

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY,  
PENNSYLVANIA**

**CRIMINAL DIVISION**

<b>COMMONWEALTH OF PENNSYLVANIA</b>	:	
	:	
v.	:	<b>MJ-03205-NT-0000935-2001</b>
	:	<b>MJ-03206-NT-0000519-2002</b>
<b>BRIAN S. KEMP,</b>	:	
<b>Defendant.</b>	:	

**ORDER OF COURT**

AND NOW, this \_\_\_\_\_ day of June 2012, Petitioner Brian Kemp’s Petitions for Expungement of the above-captioned matters are hereby **GRANTED**. Petitioner’s Counsel is hereby **ORDERED** and **DIRECTED** to forward an appropriate Expungement Order to the Court for signature upon the receipt of this Order and Statement of Reasons.

**STATEMENT OF REASONS**

The above-captioned matters came before the undersigned via the Miscellaneous Court list of June 8, 2012 on Defendant’s Petitions to Expunge both cases from his criminal record. Pursuant to statute, “criminal history record information may be expunged when . . .an individual who is the subject of [an] information petitions the court for the expungement of a summary offense and has been free of arrest or prosecution for five years following the conviction for that offense.” 18 PA.CON.S.TAT.ANN. § 9122(b)(3)(i). Expungement of a criminal record under subsection (b) of the statute lies within the sound discretion of the Court. Commw. v. V.G., 9 A.3d 222, 223-24 (Pa. Super. 2010). In ruling on a petition for expungement, the Court must consider and balance the competing interests of the petitioner and the Commonwealth. Id.

The balancing of these interests shall be case specific. Commw. v. Moto, 23 A.3d 989, 993-94 (Pa. Super. 2011). In examining a request for expungement, the Court's consideration should include but not be limited to:

[1] the strength of the Commonwealth's case against the petitioner, [2] the reasons the Commonwealth gives for wishing to retain the records, [3] the petitioner's age, criminal record, and employment history, [4] the length of time that has elapsed between the arrest and the petition to expunge, and [5] the specific adverse consequences the petitioner may endure should expunction be denied . . .The mere assertion by the Commonwealth of a general interest in maintaining accurate records of those accused of a crime does not outweigh an individual's specific, substantial interest in clearing his or her record.

Id.

By the present petition, Petitioner seeks the expungement of one summary charge of Criminal Mischief at 18 PA.CON.S.STAT.ANN. § 3304(a)(2), which he pled to in 2001, and one summary charge of Retail Theft at 18 PA.CON.S.STAT.ANN.§ 3929(a)(1), which he pled to in 2002. Defendant, who is twenty-four (24) years of age, pled to both charges as a juvenile.

The Commonwealth opposes the petitions. As the basis for such opposition, the Commonwealth asserts that the 2001 charge is not eligible for expungement in light of the 2002 offense. As noted, eligibility for expungement under subsection (b)(3)(i) of the statute is conditioned upon a petitioner remaining free from arrest or prosecution for five years following the offense sought to be expunged. In the instant case, Petitioner pled guilty to a subsequent offense in 2002. As to the petition for expungement of the 2002 case, the Commonwealth argues that a grant of Petitioner's request would violate the spirit and intent of the statute, because removal of the 2002 case from Petitioner's record would render him eligible to re-apply for expungement of the 2001 case, thereby circumventing the five year look-back period set forth by the legislature.

Arguing in favor of expungement, Petitioner contends that a proper reading of the statute does not require a person to be free from arrest or conviction in the five years immediately following an offense. Rather, submits that the five-year look-back refers to the five years preceding the petition. In support of the same, Petitioner cites to a case of the Cumberland County Court of Common Pleas interpreting the very language of the statute at issue in the present case and specifically holding that the five-year look-back refers to the five years preceding the filing of a petition for expungement. Commw. v. Wubbe, 59 Cumb. 34 (Pa. Com. Pl. 2009). In Wubbe, the Cumberland County Court of Common Pleas addressed a petition seeking the expungement of six separate offenses,<sup>1</sup> all of which occurred between 1992 and 1997.

Upon close examination of the words of the statute, given their plain meaning, and consideration of the principles of statutory construction, the court concluded that:

the verb construction “has been free” is most properly, in the court’s view, regarded as being in the present perfect progressive tense (“have + be + main verb + ing”), connoting an action occurring over time that started in the past and continues into the present.

Commw. v. Wubbe, 59 Cumb. 34, 36 (Pa. Com. Pl. 2009).

In so holding, the court, characterizing § 9122 as a remedial statute, noted that:

[r]emedial statutes are favored by the courts, and thus, they will be interpreted liberally, to embrace all cases fairly within their scope so as to accomplish the greatest public good, and to effectuate the purpose of the statute, by suppressing the mischiefs, and advancing the remedy, provided it can be done by reasonable construction of the words chosen by the legislature.

Id. at 37 (citation omitted).

As Defendant further notes, Wubbe was affirmed by the Superior Court of Pennsylvania in a non-precedential opinion in 2010, wherein the Court did not engage in its own statutory analysis,

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<sup>1</sup> Specifically, Mr. Wubbe sought the expungement of one incident of driving without a permit, two incidents of harassment, two incidents of disorderly conduct, and an incident of retail theft.

but merely rejected the Commonwealth's contention that the five-year look-back precluded expungement given the timing of the offenses. Commw. v. Wubbe, 1948 MDA 2009 (Pa. Super., October 5, 2010).

Turning to an evaluation of the competing interests of the Commonwealth and the Petitioner, we note that the Petitioner, a resident of Missouri, represents that he is now twenty-four (24) years of age and unable to find gainful employment as a result of his criminal record. He further notes that he has no outstanding obligations attendant with either case, and he has been free from arrest or conviction for the last ten years. As for its interests, the Commonwealth urges that a grant of Petitioner's request in these cases would "thwart the intent of the . . . statute by allowing serial expungements of any summary offense" irrespective of a petitioner's prior record. Commonwealth's Brief at 2. Further, as to Petitioner's plea to the retail theft charge at MJ-03206-NT-0000519-2002, the Commonwealth notes that past retail theft charges can be important to the grading of future retail theft charges. Yet, by a supplemental brief, Petitioner argues that even expunged records remain available to law enforcement for the purposes of determining the grading of subsequent offenses, rendering the Commonwealth's concern of no consequence.

Upon a careful reading of the statute and consideration of the arguments of counsel, the Court hereby concurs with the Cumberland County Court of Common Pleas' interpretation, as set forth in Wubbe, with regard to the statutory five-year look-back. Accordingly, we find that Petitioner is eligible for the expungement of his criminal record as set forth in his pending petitions. Moreover, we find that the expungement of these charges is proper, given full consideration of the competing interests of the Petitioner and the Commonwealth. In light of the foregoing, the instant petitions are hereby **GRANTED**. However, we note that the Rules of

Criminal Procedure are very specific as to the required contents of an Expungement Order, and the Court cannot fashion an appropriate Order on the record before it. Accordingly, Petitioner's counsel is directed to prepare an Order for the Court's signature. That Order shall fully comport with the requirements of PA.R.CRIM.P. 790(C).

**BY THE COURT:**

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**CRAIG A. DALLY,**

**J.**