SC88172

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI
AND
MISSOURI STATE HIGHWAY PATROL,

Appellants,

v.

IN RE: EXPUNGEMENT OF ARREST RECORDS RELATED TO WILLIAM T. BROWN, JR.,

Respondent.

Appeal from the Circuit Court of Clay County, Missouri
Seventh Judicial Circuit
The Honorable Janet Sutton, Judge

APPELLANTS' SUBSTITUTE REPLY BRIEF

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ARGUMENT

THE TRIAL COURT ERRED IN SETTING ASIDE THE ORDER OF EXPUNGEMENT WHICH HAD BEEN ENTERED OVER THIRTEEN MONTHS EARLIER BECAUSE THE EXPUNGEMENT ORDER WAS FINAL AND THE TRIAL COURT DID NOT RETAIN JURISDICTION TO SET ASIDE THE ORDER THAT THERE IS NO AUTHORITY FOR A COURT TO SET ASIDE A JUDGMENT THAT WAS WITHIN THE TIRAL COURT'S JURISDICTION TO ENTER AFTER THE JUDGMENT BECAME FINAL AND CONCLUSIVE AS TO THE PARTIES' RIGHTS. EVEN IF THE ORIGINAL ORDER WAS BASED ON A MISREPRESENATION BY THE PLAINTIFF, THAT ORDER WAS NOT VOID, BUT MERELY VOIDABLE, AND THE PLAINTIFF WHO MADE THE MISREPRESENTATION CANNOT USE HIS OWN MISREPRESENTATION AS THE BASIS TO SET ASIDE THE COURT'S ORDER.

I. The state was a Defendant in the underlying expungement action.

Mr. Brown argues in both his statement of the facts[1] and in the body of his brief that the State cannot challenge the trial court's decision because Mr. Brown negligently failed to

[1] The statement of the facts should not have been used to make arguments. *Livingston v. Schnuck Markets, Inc.* 184 S.W.3d 617, 618 (Mo.App., E.D. 2006).

name the State as a defendant.[2] By statute the State must be a defendant in any expungement case:

> The petition shall name as defendants all law enforcement agencies, counts, prosecuting attorneys, central State depositions of records or records or others who the petitioner has reason to believe may possess the records subject to expungement.

§610.123.0, RSMo. (emphasis added).

The argument that the order did not affect the State or the Highway Patrol because they were not named as defendants (Appellant's Brief p. 34-35) is absurd. While Mr. Brown admits he was dilatory in failing to serve any defendant, the circuit clerk was competent enough to do so (L.F. p. 6). And Mr. Brown did explicitly name the Missouri State Highway Patrol as an agency he believed was in possession of records (L.F. p. 5). Furthermore, immediately below Mr. Brown's acknowledgement that the Highway Patrol had records relevant to the expungement petition there is this notation:

[2] It does seem quite odd that throughout this litigation Mr. Brown reveals more and more procedural errors on his part in an attempt to somehow justify the trial court's decision. In addition to the other previous errors he made, he now admits he did not attempt proper service on any party and that he failed to verify the petition. How he thinks this somehow makes his position more just is unclear.

DIRECTIONS TO CLERK

> Upon filing of the petition, the clerk in every case shall provide a copy of the petition to the prosecuting attorney and pursuant to Section 610.123.2, RSMo, shall give reasonable notice of the hearing to the prosecuting attorney and each official, or agency, or other entity named in the petition.

(L.F., p. 5). Once again, to suggest the state was not a party to the expungement is untenable.

After being served, the State did file a Motion to Dismiss because Mr. Brown failed to fulfill the statutory requirement that he attach a fingerprint card (L.F. p. 7). This State was most certainly a party to this action and was subject to the court's original decision entered on February 20, 2004 (L.F. p. 8). That order specifically stated:

> "The Court orders each agency identified in the attached petition to expunge the arrest records specified in the petition in the manner provided in Section 610.124, RSMo."

(L.F. p. 8). Again, the Highway Patrol was such an agency and did receive and abide by that order.

