

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

FILED
2008 JUN 25 PM 2:11
DAVIDSON COUNTY CHANCERY CLERK & MASTER CL
D.C. # 07-1318-IF

CARL EUGENE HENDRICKS)
)
Petitioner,)
)
PEACE OFFICERS STANDARDS)
AND TRAINING COMMISSION)
)
Respondent.)

No. 07-1318-IF

MEMORANDUM AND ORDER

The Petitioner, Carl Eugene Hendricks (“Mr. Hendricks”), seeks certiorari review of the decision by the Respondent, the Tennessee Peace Officer Standards and Training Commission (“POST Commission”), decertifying him as a police officer for the State of Tennessee on the grounds that he had earlier “pled guilty” to a felony theft charge, even though the charge had been dismissed and expunged. According to the Respondent, the Petitioner’s expungement did not excuse him from disclosing his prior felony guilty plea on his POST application and according to state statute and POST rules, the guilty plea rendered him unqualified to be a Tennessee law enforcement officer.

BACKGROUND

Mr. Hendricks, a former Marine with an Honorable Discharge, pled guilty to one count of class E felony theft in July, 1996¹ and was placed on probation pursuant to Tenn. Code Ann. §

¹ According to Mr. Hendricks, upon his discharge from the Marines, he worked two jobs - one at a warehouse loading dock, driving a forklift, and the other at night for FedEx. He stated that at the warehouse he was only responsible for loading heating and air conditioning units at the back dock and not for taking payments or making sure that payments were made in the front office. Mr. Hendricks said that he got in trouble when he wanted a raise and told the boss that “if he [the boss] wouldn’t sleep with the young lady up front that he may be able to afford to pay me (Mr. Hendricks) more. . . two or three days later Memphis police came in, I’m on the forklift. They locked me up and said I loaded an air conditioner and the guy didn’t pay for it and they charged me with theft.” Mr. Hendricks’ attorney stated in his brief that it was later that the supervisor was found to have embezzled money from the business. Nonetheless, at the time of his arrest, Mr. Hendricks said he was advised to request diversion, “And I said well, if that’s the best thing to do, that’s what I want to do, so that’s what we did. . . [The judge] asked me if diversion was what I wanted. I said yes, sir. Then we went downstairs and signed some paperwork and I was on probation for a year. I never had a choice of which diversion I wanted. That’s just what happened.”

40-35-313. On November 13, 1998, the Criminal Trial Court ordered his arrest and guilty plea expunged from his record, pursuant to Tenn. Code Ann. § 40-35-313.

On March 22, 2000, Mr. Hendricks applied to the Gallaway Police Department to work as a reserve officer. He completed the application form, checking “no” in the space beside the specific question: “Have you ever been convicted of a felony or misdemeanor within the last 5 years?”² Mr. Hendricks was hired on October 2, 2000 as a reserve officer with a P-2 rank.

On November 13, 2000, Mr. Hendricks applied to the POST Commission for certification as a police officer with the Gallaway Police Department. Mr. Hendricks certified on the two-page application that he had “not been convicted of or pleaded guilty to or entered a plea of *nolo contendere* to any felony charge or to any violation of any federal or state laws or city ordinances relating to force, violence, theft, dishonesty, gambling, liquor, or controlled substances.” He also checked “no” on the application in response to the question, “Has the applicant ever been convicted of any criminal violation?” Mr. Hendricks certified at the end of the application that all of the information was true and correct to the best of his knowledge.

On June 22, 2001, Respondent POST certified Mr. Hendricks as qualified to serve as a Tennessee law enforcement officer. In 2006, a background check revealed that Mr. Hendricks had a criminal history for having plead guilty to a felony theft in 1996. On December 20, 2006, the POST Commission notified Mr. Hendricks that it was instituting proceedings to decertify him for failure to disclose information relating to his prior arrest and guilty plea. On January 9, 2007, Mr. Hendricks formally appealed the decision to decertify him. On February 15, 2007, the POST Commission held a hearing and entered an Initial Order, recommending immediate

² The application question was qualified by the following: “You will not be denied employment solely because of a conviction record, unless the offense is related to the job for which you have applied.”

revocation of Mr. Hendricks' certification. The Initial Order stated that his certification was being revoked because of a plea of guilty to a felony charge in violation of § 1110-2-.04(2) of the Peace Officer Standards and Training Rules and Regulations.

On March 12, 2007, Mr. Hendricks requested final review of the POST Initial Order by the Full POST Commission. On May 22, 2007, the POST Commission denied his appeal and entered a Final Order revoking his certification as a law enforcement officer in Tennessee.

