

1986

Jane Doe v. Utah Department of Public Safety;
Peace Officer Standards and Training; Ted E.
Leamons, Director, William L. Flink, and John
Does I through IV : Brief of Appellant

Utah Supreme Court

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SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH
DOCKET NO. 860138
JANE DOE, :
Petitioner-Respondent, :

-v- :

UTAH DEPARTMENT OF PUBLIC : Case No. 860138
SAFETY; PEACE OFFICER STANDARDS :
AND TRAINING; TED E. LEAMONS, : Category No. 13b
DIRECTOR; WILLIAM L. FLINK; :
and John Does I through IV, :
Respondents-Appellants. :

BRIEF OF APPELLANTS

APPEAL FROM AN ORDER GRANTING PETITIONER'S
MOTION FOR SUMMARY JUDGMENT IN A DECLARATORY
JUDGMENT ACTION, IN THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE DAVID B. DEE,
JUDGE, PRESIDING

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JUN 16 1986

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-v- :
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	i
STATEMENT OF ISSUES PRESENTED ON APPEAL.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS.....	2
SUMMARY OF ARGUMENT.....	3
ARGUMENT	
POINT I P.O.S.T AND THE P.O.S.T. COUNCIL MAY CONSIDER CONVICTIONS EXPUNGED UNDER § 77-18-2 IN DECIDING WHETHER TO GRANT OR DENY CERTIFICATION UNDER § 67-15-10.5.....	4
CONCLUSION.....	12

TABLE OF AUTHORITIES

CASES CITED

<u>Amberson v. Leamons</u> , Third Dist. Ct. No. C85-6240 (November 25, 1985).....	9
<u>Copeland v. Department of Alcoholic Beverage Control</u> , 241 Cal. App. 2d 186, 50 Cal. Rptr. 452 (Dist. Ct. App. 1966).....	10
<u>Dickerson v. New Banner Institute, Inc.</u> , 460 U.S. 103 (1982).....	10,11
<u>Dixon v. McMullen</u> , 527 F.Supp. 711 (N.D. Tex. 1981)....	9
<u>Faure v. Chesworth</u> , 489 N.Y.S.2d 641 (1985).....	10
<u>Granite School District v. Salt Lake County</u> , 659 P.2d 1030 (Utah 1983).....	6
<u>Hardy v. Stumpf</u> , 145 Cal. Rptr. 176, 576 P.2d 1342 (1978).....	10
<u>Manners v. State, Bd. of Veterinary Medicine</u> , 107 Idaho 950, 694 P.2d 1298 (1985).....	10
<u>Meyer v. Board of Medical Examiners</u> , 34 Cal.2d 62, 206 P.2d 1085 (1949).....	9

<u>Millett v. Clark Clinic Corp.</u> , 609 P.2d 934 (Utah 1980).....	6
<u>Monroe v. St. Louis Metropolitan Police Department</u> , 524 F.Supp. 1009 (E.D. Mo. 1981).....	10
<u>Parson Asphalt Production, Inc. v. Utah State Tax Commission</u> , 617 P.2d 397 (Utah 1980).....	13
<u>Patt v. Nevada State Board of Accountancy</u> , 93 Nev. 548, 571 P.2d 105 (1977).....	9
<u>Snyder v. Merkley</u> , 693 P.2d 64 (Utah 1984).....	4
<u>State v. Chambers</u> , 533 P.2d 876 (Utah 1975).....	9
<u>State v. Jones</u> , 581 P.2d 141 (Utah 1978).....	7
<u>State v. Navaro</u> , 83 Utah 6, 26 P.2d 955 (1933).....	13
<u>Stephens v. Toomey</u> , 51 Cal. 2d 864, 338 P.2d 182 (1959).....	10
<u>Thompson v. Department of the Treasury</u> , 557 F.Supp. 158 (D. Utah 1982).....	7,8

STATUTES CITED

UTAH CODE ANN. § 67-15-1 (Supp. 1985).....	4
UTAH CODE ANN. § 67-15-6(4) (Supp. 1985).....	5
UTAH CODE ANN. § 67-15-10.5 (Supp. 1985).....	1,3,4,5, 11,12
UTAH CODE ANN. § 67-15-11 (Supp. 1985).....	2
UTAH CODE ANN. § 67-15-17(2) (Supp. 1985).....	2
UTAH CODE ANN. § 77-1a-2 (Supp. 1985).....	2
UTAH CODE ANN. § 77-18-2 (1982).....	1,2,3,4,6, 7,8,11,12
UTAH CODE ANN. § 77-35-17.5 (1953).....	7,8
UTAH CODE ANN. §§ 78-33-1 and -2 (1977).....	4

IN THE SUPREME COURT OF THE STATE OF UTAH

JANE DOE,	:	
Petitioner-Respondent,	:	
-v-	:	
UTAH DEPARTMENT OF PUBLIC SAFETY; PEACE OFFICER STANDARDS AND TRAINING; TED E. LEAMONS, DIRECTOR; WILLIAM L. FLINK; and John Does I through IV,	:	Case No. 860138
	:	Category No. 13b
Respondents-Appellants.	:	

STATEMENT OF ISSUES PRESENTED ON APPEAL

The sole issue presented in this appeal is the following:

1. Did the district court erroneously rule that Peace Officer Standards and Training ("P.O.S.T."), a division of the Department of Public Safety, may not consider convictions expunged under UTAH CODE ANN. § 77-18-2 (1982) in deciding whether to grant or deny peace officer certification to an individual under UTAH CODE ANN. § 67-15-10.5 (Supp. 1985)?

