

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STEPHEN R. KING

v.

STATE OF DELAWARE

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CIVIL ACTION NUMBER

09X-07-024-JOH

Submitted: October 12, 2009

Decided: March 25, 2010

MEMORANDUM OPINION

*Upon Motion of Stephen King for Relief from Judgment - **GRANTED***

Appearances:

Charles M. Oberly, III, of Drinker Biddle & Reath, LLP, Wilmington, Delaware,
Attorney for Steven King

Richard Andrews, Esquire, State Prosecutor, of the Department of Justice, Wilmington,
Delaware, Attorney for State of Delaware

HERLIHY, Judge

Petitioner, Steven R. King, seeks *de novo* review of a Commissioner's order denying his petition for expungement. To understand his petition and the reason for the Court's disposition on this review, the full, somewhat complex, history must be set out.

King was arrested on February 8, 2008, for twenty charges of unlawfully dealing in material depicting a child engaged in prohibited sexual act,¹ two charges of unlawful sexual contact first degree,² one charge of drug paraphernalia,³ and one charge of possession of marijuana.⁴

Ordinarily, in an expungement matter the Court does not set out the affidavit of probable cause for the arrest records for which expungement is sought. In this unique case, however, to provide context, the Court finds it necessary to do so:

1. Your affiant is a police officer with the Middletown Police Department assigned as a detective. Your affiant has been employed as a police officer in the State of Delaware since 12/16/88 prior to being employed with the Middletown Police Department.
2. On 12/13/07 Sgt. Kelly and Officer Stump of the Middletown Police Department were dispatched to 421 North Broad Street Apartment #2, Middletown, Delaware, 19709, New Castle County, State of Delaware for a subject requesting a ride home.

¹ 11 *Del. C.* § 1109.

² 11 *Del. C.* § 769.

³ 16 *Del. C.* § 4771.

⁴ 16 *Del. C.* § 4754

3. Upon arrival officers met with Stephen R. King W/M 3/21/57 and (minor) W/M 9/10/93.⁵ King advised that he is (minor's) therapist. King advised the (minor) has been staying with him since his (minor's) mothers been sick. (Minor) advised that he wanted to go home and that King touched his (minor's) penis.
4. (Minor) advised that he has been staying with King on and off for the past few days and that he spent the night with him. (Minor) advised that King pulled him close to him on the bed and that caused his (minor's) penis to rub King's thigh. (Minor) advised that this caused him offense and alarm.
5. (Minor) advised that King touched him one time before approximately a year ago. (Minor) advised that on that occasion King placed his hands in his (minor) pants and rubbed his penis. (Minor) advised that the told King to stop at which time he did.
6. (Minor) advised that King has condoms, sexual toys and lubricant in his bedroom. (Minor) advised that King has pornography "straight and gay." (Minor) advised that King also has marijuana in his room under his computer and King has offered it to him in the past.
7. King advised that he is LCSW (Licensed Clinical Social Worker) and he has a practice in Newark. King advised that he has known (minor) for over four years and has been a mentor. King advised that for the past four months he's been (minor's) assigned worker from the State and sees him in a professional manner a few times a week.
8. King advised that (minor) has spent the night with him in the past and that they shared the same bed. King advised that the slept on top of the covers and (minor) slept under them. King denied any sexual contact with (minor).
9. King denied any pornography, sexual toys or marijuana. King offered to show Sgt. Kelly and Officer Stump his room. When King opened a bedroom drawer condoms and lubricant were visible. Numerous pill bottles and numerous computer disc and CDs were seen in the room.

⁵ The Court is deleting the minor's name.

