STATE OF MICHIGAN

COURT OF APPEALS

DAVID SCHIED,

Plaintiff-Appellant,

v

LINCOLN CONSOLIDATED SCHOOLS, LINCOLN CONSOLIDATED SCHOOLS BOARD OF EDUCATION, and DR. SANDRA HARRIS,

Defendants-Appellees.

UNPUBLISHED
June 29, 2006

No. 267023
Washtenaw Circuit Court
LC No. 04-000577-CL

Before: Fort Hood, P.J., and Cavanagh and Servitto, JJ.

PER CURIAM.

This appeal arises from a decision by defendants to terminate the probationary employment of plaintiff, a former teacher. Plaintiff appeals as of right from a circuit court order granting defendants summary disposition pursuant to MCR 2.116(C)(8) and (10), and denying plaintiff's motion for partial summary disposition. We affirm.

In December 1977, plaintiff pleaded guilty and was convicted of aggravated robbery in Texas. Two years later, the sentencing court entered an order discharging plaintiff from the term of probation it had imposed, setting aside plaintiff's guilty plea and conviction, and dismissing the indictment against him (1979 early termination order). In June 1983, the Governor of Texas granted plaintiff a "pardon and restoration of full civil rights of citizenship."

Plaintiff subsequently obtained a teaching certificate and, after moving to Michigan in 2003, sought employment with Lincoln Consolidated Schools. In September 2003, the school district hired plaintiff as a conditional employee. In November 2003, however, defendants terminated plaintiff's employment after they learned from an FBI criminal background report that plaintiff was convicted of aggravated robbery in Texas in 1977, contrary to his representation on a September 2003 disclosure form. The FBI background report contained no indication that the conviction had been set aside.

After the discharge, plaintiff filed this action alleging that defendants breached his contract of employment, that the discharge violated Michigan public policy, that defendants ignored a federal rule when they failed to afford him a sufficient opportunity to counter the information in the FBI's criminal background report, and that school district superintendent, Dr. Sandra Harris, defamed him in two November 2003 letters by suggesting that he had misrepresented his criminal history. The parties filed cross-motions for summary disposition, and the circuit court granted defendants' motion on the basis that, under Texas law, the 1979 early termination order and the 1983 gubernatorial pardon had not erased the 1977 conviction to the extent that plaintiff truthfully could deny its existence on the September 2003 disclosure form. The court concluded that because plaintiff had misrepresented his criminal history, defendants properly terminated his employment.

Plaintiff primarily contends on appeal that the circuit court incorrectly interpreted Texas law in finding that the 1979 early termination order and the 1983 gubernatorial pardon did not wipe out the existence of his 1977 conviction. This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Defendants sought summary disposition pursuant to MCR 2.116(C)(8) and (10), and plaintiff moved for summary disposition under MCR 2.116(C)(9) and (10). The circuit court did not cite any particular subrule in granting defendants' motion and denying plaintiff's motion. But it appears that the circuit court considered the documentary evidence submitted by the parties with their respective motions and responses and, therefore, the court effectively ruled on the motions pursuant to MCR 2.116(C)(10). See MCR 2.116(G)(5).

A summary disposition motion premised on subrule (C)(10) tests the factual support of a claim. *Walsh*, *supra*. "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material facts exists to warrant a trial." *Id*.

Near the time that plaintiff commenced his employment with the school district, he completed a disclosure form that the district presented to him. On the disclosure form, plaintiff placed a check mark next to the statement, "Pursuant to 1993 Public Act 68 and Public Act 83 of 1995, I, represent that . . . *I have not been convicted of, or pled guilty or nolo contendere (no contest) to any crimes*" (emphasis added). The disclosure form thereafter sets forth the following:

> I understand and agree that pursuant to 1993 Public Act 68 and Public Act 83 of 1995:
>
> (1) the Board of Education of the school district or governing body of the nonpublic school ("the School") must request a criminal history check on me from the Central Records Division of the Michigan Department of State Police;
>
> (2) *until that report is received and reviewed* by the School, *I am regarded as a conditional employee*; and

(3) *if the report received from the Department of State Police is not the same as my representation(s) above respecting either the absence of any conviction(s) or any crimes of which I have been convicted, my employment contract is voidable at the option of the School*. [Emphasis added.]

The clear and unambiguous language of the disclosure form, which plaintiff signed on September 11, 2003, thus authorizes defendants to void plaintiff's conditional employment should he misrepresent that he "ha[s] not been convicted of, or pled guilty . . . to any crimes." The analysis of this issue therefore depends on whether plaintiff had pleaded guilty or been convicted of any crimes under Texas law at the time he signed the disclosure form on September 11, 2003.

