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Case Number 505,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSEPH H. CORNETTE,	§	
	§	
Petitioner Below,	§	No. 505, 2024
Appellant,	§	
	§	Court Below – Superior Court
v.	§	of the State of Delaware
	§	
STATE OF DELAWARE,	§	
	§	C.A. No. 23X-00807
Appellee.	§	

BRIEF OF *AMICUS CURIAE*

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NATURE AND STAGE OF THE PROCEEDINGS

At its core, this appeal is a classic case of statutory construction, and, more particularly, the proper scope and applicability of Delaware's criminal expungement laws. In short, the appellant, Joseph H. Cornette, was convicted of both Assault Second Degree and DUI in the same proceeding. Cornette subsequently received a pardon from the Governor for his assault conviction (but not his DUI conviction). He then sought to expunge his criminal record of the assault conviction.

However, the Superior Court held that an expungement can only occur when all of the convictions in the same case are pardoned or otherwise eligible for expungement.[1] Because (i) the assault and DUI convictions arose in the same "case," and (ii) because "expungement," as defined in the Delaware Code, refers to "all law-enforcement agency records and court records relating to a case," and (iii) because the DUI conviction was not pardoned, the Superior Court concluded – correctly – that the Assault Second Degree conviction could not be expunged. Indeed, one can readily imagine the very real and practical difficulties of trying to go through court records relating to a case containing multiple charges and trying to remove only those portions of the records relating to one particular charge. It

[1] *See Cornette v. State*, Del.Super., C.A.No. 23X-00807, Jurden, J. (June 11, 2024) slip op. at 3-4 ("*Cornette I*"), *rearg. denied*, Del.Super., C.A.No. 23X-008-07, Jurden, J. (Nov. 14, 2024) ("*Cornette II*") (copies attached as Exs. A & B to Cornette Op.Br.).

would be well-nigh impossible to do so in most cases. Thus, it is not surprising that the Delaware Code speaks of expungement of a "case" and not an individual conviction.[2]

In the Superior Court proceedings below, and before this Court, the Department of Justice ("DOJ") did not oppose the requested expungement and took no position on whether expungement should be granted. The DOJ did agree with appellant, however, on the statutory construction question that a single charge from a case could be expunged. Accordingly, this Court appointed amicus counsel to defend the Superior Court's decision, and this is the brief of amicus counsel.

While all counsel and judicial officers involved in this case may feel sympathy towards the plight of appellant, the statute remains the statute. The Superior Court's decision is a correct application of the principles of statutory interpretation and should be affirmed. Whether the expungement statute should be further modified is a question for the General Assembly.

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[2] In its Opening Brief, the DOJ states that "it [is not] unreasonable to conclude the legislature intended that the expungement of one charge but not all within a case would result in the destruction of all records related to that case." DOJ Ans.Br. at 11. With respect, it is illogical to think that the General Assembly would authorize the destruction of *all* case records merely because *one* of multiple charges was expunged. Most telling here, however, is the dog that did not bark. That is, if expungement is available for a single charge in a case full of charges, then one would think that there would be many examples where that has occurred. Yet, neither appellant nor DOJ has identified a single instance of a single charge in a single case leading to the expungement and destruction of "all records related to that case."

SUMMARY OF THE ARGUMENT

I. The Superior Court correctly held, both initially and on reargument, that in order for an "expungement" to occur, all of the convictions occurring in the same "case" must be eligible for expungement. Because DUI convictions may not be expunged, and because a DUI conviction occurred in the same "case" as the pardoned assault conviction, the assault conviction may not be expunged.

STATEMENT OF FACTS

For purposes of this appeal, only a few facts are relevant:

1. On May 8, 1994, Cornette pled guilty to Assault Second Degree (11 *Del.C.* §612) and to Driving Under the Influence ("DUI," 21 *Del.C.* §4177).

