NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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April 29, 2021

Ronald E. Smith
3900 University Drive
Suite 210
Fairfax, VA 22030

Claiborne Richardson
Assistant Commonwealth Attorney
4110 Chain Bridge Road
Fairfax, VA 22030

Re: [redacted] v. *Commonwealth*, CL 2021-1663

Dear Mr. Smith and Mr. Richardson:

This matter is before the court on [redacted]'s petition to expunge the records of his arrest on January 30, 2006 for "sexual battery" in violation of Code § 18.2-267.4 in Case No. GC06024410-00. The court heard argument on April 20, 2021 and took the matter under advisement.

BACKGROUND

[redacted] was arrested on January 30, 2006 by the George Mason University (GMU) Police and charged with "sexual battery," a misdemeanor offense, allegedly committed on June 17, 2005. On May 25, 2006, [redacted] appeared with counsel in the Fairfax General District Court, where he entered a plea of not guilty (which was recorded by the judge on the back of the Warrant of Arrest form by checking the "not guilty" box). The parties also agreed to a "Stip to facts" (as indicated by the judge's handwritten notation on the back of the Warrant of Arrest form); the judge did *not*, however, check the box on the back of the Warrant of Arrest form which states:

> facts sufficient to find guilt but defer adjudication/disposition and place accused on probation, §§ 4.1-305, 18.2-57.3, 18.2-251 or 19.2-303.2. Costs imposed upon Defendant.

The judge further checked the box stating: "on PROBATION for" and wrote in

"1 year active" and, in the box for "Other," wrote: "Stay away from [redacted]. Stay away from [redacted] unless allowed by admin. action." On the front of the Warrant of Arrest form, below the date to which the case was continued (5/25/07), the judge wrote "DNFVL" (**D**ismissed, **N**o **F**urther **V**iolations of **L**aw).

On May 25, 2007, the judge checked the box stating: "I ORDER the charge dismissed" followed by her initials and the date.

ANALYSIS

[redacted] is seeking expungement of the records of his arrest pursuant to Code § 19.2-392.2, which provides in pertinent part:

> A. If a person is charged with the commission of a crime . . . or any offense defined in Title 18.2, and . . . the charge is **otherwise dismissed**, . . . he may file a petition setting forth the relevant facts and requesting expungement of the police records and the court records relating to the charge. . . .
>
> F. . . . [I]f the petitioner has no prior criminal record and the arrest was for a misdemeanor violation . . ., the petitioner shall be entitled, in the absence of good cause shown to the contrary by the Commonwealth, to expungement of the police and court records relating to the charge, and the court shall enter an order of expungement. . . . (emphasis added).

The only issue confronting the court is whether [redacted]'s charge was "otherwise dismissed" within the meaning of Code § 19.2-392.2(A).[1] The court finds, as a matter of law, that it was and will enter an order expunging the records.

The governing case interpreting the term "otherwise dismissed" in Code § 19.2-392.2(A) is *Brown & Compton v. Commonwealth,* 278 Va. 92 (2009), where the Court held that Brown's and Compton's charges were eligible for expungement under Code § 19.2-392.2(A).

The facts of Brown's case were stated by the Court as follows:

> The Salem General District Court took that charge under advisement for twelve months pending Brown's successful completion of an alcohol treatment program. The district court did so without Brown's entering a plea and without any finding that the evidence was sufficient to establish Brown's guilt of the charged offense. One year later, the district court found that Brown had completed the program and ordered the charge dismissed.

278 Va. at 95.

In Compton's case:

> [T]he Bristol Juvenile and Domestic Relations District Court, without

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[1] The Commonwealth does not assert that [redacted] has a prior criminal record or that there was otherwise "good cause" to deny [redacted]'s Petition.

> Compton's entering a plea and without finding the evidence sufficient to establish guilt, entered an order stating it was "agreed" that the district court would take the charge under advisement for six months and Compton would "submit a written parenting plan to the court and perform 20 hours of community service to be monitored by the [court service unit]." The order further stated, "If at the end of the period and no other adverse reports the case shall be dismissed [without] appearance." Approximately six months later, the district court entered a second order stating, "Matter Dismissed. All requirements met. No additional charges."

278 Va. at 97.

In holding that Brown's and Compton's charges were eligible for expungement under Code § 19.2-392.2(A), the Court explained:

> Unlike the circumstances in [*Gregg v. Commonwealth*, 227 Va. 504 (1984), *Commonwealth v. Jackson*, 255 Va. 552 (1998), *Daniel v. Commonwealth*, 268 Va. 523 (2004), and *Commonwealth v. Dotson*, 276 Va. 278 (2008)], neither Brown nor Compton entered any kind of plea to the criminal offense with which each was charged, and the respective district court made no finding that the evidence was sufficient to establish guilt. Nor are we concerned in either case with an offense for which a deferred disposition or the status of a first offender is allowed. *See, e.g.*, Code §§ 18.2-57.3 and 18.2-251. At most, we have only each district court taking the criminal charge under advisement while the respective petitioner, Brown or Compton, performed certain agreed-upon tasks with the understanding that, upon doing so, the charge would be dismissed. We liken the dismissals at issue to a nolle prosequi or accord and satisfaction; each dismissal took place without a determination of guilt, without a finding of evidence sufficient to establish guilt, and without penalties or conditions imposed by judicial authority.

278 Va. at 102-103.

While [redacted], unlike Brown and Compton, *did* enter a plea to the criminal offense with which he was charged, his pleas was "not guilty"; thus, the presumption of innocence remained with him. Importantly, like in *Brown & Compton*, the judge in [redacted]'s case did *not* make a finding that the evidence was sufficient to establish guilt. Moreover, like in *Brown & Compton*, the offense with which [redacted] was charged was not an offense for which a deferred disposition or the status of a first offender is allowed: Code §§ 4.1-305, 18.2-57.3, 18.2-251 or 19.2-303.2. Finally, like in *Brown & Compton*, in [redacted]'s case, the judge, although not expressing so stating, took the matter under advisement for 1 year by indicating "DNFVL" (**D**ismissed, **N**o **F**urther **V**iolations of **L**aw) and required [redacted] to perform certain agreed-upon tasks, *i.e.*, completing 1 year of active probation and staying away from [redacted] and [redacted].

The Commonwealth argues that the district court judge impliedly *did* make a finding that the evidence was sufficient to establish guilt by writing that there was a "Stip to facts". There two flaws with this argument.

First, the judge did not check the box indicating that there were facts

sufficient to find guilt. If it had been the agreement that the judge would make such a finding, rather than merely writing "Stip to facts," the judge certainly would have checked the box; the fact that the judge did not do so is a strong indication that "Stip to facts" was not meant to indicate that there was a stipulation that there were facts *sufficient to find guilt*. And that points to the second flaw in the Commonwealth's position.

The judge wrote simply "Stip to facts", not "Stip to facts sufficient to find guilt" or even "Stip to facts sufficient". There is a distinction since agreeing on what the facts are does not mean agreeing that those facts are sufficient, as a matter of law, to prove, beyond a reasonable doubt, that the defendant is guilty of the offense charged.

Because of the material similarities to the facts of *Brown & Compton*, and the distinctions without differences between the facts of *Brown & Compton* and the instant case, this court finds that [redacted]:

> "occup[ies] the status of 'innocent' so as to qualify under the expungement statute as a person whose charge has been 'otherwise dismissed.'" *Gregg*, 227 Va. at 507, 316 S.E.2d at 743.

278 Va. at 103.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge



OPINION LETTER