STANDARD OF REVIEW

The scope of this review is governed by Tenn. Code Ann § 4-5-322. This court may reverse or modify the Commission's decision only if Mr. Hendricks' rights have been prejudiced because the Commission's decision is (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of an agency; (c) made upon unlawful procedure; (d) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (e) unsupported by evidence which is both substantial and material in light of the entire record. Tenn. Code Ann. § 4-5-311(h).

"The scope of review under an action for writ of certiorari is narrow." *Blackmon v. Tennessee Bd. of Paroles*, 29 S.W.3d 875, 878 (Tenn. Ct. App. 2000). "It covers only an inquiry into whether the [Commission] exceeded its jurisdiction or is acting illegally, fraudulently, or arbitrarily." *Powell v. Parole Eligibility Review Bd.* 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994). "Reversal or modification of the [administrative board's] action may be had only when the trial court determines that the [Commission] acted in violation of constitutional and statutory provisions, exceeded its own statutory authority, followed an unlawful procedure, acted arbitrarily or capriciously, or reached a decision without any material evidence to support it. *Massey v. Shelby County Retirement Bd.*, 813 S.W.2d 462, 464 (Tenn. Ct. App. 1991).

ANALYSIS

According to the Respondent, Mr. Hendricks was decertified based upon a statutory disqualification under Tennessee law. Tenn. Code Ann. § 38-8-106, which sets forth the qualifications for police officers in Tennessee, states in relevant part:

Any person employed as a full-time officer, and any person employed or utilized as a part-time, temporary, reserve or auxiliary police officer or as a special deputy, shall:

(4) Not have been convicted of or pleaded guilty to or entered a plea of nolo contendere to any felony charge or to any violation of any federal or state laws or city ordinances relating to force, theft, dishonesty, gambling, liquor or controlled substances.

Tenn. Code Ann. § 38-8-106(4).

Based upon that statute and its own Rule 1110-2-.03³, the Respondent contends that Mr. Hendricks' guilty plea disqualified him from service.

Further, the Respondent alleges that Mr. Hendricks violated POST Rule 1110-2-.04(2)(a) by supplying false information or acquiescing to false information being supplied to the Commission regarding eligibility for certification. Rule 1110-2-.04, states in pertinent part:

(2) Suspension or Revocation of Certification

(a) Grounds for Suspension or Revocation. The Commission may suspend or revoke the certification of any officer who shall, subsequent to certification under these Rules:

4. Be found to have supplied or acquiesced in false information being supplied to the Commission regarding eligibility for certification ;

Tenn. Comp. R. & Reg. 1110-2-.04(2)(a).

³ 1110-2-.03 LAW ENFORCEMENT OFFICER CERTIFICATION REQUIREMENTS.

(1)(d) Not have been convicted of or pleaded guilty to or entered a plea of nolo contendere to any felony charge or to any violation of any federal or state laws or city ordinances relating to force, violence, theft, dishonesty, gambling, liquor or controlled substances;

According to the Respondent, although Mr. Hendricks admitted that he did not inform POST of his prior felony plea because he thought his expungement meant that he did not have to disclose it, POST asserts that Legislature did not create an exception for persons whose prior felony guilty pleas had been expunged under judicial diversions statutes. POST also argues that the Legislature did not create an exception for persons who failed, for whatever reason, to inform the POST Commission of their prior felony guilty plea.

Finally, POST asserts that the judicial diversion statute, Tenn. Code Ann. § 40-35-313, only authorizes the expungement of “official records,” and does not authorize expungement of the non-public records of the prior guilty plea. The statute, Tenn. Code Ann. § 40-35-313 provides, in pertinent part:

(b) Upon the dismissal of the person and discharge of the proceedings against the person under subsection (a), the person may apply to the court for an order to expunge from all official records, other than the non-public records to be retained by the court under subsection (a) and the public records that are defined in § 40-32-101(b), all recordation relating to the person’s arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section . . . The effect of the order is to restore the person, in the contemplation of the law, to the status the person occupied before the arrest or indictment or information. No person as to whom the order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of the person’s failures to recite or acknowledge the arrest, or indictment or information, or trial in response to any inquiry made of the person for any purpose, except when the person who has been availed of the privileges of expunction then assumes the role of plaintiff in a civil action based upon the same transaction or occurrence as the expunged criminal record.

(d)(1) Any court dismissing charges against a person and ordering the expunction of a person’s public records following the discharge of proceeding pursuant to this section after October 1, 1998, shall send or cause to be sent a copy of the dismissal and expunction order to the Tennessee bureau of investigation for entry into its expunged criminal offender and pretrial diversion database; provided, however, the court shall not be required to send to the bureau a copy of any dismissal and

expunction order dated on or after July 1, 1999, if the charge dismissed is classified as a Class B or C misdemeanor.

Tenn. Code Ann. § 40-35-313(b) and (d)(1).