STATEMENT OF THE CASE

This appeal is from the district court's order granting Jane Doe's motion for summary judgment and denying P.O.S.T.'s motion for summary judgment in a declaratory judgment action filed by Jane Doe (R. 2-10). In that order and the accompanying memorandum decision (Appendix A), the lower court ruled that, under § 67-15-10.5 and § 77-18-2, P.O.S.T. may not consider expunged convictions in deciding whether to grant or deny peace officer certification to an individual (R. 186-95).

STATEMENT OF FACTS

The essential facts of this case are not in dispute. Jane Doe, a resident of Salt Lake County, is an employee of Adult Probation and Parole, a subdivision of the Department of Corrections. In November 1984, she obtained expungements under § 77-18-2 of a felony conviction for obtaining money under false pretenses and a class A misdemeanor conviction for possession of a controlled substance with intent to distribute for value (Appendix B). Upon application to P.O.S.T. for correctional officer certification, which is required for her position with Adult Probation and Parole, see UTAH CODE ANN. § 77-1a-2 (Supp. 1985), and completion of the necessary training for that level of certification, Ms. Doe was informed that a committee of the P.O.S.T. Council¹ would meet to determine whether there was probable cause based upon her expunged convictions to issue an administrative complaint that sought denial of certification. Findings of Fact at 2-3 (R. 189-90).

Prior to the hearing before the P.O.S.T. Council committee, Ms. Doe filed a petition for declaratory judgment which asked the district court to declare that, under the pertinent statutes, P.O.S.T. was prohibited from considering her expunged convictions (R. 2-10). She also obtained a temporary restraining order from the court which prohibited P.O.S.T. from

¹ The P.O.S.T. Council was created by statute "to serve as an advisory board to the director of the division of peace officer training on matters relating to peace officer standards and training." § 67-15-11. It is statutorily authorized to advise the director on certification of individual peace officers. § 67-15-17(2).

proceeding with that hearing (R. 34-35). Pursuant to stipulation of the parties, the court then issued a preliminary injunction which enjoined P.O.S.T. from holding a probable cause hearing until the issues regarding consideration of expunged convictions were resolved (R. 26-27). After the parties had filed cross-motions for summary judgment in the declaratory judgment action and the court had heard oral argument on February 7, 1986, the court granted Ms. Doe's motion and ruled that, under § 67-15-1 et seq. and § 77-18-2, P.O.S.T. may not consider Ms. Doe's expunged convictions "for purposes of determining cause for refusal to issue petitioner's P.O.S.T. certification" (R. 186-87, 192). It specifically held that "[t]he legal effect of an expungement is to render any related conviction, arrest or record thereof a legal nullity, i.e., as a matter of law the conviction, arrest or record never existed" (R. 192). P.O.S.T. appeals to this Court from the district court's order and memorandum decision granting Ms. Doe's motion for summary judgment.

SUMMARY OF ARGUMENT

A fair reading of the plain language of § 77-18-2 and § 67-15-10.5, coupled with a recognition of the clear purpose of the peace officer standards and training statutes, indicates that the Legislature did not intend to restrict P.O.S.T.'s consideration of disqualifying criminal convictions for purposes of peace officer certification to those convictions that have not been expunged. Therefore, the district court incorrectly ruled that P.O.S.T. may not consider Ms. Doe's expunged convictions in deciding whether to issue her correctional officer certification.

Accordingly, this Court should reverse the lower court's order granting Ms. Doe's motion for summary judgment and hold that P.O.S.T. may properly consider the expunged convictions.

ARGUMENT

POINT I

P.O.S.T AND THE P.O.S.T. COUNCIL MAY CONSIDER
CONVICTIONS EXPUNGED UNDER § 77-18-2 IN
DECIDING WHETHER TO GRANT OR DENY
CERTIFICATION UNDER § 67-15-10.5.

Summary judgment should be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Snyder v. Merkley, 693 P.2d 64, 65 (Utah 1984). The parties here do not disagree as to any of the material facts. The only issue is whether P.O.S.T. and the P.O.S.T. Council may consider convictions expunged under § 77-18-2² in deciding whether to grant or deny certification under § 67-15-10.5. The district court resolved that issue against P.O.S.T. under UTAH CODE ANN. §§ 78-33-1 and -2 (1977), Utah's declaratory judgment statutes, by granting Ms. Doe's motion for summary judgment.

UTAH CODE ANN. § 67-15-1 (Supp. 1985) sets forth the purpose behind the creation of P.O.S.T.:

To better promote and insure the safety and welfare of the citizens of this state in their respective communities and to provide for more efficient and professional law enforcement by establishing minimum standards and training for peace officers throughout the state, there is hereby created a division

² Under Utah's expungement statute, conviction records are actually "sealed." See §§ 77-18-2(1)(b) and -2(4). A copy of § 77-18-2 is contained in Appendix C.

of the state department of public safety to be known as the division of peace officer standards and training which shall be administered by a director appointed by and acting under the supervision and control of the commissioner of public safety.

By enacting this purpose clause, the Legislature sought to insure that only those persons who meet certain minimum standards would be eligible to become peace officers. An obvious concern was that the prospective peace officer had not been found guilty of certain types of criminal offenses. See §§ 67-15-6(4) and -10.5(1)(d).

