

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

IN RE: PETITION FOR)
 EXPUNGEMENT.)
)
 JIMMY REAL HARMON,)
)
)
 Petitioner/Appellee,)
)
)
 vs.)
)
)
 STATE OF OKLAHOMA *ex rel.*)
 DEPARTMENT OF PUBLIC SAFETY,)
)
)
 Respondent/Appellant.)

FILED
 COURT OF CIVIL APPEALS
 STATE OF OKLAHOMA
 JUL 11 2007
 MICHAEL S. RICHIE
 CLERK

Case No. 103,326

APPEAL FROM THE DISTRICT COURT OF
MUSKOGEE COUNTY

HONORABLE A. CARL ROBINSON, TRIAL JUDGE

AFFIRMED

Jimmy Real Harmon
McAlester, Oklahoma

Pro se

Susan Todd Murray
ASSOCIATE LEGAL COUNSEL
DEPARTMENT OF PUBLIC SAFETY
Oklahoma City, Oklahoma

For Respondent/Appellant

OPINION BY JANE P. WISEMAN, JUDGE:

The Department of Public Safety (DPS) appeals an order of the trial court expunging records pertaining to misdemeanor convictions against Jimmy Real Harmon that occurred more than ten years ago. After review of the record and applicable law, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL BACKGROUND

Harmon was arrested on December 17, 1994, in Muskogee County, Oklahoma, for driving under the influence (DUI) and leaving the scene of a property damage accident. He was twenty-one years old at the time of the accident. He consented to a breath test and tested below the applicable statutory limit. Harmon subsequently pled guilty to an amended charge of reckless driving and either leaving the scene of a property damage accident or failure to stop after striking an unattended vehicle. He appeared in Porum Municipal Court where he was fined and ordered to complete a DUI class, which he completed.

In the more than ten years following his arrest, Harmon has not been convicted of any felony or misdemeanor offenses. In a petition before the Muskogee County District Court, he sought, pursuant to 22 O.S. Supp. 2006 §§ 18 and 19, to have all the records pertaining to the arrest and conviction expunged. As required by statute, Harmon served notice on the Oklahoma State Bureau of

Investigation (OSBI), the Porum Police Department, the Muskogee County District Attorney's office, and DPS. DPS is the only agency that objected to his request for expungement.

DPS filed a motion to dismiss, alleging that the district court lacked subject matter jurisdiction to issue an order expunging DPS' civil implied consent and/or driving records pursuant to 22 O.S. Supp. 2006 §§ 18 and 19. A hearing was held, and the trial court in its order found, in part, the following:

3. Petitioner's municipal misdemeanor convictions occurred more than ten (10) years ago in the City of Porum, Muskogee County, Oklahoma.
4. Petitioner has not been convicted of a criminal offense during that intervening time period and no criminal charges are currently pending against the Petitioner.
5. The harm to privacy of the Petitioner or dangers of unwarranted adverse consequences outweigh the public interest in retaining the records.

The trial court then ordered that “[a]ny records, other than basic identifying information, maintained by the OSBI, DPS, City of Porum, Porum Police Department, or other law enforcement agencies relating to the arrest of Petitioner on December 17, 1994, or the municipal misdemeanor convictions that resulted from that arrest” be expunged and sealed. It is from this order that DPS appeals.

STANDARD OF REVIEW

The question presented on appeal is one of law, which we review *de novo*, “since an appellate court has plenary, independent and non-deferential authority to reexamine a trial court’s legal rulings.” *K&H Well Serv., Inc. v. Tcina, Inc.*, 2002 OK 62, ¶ 9, 51 P.3d 1219, 1223.