The parties do not dispute the following events concerning plaintiff's criminal history. On December 14, 1977, plaintiff "was convicted in the 183rd District Court of Harris County, Texas . . . and was sentenced to serve Ten (10) years in the Texas Department of Corrections for the offense of Aggravated Robbery . . . (Penitentiary Sentence Probated)." On December 20, 1979, the 183rd Criminal District Court entered an "Early termination order of the court dismissing the cause" against plaintiff, which provided in its entirety as follows:

> It appears to the Court, after considering the recommendation of the defendant's probation officer, and other matters and evidence to the effect [sic] that the defendant has satisfactorily fulfilled the conditions of probation during a period of over one third of the original probationary period to which he was sentenced. Therefore, the period of probation is terminated.
>
> It is therefore the order of the Court that the defendant be and he is hereby permitted to withdraw his plea of guilty, the indictment against defendant be and the same is hereby dismissed and the Judgment of Conviction be hereby set aside as provided by law.

On June 1, 1983, plaintiff received an executive order from the Governor of Texas that stated, in relevant part:

> Subject has been represented as being worthy of being restored full civil rights.
>
> NOW, THEREFORE, I, MARK WHITE, Governor of the State of Texas, by virtue of authority vested in me under the Constitution and laws of this State, and acting upon and because of the recommendation of the Board of Pardons and Paroles dated April 28, 1983 do hereby grant unto the said DAVID SCHIED, AKA, DAVID EUGENE SCHIED A FULL PARDON AND RESTORATION OF FULL CIVIL RIGHTS OF CITIZENSHIP THAT MAY HAVE HERETOFORE BEEN LOST AS A RESULT OF HIS CONVICTION OF THE OFFENSE ABOVE SET OUR [SIC] IN CAUSE NO. 266491.

The parties dispute only the effect under Texas law of the 1979 early termination order and the 1983 gubernatorial pardon.

The Texas Code of Criminal Procedure authorizes the entry of orders like the 1979 early termination order involved in this case. Article 42.12, § 20,[1] subtitled "Reduction or Termination of Community Supervision," contemplates that a court may discharge a criminal defendant from his term of community supervision as follows:

> (a) *At any time, after the defendant has satisfactorily completed* one-third of the original community supervision period or *two years of community supervision*, whichever is less, *the period of community supervision may be reduced or terminated by the judge*. Upon the satisfactory fulfillment of the conditions of community supervision, and the expiration of the period of community supervision, the judge, by order duly entered, shall amend or modify the original sentence imposed, if necessary, to conform to the community supervision period and shall discharge the defendant. *If the judge discharges the defendant under this section, the judge may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against the defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty*, except that:
>
> (1) proof of the conviction or plea of guilty shall be made known to the judge should the defendant again be convicted of any criminal offense; and
>
> (2) if the defendant is an applicant for a license or is a licensee under Chapter 42, Human Resources Code, the Texas Department of Human Services may consider the fact that the defendant has received community supervision under this article in issuing, renewing, denying, or revoking a license under that chapter. [Emphasis added.]

Under this statute, therefore, even where a defendant has not entirely completed a term of community supervision, § 20(a) vests a court with discretion to invoke "judicial clemency" as relief "when a trial judge believes that a person on community supervision is completely rehabilitated and is ready to re-take his place as a law-abiding member of society . . . ." *Cuellar v Texas*, 70 SW3d 815, 818-819 (Tex Crim App, 2002). "If a judge chooses to exercise this judicial clemency provision, the conviction is wiped away, the indictment dismissed, and the person is free to walk away from the courtroom 'released from all penalties and disabilities' resulting from the conviction." *Id*. at 819, quoting article 42.12, § 20(a).

[1] Because the parties refer to current § 20, this opinion does so also for the sake of consistency.

With respect to the 1983 pardon plaintiff obtained, "[t]he Governor of the State of Texas has the power to pardon, subject to the written recommendation and advice of the Texas Board of Pardons and Paroles." *In re Hernandez*, 165 SW3d 760, 762 (Tex App, 2005), citing Tex Const, art IV, § 11. "A pardon has been defined as an act of grace exempting the individual on whom it has been bestowed from the punishment that has been assessed against him or her by the court." *Id*. Although an "'[a]mnesty or pardon obliterates the offense . . . to such extent that for all legal purposes the one-time offender is to be relieved in the future from all its results; . . . it does not obliterate the acts themselves[,] . . . it does not close the judicial eye to the fact that once he had done the acts which constituted the offense.'" *Jones v Texas*, 141 Tex Crim 70, 73; 147 SW2d 508 (Tex Crim App, 1941), quoting *United States v Swift*, 186 F 1002, 1016 (ND Ill, 1911). "The Governor can forgive the penalty, but he has no power to direct that the courts shall forget either the crime or the conviction. The pages written by the court's decree are in the minutes still." *Jones*, *supra* at 76.[2]