Section 67-15-10.5(1)(d), the interpretation of which is of primary concern in the instant case,³ provides:

(1) The director may, upon the concurrence of the majority of the council, and after the person or peace officer involved has been afforded prior notice and an opportunity for a full hearing before the council, revoke, refuse, or suspend certification of a person as a peace officer for cause. Any of the following shall constitute cause for such action:

. . .
(d) Conviction of a felony or any crime involving dishonesty, unlawful sexual conduct, or physical violence[.]

³ Criminal convictions for offenses not identified in subsection (d) may be relevant to revocation, suspension, or denial of certification under subsection (e), which identifies as cause for such action:

Any conduct or pattern of conduct that would tend to disrupt, diminish or otherwise jeopardize public trust and fidelity with regard to law enforcement.

Thus, the analysis in this brief that pertains to subsection (d) is applicable to subsection (e) insofar as expunged convictions may be considered under subsection (e).

There is nothing in subsection (1)(d) that even suggests that the Legislature intended to restrict P.O.S.T.'s consideration of convictions of disqualifying offenses to those convictions that had not been expunged. In fact, the use of the unmodified term "conviction" indicates that the opposite was intended. See Granite School District v. Salt Lake County, 659 P.2d 1030, 1035 (Utah 1983) ("terms of a statute are used advisedly and should be given an interpretation and application which is in accord with their usually accepted meanings"). To read (1)(d) otherwise would defeat the clear purpose of the peace officer standards and training laws. See Millett v. Clark Clinic Corp., 609 P.2d 934, 936 (Utah 1980) ("This Court's primary responsibility in construing legislative enactments is to give effect to the legislature's underlying intent."). An expungement does not alter the historical fact of a conviction, which reflects guilt of certain criminal behavior the Legislature has determined should be grounds for denying an individual peace officer status. What was obviously important to the Legislature was the presence or fact of the conviction--which relates directly to an individual's fitness to be a peace officer.

Furthermore, Utah's current expungement statute, § 77-18-2, does not prohibit consideration of an expunged conviction by a governmental licensing agency like P.O.S.T. This conclusion becomes apparent after a review of the significant changes the Legislature made in the expungement law when it adopted the current statute.

Under UTAH CODE ANN. § 77-35-17.5 (1953) (Appendix D), Utah's former expungement statute, any person who had been convicted of a crime in this state could petition the convicting court for a judicial pardon and for the expungement of his record in that court. If the court found that the petitioner had satisfied the requirements for a judicial pardon and expungement of his record contained in § 77-35-17.5(1)(b), the court entered "an order that all records in the petitioner's case in the custody of that court or in the custody of any other court, agency or official, be sealed." Section 77-35-17.5(1)(c) further provided: "Upon the entry of the order in those proceedings, the petitioner shall be deemed judicially pardoned and the petitioner may thereafter respond to any inquiries relating to convictions of crimes as though that conviction never occurred." Under the broad language used in this former statute, a person who obtained a judicial pardon and an expungement of a conviction pursuant to it could lawfully respond to any inquiry relating to convictions as if the expunged conviction had never occurred. A single Utah case, State v. Jones, 581 P.2d 141 (Utah 1978), which construed the former statute and held that a felon whose conviction had been expunged could not be impeached as a witness on account of his prior conviction, suggests that the statute provided a full and complete expungement, legally erasing the prior conviction. Thompson v. Department of the Treasury, 557 F.Supp. 158, 167 (D. Utah 1982).

In 1980, the Legislature enacted the current expungement statute, § 77-18-2. Although similar to the former

law in many respects, § 77-18-2 contains several important changes. A particularly significant change is found in subsection (3) of the current law which replaces the former provision allowing the petitioner to respond to any inquiry relating to prior convictions as though the expunged conviction had never occurred (see former § 77-35-17.5(1)(c)). Subsection (3) reads:

Employers may inquire concerning arrests or convictions only to the extent that the arrests have not been expunged or the record of convictions sealed under this provision. In the event an employer asks concerning arrests which have been expunged or convictions the records of which have been sealed, the person who has received expungement of arrest or judicial pardon may answer as though the arrest or conviction had not occurred. [Emphasis added.]

Also eliminated in the current statute is the language stating that "the petitioner shall be deemed judicially pardoned." As noted in Thompson v. Department of the Treasury, which discussed these changes and held that expungement of several convictions under § 77-18-2 did not relieve the petitioner of a federal firearms disability:

There is no explanation in the legislative history for the changes in the amended statute, nor have there been any cases construing the new statute. The new language, especially when construed in light of the former language, seems to place a limitation on the effect of the judicial pardon and expungement. Though the legislative intent is not entirely clear, the court must conclude that the statute was changed for a purpose; and that purpose, from the substance of the change, evidently was to limit the effect of a judicial pardon and expungement.

557 F.Supp. at 167. Thus, an expungement under § 77-18-2 is not as complete as one under the former law and only gives the convicted person the right to deny to "employers" the existence of the expunged conviction. No longer can he or she deny its existence in response to "any inquiries."⁴

Under this analysis of the changes, P.O.S.T., which cannot reasonably be regarded as an "employer" and is most appropriately viewed as a licensing agency, may properly require disclosure of convictions expunged under the current law and consider those convictions in the certification process. See Dixon v. McMullen, 527 F.Supp. 711 (N.D. Tex. 1981) (upholding denial of police officer certification to an ex-felon although he had received a pardon); Patt v. Nevada State Board of Accountancy, 93 Nev. 548, 571 P.2d 105 (1977) (upholding revocation of certified public accountant's certificate based upon embezzlement conviction which had effectively been expunged under Nevada law providing for honorable discharge from probation); Meyer v. Board of Medical Examiners, 34 Cal.2d 62, 206 P.2d 1085 (1949) (holding that expunged conviction could provide basis for revocation of medical license); Amberson v. Leamons, Third Dist. Ct. No. C85-6240 (November 25, 1985) (ruling

