

[J-60-2010][M.O. - McCaffery, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 17 EAP 2010
	:	
Appellant	:	
	:	Appeal from the Judgment of Superior
	:	Court entered on 8/10/09 at 1101 EDA
	:	2008 reversing the order entered on
v.	:	3/5/08 and remanding to the Court of
	:	Common Pleas, Criminal Division at Nos.
	:	CP-51-CR-0603191-1986 and CP-51-CR-
	:	0519001-1986
VINCENT A. MOTO,	:	
	:	
Appellee	:	Argued: September 14, 2010

DISSENTING OPINION

MR. JUSTICE SAYLOR

DECIDED: May 26, 2011

I differ with the majority’s treatment of Section 9122 of the Criminal History Record Information Act,¹ as well as its determination to reverse the Superior Court’s order. With respect to the latter, I would remand this case to the trial court to provide an opinion rendered in sufficient legal and factual detail to allow for meaningful appellate review. My reasoning is as follows.

Preliminarily, it is my understanding that Section 9122 sets forth two distinct rules for purposes of expunging “[c]riminal history record information.” 18 Pa.C.S. §9122.²

¹ Act of July 16, 1979, P.L. 116, No. 47, §2 (as amended 18 Pa.C.S. §§9101-9183) (the “Act” or the “CHRIA”).

² Under the Act, “criminal record history information” is defined as “[i]nformation collected by criminal justice agencies concerning individuals, and arising from the (continued . . .)

Expungement is discretionary when sought to purge criminal history record information generally (i.e., to wipe the slate clean). See id. §9122(b). For instance, expungement is allowed when the “individual who is the subject of the information has been dead for three years.” Id. §9122(b)(2). In contrast, expungement is mandatory in certain instances in which a person seeks to remove criminal record information in connection with a specific proceeding. See id. §9122(a). For example, expungement is required when an individual 21 years of age or older who has been convicted of violating Section 6308 of the Crimes Code, id. §6308,³ “petitions the court of common pleas in the county where the conviction occurred seeking expungement and the person has satisfied all terms and conditions of the sentence imposed for the violation . . .” Id. §9122(a)(3).⁴

The majority seems to suggest that Section 9122 only applies to conviction scenarios, that is, “[w]hen an individual has been convicted of the offenses charged.” Majority Opinion, slip op. at 5. Insofar as the majority endorses that view, I depart from its reasoning, since the provision, by its plain terms, also pertains to non-conviction situations. See, e.g., 18 Pa.C.S. §9122(a)(1) (requiring expungement in a specific proceeding when “no disposition has been received or, upon request for criminal history record information, no disposition has been recorded in the repository within 18 months

(. . . continued)

initiation of a criminal proceeding, consisting of identifiable descriptions, dates and notations of arrests, indictments, informations or other formal criminal charges and any dispositions arising therefrom.” 18 Pa.C.S. §9102.

³ See 18 Pa.C.S. §6308 (“Purchase, consumption, possession or transportation of liquor or malt or brewed beverages”).

⁴ The above overlay is subject to the restrictions contained in Section 9122(b.1). See 18 Pa.C.S. §9122(b.1) (prohibiting a court from expunging a defendant’s arrest record under certain circumstances).

after the date of arrest and the court of proper jurisdiction certifies to the director of the repository that no disposition is available and no action is pending.”).

Nor do I agree, to the extent the majority indicates as much, that Section 9122 only sanctions expungement in “very limited circumstances.” Majority Opinion, slip op. at 5. While this Court has yet to address the meaning of subsection (a)(2), on its face, it supplies trial courts with a mechanism to expunge criminal history record information apart from those instances listed in subsections (a)(1), (a)(3), and (b). See 18 Pa.C.S. §9122(a)(2) (“Criminal history record information shall be expunged in a specific criminal proceeding when . . . a court order requires that such nonconviction data be expunged[.]”). Given that Section 9122(a)(2) does not impose any conditions on a trial court’s ability to exercise this authority, save those set forth in subsection (b.1), see supra note 4, I would not couch Section 9122 in such narrow terms, at least not at this juncture.

Further, it is unclear whether the majority believes that the expungement standards set out in Commonwealth v. Wexler, 494 Pa. 325, 431 A.2d 877 (1981), operate independently from the legislative scheme reflected in Section 9122 and, in particular, subsection (a)(2). See Majority Opinion, slip op. at 5. To the degree that the majority supports such a view, I differ with the majority and offer the following comments.