Public records are defined in the statute as follows:

(b)(1) "Public records" for the purpose of expunction only, does not include arrest histories, investigative reports, intelligence information of law enforcement agencies. . .

Tenn. Code Ann. § 40-32-101(b)(1).

The Respondent claims that the Legislature intended for the State to maintain non-public records and to use them for other law enforcement purposes, including but not limited to, whether a person is qualified to serve as a police officer. Tenn. Code Ann. § 40-35-313(d)(1). In support of its position, the Respondent relied upon the language in *State v. Schindler*, 986 S.W.2d 209 (Tenn. 1999) which states that "expungement does not return a person to the position occupied prior to committing the offense." Further, Respondent relies upon Tenn. Op. Atty. Gen. No. 00-026, 2000 WL 201992 (February 15, 2000) which states that

[A] conviction, even if later expunged, is evidence of misconduct; no showing of innocence of the charges is required to qualify for expungement of former convictions. Information about an officer's prior criminal activity is significant and worthy of consideration by the POST Commission, in that a police officer occupies a position of public trust.

As discussed below, none of the arguments advanced by the Respondent or the authorities upon which it relies are compelling. The recent appellate decision in *Wright v. Tennessee Peace Officer Standards and Training Commission*, M2006-00123-COA-R3-CV, 2008 WL 18914135 (Tenn. Ct. App. April 29, 2008) effectively negates the Respondent's position. First, the Court of Appeals found that the *Schindler* case does not stand for the broad proposition that expungement allows continued resort to the person's resulting legal status as an independent ground for legal disqualifications. The crucial distinction in *Schindler* is between

the criminal act itself and the legal status that results from the legal proceedings precipitated by that criminal act. At most, *Schindler* stands only for the proposition that expungement does not erase a person's underlying criminal conduct.

Similar to the plea of the police officer in *Wright*, Mr. Hendricks' plea was used to simply prove that the plea happened, not to prove the factual scenario that precipitated the arrest, charge and eventual plea. As in *Wright*, the underlying facts of Mr. Hendricks' offense are not enough; his legal status must be proven in order to satisfy the applicable statute. Using the rationale in *Wright*, a factual allegation of a theft, absent a guilty plea, does not pass muster as an independent reason for denying or revoking certification under Tenn. Code Ann § 38-8-106 or Tenn. Comp. R. & Regs. 1110-2. The POST Commission did not decertify Mr. Hendricks for a criminal charge based on an alleged theft; it could not have done so, as there is no such ground for decertification. Rather, as in *Wright*, the commission decertified Mr. Hendricks because he entered a plea of guilty to a violation of a state law, even though it had not become a conviction.

If the crux of the dispute had been the facts of the underlying theft case, rather than Mr. Hendrick's *legal* status, Mr. Hendricks might have been able to mount a more vigorous defense. Testimony that he never had responsibility for payments or access to any commercial transactions would have been relevant because the commission would have been called upon to decide *what happened*, rather than to merely decide what the legal records show. As in *Wright*, Mr. Hendricks' case was not properly before the commission in the first place, because his expungement erased from his record the legal fact of his guilty plea. Mr. Hendricks was not disqualified under either Tenn. Code Ann. § 38-8-106(4), or Tenn. Comp. R. & Regs. 1110-2-.03(d). His disqualification is dependent entirely upon the existence of the guilty plea as a legally operative fact. *Wright*, at *11. As declared in *Wright*, legally, an expunged guilty plea

under the judicial diversion statute is not a legally operative fact. The plea can be used as evidence of underlying facts, but it cannot, by itself, be used as a reason for legal disqualification, as it was here.

This court embraces as controlling the statement in *Wright* that if the “effect of [the expungement] order is to restore the person, in the contemplation of the law, to the status the person occupied before the arrest or indictment or information, . . . then it defies logic to suggest that the person’s status with regard to the guilty plea, in the contemplation of the law, is unchanged by the expungement.” *Id.*

This trial court seriously erred in affirming the action of the commission in *Wright* by finding that because a police officer occupies a position of public trust, the commission was warranted in considering the guilty plea. Although police officers do occupy a position of public trust, the appellate decision in *Wright* explains that the state legislature has not chosen to create a police-qualifications exception to the expungement provision of the judicial diversion statute. *Id.* “The POST rules attempt to create such an exception, but of course, administrative regulations cannot overrule a statute.” *Id.* The statutory language of Tenn. Code Ann. § 40-35-313 is . . . in clear and express contravention of the administrative rule. *Id.*