2. On December 8, 2022, the Governor issued Cornette a full and unconditional pardon for the Assault Second Degree conviction.

Cornette I at 2-3.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT EXPUNGEMENT WAS NOT AVAILABLE UNDER THESE FACTS.

A. Question Presented: Whether the Superior Court correctly found that expungement was not available to Appellant because not all of the convictions in the "case" (as defined in the statute) were pardoned or otherwise subject to being expunged.

This issue was part of the Superior Court's decision and was briefed below. *See* A-40-41, 43-58, 92-93, 98-102, 105-20, 123-27, 129-31, 134-57.

B. Standard and Scope of Review.

This appeal turns on statutory interpretation, which is a question of law; and questions of law are reviewed *de novo*. *Wiggins v. State*, 227 A.3d 1062, 1078 (Del. 2020); *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985). The starting point for the interpretation of a statute begins with the statute's language. When a statute is susceptible to two different interpretations, the court is required to interpret the statute based on "available, relevant information and evidence." *State v. Barnes*, 116 A.3d 883, 888 (Del. 2015) (citations omitted). Here, nothing in the statute permits a "partial" or "split" expungement and the Superior Court's refusal to expunge only a portion of the "case," or to expunge the entire "case" even though the DUI charge was not pardoned and is not otherwise eligible for expungment, was correct.

C. Merits of the Argument.

1. The statutory language does not support piece-meal expungement.

The plain language of the statute explains that expungement pertains to a "case," not singular charges within a case. In denying the request for expungement, the Superior Court explained:

> Because both Cornette's Assault Second Degree and DUI arise out of the same case, the Court cannot split cases to expunge only a portion of Cornette's case.

Cornette I at 3-4. To understand this reasoning, one starts with the definitions set forth in the statute and the means by which "expungement" may be granted. Specifically, the Delaware Code states that:

> "Expungement" means that *all* law-enforcement agency records and court records *relating to a case* in which an expungement is granted, including any electronic records, are destroyed, segregated, or placed in the custody of the State Bureau of Identification, and are not released in conjunction with any inquiry beyond those specifically authorized under this subchapter.

11 *Del.C.* §4372(c)(4) (emphasis added). The term "case" is also defined by the Delaware Code:

> "Case" means a charge or set of charges related to a complaint or incident that are or could be properly joined for prosecution.

11 *Del.C.* §4372(c)(1). Thus, when "expungement" occurs, "all" agency and court records relating to "a case" are destroyed, segregated, or otherwise placed in the custody of the State Bureau of Identification. Here, Cornette's "case" consisted of

two charges: Assault Second Degree *and* DUI. Only the assault charge was pardoned. If expungement could be granted, this would mean that all records related to both charges would be destroyed, but such is not contemplated by the statute as a whole.

To begin, Delaware law provides for three means by which expungement may occur: (1) mandatory, (2) discretionary, and (3) discretionary following a pardon. 11 *Del.C.* §§4373, 4374, 4375.

For "mandatory" expungement to apply, certain conditions must be met, including that "all charges in the case are eligible for expungement." *See* 11 *Del.C.* §§4373(a)(1), (a)(2). If all charges in a case do not qualify for expungement, then mandatory expungement cannot occur.

For "discretionary" expungement to apply, the general requirement is one of time. 11 *Del.C.* §4374. Depending on the crimes for which the person was convicted, "discretionary" expungement *may* be granted where 3, 5, or 7 years have passed and the person has no prior or subsequent convictions. In particular, the charges to be expunged must either all be related to the same "case," 11 *Del.C.* §§4374(a)(1), (a)(2), or, if they involve multiple "cases," each conviction in each "case" must be eligible for expungement. 11 *Del.C.* §4374(a)(4). Note that there are numerous exceptions which would render a person ineligible for "discretionary" expungement, including, primarily, convictions for certain felonies.

11 *Del.C.* §4374(b). Most traffic offenses are also not eligible for expungement. *See* 11 *Del.C.* §§ 4372(f)(2), 4374(i)(1).

