class of persons who are ineligible for an expungement absent a clear statutory expression.

In this case, the Legislature clearly expressed its will concerning treatment of juvenile adjudications. That expression directly supports the proposition that N.J.S. 2A:4A-48 says exactly what the Legislature intended to say. N.J.S. 2A:4A-48 is the codification of L.1982, c. 77, effective December 31, 1983. L.1982, c. 77 was a package of legislation intended to amend and supplement the New Jersey Code of Juvenile Justice. It was Section 29 of that bill that eventually became N.J.S. 2A:4A-48. Concerning that Section, the Senate Judiciary Committee Statement specified:

> Section 29 provides that a disposition under this bill shall not operate to impose any of the civil disabilities ordinarily imposed by virtue of a criminal conviction, nor shall a juvenile be considered a criminal by reason of such disposition.

On January 25, 2010, Assemblyman Gordon Johnson introduced Bill A-1862. That Bill would have amended N.J.S. 2A:4A-48. Beyond the fact that A-1862 was never enacted, it expressed no dissatisfaction with that portion of N.J.S. 2A:4A-48 that bears upon this application. Quite the contrary, A-1862 limited itself to a very narrow issue: It would have subjected adults convicted of sex offenses to be treated as repeat offenders when those adults had previous juvenile adjudications for acts involving sexual misconduct. Thus, Petitioner's juvenile dispositions, having no sexual element, would remain irrelevant in considering whether his adult conviction, also having no sexual element, may be expunged.

Other non-Title 2C legislative findings and declarations firmly support Petitioner's position. The Rehabilitated Convicted Offenders Act, N.J.S. 2A:168A-1 provides:

> The Legislature finds and declares that it is in the public interest to assist the rehabilitation of convicted offenders by removing impediments and restrictions upon their ability to obtain employment or to participate in vocational or educational rehabilitation programs based solely upon the existence of a criminal record.

The State (and the Law Division) correctly noted in N.J.S. 2C:52-32 that Chapter 52 is to be construed with the primary objective of providing relief to the one-time offender. However, myopic fixation upon this provision to the exclusion of its limited applicability, and to the exclusion of manifest provisions relating to specific situations, results in wholesale thwarting of Legislative intent. Chapter 52 itself explicitly departs from this "primary" objective of N.J.S. 2C:52-32. Thus N.J.S. 2C:52-3 allows expungement of up to three disorderly persons convictions. And N.J.S. 2C:52-4 allows expungement of an unlimited number of municipal ordinance convictions. Thus the "one-time offender" reference in N.J.S. 2C:52-32 was manifestly intended to limit itself to criminal convictions. See State v. A.N.J., 98 N.J. 421 (1985)

POINT TWO

THE PETITION IS SUFFICIENT

The State also maintains (Pa35), "Petitioner must also provide proof of disposition for the arrests of December 10, 1984 and July 18, 1987."

Preliminarily, the two matters to which the State adverted were not arrests. On both occasions, Petitioner was a juvenile, having been born on June 16, 1971 (Pa1). Juveniles are not "arrested." Rather, they are "taken into custody," N.J.S. 2A:4A-31. N.J.S. 2A:4A-31c explicitly provides:

> The taking of a juvenile into custody shall not be construed as an arrest, but shall be deemed a measure to protect the health, morals and well-being of the juvenile.

This is more than just semantics. Mischaracterizing the events as arrests obscures the very real distinctions that exist between disqualifying adult convictions and non-disqualifying juvenile adjudications.[2]

---

[2] This mischaracterization is a pit into which it is quite easy to fall. Indeed, the original Petition itself recited these events under the heading of "ADDITIONAL ARRESTS" (Pa3). Each individual juvenile event, however, was correctly characterized as a taking into

Turning to the substance of its objection, what the State calls upon Petitioners to do is to provide information that (as far as anyone knows) no longer exists. The unavailability of the information is amply documented in the Affidavit of Ms. Westerberg (Pa12). Compounding the invalidity of the State's demand, the information in question has no capacity to affect Petitioner's eligibility for expungement of records.

The efforts of Ms. Westerberg and Legal Assistant Ben to obtain the information spanned a period of approximately seven weeks. During that period, counsel's office called the Family Division Managers in both Somerset and Hunterdon Counties (Pa14, Pa15). Counsel's office called Hunterdon County Juvenile Probation (Pa16). Counsel called Asst. Pros. Solari herself seeking either the missing information, or sources as to how that information might be obtained (Pa16). None of these efforts bore fruit. Counsel notes as an aside that on every previous expungement he has ever handled wherein information was

---

custody (Pa3 through Pa6).

missing, the prosecutor's objection letter would furnish the missing information, thus enabling counsel to prepare an amended petition. Petitioner surmises that that was not done here, not for malicious reasons but, rather, because Ms. Solari herself was unable to determine that missing information[3].