The *Wright* decision also addresses the exception to expungement created by the judicial diversion statute which allows the use of non-public records . . . for law enforcement purposes. Tenn. Code Ann. § 40-32-101(b)(1)(Supp. 2007). As in *Wright*, the Respondent argues that the existence of the exception suggests that the Legislature intended for the State to maintain non-public expungement records and to use them for other law enforcement purposes, including but not limited to determining whether a person is qualified to serve as a police officer. The appellate court in *Wright* disagreed, repeating that a history of arrests, investigations and/or

police intelligence about the individual's alleged *conduct* is not sufficient to disqualify the person under either the police qualifications statute or the POST rules regarding certification. *Id.* at *12. Only a conviction, a guilty plea, or a plea of nolo contendere will suffice. *Id.* Further, the appellate court doubted that the POST Commission decertification proceedings qualify as a "law enforcement purpose" under the intended meaning of Tenn. Code Ann. § 40-32-101, as the language in the statute far more likely refers to *actual police investigations*.⁴ *Id.*

Finally, in *Wright*, the court states that a loose construction of the phrase "law enforcement purpose" would "threaten to create a broad exception that could nearly swallow the expungement rule by creating a minefield of potential circumstances in which an expunged offense could come back to haunt a defendant." *Id.* at *13. The *Wright* court adopted a narrower construction in keeping with the judicial diversion statute, which delineates a number of very specific exceptions and otherwise sweeps quite broadly in defining the impact of expungement. *Id.* If the legislature wished to create an exception to the judicial diversion statute that would allow the POST Commission to consider expunged offenses for purposes of police certification, the Legislature of course is free to do so, but it must do so specifically by statute. *Id.*

According to *Wright*, a proper reading of Tenn. Code Ann. § 38-8-106 is that it is silent on the question of whether the commission can consider expunged guilty pleas. *Id.* The legislature's inclusion of the term "pleaded guilty" does not necessarily imply an intention to include expunged guilty pleas under the ambit of the statute, and the mere fact that guilty pleas are listed separately from convictions does not by itself establish this intention. *Id.* Following the rules of statutory construction, the *Wright* court held that the specific language of Tenn. Code

⁴ The appellate court cites the Tennessee Supreme Court decision in *Memphis Publ's. Co. v. Holt*, 710 S.W.2d 513, 517 (Tenn. 1986) to support this view. "[T]he statute merely acknowledges that the described documents may be maintained by law-enforcement agencies and district attorneys general for further investigative purposes after an expungement order is entered. Implicitly, these 'further investigative purposes' would be for police investigations, not personnel investigations by a politically appointed state agency." *Wright*, at *12.

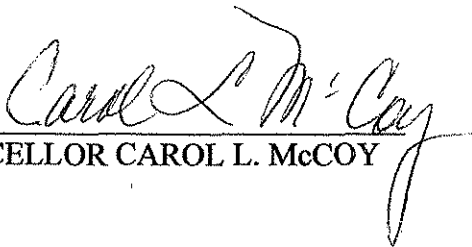
Ann. § 40-35-313, which bars any reliance upon expunged offenses for all but a strictly limited list of purposes, controls the general language in Tenn. Code Ann. § 38-8-106, which does not even mention expungement. *Id.*

The *Wright* court held that Tenn. Comp. R. and Regs. 1110-2-.03(1)(e)(3) and Tenn. Comp. R. and Regs., ch. 1110-9-.04(1)(c) are in conflict with Tenn. Code Ann. § 40-35-313, and as such are invalid in any case where that conflict arises. Mr. Hendricks' case is directly on point and as such, Mr. Hendricks was wrongly decertified on the basis of a guilty plea that, at the time of his decertification, was of no legal effect.

CONCLUSION

The decision of the POST Commission is reversed and Mr. Hendricks is reinstated as a certified law enforcement officer in the State of Tennessee, with the Initial Order and Final Order to have no effect regarding any benefits or tenure to which he may be entitled. Costs are assessed against the Tennessee Peace Officer Standards and Training Commission, for which execution may issue if necessary.

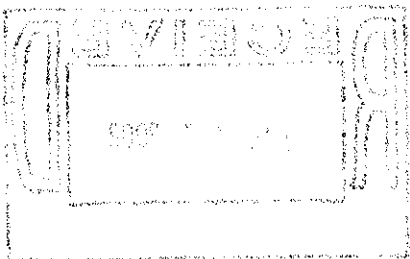
IT IS SO ORDERED.


CHANCELLOR CAROL L. McCOY

June 24, 2008

cc: David L. Raybin
Hollins, Wagster, Weatherly & Raybin, P.C.
Fifth Third Center, 22nd Floor
424 Church Street
Nashville, TN 37219

William Lundy
Assistant Attorney General
P.O. Box 20207
Nashville, TN 37202 -0207



RULE 50 CERTIFICATION

A Copy of this order has been served by U. S. Mail upon all parties or their counsel named above.


Deputy Clerk and Master
Chancery Court

6-25-08
Date