Finally, if the Governor issues an unconditional pardon, a person may have the matter reviewed for a possible discretionary expungement. 11 *Del.C.* §4375. After an unconditional pardon, the Superior Court reviews the expungement request following the same procedures it follows for a discretionary request. *Id.*

As it happens, Cornette's "case" is not eligible for *mandatory* or *discretionary* expungement because neither Assault Second Degree nor DUI is eligible for mandatory or discretionary expungement.[3] Presumably Cornette sought a pardon for the Assault Second Degree charge from the Governor with the hope that, if a pardon were granted, the Superior Court would grant expungement of that particular conviction under 11 *Del.C.* §4375 and that expungement would then cause the records relating to both charges to be removed from the criminal history. However, as observed above, the Superior Court concluded that "[b]ecause both Cornette's Assault Second Degree and DUI arise out of the same

[3] As to Assault Second Degree, such crime is a felony, and only a few felonies (not including Assault Second Degree) qualify for *mandatory* expungement. 11 *Del.C.* §4373(a)(2)b-c. Assault Second Degree is also excluded from the list of felonies for which *discretionary* expungement may be granted. 11 *Del.C.* §4374((b)(1) (identifying felonies listed in 11 *Del.C.* §4201(c), which list includes Assault Second Degree, as being ineligible for *discretionary* expungement); *see also* DOJ Ans.Br. at 8 (concurring with the foregoing analysis). As to DUI, traffic offenses under Title 21 are not eligible for expungement, subject to a few limited exceptions not applicable here. 11 *Del.C.* §4372(f)(2); *see also* DOJ Ans.Br. at 9.

case, the Court cannot split cases to expunge only a portion of Cornette's case." *Cornette I* at 3-4. The Governor's pardon of one of the two charges in the case against Cornette is not enough for expungement under the plain language of the statute. It is unclear why Cornette did not seek a pardon for both charges. Perhaps he feared that the Governor would not pardon a drunk driving charge, despite the passage of time, given the seriousness of such driving.

2. The "notwithstanding" language of §4375 does not alter the definition of "expungement."

Expungement still requires *all* charges in the case be satisfied in an applicant's favor. Section 4375(a) states that:

> Notwithstanding any provision of this subchapter or any other law to the contrary, a person who was convicted of a crime, other than those specifically excluded under subsection (b) of this section, who is thereafter unconditionally pardoned by the Governor may request a discretionary expungement under the procedures under §4374(c) through (h) and (j) of this title.

11 *Del.C.* §4375(a). Based on the introductory phrase "Notwithstanding any provision of this subchapter . . . to the contrary," Cornette argues that the Assault Second Degree charge can be expunged even though, expungement means that all charges in a case must be satisfied in the applicant's favor. But, the problem with this argument is that "expungement" still means "expungement," and that means "all" records relating to "all" charges end up getting expunged. The "notwithstanding" phrase does not change the definition of "expungement" itself.

What the "notwithstanding" language is clearly intended to do is to eliminate all of the various categories of convictions that are not otherwise available for expungement[4] but only *if* the Governor grants an unconditional pardon for such conviction(s). For example, violent felonies (such as Assault Second Degree) are not eligible for *mandatory* or *discretionary* expungement; but, if the Governor grants an unconditional pardon, then the violent felony classification of the charge would not prohibit discretionary expungement (of the case), and the Superior Court could, in its discretion, grant expungement (of the case). So, if the Assault Second Degree had been the only charge, Cornette would be eligible for discretionary expungement notwithstanding the fact that such charge is otherwise not one which can be expunged.

Again, §4375(a) does not operate to change the rule that all of the charges comprising a case must be resolved in favor of the applicant – the very definition of "expungement" means that *all* records relating to *all* charges *in a case* are expunged if expungement is granted.