10. Sgt. Kelly and Officer Stump observed a print page from King's computer that depicted a young nude male with the words "in search of a 22 year old young cock." When the Officers brought the document to King's attention he shrugged his shoulders.
11. King advised that he knows that he is in trouble and that he used very poor judgment.
12. Your affiant interviewed (minor) who advised that he had asked King to allow him to visit his residence on 12/30/07. While at the residence on that date at approximately 0050 hrs., (minor) asked King to take him home and King refused stating that King was late at night, he was tired, and the weather was bad. (Minor) stated that he would call his mother but unable to reach her for a ride home. (Minor) stated that he laid on the bed next to King and King pulled him close asking what he could do or say to make him feel better and at that point, (minor's) penis touched King's thigh. (Minor) stated that he was wearing boxer shorts while King was wearing boxer shorts and a t-shirt. (Minor) then got out of bed and stated that he was calling 9-1-1 for a ride home. (Minor) called 9-1-1 and advised that he needed a ride home and that while at the King residence, King inappropriately touched his penis.
13. Your affiant interviewed (minor's) mother who advised that King had driven to their residence on 12/30/07 and picked up (minor) to spend time with him at King's residence. Pratt confirmed that King is (minor's) counselor and allowed him to visit the King residence. Pratt became aware of the incident after finding the missed calls from (minor) at the King residence.
14. Your affiant interviewed King after he agreed to waive his Miranda Rights and speak to your Affiant. King stated that he is a counselor for (minor), has known him for approximately two years, and has been assigned to his case 08/07. King stated that he did not touch (minor's) penis with any part of his body nor did he show him any pornographic material. King also denied ever smoking marijuana in front of (minor) but did admit to having a small amount of marijuana and a pipe in his residence. King also stated that he does have pictures of naked adults on his computers but no pictures of naked children.

15. On 12/31/07, your affiant executed the search warrant at the aforementioned residence of Stephen R. King. Property seized from the residence included the following items: (1) Home Built Low Profile Desktop Computer with a CD-Rom and 3.5" Floppy Drive with no cover, model PVU, serial number KA92THP (1) Beige Tower Computer - No Brand with (2) DVD-RW Drives, (2) 3.5" floppy Drives and (2) Internal Hard Drives, (1) Panasonic Model CF-45, serial number DJ48JAM9CKSA31636 Laptop Computer with 3.5" floppy and CD-Rom Drives, (1) Hitachi Deskstar 92.6 GB IDE Hard Disk Drive model number 1C35L090AVV207-0, serial number G3GZ0JAT as well as a bag of 5.0 grams of marijuana and (2) two pipes that are used to smoke marijuana.⁶

On March 3, 2008, King was indicted for two counts of unlawful sexual contact first degree involving the minor and twenty counts of unlawfully dealing in material depicting a child engaging in a prohibited act. All of the offenses, including the two charges of unlawful sexual contact, were alleged to have occurred December 31, 2007. He was not, however, indicted on the charges of possession of marijuana or possession of drug paraphernalia.

King had filed a motion to sever on June 9, 2008. He wanted to sever the two counts charging unlawful sexual content from the twenty counts charging unlawfully dealing in material depicting a child engaging in a prohibited sexual act. He argued those counts charged conduct involving a young person under fourteen.⁷ He went on to contend as to those twenty counts, "The visual images found to exist on a computer allegedly belonging to the Defendant have no relation to the alleged offenses committed upon the

⁶ Affidavit of Probable Cause.

⁷ Severance motion, ¶ 1.

fourteen year old. There is no allegation that the photographs and/or video images were ever shown to the alleged victim or that the alleged victim had seen the pictures and/or video. There is no evidence that the visual images are related in any manner to the acts alleged to have occurred on December 31, 2007.”⁸

The motion to sever was never considered. In July and August, the State entered *nolle prosequi* on the twenty charges of unlawfully dealing. He was, however, re-indicted on September 2, 2008, for two counts of unlawful sexual contact and forty-two counts of obscenity.⁹ Each of the obscenity charges read identically:

Obscenity, in violation of Title 11, Section 1251(A)(3), a class G felony, of the Delaware Code of 1974, as amended.

Stephen R. King, on or about the 31st day of December, 2007, in the County of New Castle, State of Delaware, did knowingly publish, exhibit or otherwise make available obscene material to a child under the age of 18 years old.¹⁰

The first count charging unlawful sexual contact alleged the offense occurred on December 31, 2007. The second count charging unlawful sexual contact alleged the offense occurred between September 1, 2006, and September 1, 2007. The re-indictment

⁸ Severance motion, ¶ 3.

⁹ These forty-two counts alleged a violation of 11 Del. C. § 1251(A)(3). There is no such statute. Section 1251 creates the offense of escape third degree. The applicable obscenity statute is 11 Del. C. § 1361(a)(3). The body of each of the obscenity charges, however, contains all the necessary elements for what was intended, a violation of § 1361(a)(3). The Court views this scrivener’s error to be irrelevant at this point.

