

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 0375

STATE OF LOUISIANA

VERSUS

ERICA TAYLOR

Judgment Rendered: MAR 19 2012

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On Appeal from the
18th Judicial District Court,
In and for the Parish of Iberville,
State of Louisiana
Trial Court No. 1325-03(A)

Honorable William C. Dupont, Judge Presiding

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Harrietta J. Bridges
Baton Rouge, LA

Attorney for Appellant,
Department of Public Safety and
Corrections

J. Christopher Alexander
Baton Rouge, LA

Attorney for Defendant-Appellee,
Erica Taylor

* * * * *

BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

*Carter, C.J. concurs
Parro, J., concurs.*

TMH

HIGGINBOTHAM, J.

The State of Louisiana, Department of Public Safety and Corrections (the Department), appeals from a judgment ordering that the department “[e]xpunge and destroy the record of arrest, photograph, fingerprint, or any other information” relating to Erica Taylor in conjunction with, docket number 1325-03-A of the Eighteenth Judicial District Court.

FACTS AND PROCEDURAL HISTORY

Erica Taylor was arrested and charged with possession with the intent to distribute marijuana in violation of La. R.S. 40:966A. On May 4, 2004, she pled guilty as charged. On August 2, 2004, she was sentenced to five years of confinement with the Department of Public Safety and Corrections. The sentence was suspended, and she was placed on probation for five years. On October 15, 2010, Taylor filed a “Motion for Expungement of Record,” requesting “to expunge all records of her arrest and conviction.” The original sentencing transcript did not expressly invoke La. C.Cr.P. art. 893, however, after a brief hearing on September 9, 2010, the sentencing minutes were amended to reflect that Taylor be given the provisions of Article 893.

Subsequently, on October 18, 2010, a judgment was signed granting Taylor’s motion for expungement and destruction. It is from this judgment that the Department¹ appeals, asserting that the trial court erred in granting Taylor’s motion to expunge and destroy her criminal record. Specifically, the Department contends that Taylor’s sentence was suspended, not deferred, and therefore, her record was not eligible for expungement. The Department also contends that the trial court

¹ Taylor argued that the Department lacked standing to appeal the trial court’s judgment. As the principal agency charged with establishment and maintenance of public records relating to criminal offenses, we find the Department has a “real and actual interest” in maintaining the integrity of those records. *State v. Daniel*, 39,633 (La. App. 2d Cir. 5/25/05), 903 So.2d 644, 649: see also La. R.S. 15:575 *et seq.*

erred in ordering destruction of the record, because La. R.S. 44:9E prohibits destruction of a felony criminal record.

DISCUSSION

Only certain specified criminal arrest and conviction records may be expunged and destroyed under the authority of La. R.S. 44:9. Criminal records that do not meet the particular circumstances described in the statute are not eligible for expungement. See State v. Daniel, 39,633 (La. App. 2d Cir. 5/25/05), 903 So.2d 644, 648. Therefore, we must determine whether the record of Taylor's felony conviction, which was amended to be given the provisions of La. C.Cr.P. art. 893 meets any of the criteria for expungement and destruction in La. R.S. 44:9. State v. Gerchow, 2009-1055 (La. App. 1st Cir. 3/11/10), 36 So.3d 304, 305-06.

EXPUNGEMENT

The Department asserts that the trial court improperly ordered the expungement of Taylor's record because her sentence was suspended and not deferred, and therefore, was not eligible for expungement under La. R.S. 44:9.² Pointing out that the district attorney has stated that he "has no objection" to her receiving all the relief to which she is entitled by law, Taylor urges entitlement to expungement of her record under La. R.S. 44:9E(1)(b), since the trial court amended her sentence to give her the benefit of the provisions of La. C.Cr.P. art. 893. She urges that under the provisions of La. C.Cr.P. art. 893, addressing suspension of sentence, she is "per se qualified" for expungement. Article 893 has been amended since 2003, when Taylor was arrested, and September 9, 2010, when the trial court amended her sentence to give her the benefit of Article 893. For the following

² Taylor maintains that her record should be expunged under Article 893(E)(3)(A) because she was sentenced to the functional equivalent of court ordered substance abuse program which fulfilled the statutory requirements set forth therein. The article requires that the court find that the defendant has successfully completed all conditions of probation. After review of the record, we found no such finding by the trial court.

reasons, we find that the plaintiff is not entitled to an expungement under either version of the statute.