⁴ Although paragraph III of the expungement orders on petitioner's convictions states: "That upon entry of this order, the petitioner shall be deemed judicially pardoned and he may thereafter respond to any inquiries relating to convictions of crimes as though the conviction above described had never occurred" (Appendix B), that statement simply is not an accurate statement of the current law and is therefore not controlling. See State v. Chambers, 533 P.2d 876 (Utah 1975) (expungement of criminal records is controlled by statute).

that P.O.S.T. could properly deny certification to individual whose felony conviction had been expunged under Colorado's deferred sentencing law) (Appendix E). Cf. Manners v. State, Bd. of Veterinary Medicine, 694 P.2d 1298, 1300 (Idaho 1985) (which takes a view contrary to Patt and Meyer). This conclusion is consistent with the generally accepted notion that expungement is a criminal remedy, while licensing is civil in nature, see Copeland v. Department of Alcoholic Beverage Control, 241 Cal. App. 2d 186, 50 Cal. Rptr. 452 (Dist. Ct. App. 1966), and that in view of the "high degree of professional skill and fidelity to the public [licensed occupations] serve[]," licensing boards must be allowed considerable discretion in deciding whether a former criminal has rehabilitated sufficiently to assume such responsibilities. Stephens v. Toomey, 51 Cal. 2d 864, 338 P.2d 182, 186 (1959). By enacting the peace officer standards and training statutes, the Legislature codified the generally accepted view that a high standard of fitness and character pertains to police officers. See, e.g., Dixon, 527 F.Supp. at 721; Faure v. Chesworth, 489 N.Y.S.2d 641, 643 (1985); Amberson v. Leamons. A person lacking the necessary qualifications simply has no constitutional right to public employment as a police officer. Monroe v. St. Louis Metropolitan Police Department, 524 F.Supp. 1009, 1013 (E.D. Mo. 1981); Hardy v. Stumpf, 145 Cal. Rptr. 176, 179, 576 P.2d 1342, 1345 (1978).

Particularly applicable to the instant case is the reasoning applied by the United States Supreme Court in Dickerson v. New Banner Institute, Inc., 460 U.S. 103 (1982). There, the

Court addressed the issue of "whether firearms disabilities imposed by 18 U.S.C. §§ 922(g) and (h) [federal gun control laws] apply with respect to a person who pleads guilty to a state offense punishable by imprisonment for more than one year, when the record of the proceeding subsequently is expunged under state procedure following a successfully served term of probation." Id. at 105. It held that because "Congress used unambiguous language in attaching gun control disabilities to any person 'who has been convicted' of a [dis]qualifying offense," id. at 122, the government could properly deny a firearms license to a person who had been charged under Iowa law with a crime of the disqualifying type, had pleaded guilty to that charge, and had been placed on probation, even though that person's conviction subsequently was expunged under Iowa's deferred sentencing statute. In reaching this conclusion, the Court made several observations that are central to the analysis that should be applied in construing §§ 67-15-10.5(1)(d) and (e) and § 77-18-2.

First, there was nothing in the plain language of the statute or its legislative history "that suggests, even remotely, that a state expunction was intended automatically to remove the disabilities imposed by [the federal gun control laws]." Id. at 119. "[T]he purpose of the statute would be frustrated by a ruling that gave effect to state expunctions; a state expunction typically does not focus upon the question with which Title IV is concerned, namely, whether the convicted person is fit to engage in the firearms business or to possess a firearm." Ibid. Similarly, an expungement under § 77-18-2 does not focus on the question of whether one is fit to be a peace officer in Utah.

Second, Iowa's expunction provisions did not nullify the applicant's conviction for purposes of the federal statute. The Court stated:

We recognized in Lewis that a qualifying pardon, see 27 CFR § 178.142 (1982), or a consent from the Secretary of the Treasury would operate to relieve the disability. 445 U.S., at 60-61. So far as the face of the statute is concerned, however, expunction under state law does not alter the historical fact of the conviction, and does not open the way to a license despite the conviction, as does positive or "affirmative action," ibid., by way of the Secretary's consent on the conditions specified by § 925(c).

Id. at 114-15 (emphasis added). This same analysis applies to Utah's current expungement and peace officer certification statutes.

Based upon the foregoing discussion, the district court erred in concluding that § 77-18-2 prohibited P.O.S.T. from considering Ms. Doe's expunged convictions for certification purposes. Its statement that an expungement under § 77-18-2 legally nullifies a prior conviction simply is not consistent with the statutory language.

CONCLUSION

In deciding the issue presented here, the Court must closely examine the specific language used in §§ 67-15-10.5(1)(d) and (e) and § 77-18-2. A fair reading of the plain language of those statutes, coupled with a recognition of the clear purpose of the peace officer standards and training statutes, indicates that the Legislature did not intend to restrict P.O.S.T.'s consideration of disqualifying criminal convictions for purposes of peace officer certification to those convictions that have not

been expunged. Given the language employed, the Legislature could not have intended to "obliterate the fact that the defendant had been finally adjudged guilty of a crime." Meyer, 34 Cal.2d at 65, 206 P.2d at 1087. It being well settled that when asked to construe a statute, a court must be controlled by the evident purpose of the Legislature to attain a certain end and must strive to insure proper effect to legislative intent, Parson Asphalt Production, Inc. v. Utah State Tax Commission, 617 P.2d 397, 398 (Utah 1980); State v. Navaro, 83 Utah 6, 26 P.2d 955, 959 (1933), this Court should reverse the district court's order and rule that P.O.S.T. and the P.O.S.T. Council may properly consider convictions expunged under § 77-18-2 in deciding whether to revoke, suspend, or deny certification under §§ 67-15-10.5(1)(d) and (e).