State v. DeMarco, 174 N.J. Super. 411 (Law Div., 1980) holds that petitions for expungement must list all arrests, regardless of whether they resulted in convictions. Passing over the fact that these juvenile events were takings into custody, and not "arrests," and passing over the fact that dispositions are "adjudications" and not "convictions", Petitioner did duly list them (Pa3, Pa4, Pa5, Pa6) complying with both the letter and the spirit of DeMarco. In connection with those listings, Petitioner provided all information that he possessed or was able to determine.

[3]Were this information available at all, presumably it would have been reflected in the presentence report prepared on the occasion of Petitioner's adult criminal conviction. Petitioner does not have that report. Presumably, the State does or, at the very least, has access to it. The absence of this information from Ms. Solari's letter suggests that the information simply is available to no one. Further, were either of those two matters still open of record, such loose ends presumably would have been addressed on the occasion of Petitioner's three adult arrests.

And for reasons indicated above, even if those events did result in adjudications, they would not affect Petitioner's eligibility to have his record expunged.

POINT THREE

JUDGMENTS AND FINAL ORDERS ON EXPUNGEMENT APPLICATIONS SHOULD REFERENCE PETITIONER BY INITIALS ONLY, AND NOT BY FULL NAME

A. FINAL ORDERS IN EXPUNGEMENT MATTERS GENERALLY SHOULD REFERENCE PETITIONERS ONLY BY INITIALS

The relief that Petitioner seeks is expungement. If Petitioner ultimately prevails, published, or even unpublished, opinions would negate or severely dilute the relief that expungement is intended to provide. And even if this court should deny relief, a higher court might decide otherwise.

R. 1:38-3 lists records excluded from public access. That list includes court records expunged under N.J.S. 2C:52-15. It does not specify case names of the expungement opinions themselves. That creates an anomaly. Illustrative is the case of Patrick Fontana.

Patrick Fontana "won" his case. But because the opinion in his appeal referenced him by his full name, the world knows his entire history, expungement notwithstanding, State v. Fontana, 146 N.J. Super. 264 (App. Div., 1976).

As indicated above, N.J.S. 2A:168A-1 provides Legislative findings of public interest that vocational and educational impediments arising from criminal records be removed. Petitioners should not be deterred from pursuing the relief offered by expungement for fear that such pursuit can make them worse off than when they began.

B. BECAUSE JUVENILE JUDICIAL PROCEEDINGS ARE AT ISSUE, THE JUDGMENT AND FINAL ORDER IN THIS CASE SPECIFICALLY SHOULD REFERENCE PETITIONER ONLY BY INITIALS

Much of Petitioner's court history consisted of juvenile matters (Pa1 through Pa6). Accordingly, regardless of whether this court be inclined to grant anonymity to all expungement petitioners, it should be so here.

R. 5:19-2(b), in conjunction with N.J.S. 2A:4A-60, limit the availability of "social, medical, psychological, legal and

other records" relating to juvenile judicial proceedings to a select few parties. The public is not amongst them. *R.* 1:38-3(d)(5) lists juvenile delinquency records and reports, expunged or not, as an explicit exception to public access provisions.

Courts in New Jersey have long permitted juveniles to proceed under something other than their full name as a matter of course. See, Stern v. Stern, 66 N.J. 340, 343 n.1 (1975) (recognizing that pseudonymity "serves a legitimate end where the interests of minor children are concerned, as well as upon other miscellaneous but rare occasions."). Other courts have recognized that a minor's interest in privacy alone justifies proceeding under a fictitious name. See Doe v. Blue Cross & Blue Shied United of Wisconsin, 112 F. 3d 869, 872 (7th Cir. 1997) (Fictitious names are allowed when necessary to protect the privacy of children, rape victims, and other particularly vulnerable parties."); Moe v. Dinkins, 533 F. Supp. 623, 627 (S.D.N.Y. 1981) (allowing anonymity to plaintiffs challenging law requiring parental consent for minors to marry). Implicit in these court decisions is recognition that juveniles, by virtue of

their age, are to be shielded from damage to their reputation.

CONCLUSION

N.J.S. 2C:52-2a allows expungement of Petitioner's criminal conviction (and his two dismissals): He has not been convicted of any prior or subsequent crime, and he has not been convicted of more than two disorderly persons offenses. Petitioner's juvenile judicial proceedings have no bearing on his eligibility to expunge his adult matters.

The Order of the Law Division denying expungement of Petitioner's adult criminal conviction should be reversed. His anonymity should be preserved.

Respectfully submitted,

Allan Marain