Mr. Brown then tries to justify his failure to notify the State of his motion to vacate because he told "some" defendants[3], although not others. Mr. Brown cannot seriously contend that the appropriate practice of law, nor basic due process, permits a party to litigation to selectively provide notice to some parties but not others.

II. The State is not advocating abandonment of the rule that decisions must be denominated "Judgments" for the purposes of appeal.

Mr. Brown suggests that the State is asking that the rule in *City of St. Louis v. Hughes*, 950 S.W.2d 850 (Mo. banc 1997), be abrogated. The State is suggesting no such thing.

For purposes of appeal, a final decision should be denominated as a "judgment". "The rule is an attempt to assist the litigants and the appellate courts by clearly distinguishing between where orders and rulings of the trial court are intended to be final and appealable and when the trial court seeks to retain jurisdiction over the issue." *Hughes*, 950 S.W.2d at 853. But for an expungement to be final, it is reasonable for the State to accept an "order" because that is what both this court and the legislature have dictated. This is not a matter of a party "choosing" to treat an order as a final judgment (App. Brief, p. 27). Rule 155.04 sets forth the form for ordering an expungement, which is titled:

"Order of Expungement of Arrest Records"

[3] Interestingly, these other defendants are not listed in the expungement petition, nor served, in any manner different from that of the Highway Patrol, yet Mr. Brown readily identifies them as "defendants."

It is not unreasonable for the State, upon receiving such an order, to comply. Should the State wish to appeal, requesting the Court to designate the order as a "judgment" is appropriate. But once that period for filing an appeal has run, the State must comply with that order. This is entirely consistent with *Hughes's* holding that a final judgment is a "prerequisite to appellate review." 950 S.W.2d at 852.

III. The State did not waive its arguments regarding the unfairness of Mr. Brown's attempt to "void" the expungement.

Given the litany of missteps by Mr. Brown[4], it is more than a little disingenuous for Mr. Brown to claim that the State has waived certain arguments because it did not raise those "defenses" at the first possible opportunity.

Mr. Brown argues that judicial estoppel and laches are "affirmative defenses." It should be noted, however, that under Rule 55.27, defenses will be set out "in the responsive pleading thereto if one is required."(Emphasis added). There is no responsive pleading required to an expungement petition, and the State's motion to set aside the court's order of April 7, 2005 (L.F. p. 21-23) was not a responsive pleading.

[4] By his own admission, Mr. Brown did not verify his petition, he failed to read the statute, he failed to name necessary parties, he failed to plead that there was no litigation pending, he failed to submit a fingerprint card as required by statute, he failed to give notice of his motion to vacate, he failed to have a record of either the expungement hearing or the motion to vacate as required, and he failed to provide a "judgment" for the court to file.

In addition, the State was not "defending" anything. The trial court had issued an improper order and the State was challenging the trial court's authority to make that order. This challenge was complicated by the fact that the State was given no notice by Mr. Brown of his motion, the order, or that he had obtained the order the same day he filed it. Yet, the State did plead that the order was unfair and improper, without using the words "judicial estoppel" or "laches":

12. The Order of April 7, 2005, is void because it is unenforceable. Once records have been destroyed and obliterated pursuant to a court order, those records cannot be undestroyed.

13. Further, the State and the Missouri State Highway Patrol do not believe the Petitioner, who sought and obtained an expungement, has any standing to seek to undue the very action he sought simply because of a change in legal strategy.

14. The State and the Missouri State Highway Patrol are aware of no continuing jurisdiction which can be retained by a trial court to set aside an order of expungement more than twelve months later.

15. To allow the Petitioner to "change his mind" is inequitable.

(L.F., p. 22)

The State's motion most certainly gave notice to the trial court and Mr. Brown that it was inequitable for Mr. Brown to seek the expungement and then ask to set it aside.