Louisiana Revised Statute 44:9³ governs the expungement and destruction of criminal records. The statute provides, in pertinent part:

B. (1) Any person who has been arrested for the violation of a felony offense or who has been arrested for a violation of R.S. 14:34.2, R.S. 14:34.3, or R.S. 14:37 may make a written motion to the district court for the parish in which he was arrested for the expungement of the arrest record if:

(a) The district attorney declines to prosecute, or the prosecution has been instituted, and such proceedings have been finally disposed of by acquittal, **dismissal**, or sustaining a motion to quash; and

E.(1)...

(b) After a contradictory hearing with the district attorney and the arresting law enforcement agency, the court may order expungement of the record of a felony conviction **dismissed** pursuant to Article 893 of the Code of Criminal Procedure.(Emphasis added.)

The statute requires dismissal of the prosecution pursuant to article 893 for a record to be eligible for expungement.

Louisiana Code of Criminal Procedure Article 893 governs the suspension and deferral of sentences and probation in felony trials. Article 893 A-C address the suspension of a criminal sentence. In 2003, when Taylor was arrested, subsections A-C stated:

A. When it appears that the best interest of the public and of the defendant will be served, the court, after a first or second conviction of a noncapital felony, may suspend, in whole or in part, the imposition or execution of either or both sentences, where suspension is allowed under the law, and in either or both cases place the defendant on probation under the supervision of the division of probation and parole. The court shall not suspend the sentence of a conviction for a crime of violence as defined in R.S. 14:2(13)(a), (b), (c), (d), (e), (i), (j), (k), (l), (m), (n), (o), (p), (q), (r), (t), (v), (w), (x), (bb), (cc), or (dd), or of a second conviction if the second conviction is for a violation of R.S. 14:73.5, R.S. 14:81.1, or R.S. 14:81.2. The period of probation shall be specified and shall not be less than one year nor more than five years. The suspended sentence shall be

³ This is the current version of La. R.S. 44:9 and the applicable version when Taylor filed her motion to expunge See In Re Elloie, 2005-1499 (La. 1/19/06), 921 So.2d 882, 893.

regarded as a sentence for the purpose of granting or denying a new trial or appeal.⁴

B. If the sentence consists of a fine and imprisonment, the court may impose the fine and suspend the sentence or place the defendant on probation as to the imprisonment.⁵

C. Except as otherwise provided by law, the court shall not suspend a felony sentence after the defendant has begun to serve the sentence.

Subsection D specifically addresses deferral of a criminal sentence. In 2003 it stated:

D. (1)(a) When it appears that the best interest of the public and of the defendant will be served, the court may defer, in whole or in part, the imposition of a sentence after conviction of a first offense noncapital felony under the conditions set forth in this Paragraph. When a conviction is entered under this Paragraph, the court may defer the imposition of sentence and place the defendant on probation under the supervision of the division of probation and parole.

(b) The court shall not defer a sentence under this provision for an offense or an attempted offense which is defined or enumerated as a crime of violence under R.S. 14:2(13) or a sex offense as defined by R.S. 15:541, involving a child under the age of seventeen years or for a violation of the Uniform Controlled Dangerous Substances Law punishable by a term of imprisonment of more than five years or for a violation of R.S. 40:966(A), 967(A), 968(A), 969(A), or 970(A).