We find unpersuasive plaintiff's claim that the 1979 early termination order pursuant to article 42.12, § 20(a), eliminated his prior conviction to the extent that he could truthfully deny its existence on the September 2003 disclosure form. Plaintiff does not dispute that he was the subject of a December 1977 order of conviction for aggravated robbery. The 1979 early termination order pursuant to article 42.12, § 20(a), set aside the order of conviction, as well as ordering the withdrawal of plaintiff's guilty plea and the dismissal of the instrument charging him with robbery. But neither the terms of article 42.12, § 20(a), nor the 1979 early termination order, contain any indication that the 1977 order of conviction would be completely erased from existence. Therefore, under the statute, a record of the order of conviction still exists together with the subsequent order setting aside the conviction. The clause toward the end of § 20(a) [releasing the defendant "from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty"] does not operate to obliterate the existence or record of the prior conviction, but precludes the effect of any outstanding obligations imposed as conditions of a community supervision period and to restore the civil rights forfeited on conviction. *Payton v Texas*, 572 SW2d 677, 678-679 (Tex Crim App, 1978) (explaining that a release from all disabilities and penalties pursuant to article 42.12 "includ[es] the disability to serve on a jury").[3] A 1990 opinion of the Texas attorney general further supports the notion that an order setting aside a conviction under article 42.12 restores civil rights that were suspended on conviction, like the right to vote or to serve on a jury, but does not entirely erase the existence of the prior conviction such that it would permit an individual to deny the prior conviction on an employment application. Tex AG opinion, October 22, 1990, JM-1237 (1990 WL 508355), pp 3-4.[4]

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[2] Although Texas Code of Criminal Procedure article 55.01 contemplates that pardoned defendants may obtain orders expunging their arrest records, we need not consider the effect of an expunction under Texas law because plaintiff undisputedly had not obtained an order of expunction in September 2003, when he completed the disclosure form at issue here.

[3] Overruled on other grounds in *Jones v Texas*, 982 SW2d 386 (Tex Crim App, 1998).

[4] Although opinions of the Texas attorney general do not bind Texas courts, the courts in Texas may treat the opinions as persuasive authority. *Holmes v Morales*, 924 SW2d 920, 924 (Tex, 1996).

Consequently, we conclude that while the 1979 early termination order relieved plaintiff from the order of conviction and the legal liabilities arising therefrom, the early termination order did not erase the existence of the 1977 conviction such that plaintiff could deny truthfully in September 2003 that any conviction ever existed.[5] We also find unpersuasive plaintiff's suggestion that the 1983 gubernatorial pardon effectively obliterated his 1977 conviction. Similar to article 42.12, § 20(a), the 1983 pardon had no effect on the existence of the 1977 order of conviction, but the pardon by its terms only restored plaintiff's "full civil rights of citizenship that may have . . . been lost as a result of" the 1977 conviction. *Jones, supra* at 76.

We conclude that the circuit court correctly interpreted and applied Texas law, and properly granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) regarding the effect of the 1979 early termination order and the 1983 gubernatorial pardon. Because plaintiff had a prior conviction according to Texas law, which he undisputedly failed to report on the September 2003 disclosure form, the disclosure form and MCL 380.1230a plainly authorized defendants to terminate his employment as a matter of law, notwithstanding the terms of any collective bargaining agreement.

With respect to plaintiff's contention that the circuit court erroneously dismissed his claim that his discharge violated Michigan public policy, plaintiff's public policy arguments rest on the mistaken premise that he did not misrepresent his criminal history on the September 2003 disclosure form. Similarly, regarding plaintiff's argument on appeal that the circuit court erred by failing to address his defamation claim, we observe that because as a matter of law plaintiff mischaracterized his criminal history on the disclosure form, Dr. Harris did not defame him in her November 2003 letters when she stated that plaintiff had misrepresented his criminal history. See *Mino v Clio School Dist*, 255 Mich App 60, 72; 661 NW2d 586 (2003).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto

[5] Plaintiff cites *Cuellar, supra* at 820, in support of the proposition that "[o]nce the trial court judge signs the Article 42.12, § 20, order, the felony conviction disappears, except as specifically noted in subsections (1) [regarding conviction of a subsequent criminal offense] and (2) [applicable when the discharged person seeks or has a child care facility license]." *Cuellar* is distinguishable from this case. In *Cuellar*, the Texas Criminal Court of Appeals held that for purposes of § 46.04(a) of the Texas Penal Code, which "requires a [prior] felony conviction as an element of the offense" of being a convicted felon in possession of a firearm, "a person whose conviction is set aside pursuant to an Article 42.12, § 20, order *is not a convicted felon*." *Cuellar, supra* at 820 (emphasis in original). The decision in *Cuellar* involved the restoration of the defendant's civil rights, specifically the otherwise legal privilege of an individual to carry a firearm, and not an individual's ability to truthfully deny the existence of a set aside conviction on an employment application. *Id.*