[4] Per §4375(b), six felony convictions (relating to murder, manslaughter, rape, and sexual abuse) remain ineligible for expungement, even if a pardon is granted. None of these felonies are present here.

3. "Absurd" results do not occur if the statute is interpreted to require all charges in a case be expunged – in fact, the opposite is true, it would be "absurd" to allow expungement of a single charge to result in the destruction of the records relating to all charges in the same case.

Both Cornette and the DOJ claim that if, following a pardon, expungement cannot occur because other charges in a case were not pardoned, then absurd results will follow. For example, they point out that anyone convicted of a Title 21 traffic offense would never be able to expunge criminal charges in a case that also involved Title 16 drug offenses. But this is already true in the absence of a pardon. That is, if someone is convicted of a traffic offense and a drug offense in the same case, then, absent a pardon, they are not entitled to expungement. In fact, all of the various "absurd" results about which Cornette complains (*see* Op.Br. at 21-23) are entirely consistent with the statute as currently drafted, at least with respect to either *mandatory* or *discretionary* expungement. The mere fact that Cornette received a pardon for *one* of the charges in his case doesn't mean he is entitled to expungement of *all* charges. The definition for expungement remains unchanged and unaffected.

However, Cornette's desire for expungement was never hopeless. Had Cornette sought and received a pardon for his DUI conviction (in addition to seeking and receiving the pardon for Assault Second Degree), then there would be nothing to prohibit expungement. All of the charges would, at that point, have

been resolved in favor of Cornette and destruction of all records relating to the case (i.e., by definition, expungement) would not be inappropriate.

But, imagine a situation where *in the same case* a person is convicted of multiple crimes, but is only pardoned for one or two of them. Under Cornette and DOJ's approach, expungement could be ordered, resulting in the destruction of records relating to all of the other non-pardoned convictions. In fact, in its brief, DOJ goes so far as to say: "it [is not] unreasonable to conclude the legislature intended that the expungement of one charge but not all within a case would result in the destruction of all records related to that case." DOJ Ans.Br. at 11. But how can this destruction of records relating to unpardoned crimes be "not unreasonable"? Or, put another way, how could the destruction of records relating to unpardoned crimes ever be considered "reasonable"? The DOJ's observation is nothing more than speculation, and *amici* submit that it would be unreasonable to destroy records relating to unpardoned crimes.

Indeed, under Cornette and DOJ's approach, if all of the records of a case were destroyed, and only one crime in the case were pardoned, then someone doing a criminal background check would receive no notice of the other, unpardoned charges. That is why all of the charges in a "case" must be suitable for expungement. That is why the Superior Court said it could not "split" a case. That is why, throughout the expungement statute, the General Assembly was careful to

make clear that all charges in the same case had to be resolved in favor of the applicant before expungement could be granted.

Again, if Cornette's goal beyond the pardon was one of expungement, he should have sought a pardon of all the charges. If a pardon of all charges had been granted, then discretionary expungement would be available "notwithstanding" any language to the contrary about traffic offenses not being subject to expungement.

4. The State Bureau of Identification's letter does not entitle Cornette to his requested expungement.

At various times in his brief, Cornette cites to a letter from the State Bureau of Identification ("SBI") which states in part that: "the State Bureau of Identification can grant your request for a mandatory expungement for a portion of your certified criminal history."[5] A-28.

The letter then goes on, in what appears to be standard, boilerplate language, to say: "you may be eligible for a juvenile, discretionary adult expungement, or a pardon, please see the reverse side of this correspondence for a list of resources that may assist you." A-28. Contrary to Cornette's Opening Brief, this language cannot fairly be read to suggest that Cornette is entitled to be considered for discretionary expungement. The letter merely says that Cornette "may be

[5] In addition to the charges at issue in this case, Cornette was also charged with another vehicular assault charge second degree, but that criminal charge was in a different case (case number 9312013018) and was disposed via *nolle proscqui*. A-29. It was the only charge in that particular case, and because it was resolved in favor of Cornette, it is eligible for mandatory expungement. 11 *Del.C.* §4373(a).

eligible." Of course, this also means that Cornette "may not" be eligible. The letter does not say that Cornette is eligible for discretionary expungement; and, even if it did, it would not be legally binding. Simply put, the SBI letter is of no assistance to Cornette.