(2) Upon motion of the defendant, if the court finds at the conclusion of the probationary period that the probation of the defendant has been satisfactory, the court may set the conviction aside and **dismiss** the prosecution. The dismissal of the prosecution shall have the same effect as acquittal, except that the conviction may be considered as a first offense and provide the basis for subsequent prosecution of the party as a multiple offender, and further shall be considered as a first offense for purposes of any other law or laws relating to cumulation of offenses. Dismissal under this Paragraph shall occur only once with respect to any person.⁶

We note Article 893 A-C in La. C.Cr.P. art. 893 regarding suspension of sentence contains no language that describes the conditions under which a suspended sentence may serve as a motion to dismiss the prosecution. However, subsection D

⁴ As amended by 2001 La. Acts 403 § 5.

⁵ As amended by 1994 La. Acts 3rd Ex. Sess. 100 §1.

⁶ La. Acts 2006, No. 581, § 1 inserted par. B, and designated former pars. B to E as pars. C to F, respectively. Thus, these quoted provisions of La. C.Cr.P. art. 893 appeared in par. D in 2003 and in par. E after the amendment.

relates to a court's ability to defer a criminal sentence and the conditions under which such a deferred sentence may serve as the basis for a motion to dismiss the prosecution. **State v. Comardelle**, 2006-251 (La. App. 5th Cir. 9/26/06), 942 So.2d 1126, 1129.

The comparison of these two sentencing provisions of Article 893 reveals that only the deferral of sentence, Subsection D, allows for the later dismissal of the prosecution, which has the same effect as acquittal. After the suspension of sentence and probation pursuant to Article 893, the court lacks the authority to dismiss the felony prosecution. Therefore, La. R.S. 44:9B(1)(b)'s reference to "a felony conviction dismissed pursuant to Article 893" pertains only to Subsection D's deferral of sentence proceedings, and no expungement is available in the case of a suspended sentence. **State v. Oliver**, 38,520 (La. App. 2d Cir. 5/12/04), 874 So.2d 365, 367-68.

Taylor's criminal record clearly establishes that on August 2, 2004, the trial court suspended her sentence; it did not defer it. As such, she is not entitled to expungement of her arrest record under the provisions of La. R.S. 44:9E(1)(b). See State v. Green, 2008-273 (La. App. 5th Cir. 9/30/08), 997 So.2d 42, 45. Accordingly, that portion of the judgment ordering expungement of Taylor's record is reversed.⁷

DESTRUCTION

The Department also complains of the order of destruction of Taylor's arrest and conviction record, suggesting that the trial court erred in granting that relief. And in her appellate brief, Taylor concedes that the order of destruction of her records of arrest and conviction does not comply with the law. Louisiana Revised Statute 44:9E(1)(a) states:

⁷ We note, deferment of sentence is not permitted for the violation of which Taylor was convicted. Subsection D(1)(b) governing deferment of a sentence states "The court shall not defer a sentence under this provision for ... a violation of Revised Statutes 40:966(A), 967(A), 968(A), 969(A), or 970(A)."

No court shall order the destruction of any record of the arrest and prosecution of any person convicted of a felony, including a conviction dismissed pursuant to Article 893 of the Code of Criminal Procedure.

The word “expungement” is distinct from the word “destruction” and the two words cannot be used interchangeably or to mean the same thing. Public records that may be “expunged” need not be “destroyed.” **State v. Expunged Record (No.) 249,044**, 2003-1940 (La. 7/2/04), 881 So.2d 104, 108 (citing **State v. Savoie**, 92-1586 (La. 5/23/94), 637 So.2d 408, 410). Expungement is defined as the removal of a record from public access, but does not mean destruction of the record. An expunged record is confidential, but remains available for use by law enforcement agencies and other specified persons and agencies. See La. R.S. 44:9G. In light of the plain language of La. R.S. 44:9E(1)(a), we find no authority for the trial court’s order of destruction of the record relating to Taylor’s arrest for possession with intent to distribute marijuana. Accordingly, that portion of the judgment ordering the destruction of Taylor’s arrest record is reversed.

CONCLUSION

For these reasons, the judgment ordering the expungement and destruction of Taylor’s record is reversed. All costs of the appeal are assessed against Erica Taylor.

REVERSED.