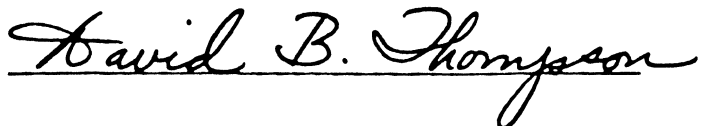
RESPECTFULLY submitted this 16th day of June, 1986.

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CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copies of the foregoing Brief, postage prepaid, to L. Zane Gill, Gill & Wade, Attorney for Respondent, Valley Tower Building, Suite 900, 50 West 300 South, Salt Lake City, Utah 84101, this 16th day of June, 1986.



APPENDICES

APPENDIX A

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JANE DOE,

Petitioner,

vs.

ORDER

STATE OF UTAH DEPARTMENT OF
PUBLIC SAFETY, PEACE OFFICER
STANDARDS AND TRAINING, TED E.
LEAMONS, DIRECTOR; WILLIAM L.
FLINK; AND JOHN DOES 1 THROUGH
IV,

Civil No. C85-7192
Judge Dee

Respondents.

This matter came before the Court on Friday, February 7, 1986 for hearing on cross motions for summary judgment pursuant to U.R.C.P. 56(c). The Court having heard oral arguments of counsel, having considered the respective motions of the parties and all other documents in the Court's file, the Court having heretofore signed and filed its Findings of Fact and Conclusions of Law, and being otherwise fully advised in the premises, now, therefore, it is hereby:

ORDERED, ADJUDGED AND DECREED

1. That Petitioner's Motion for Summary Judgment is granted.
2. That Respondents' Motion for Summary Judgment is denied.

DATED this 15 day of April, 1986.

By the Court:

David B. Thompson
District Court Judge

Approved as to Form:

100-231
H. DIXON HINDLEY
CLERK
By *[Signature]*
Deputy Clerk

David B. Thompson
Attorney for Respondents

CERTIFICATE OF MAILING

I hereby certify that I sent a true and correct copy of the foregoing ORDER, postage prepaid, to David B. Thompson, 236 State Capitol, Salt Lake City, Utah 84114, this 1 day of ~~March~~ April, 1986.

Cyndee Call

[Handwritten mark]

Doe Findings of Fact
Page 2

1. Whether P.O.S.T. may consider expungements in its deliberations regarding police officer certification.
2. Whether public policy forbids any consideration by P.O.S.T. of records sealed by expungement under Utah Code Annotated §77-18-2, and
3. Whether P.O.S.T. has a ministerial duty to issue police officer certification to petitioner if her expunged records cannot be considered.

The parties stated no disagreement as to each other's statement of undisputed facts.

The court heard oral argument by L. Zane Gill on behalf of petitioner and David B. Thompson on behalf of P.O.S.T., having considered the respective motions of the parties and all other documents in the court's file. After being fully advised in the premises, the court now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Petitioner Jane Doe is a resident of Salt Lake County and is an employee of Adult Probation and Parole of the Utah State Division of Corrections.

2. The State of Utah Department of Public Safety, Peace Officers Standards and Training ("P.O.S.T.") is a governmental entity duly created under Utah Code Ann. §67-15-1
... unless otherwise indicated, are to

Utah Code Annotated 1953 as amended). Ted E. Leamons is the director of P.O.S.T. and William L. Flink is an employee of P.O.S.T.

3. Petitioner obtained expungement and sealing of felony conviction records pursuant to 77-18-2 in 1984 prior to applying for P.O.S.T. certification.

4. Petitioner is required to obtain peace officer certification in order to maintain her present employment.

5. Petitioner made application for training through P.O.S.T. to attain certification.

7. Petitioner replied to questions on her P.O.S.T. application regarding a criminal record that she had none.

8. Petitioner completed all requirements for P.O.S.T. certification.

9. P.O.S.T. officials learned that Petitioner had a prior felony conviction.

10. On the basis of an informal attorney general's opinion No. 84-63 (Exhibit "B" hereto), authored by David B. Thompson, P.O.S.T. officials, and specifically William L. Flink, attempted to summon Petitioner before a panel to determine if there is probable cause based on the fact of an expunged felony conviction to deny Petitioner peace officer certification.

11. Respondents made inquiries regarding the existence of Petitioner's expungements.

11-02-0

12. This Court granted Petitioner a Temporary Restraining Order causing Respondents to cease and desist from conducting any further investigation relating to the existence of Petitioner's expungements.

CONCLUSIONS OF LAW

1. This court has jurisdiction under 78-33-1 to declare rights, status, and other legal relations, whether or not further relief is or could be claimed.

2. At all pertinent times it was, and still is, the duty of Respondents to perform certain nondiscretionary functions set forth in 67-15-1 et seq, including but not limited to the issuance of certificates to peace officers who complete the basic police officers' standards and training by passing the appropriate examination.

3. P.O.S.T. has the statutory responsibility to assure that persons seeking peace officer certification meet minimum standards. 67-15-1 (Supp. 1985).

4. P.O.S.T. has the nondiscretionary function of certifying law enforcement officers unless cause exists to refuse certification.