ANALYSIS

DPS’ first issue on appeal is whether the trial court “lacked subject matter jurisdiction to expunge [DPS’] civil implied consent and internal, non-publicly available, driving records pursuant to the criminal record expungement statutes 22 O.S. §§ 18-19” and similarly whether denying DPS’ motion to dismiss was error. In *State of Oklahoma v. McMahon*, 1998 OK CIV APP 103, n.1, 959 P.2d 607, the Oklahoma Court of Civil Appeals stated as follows:

The objecting agencies questioned the jurisdiction of the Oklahoma Supreme Court and the Oklahoma Court of Civil Appeals to entertain this appeal. They note that [Petitioner] sought expungement of records in criminal prosecutions and that the legislature codified the expungement statutes in the Oklahoma Code of Criminal Procedure. . . . Sections 18 and 19 do not deal exclusively with records related to criminal prosecutions. . . . the remedy or relief of expungement is to be administered as “the ends of justice” may require. The legislature has clearly placed expungement within the general equitable power of the district court. Cases of equitable cognizance are reviewable by the Oklahoma

Supreme Court and the Oklahoma Court of Civil Appeals
upon assignment from the Supreme Court.

We therefore find that the trial court did have subject matter jurisdiction to expunge Harmon's records. Accordingly, denying DPS' motion to dismiss was not error.

Section 18 of Title 22 provides for expungement of criminal records under certain circumstances. Subsection 7 is relevant here. It states that an expungeable record is one where "[t]he offense was a misdemeanor, the person has not been convicted of any other misdemeanor or felony, no felony or misdemeanor charges are pending against the person, and at least ten (10) years have passed since the judgment was entered." 22 O.S. Supp. 2006 § 18(7). Harmon showed the trial court that he met all of the requirements of subsection 7. His original offense was a misdemeanor; he has not been convicted of any other misdemeanors or felonies since the original crime; he currently has no other criminal charges pending against him; and more than ten years have passed since his original conviction.

Harmon also proved that his privacy interest in expungement outweighed DPS' interest in keeping the records public. "When one of these circumstances [in § 18] is shown to exist, a prima facie showing of harm is made." *McMahon*, 1998 OK CIV APP 103 at ¶ 4, 959 P.2d at 608; *see also Hoover v. State*, 2001 OK

CR 16, ¶ 6, 29 P.3d 591, 594 (“[T]here is a prima facie showing of harm when a circumstance enumerated in § 18 is shown to exist.”). With this showing, the burden then shifted to DPS to prove that “the public interest in keeping the records does not harm privacy interests and serves the ends of justice.” *Hoover*, 2001 OK CR 16 at ¶ 7, 29 P.3d at 594-95. DPS failed to make this showing.

The trial court must “balance the personal harm to privacy and other adverse consequences of open records against the public interest in keeping the records open.” *Id.* at ¶ 7, 29 P.3d at 595. In support of the alleged harm to the public Harmon’s expungement would cause, DPS states the following:

An absurd result will occur if courts are allowed to expunge data from DPS’s non-public driving indexes, because a repeat D.U.I. or A.P.C. violator could continuously come back for a 6-month revocation with modification privileges (when he or she would otherwise be required to have a one-year or three-year revocation without modification).

This hypothetical misses the mark. Harmon is allowed to request expungement precisely because he is not a repeat violator.

Two of the requirements under 22 O.S. Supp. 2006 § 18(7) that Harmon must meet are that he can have no other convictions or charges pending against him at the time his petition is made. He has clearly proven that in the ten years

since his original conviction, he has had no further arrests or convictions, so he clearly cannot be viewed as a repeat offender.

This distinguishes the present case from the *McMahon* decision. The petitioner in *McMahon* was a career criminal with multiple felony convictions, and all the agencies involved opposed expungement. This Court stated, “It is doubtful that the legislature intended expungement to be used by ‘career criminals’ to conceal or withdraw portions of their criminal record from law enforcement and the public, or to improve their evaluation status while under incarceration.” *McMahon*, 1998 OK CIV APP 103 at ¶ 9, 959 P.2d at 609. Under those circumstances, the motion for expungement was properly denied. The *McMahon* Court stated, and the *Hoover* Court agreed, that the purpose of the expungement statutes is “to aid those who are acquitted, exonerated, or who otherwise deserve a second chance at a ‘clean record.’” *Id.* Clearly, Harmon is not a career criminal and falls within the category of those who deserve a second chance at a clean record.

