

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: Reply Brief of Appellants

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

UTAH
DOCUMENT
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IN THE SUPREME COURT OF THE STATE OF UTAH

45.9
JANE DOE, :
DOCKET NO. 860138 :
Petitioner-Respondent, :

-v- :

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

Respondents-Appellants.:

REPLY 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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Clerk,

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INTRODUCTION

Because the parties do not disagree on the issues presented on appeal, the statement of the case, or the statement of facts, replies by P.O.S.T. to those portions of Ms. Doe's responsive brief are unnecessary. However, P.O.S.T. will reply to the argument presented in that brief.

REPLY TO RESPONDENT'S ARGUMENT

It is obvious that at least one purpose for the legislature's enactment of the current expungement statute and its predecessor was to enhance the employment opportunities of ex-offenders. Moreover, there is no dispute that, under the current law, an employer cannot require disclosure of an expunged conviction by an applicant for a job. The language of UTAH CODE ANN. § 77-18-2(3) (1982) makes that clear. The issue in this case, however, is not whether an employer may inquire about expunged convictions; rather, the question is: Can a governmental agency like P.O.S.T. consider expunged convictions in performing its legislatively mandated licensing function?

In her responsive brief Ms. Doe offers no compelling reason why this Court should ignore the plain language of § 77-18-2, which only restricts inquiries by employers about expunged convictions, and rule that P.O.S.T. may not require disclosure of convictions expunged under that statute by applicants for peace officer certification. She fails to explain how P.O.S.T. falls within the ambit of the term "employer" or upon what basis this Court could interpret § 77-18-2(3) to apply to P.O.S.T. The 1980 amendments to the expungement statute are most reasonably interpreted as reflecting a legislative intent to limit the effect of an expungement -- i.e., to limit it to inquiries from employers.¹ That, of course, would not include inquiries from state licensing agencies, even though licensing may be a prerequisite to a particular type of employment. The very purpose of licensing is to ensure that only qualified persons practice certain professions, hold certain positions, or engage in particular activities. The public's interest in ensuring that only persons with a high standard of fitness and character function as peace officers in this state is reflected in the peace officer certification statutes. In The Matter of the Discharge of Wayne L. Jones, 35 Utah Adv. Rep. 7, 10, ___P.2d___, ___ (1986) (noting § 67-15-10.5(1)(e) and the paramount interest

¹ Interestingly, in the affidavit of Ronald N. Boyce, which Ms. Doe relies upon to support her position (Brief of Respondent, Appendix C), Professor Boyce suggests that § 77-18-2(3) might not apply to the situation where an ex-offender applies for a sensitive government position. This suggests that the intended scope of that provision was even more narrow than the plain language suggests -- i.e., not all employers would be barred from requiring disclosure of expunged convictions.

in the appearance of integrity in a peace officer). This Court itself has recognized that "[i]n the sensitive area of law enforcement a police officer's reputation of high moral character and his credibility as a witness in his frequent appearances in the courts of law are essential to his effective performance of his duty." Clearfield City v. Department of Employment Security, 663 P.2d 440, 442 (Utah 1983). Accordingly, beyond the plain language of § 77-18-2, which when read literally would not prohibit inquiries by P.O.S.T. about expunged convictions, sound public policy demands that criminal convictions be available for consideration in deciding whether a particular individual should be vested with the powers and responsibilities of a peace officer.

Ms. Doe's contention that "[t]he effect of allowing P.O.S.T to consider the past expunged convictions of an offender is to bar that individual from state employment, in general," Brief of Respondent at 9, is unfounded. Although it is true that an individual may be barred from peace officer positions, there are numerous state and other governmental positions that would not require licensing or certification like that received through P.O.S.T.

Ms. Doe's additional assertion that P.O.S.T.'s requirement that expunged convictions be disclosed violates § 77-

18-2(4),² is without merit. P.O.S.T., by requiring disclosure, is not seeking to inspect the sealed records; it merely is asking the individual to provide a complete criminal history.

Finally, implicit in Ms. Doe's argument is that, if P.O.S.T. is allowed to consider her expunged convictions, she will necessarily be denied certification, and a court's previous determination of suitability for police work will effectively be overruled. These claims simply are not true. Sections 67-15-10.5(1)(d) and (e) give the director of P.O.S.T. the discretion to deny certification to an individual if that individual has been convicted of a certain type of crime or is guilty of other disqualifying conduct; they do not require denial of certification under those circumstances. Under current P.O.S.T. procedures, the individual whose certification is being addressed under § 67-15-10.5 is entitled to appear at a probable cause hearing before a three person committee³ where an initial decision is made on whether to send the case on to the P.O.S.T. Council or to grant or maintain the individual's certification. If the case is sent on to the Council, the individual may appear at a hearing before that body. At both the probable cause and Council hearing stages, the individual may present whatever

² Section 77-18-2(4) provides:

Inspections 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.

³ The probable cause committee is appointed by the chairman of the P.O.S.T. Council. Currently, the committee is made up of two chiefs of police and a citizen, none of whom are employees of P.O.S.T. or members of the Council.

evidence he or she has in support of certification. The director of P.O.S.T. may not deny, suspend, or revoke certification without "concurrence of the majority of the council." § 67-15-10.5(1). These procedures provide the individual with a fair process for resolving peace officer certification issues, and represent an intelligent approach to the problem of ensuring that the citizens of this state have a police force that is marked by professionalism and integrity.

Furthermore, although a court's determination that an ex-offender is sufficiently rehabilitated to receive an expungement under § 77-18-2 is significant when that individual applies for peace officer certification, the expungement decision generally is not made on the basis of whether the person would be qualified to become a peace officer. It simply is not realistic to assume that the expunging court focused on the concerns inherent in the peace officer certification statutes. The degree of rehabilitation required for an expungement under § 77-18-2 should logically be somewhat less than that required to attain peace officer status. The members of P.O.S.T. and the P.O.S.T. Council, who presumably have greater specialized knowledge about law enforcement training and personnel than does the average judge, are better equipped than are the courts to decide which of those individuals who have been convicted of crimes, whether or not the convictions have been expunged, should receive peace officer certification. Therefore, there is no impermissible abridgement of judicial prerogative if P.O.S.T. considers expunged convictions in performing its certification function.

CONCLUSION

Based upon the foregoing reply to Ms. Doe's argument and the arguments set forth in P.O.S.T.'s opening brief, 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 17th day of September, 1986.

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CERTIFICATE OF SERVICE

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 17th day of September, 1986.

David B. Thompson