5. Respondents have no authority to compel Petitioner to petition for the unsealing of her expungements.

6. Respondents have no right to deny Petitioner P.O.S.T. certification since expungements, the underlying acts, and records thereof cannot be considered as an element of cause not to issue certification.

7. Respondents have no legal right to refuse to certify Petitioner if she refuses to petition for unsealing of the expungements.

8. Petitioner lawfully replied to questions on her application to P.O.S.T. regarding a criminal record (67-15-6(3)) that she had none.

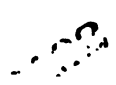
9. Petitioner is entitled under 77-18-2 to respond to such questions as required under 67-15-6(3) as if no convictions ever occurred.

10. Expungement by statute constitutes a judicial pardon and effects a sealing of any related records such that: (a) Petitioner and others may for all purposes act as though any expunged conviction had never occurred; and (b) only Petitioner is authorized to petition for the disclosure of any related records. 77-18-2(3) and (4).

11. The legal effect of an expungement is to render any related conviction, arrest or record thereof a legal nullity, i.e., as a matter of law the conviction, arrest or record never existed.

12. Respondents may not consider, for purposes of determining cause for refusal to issue petitioner's P.O.S.T. certification, any expungement, since by law the related events and records never existed.

13. Without considering Petitioner's expungements, respondents have no cause to refuse certification.



14. Without cause to refuse Petitioner's certification, Respondents have a nondiscretionary duty to issue Petitioner's P.O.S.T. certification.

15. 77-18-2 is based on the public policy of encouraging the rehabilitation of those who have violated the laws of the state.

16. The Court rejects P.O.S.T.'s contention that the Utah expungement statute does not prevent P.O.S.T.'s consideration of the historical fact of a felony conviction. Such a position belies the obvious public policy of promoting rehabilitation of felons and the basic human virtue of forgiveness.

17. The present expungement statute 77-18-2 is the result of a 1980 amendment of its predecessor. The former was modified in regard to any inquiry regarding the existence of a conviction. The latter substituted language specifically relating to inquiries by an employer.

Employers may inquire concerning arrests or convictions only to the extent that the arrests have not been expunged or the record of convictions sealed under this provision. In the event an employer asks concerning arrests which have been expunged or convictions the records of which have been sealed, the person who has received expungement of arrest or judicial pardon may answer as though

19. The briefs of the parties describe the efforts of both this court, through Judge Sawaya, and the Federal District Court in Utah to find the intent of the Utah Legislature when it amended the expungement statute. The Amberson¹ case cited by Respondents is inapposite on its facts and on the law. Thompson v. Department of the Treasury, 557 F. Supp 158, 167 (D Utah 1982), also cited by Respondent, is an effort by Judge Anderson to devine the intent of the Legislature in making the changes it did. This Court, of course, is not bound by the Federal Court decision. The Thompson ruling recognizes that there is an apparent change in the statute moving from broad, general language to more specific language regarding the effect of an expungement. However, no statement is made as to why this change was made.

This Court has also searched for the legislative intent behind the change. There is no record of such intent as is pointed out in Thompson at 167.

In argument Mr. Gill pointed out the fact that perhaps the greatest obstacle in the path of a rehabilitated felon is getting a job. The more specific language in the statute relates to inquiries by employers into the existence of

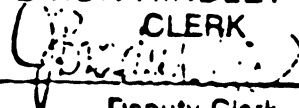
¹Amberson v. Leamons, Third District Court No. C85-6240 (November 25, 1985) (ruling that P.O.S.T. could properly deny certification to a person whose felony arrest had been erased by a deferred sentencing statute in Colorado.)

past convictions. It is reasonable to discern from the more specific language an intent of the Legislature to embody recognition of this obstacle in the statute rather than to restrict the effect of an expungement.

If P.O.S.T., as a licensing agency, is allowed to deny access to peace officer employment to any former felon despite the fact that an independent judge in a full and fair hearing has decided that the public's forgiveness has been earned through rehabilitation, any licensing group could do the same. This could bar rehabilitated felons from entering any number of professional fields² and would belie the public policy supporting the 1980 amendment to the expungement statute, i.e. promoting the hirability of a rehabilitated felon.

DATED this 18 day of April, 1986.


District Judge

1986 APR 18
H. DIXON HINDLEY
CLERK
By 
Deputy Clerk

²Under this analysis a rehabilitated felon could be denied access to any profession requiring certification or licensure such as teaching, real estate, stock trading, medicine, law, even used car dealer.

7/10/86

APPENDIX B

In and for Salt Lake ^{FILED IN CLERK'S OFFICE} Salt Lake County, State of Utah
THE STATE OF UTAH

Plaintiff 10V 1984 Order of Judicial Pardon and
Expungement of Record

vs.