In addition, it is not reasonable to require the State to assert a "defense" to a claim not raised until appeal. Mr. Brown's argument to the trial court was that the original expungement order was "void." It was not until oral argument before the Western District

that the issue of whether the expungement order must be denominated a judgment was argued by Mr. Brown. It was not raised in his brief before that Court. It is, therefore, unreasonable to expect the State to raise a defense to an issue not pled or argued. The constitutional questions addressed by the State in its substitute brief are being made at the first opportunity to do so, since those issues did not arise until this case was argued before the Western District. These arguments were, in fact, raised at the very first opportunity to do so.

IV. Under State law, Equitable Estoppel does not require evidence that Mr. Brown intentionally mislead the Court.

Mr. Brown feels compelled to suggest that judicial estoppel is not applicable because he did not intentionally mislead the trial court, citing federal law. Regardless of whether Mr. Brown's discussion of federal law is accurate, it has no application to Missouri law because Missouri law has no such requirement.

"Judicial estoppel applies to prevent litigants from taking a position in one judicial proceeding, thereby obtaining benefits from that position in that instance and later in a second proceeding, taking a contrary position in order to obtain benefits from such a contrary position at that time." *Besand v. Gibbar*, 982 S.W.2d 808, 810 (Mo.App.E.D. 1998). Contrary to Mr. Brown's argument, the conduct need not be fraudulent. *State ex rel. KelCor, Inc. v. Nooney Realty Trust , Inc.*, 966 S.W.2d 399, 404 (Mo. App. E.D. 1998).

V. The State did Expunge Mr. Brown's Criminal History

Referring to a document not a part of this case, but which is part of the legal file in a

separate case (Appt's Brief p. 34) Mr. Brown argues that the State did not prove that it expunged the records. Once again, the argument shows a complete lack of understanding of the criminal records and demonstrates the impropriety of allowing a criminal defendant to recreate his own criminal history. It also demonstrates why matters should be addressed and litigated at the trial level, rather than wait until the appeal to raise them for the first time. Had Mr. Brown made the present assertion before the trial court, the State could have easily demonstrated that the document Mr. Brown is referring to was not a "criminal history" record.

The "document" Mr. Brown so proudly refers to in his brief the Highway Patrol still possessed was an arrest report--it is not the criminal history.[5] In fact, these documents prove that the criminal history was, in fact, destroyed! There is no "rap sheet", no ORI number, no fingerprint card. These are the documents that make up the actual criminal records, and Mr. Brown has essentially proven that they do not exist – because they were destroyed pursuant to the expungement order.

Furthermore, Mr. Brown's claim that the State said it did not destroy the records because the expungement order was not final (Appellant's Brief, p. 34), is patently false. To the contrary, the State informed Judge Sutton that once the time for appeal has run, the State accepts the expungement order as final (Tr. p. 10-12).

[5] And the only reason this arrest report is still in existence is because it was made the subject of litigation by Mr. Brown prior to the original expungement order being issued.

It continues to be ironic that Mr. Brown convinced the trial court to vacate an expungement order with no notice, and presenting no evidence whatsoever, yet now claims the State had some unspecified burden to prove that it complied with the original expungement order.

The issue during the May 5, 2005, hearing was whether the trial court had jurisdiction to vacate its original expungement order. The trial court had no doubt that the records had been expunged (Tr. p. 17), and Mr. Brown now wishes to create a factual dispute that is both non-existent and irrelevant. The issue on appeal is whether the trial court can set aside a valid order of expungement 14 months later simply because Mr. Brown changed his mind about the wanting the expungement. The answer is "no".

CONCLUSION

The trial court's order of April 7, 2006, and Judgment of May 16, 2005, should be reversed and set aside.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies:

That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and (c) of this Court and contains _____words, excluding the cover, and this certification, as determined by Microsoft Word software; and

That the labeled disk, simultaneously filed with the hard copies of this brief, has been scanned for viruses and is virus-free; and

That two true and correct copies of the attached brief, and a labeled disk containing a copy of this brief, were mailed, postage prepaid, this _____ day of April, 2007, to:

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APPENDIX

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