¹⁰ Re-indictment.

did not charge possession of marijuana or possession of drug paraphernalia.

On November 26, 2008, King pled guilty to two charges. These charges were brought by means of an information. One charge was possession of drug paraphernalia occurring on December 31, 2007. The other charge was endangering the welfare of a child:

Endangering the Welfare of a Child, in violation of Title 11, Section 1102(a)(6) & (b)(4) of the Delaware Code of 1974, as amended.

Stephen R. King, on or about the 30th day of December, 2007, in the County of New Castle, State of Delaware did commit the offense of Possession of Marijuana in a dwelling, to wit, 421 N. Broad Street, Apartment #2, Middletown, Delaware, know that a child less than 18 years of age, (minor), was present in the dwelling at the time.¹¹

The minor named is the same one named in the affidavit of probable cause and in the two counts of unlawful sexual contact.

As a result of these two pleas, the State entered a *nolle prosequi* on the two charges of unlawful sexual contact and all of the forty-two obscenity charges. As part of his plea, King was to surrender his clinical social worker license and agreed not to reapply for it in Delaware. He was to advise the Board of Clinical Social Workers of this. King was sentenced the day he entered his plea. When he was sentenced, a condition of his sentence was to surrender his license and not seek re-instatement.

¹¹ Count I of the Information.

The plea and the *nolle prosequi* of the two charges of unlawful sexual contact, the twenty charges of unlawful dealing and the forty-two charges of obscenity prompted King to petition this Court for expungement of all of the *nol prossed* charges. Such petitions are first presented to a Commissioner. The State opposed King's petition, in part, and agreed to it, in part. It told the Commissioner that the Court should grant King's petition as it relates to the obscenity charges. But it argued the Commissioner should deny the petition to expunge the charges of unlawfully dealing in child pornography and unlawful sexual contact.

King's reasons for seeking expungement of his arrest records for all but the charges to which he pled guilty are that his case is unique and that he has only a minor criminal history, now buried in a voluminous felony arrest history for which there were no convictions. King's petition goes on to assert that the State conducted an insufficient investigation, and, that if it had done its job, the felony sex offenses would never have been charged in the first place.

These accusations are set out in a more detailed and virulent, perhaps in too strong a fashion, in King's petition presented to the Commissioner. The Court sees no value in repeating in this opinion some of that attacks on the State. These accusations against the State were vigorously denied. Again, for purposes of this opinion, the Court sees no reason to repeat the State's point-by-point rebuttal. The Court declines to indicate whether it agrees or disagrees with either side's accusations. That, however, must not be construed

to mean what the Court believes about the parties intemperate exchange. The virtual name calling was unnecessary. The Court is compelled to state on the record presented that while there may have been - and the Court is not saying there was - more the State could have done or done earlier, the investigation was sufficient. Based on the affidavit of probable cause, it was a situation that required some prompt action by the police involving an underage person and information he reported to them.

King notes the “societal opprobrium” that result from these kind of charges.¹² He attaches to his petition the newspaper article of February 14, 2008 about his arrest, headlining “Social worker charged with dealing in child porn.”¹³

Because of all of the above and that there were no convictions for any of the sex related charges, King contends “manifest injustice” would result from the continuation of his arrest records for all of those alleged sex offenses, namely the charges of unlawful sexual contact, unlawfully dealing in material depicting a child engaged in a prohibited sexual act and obscenity.

The State in response argues that King has not met his burden of showing manifest injustice will result if his arrest for unlawful sexual contact and possession of child pornography are not expunged. It contends that King has not pointed to any specific instances of harm, such as, problem with job interviews or anything else causing him harm.

¹² Motion for Relief from Order at ¶ 2.

¹³ *Id.* at Exhibit 6.

As noted earlier, the State does not object to expungement of King's records involving the obscenity charges. Those charges, it says, are unrelated to the charges to which he pled guilty. But the other charges, the State asserts, are related to one of the two charges of unlawful sexual contact in that the two guilty pleas involve the same location, the same victim, and the same date.