5. The legislative history cited by Cornette and DOJ is not applicable here, where there is a DUI conviction – and, in fact, the history supports the Superior Court's decision.

The DOJ engages in some discussion of legislative history which, it suggests, means that expungement should be permitted here. DOJ Ans.Br. at 16-17. Specifically, DOJ quotes from the synopsis to Senate Sub. No. 1 For Senate Bill No. 37, (available at https://www.legis.delaware.gov/billdetail/47355) which states in part: "Most Title 21 (traffic offenses), including DUI, are ineligible for expungement under this Act. However, traffic offenses (other than DUIs) will also not operate as a bar to the expungement of other charges." But, context always matters, and this language refers to specific language added to the Delaware Code by the legislation, specifically, 11 *Del.C.* §4372(h), which reads:

> A *prior* or *subsequent* conviction of a Title 21 offense does not operate as a bar to eligibility for discretionary or mandatory expungement under this subchapter.

(emphasis added). Thus, the language relied upon by the DOJ has nothing to do with a Title 21 offense that is part of the same "case." Rather, the language added by the General Assembly says only *past* or *subsequent* Title 21 offenses will not

act as a bar to expungement of the "case" before the Superior Court.[6] This new language does not apply to Title 21 offenses that are part of the same "case." Indeed, under the doctrine of *expressio unius est exclusio alterius* (*i.e.,* the expression of one thing is to exclude another),[7] the fact that the General Assembly has said that past or subsequent traffic convictions do not prevent expungement, but omitted reference to *concurrent* convictions, indicates that concurrent convictions (that is, convictions part of the same case) continue to bar expungement. Otherwise, the General Assembly would not have said "a *prior* or *subsequent* conviction of a Title 21 offense" but would have simply said "*any* conviction of a Title 21 offense."

6. The language of §4374(f) does not change the analysis.

In his Opening Brief, Cornette cites to language in subsection 4374(f), where the phrase "charge or case" appears, and says, essentially, "aha, see, you can expunge less than an entire case." Op.Br. at 16. However, context matters, and when properly put in context, the use of the phrase "charge or case," in this one

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[6] In its brief, the DOJ noted that the parenthetical language in the synopsis ("(other than DUIs)") "does not appear to have been implemented into the Expungement Statute," DOJ Ans.Br. at 17, when in fact, the exception for DUI convictions was removed by the Substitute Bill and this change is noted later on in the synopsis, which explains the differences between the substitute and the original bill.

[7] *See, e.g., Walt v. State,* 727 A.2d 836, 840 (Del. 1999) *citing Hickman v. Workman*, 450 A.2d 388, 391 (Del. 1982).

and only instance in the statute, does not mean that one can "split" a case and only expunge some charges in a case.

To begin, subsection 4374(f) is found in section 4374, which sets forth the process and standards for "discretionary" expungement. And, "discretionary" expungement is only possible where there has been a passage of time and there have been no prior or subsequent convictions since the misdemeanors or felonies for which expungement is sought. 11 *Del.C.* §4374(a).[8] Thus, when subsection 4374(f) speaks of expungement of a "charge or case," it does so because if there is only one charge, there wouldn't be any other related charges not also eligible for expungement at the same time. Moreover, as "expungement" means that all records relating to all charges in a "case" are destroyed, the use of the phrase "charge or case" doesn't undo all of the other careful interplay set forth between the various terms in the expungement statute. When the subsection speaks of a "charge or case," the use of the term "charge" is referring to a "case" with only one charge. To hold otherwise would allow a pardon for only one felony to lead to an "expungement" of a case which involved multiple felonies and misdemeanors, a result which the General Assembly otherwise was very careful to avoid in crafting the language of the statute.