By way of background, the Wexler expungement standards evolved from a series of en banc Superior Court rulings.⁵ Notably, when these decisions were issued, the

⁵ See Commonwealth v. Malone, 244 Pa. Super. 62, 366 A.2d 584 (1976) (en banc); Wert v. Jennings, 249 Pa. Super. 467, 378 A.2d 390 (1977) (en banc); Commonwealth v. Mueller, 258 Pa. Super. 219, 392 A.2d 763 (1978) (en banc); Commonwealth v. Rose, 263 Pa. Super. 349, 397 A.2d 1243 (1979) (en banc) (per curiam); Commonwealth v. Iacino, 270 Pa. Super. 350, 411 A.2d 754 (1979) (en banc).

General Assembly had not afforded a statutory right to expungement. See, e.g., Malone, 244 Pa. Super. at 65-66, 366 A.2d at 586. Believing that an individual’s right to seek expungement of an arrest record was “an adjunct to due process” and was not dependent upon express statutory authority, id. at 68, 366 A.2d at 587, the Superior Court devised a balancing test for evaluating expungement petitions in which the trial court weighed 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. See id. at 70, 366 A.2d at 588-89; Jennings, 249 Pa. Super. at 471, 378 A.2d at 392.

The Legislature subsequently passed the CHRIA, which, as noted, set forth, among other things, a statutory expungement scheme. As relevant here, the Act provided (and still provides) that “[c]riminal history record information shall be expunged in a specific proceeding when . . . a court order requires that such nonconviction data be expunged.” Act of July 16, 1979, P.L. 116, No. 47, §2 (as amended 18 Pa.C.S. §9122(a)(2)).

In Wexler -- the seminal expungement case in which this Court adopted the Superior Court’s balancing test, as well as the factors Judge Spaeth set forth in Iacino, see Wexler, 494 Pa. at 329-30, 431 A.2d at 879 (quoting Iacino, 270 Pa. Super. at 358, 411 A.2d at 759 (Spaeth, J., concurring)) -- the Court did not mention that legislation.⁶ Instead, the Wexler Court reasoned that an accused’s right to have his or her arrest record expunged was guaranteed by substantive due process. See id. at 329, 431 A.2d at 879 (citing Malone, 244 Pa. Super. at 68-69, 366 A.2d at 587-88). In subsequent rulings, though, this Court seemed to revert to Malone’s treatment of the right as “an adjunct to due process.” Commonwealth v. Armstrong, 495 Pa. 506, 509, 434 A.2d

⁶ Presumably, this is because it did not apply in that case, as that appeal concerned an expungement petition filed before the Act’s passage.

1205, 1206 (1981); see Carlacci v. Mazaleski, 568 Pa. 471, 474, 477, 798 A.2d 186, 188, 190 (2002). Neither position rests on sound constitutional footing, however.

As concerns the belief that the right is guaranteed by substantive due process, the Wexler Court did not specify whether it was referring to the Due Process Clause of the Fourteenth Amendment of the United States Constitution or Article I, Section 9 of the Pennsylvania Constitution. Although the Court has, at times, afforded greater protection under the Pennsylvania Constitution than is required under its federal counterpart, see, e.g., Commonwealth v. Edmunds, 526 Pa. 374, 388-91, 586 A.2d 887, 894-95 (1991), we have generally treated the Due Process Clause of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution as coextensive. See, e.g., Commonwealth v. Sims, 591 Pa. 506, 523 n.6, 919 A.2d 931, 941 n.6 (2007). Of importance here, the United States Supreme Court has held that substantive due process protection is only afforded to “those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” Washington v. Glucksberg, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 2268 (1997) (quotation marks and citations omitted).⁷ Even if the right to petition for expungement of an arrest record could arguably be considered such a right, the Supreme Court has been reluctant to expand the concept of substantive due process protection to encompass a new asserted right or liberty interest. See id. at 720, 117 S. Ct. at 2267-68.

⁷ Such rights include the right to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, and to bodily integrity. See Glucksberg, 521 U.S. at 720, 117 S. Ct. at 2267 (collecting cases).

With regard to the assertion that the right is “an adjunct to due process,” the Malone court did not supply any authority for this proposition and, indeed, conceded that, although it appeared that Pennsylvania appellate courts had recognized a right to expungement, none of those tribunals had provided a legal basis for that right. Malone, 244 Pa. Super. at 68, 366 A.2d at 587. Further, this Court has never employed the “adjunct to due process” terminology outside of the expungement context. Thus, but for the bald pronouncement that the right is constitutionally derived by various courts, Wexler’s scheme most closely resembles a common law system for administering expungements.