DPS also contends that the public interest in “statistical record-keeping purposes” outweighs Harmon’s privacy interest in expungement. We reject this argument, however, noting that § 18 specifically provides for expungement of

records in Harmon's circumstances. His interest in obtaining gainful employment¹ without having to disclose an offense committed more than ten years ago outweighs any statistical record-keeping interests DPS might claim. DPS also states that reckless driving charges result in points accumulation with DPS and that a certain number of points can cause an individual to lose driving privileges. Notably, DPS does not state whether those points can accumulate based on charges more than ten years old as is the case with Harmon.

DPS also contends that if it is required to delete its records relating to Harmon's arrest, it is essentially being ordered to destroy those records as they are computer-generated. Nothing in the order suggests that DPS must destroy or delete these records; rather it orders the expungement and sealing of those records in accordance with 22 O.S. Supp. 2006 § 19. Section 19(H) specifically states that "[n]othing in this section shall be construed to authorize the physical destruction of any criminal justice records." 22 O.S. Supp. 2006 § 19. The Court of Criminal Appeals has noted that:

¹ Harmon notes in his answer brief before this Court that DPS continually refers to its records as purely internal. This is not, however, an accurate representation. At the hearing on the petition for expungement, DPS' counsel did not dispute Harmon's assertion that, even though the records may not be accessible to the public at large, they are accessible to law enforcement and prosecutorial agencies conducting background checks and employment screening or driver's license checks. Harmon stated in his petition that he was seeking employment with certain federal and/or state agencies which "would likely be impeded without expungement of the referenced records."

22 O.S. Section 19 affords the district court broad powers in determining what information is affected, and to whom access is denied. Section 19 permits sealing “all or any part” of the records (except basic identification information), and grants the court authority to selectively limit access to the records as the court may deem appropriate under the circumstances (*e.g.* access by law enforcement *vis à vis* access by private parties).

Howrey v. State, 2002 OK CR 22, ¶ 13, 46 P.3d 1282, 1285 (citing 22 O.S. § 19(A), (C) and *Hoover*, 2001 OK CR 16 at ¶ 7, 29 P.3d at 595). DPS is merely required to expunge and seal Harmon’s records in a manner that prevents persons or agencies from accessing those records upon inquiry.

DPS’ next issue on appeal is “[w]hether the trial court’s order is contrary to legislative intent and the dictates of Title 47 O.S. § 6-117” Title 47 O.S.

Supp. 2006 § 6-117(B) provides in relevant part that DPS shall:

maintain convenient records of the [court] records and [collision] reports or make suitable notations in order that an individual record of a person showing the convictions of the person and the traffic collisions in which the person has been involved shall be readily ascertainable and available for the consideration of the Department of Public Safety *upon any application for a driver license or renewal of a driver license and at other suitable times.*

(Emphasis added). Article 1 of Section 6 in Title 47 concerns the issuance, expiration and renewal of drivers’ licenses. This case does not involve a driver’s license application, expiration or renewal despite DPS’ arguments to that effect.

No proceedings relating to Harmon's driver's license occurred following his arrest because he tested below the applicable limit on his breath test. His driver's license was never revoked, and as far as the record shows, there was never a proceeding of any kind where the state attempted to revoke his license.

As Harmon stated in his response brief to this Court, he "is not seeking expungement of any records pertaining to a driver's license revocation. No such records are known by [Harmon] to even exist." The only records for which he is requesting expungement are those related to his arrest and conviction for misdemeanor offenses, which are criminal in nature as opposed to civil. We find that, under these circumstances, 47 O.S. Supp. 2006 § 6-117 is inapplicable and that 22 O.S. Supp. 2006 §§ 18 and 19 control.

CONCLUSION

We find that the trial court did have subject matter jurisdiction to expunge Harmon's records, and the trial court properly denied DPS' motion to dismiss. We further find that Harmon satisfied all of the requirements of 22 O.S. Supp. 2006 § 18(7), entitling him to expungement of his arrest and disposition records, and that his privacy interest in expungement outweighs any public interest asserted by DPS. The judgment of the trial court is therefore affirmed.

AFFIRMED.

RAPP, C.J., and FISCHER, P.J., concur.

July 11, 2007