H. Dixon (Indle)

By Byron Stark

Case No. 26605

Defendant (petitioner)

The above entitled case having come before the court upon due notice given on the _____ day of _____, 19____, upon defendant's petition for judicial pardon and for the expungement of his record of conviction in this court, made pursuant to the provisions of Section 77-18-2, UCA 1953 as amended, the petitioner appearing in person and by ^{her} his attorney Stephen R. McCaughey, and the plaintiff appearing through Richard Shepard, Deputy County Attorney of Salt Lake County;

And it appearing from the records of the court in the above entitled case that the petitioner, CONNIE M. MOE, whose date of birth is 5-6-46, and who was arrested by the Salt Lake County Sheriff under File Number 54199 on the 24th day of January, 1974 was convicted in this court of the crime of Pos. of c/s of dis. for value 3rd day of October, 1974; which said crime is a Class A misdemeanor under the laws of the State of Utah;

And the court, having received testimony at said hearing and other requested information, and having fully considered the petition, now enters its findings as follows:

1. That a period of at least five years has passed since said petitioner was released from Probation (the probation period is over)
2. That said petitioner has not been convicted of a felony or of a misdemeanor involving moral turpitude and that no proceeding involving such a crime is pending or being instituted against the petitioner.
3. That the rehabilitation of the petitioner has been attained to the satisfaction of the court

NOW THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

I. That all records in the petitioner's above entitled case in the custody of this court, or in the custody of any other court agency or official be sealed;

II. That copies of this order shall be sent to the Utah Bureau of Identification, the Salt Lake County Attorney's Office, the Salt Lake City Police Department, the Salt Lake County Sheriff's Office, and the Utah State Prison;

III. The aforementioned arresting agency shall request the return to that agency of the petitioner's fingerprint record with regard to the above matter from the Identification Division of the Federal Bureau of Investigation;

IV. That upon entry of this order, the petitioner shall be deemed judicially pardoned and he may hereafter respond to any inquiries relating to convictions of crimes as though the conviction above described had never occurred;

V. That inspection of the records in this court, and records held in the courts and agencies or by the officials named above, shall thereafter be permitted by the court only upon the petition of the said Connie M. Mortensen (Petitioner's Heir) and shall only be inspected by the persons named in such petition for inspection.

Dated this 6th day of Nov, 1984.

BY Byron Stark
CLERK

Edward F. Branning
Judge

in the FILED IN CLERK'S OFFICE Judicial District Court
In and for SALT LAKE Salt Lake County, State of Utah

THE STATE OF UTAH

110V 6 1984
Plaintiff
H. G. Hindley, Clerk of the Court
By [Signature]
Order of Judicial Pardon and
Expungement of Record
Case No. 24332

Defendant (petitioner)

The above entitled case having come before the court upon due notice given on the _____ day of _____, 19____, upon defendant's petition for judicial pardon and for the expungement of his record of conviction in this court, made pursuant to the provisions of Section 77-18-2, UCA 1953 as amended, the petitioner appearing in person and by his attorney STEPHEN R. McCAUGHEY, and the plaintiff appearing through RICHARD SHEPARD, Deputy County Attorney of Salt Lake County;

And it appearing from the records of the court in the above entitled case that the petitioner, CONNIE M. MORTENSEN whose date of birth is May 6, 1946, and who was arrested by the Salt Lake City Police under File Number _____ on the 29th day of February, 1972, was convicted in this court of the crime of obtaining money on the 8th day of September, 1972; which said crime is a Felony under the laws of the State of Utah;

And the court, having received testimony at said hearing and other requested information, and having fully considered the petition, now enters its findings as follows:

1. That a period of at least five years has passed since said petitioner was released from Probation (Intermediate Probation Period).
2. That said petitioner has not been convicted of a felony or of a misdemeanor involving moral turpitude and that no proceeding involving such a crime is pending or being instituted against the petitioner.
3. That the rehabilitation of the petitioner has been attained to the satisfaction of the court.

NOW THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

I. That all records in the petitioner's above entitled case in the custody of this court, or in the custody of any other court agency or official be sealed;

II. That copies of this order shall be sent to the Utah Bureau of Identification, the Salt Lake County Attorney's Office, the Salt Lake City Police Department, the Salt Lake County Sheriff's Office, and the Utah State Prison;

III. The aforementioned arresting agency shall request the return to that agency of the petitioner's fingerprint record with regard to the above matter from the Identification Division of the Federal Bureau of Investigation;

IV. That upon entry of this order, the petitioner shall be deemed judicially pardoned and he may hereafter respond to any inquiries relating to convictions of crimes as though the conviction above described had never occurred;

V. That inspection of the records in this court, and records held in the courts and agencies or by the officials named above, shall thereafter be permitted by the court only upon the petition of the said CONNIE M. MORTENSEN (Petitioner Herein) and shall only be inspected by the persons named in such petition for inspection.

Dated this 6th day of NOV, 1984.

ATTEST
H. G. Hindley, Clerk of the Court
[Signature]
Judge

APPENDIX C

77-18-2. Expungement and sealing of records. (1) (a) Any person who has been convicted of any crime within this state may petition the convicting court for a judicial pardon and for sealing of his record in that court. At the time the petition is filed and served upon the prosecuting attorney, the court shall set a date for a hearing and notify the prosecuting attorney for the jurisdiction of the date set for hearing. Any person who may have relevant information about the petitioner may testify at the hearing and the court, in its discretion, may request a written evaluation of the adult parole and probation section of the state division of corrections.

(b) If the court finds the petitioner for a period of five years in the case of a class A misdemeanor or felony, or for a period of three years in the case of other misdemeanors or infractions, after his release from incarceration, parole or probation whichever occurs last, has not been convicted of a felony or of a misdemeanor involving moral turpitude and that no proceeding involving such a crime is pending or being instituted against the petitioner and further finds that the rehabilitation of petitioner has been attained to the satisfaction of the court, it shall enter an order that all records in petitioner's case in the custody of that court or in the custody of any other court, agency or official be sealed. The provisions of this subsection shall not apply to violations for the operation of motor vehicle under title 41. The court shall also issue to the petitioner a certificate stating the court's finding that he has satisfied the court of his rehabilitation.