Normally, I would find tension in the maintenance of such a judge-made system, since the Legislature has implemented a statutory expungement scheme. See, e.g., Sternlicht v. Sternlicht, 583 Pa. 149, 163, 876 A.2d 904, 912 (2005) (“Where the Legislature expressly provides a comprehensive legislative scheme, these provisions supersede the prior common law principles.”). Notably, other jurisdictions have been reluctant to administer expungement under the common law where the policy-making branch has established the conditions for expungement.⁸ The difference here is that there is a colorable argument that the General Assembly intended to codify, rather than displace, this common law scheme when it enacted Section 9122(a)(2) of the CHRIA.

⁸ See, e.g., State v. Chesley, 92 P.3d 1212, 1215 (Mont. 2004) (“Absent explicit authorization from the legislature, we conclude that the judiciary has no power to expunge criminal records. Expungement of such records is a matter of legislative discretion.”); Oler v. United States, 17 P.3d 27, 30 (Wyo. 2001) (“The expungement of a criminal record is an extraordinary form of relief and can only be recognized where the legislature has specifically provided for it. We consistently have ruled that courts have no inherent power to expunge criminal records.” (citation omitted)). See generally Program Admin. Servs., Inc. v. Dauphin County Gen. Auth., 593 Pa. 184, 192, 928 A.2d 1013, 1017-18 (2007) (“[I]t is the Legislature’s chief function to set public policy and the courts’ role to enforce that policy, subject to constitutional limitations.”).

As indicated above, under that subsection, expungement is mandatory when “a court order requires that such nonconviction data be expunged.” 18 Pa.C.S. §9122(a)(2). While this provision commands expungement when a trial court exerts this power, it fails to specify the conditions, if any, for when that tribunal can exercise this authority. See id. It seems plausible that, given the Superior Court’s judicially-crafted expungement standards -- which, at the time of the Act’s passage, were of recent creation and believed to be rooted in due process -- the Legislature intended (or, perhaps, felt compelled) to preserve this supposed constitutional scheme under Section 9122(a)(2). See 1 Pa.C.S. §1922(3) (reflecting the presumption that the General Assembly does not intend to violate the United States or Pennsylvania Constitution when enacting a law).

In any event, this Court has viewed the Wexler expungement standards as conforming with Section 9122(a)(2)’s terms,⁹ and even though the Legislature has subsequently amended the CHRIA, it has not altered this subsection in the wake of that ruling. See id. §1922(4) (“That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.”). Accordingly, despite the fact that there appears to be no actual constitutional basis for the right to expungement, which formed the foundation for the Wexler expungement standards, it

⁹ See Armstrong, 495 Pa. at 513 n.8, 434 A.2d at 1209 n.8 (“Our decision is in accord with the provisions of the Criminal History Record Information Acts of 1978 and 1979. See 18 Pa.C.S. § 9122(a)(2) & (c) (Supp. 1981-82). The present case, however, arose before the effective dates of those statutes.”).

reasons that the Court should continue to apply those principles for purposes of Section 9122(a)(2), at least unless and until the Legislature indicates otherwise.¹⁰

On the merits of this case, I believe that a reasoned treatment of a balancing inquiry by a court of original jurisdiction should demonstrate some weighing of the Wexler factors on both sides of the equation. Such balancing is lacking here, as the trial court only provided analysis for the first two considerations -- the strength of the Commonwealth's case against the petitioner and the reasons the Commonwealth gives for wishing to retain the record -- factors which only concern the interests of the Commonwealth. See Commonwealth v. Moto, No. CP-51-CR-0603191-1986, slip op. at 3-5 (C.P. Phila., July 1, 2008). I therefore find the best course to be to return the matter to the court of original jurisdiction to provide an opinion rendered in sufficient legal and factual detail to allow for meaningful appellate review. Respectfully, I do not support the presumption of balancing created by the majority. See Majority Opinion, slip op. at 9.

Mr. Chief Justice Castille and Madame Justice Orié Melvin join this Dissenting Opinion.

¹⁰ Parenthetically, while the Superior Court has held that a person cannot expunge his conviction records under the Wexler expungement standards, see Commonwealth v. Madgon, 310 Pa. Super. 84, 456 A.2d 194 (1983), we have never addressed that issue. Therefore, it remains an open question whether, pursuant to Section 9122(a)(2), a trial court could order expungement of criminal history record information for a person convicted of a crime.