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[8] For certain misdemeanors, at least 3 years must have passed; for other misdemeanors at least 7 years must have passed; for a felony, at least 7 years must have passed; and, where there are multiple misdemeanor convictions in different cases, at least 5 years must have passed. *See* 11 *Del.C.* §4374(a).

7. Neither Cornette nor DOJ point to any cases where a partial expungement has ever been granted.

In the Sherlock Holmes' case "The Adventure of the Silver Blaze," an important clue arose from the fact that the watchdog did not bark. From this silence, Holmes deduced that the murderer was known to the dog. Here, the silence comes from a lack of any examples or past expungement cases where less than all of the charges were resolved in favor of the applicant. This silence is telling. It is no accident that the Superior Court refused to grant expungement here, even in the absence of objection from the DOJ. As the Court said at oral argument:

> I will tell you that I know when legislation has come up in the past, the Court has been clear that expungement relates to cases, not individual charges . . . I know we've been talking about legislation, we have always said we can't do it by charge, it has to be by case.

A-145. Appellant and DOJ have failed to provide any past examples where a "partial" expungement of only part of a case has occurred or where expungement has been ordered despite the lack of all charges in the case being resolved in favor of the applicant.

8. The General Assembly can further amend the expungement laws if it believes that expungement should occur in situations where less than all charges in a case are pardoned.

There is no right to expungement, constitutional or otherwise. It is a policy choice made by the General Assembly, and it is for the General Assembly to set

forth the terms and conditions for expungement – terms and conditions it can modify and change at any time. For now, the General Assembly has indicated that all charges in a "case" must be resolved in favor of an applicant – whether by dismissal, nolle pros, pardon, or otherwise – because expungement of all the records *in that case* relating to all the charges *in that case* will be expunged.

Cornette's brief ultimately boils down to one of public policy. If the Governor pardons someone, Cornette (and DOJ) argue that the entire case should be expunged, even if there are other, unpardoned charges in the same case. In its ruling, the Superior Court said it could not "split" cases and expunge only part of a case. Neither Cornette nor DOJ have cited any instances where a pardon with respect to one charge, with other charges remaining, resulted in expungement. The statutory language does not support expungement where less than all charges within the same "case" are resolved in favor of the person seeking expungement.

If the General Assembly wants to broaden expungement, and wants to make it possible for the convicted to receive "partial" expungements that remove certain – but not all – criminal records from a case, the General Assembly is entirely capable of revising the expungement statute to do so. Indeed, over the years, it has revised the expungement statute several times.

But, here and now, for better or worse, Appellant's DUI conviction was not pardoned, and, as such, it bars expungement of the court records relating to the

DUI and Assault Second Degree charges. Ultimately, the expungement statute simply does not allow cases to be "split." If records of a case are to be destroyed, all of the charges making up that case must be eligible for expungement; otherwise, expungement will result in deleting information from a criminal background check that the General Assembly did not intend to have removed from such a check.

CONCLUSION

The Superior Court was correct when it said:

> Because both Cornette's Assault Second Degree and DUI arise out of the same case, the Court cannot split cases to expunge only a portion of Cornette's case.

Neither Cornette nor DOJ have cited any cases to the contrary. While one certainly feels sympathy for Cornette, the ultimate decision here rests with the General Assembly. It remains free to revise the statute and to allow for partial expungements – or no expungements for that matter – but it is the General Assembly which needs to provide for partial expungements if they are going to exist. And, the General Assembly knows how to amend the expungement statute, as it has amended the statute on several occasions over the last decade or so. That most traffic offenses are not subject to expungement, and may therefore prevent expungement of other charges and convictions, is a decision that the General Assembly has made and that should be respected. The Superior Court's decision should be affirmed.

Respectfully submitted,

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