(2) (a) In any case in which a person has been arrested with or without a warrant, that individual after 12 months, provided there have been no intervening arrests, may petition the court in which the proceeding occurred, or, if there were no court proceedings, any court in the jurisdiction where the arrest occurred, for an order expunging any and all records of arrest and detention which may have been made, if any of the following occurred:

- (i) He was released without the filing of formal charges;
- (ii) Proceedings against him were dismissed, he was discharged without a conviction and no charges were refiled against him within 30 days thereafter, or he was acquitted at trial; or
- (iii) The record of any proceedings against him has been sealed pursuant to subsection (1).

(b) If the court finds that the petitioner is eligible for relief under this subsection, it shall issue its order granting the relief prayed for and further directing the law enforcement agency making the initial arrest to retrieve any record of that arrest which may have been forwarded to the Federal Bureau of Investigation and the Utah Bureau of Criminal Identification.

(c) This subsection shall apply to all arrests and any proceedings which occurred before, as well as those which may occur after, the effective date of this act.

(3) Employers may inquire concerning arrests or convictions only to the extent that the arrests have not been expunged or the record of convictions sealed under this provision. In the event an employer asks concerning arrests which have been expunged or convictions the records of which have been sealed, the person who has received expungement of arrest or judicial pardon may answer as though the arrest or conviction had not occurred.

(4) Inspection of the sealed records shall be permitted by the court only upon petition by the person who is the subject of those records and only to the persons named in the petition.

APPENDIX D

77-35-17.5. Expungement of court records.—(1) (a) Any person who has been convicted of any crime within this state may petition the convicting court for a judicial pardon and for the expungement of his record in that court. At the time the petition is filed, the court shall set a date for a hearing and notify the prosecuting attorney for the jurisdiction of the pendency of the petition and of the date set for the hearing. Any person who may have relevant information about the petitioner may testify at the hearing and the court, in its discretion, may request a written evaluation of the adult parole and probation section of the Utah division of corrections.

(b) If the court finds that the petitioner, for a period of five years in the case of a class A misdemeanor or felony, or for a period of one year in the case of other misdemeanors, since his release from incarceration or probation, has not been convicted of a felony or of a misdemeanor involving moral turpitude and that no proceeding involving such a crime is pending or being instituted against the petitioner and, further, finds that the rehabilitation of the petitioner has been attained to the satisfaction of the court, it shall enter an order that all records in the petitioner's case in the custody of that court or in the custody of any other court, agency or official, be sealed. The provisions of this paragraph shall not apply to violations for the operation of motor vehicles under Title 41, of the Utah Code.

(c) Upon the entry of the order in those proceedings, the petitioner shall be deemed judicially pardoned and the petitioner may thereafter respond to any inquiries relating to convictions of crimes as though that conviction never occurred.

(2) (a) In any case in which a person has been arrested with or without a warrant, that individual after twelve months, provided there have been no intervening arrests, may petition the court in which the proceeding occurred, or, if there were no court proceedings, any court in the jurisdiction where the arrest occurred, for an order expunging any and all records of arrest and detention which may have been made, if any of the following occurred:

(i) He was released without the filing of formal charges;

(ii) Proceedings against him were dismissed, he was discharged without a conviction and no charges were refiled against him within thirty days thereafter, or he was acquitted at trial; or

(iii) The record of any proceedings against him has been expunged pursuant to subsection (1).

(b) If the court finds that the petitioner is eligible for relief under this subsection, it shall issue its order granting the relief prayed for and further directing the law enforcement agency making the initial arrest to retrieve any record of that arrest which may have been forwarded to the Federal Bureau of Investigation. Thereafter, the arrest, detention, and any further proceedings in the case shall be deemed not to have occurred, and a petitioner may answer accordingly any question relating to their existence.

(c) This subsection shall apply to all arrests and any proceedings which occurred before, as well as those which may occur after, the effective date of this act.

(3) Copies of any order issued pursuant hereto shall be sent to each court, agency or official named in the order.

(4) Inspection of the records shall thereafter be permitted by the court only upon petition by the person who is the subject of those records and only to the persons named in that petition.

APPENDIX E

THIRD JUDICIAL DISTRICT
County of Salt Lake - State of Utah

FILE NO. C85-6240

PLAINTIFF: (✓ PARTIES PRESENT)

DEFENDANT: (✓ COUNSEL PRESENT)

CHARL D. AMBERSON

: David E. Yocum

-vs-

D E. LEAMONS, etc.

: David B. Thompson

RECEIVED

NOV 27 1985

HON. James S. Sawaya

JUDGE

OFFICE OF
ATTORNEY GENERAL

DATE: November 25, 1985

The matter of Plaintiff's Petition for Issuance of an Extraordinary writ came on regularly for hearing on the 18th day of November, 1985 with appearances as above indicated. The matter was fully presented, argued and submitted and the decision thereon taken under advisement by the Court. The Court having now fully considered the matter makes its ruling and decision thereon as follows:

The Court is of the opinion that under the uncontroverted facts and the circumstances of this matter the P.O.S.T. Council denial of certification is justified under the provisions of UTAH CODE ANN. 67-15-10.5(1)(d). The clear intent and purpose of the legislature to deny certification under these acts as these seems apparent to the Court. The principal issue being the moral character of the applicant. The statutory procedure for subsequent dismissal of charges following entry of a guilty plea, under Colorado law, would not work contrary to the obvious intent of the legislature.

Based upon the foregoing and upon the grounds and reasons stated in the defendant's memorandum the Petition of the Plaintiff is denied.