The Court's analysis must begin with the expungement statute itself. Two provision are particularly key. The first is 11 *Del. C.* § 4372. Under that section a person may seek expungement if all the charges are terminated in the accused's favor.¹⁴ "Terminated in favor of the accused" is statutorily defined:

- (b) For the purposes of this subchapter, a case shall be deemed to be "terminated in favor of the accused" only if:
 - (1) The accused is acquitted of all charges related to the case; or
 - (2) A nolle prosequi is entered on all charges related to the case, or all charges related to the case are otherwise dismissed.¹⁵

Further, the word "case" as used that subsection is itself defined:

- (c) For the purposes of this subchapter, "case" means a charge or set of charges related to a complaint or incident that are or could be properly joined for prosecution.¹⁶

King and the State cited the other pertinent statutory provision in which the words "manifest injustice" appear:

¹⁴ 11 *Del. C.* § 4372(a).

¹⁵ 11 *Del. C.* § 4372(b).

¹⁶ 11 *Del. C.* § 4372(c).

If the Court finds that the continued existence and possible dissemination of information relating to the arrest of the petitioner causes, or may cause, circumstances which constitute a manifest injustice to the petitioner, it shall enter an order requiring the expungement of the police and court records relating to the charge or case. Otherwise, it shall deny the petition. The burden shall be on the petitioner to allege specific facts in support of that petitioner's allegation of manifest injustice, and the burden shall be on the petitioner to prove such manifest injustice by a preponderance of the evidence.¹⁷

When interpreting a statute, the Court's role is to determine and give effect to the legislature's intent.¹⁸ Statutes must be read as a whole and all words must be given effect.¹⁹

Paragraph six of the affidavit of probable cause states the minor reported King had marijuana in his residence and had offered it to him. King was arrested for possession of marijuana but was never indicted for it. The charge of endangering, states King, were for possess of marijuana in his residence while the minor was present. It does not charge him with endangering by offering marijuana to a minor. If so, the Court believes, there would be a link between illegal sexual activities and offering marijuana to the minor. Further, the endangering charge occurred on December 30, 2007, and one of the two charges of unlawful sexual contact in the re-indictment occurred allegedly occurred on December 31, 2007. The other charge of unlawful sexual contact in the re-indictment was alleged to have occurred between September 1, 2006, and September 1, 2007.

¹⁷ 11 *Del. C.* § 4374(c).

¹⁸ *Richardson v. Wile*, 535 A.2d 1346, 1348 (Del. 1988).

¹⁹ *Williams v. State*, 818 A.2d 906, 912 (Del. 2003).

The Court finds these facts mean that the two charges to which King pled guilty do not constitute a “case” as § 4373 contemplates. They are sufficiently distinct from all of the other offenses.

King’s argument that continuation of all of the felony arrest charges would constitute manifest injustice is somewhat murky. In his plea agreement, he was to surrender his clinical social worker license, not seek reinstatement, and notify the Board of Clinical Social Workers. All but this last condition was incorporated into his sentence on the two charges to which he pled. The plea agreement does not specify what he was to tell the Board. These conditions, however, seem especially harsh for the type of endangering charge to which he pled guilty.

Nevertheless, King’s arrest record has on it twenty charges of unlawfully dealing in material depicting children engaged in a prohibited sexual act, forty-two charges of obscenity, and two charges of unlawful sexual contact. There is no hint of such activity in the two charges to which he pled. The opprobrium is obvious and whatever flows from the two convictions pales in comparison to all these charges the State chose to not to pursue or even to link to either of the other two charges to which he pled. Further, the records shows that the obscenity charges arose out of the same material for which King was originally arrested and originally indicted, unlawfully dealing in material depicting a child engaged in a prohibited sexual act.²⁰ On that basis, the Court cannot accept the

²⁰ Apparently, later investigation led to a determination that the age of the person in the
(continued...)

State's argument parsing the two sets of charges and that one set can be expunged but not the other. Under these circumstances, King has shown manifest injustice.

Conclusion

For the reasons indicated herein Steven R. King's petition for expungement of his various arrest records is **GRANTED**.

IT IS SO ORDERED.

J.

²⁰(...continued)
material was not a minor but may be a young adult.