In the
Supreme Court of Virginia

Record No. 081588

Circuit Court No. CL07-472-00

COMMONWEALTH OF VIRGINIA,

Appellant – Petitioner,

v.

KIMBERLY DAWN COMPTON,

Appellee – Respondent.

OPENING BRIEF

Colette Marie Wilcox (VSB No. 51109)
Assistant Commonwealth's Attorney for the City of Bristol
PO Box 1058
Bristol VA 24203-1058
Telephone number: 276-645-7200
Facsimile number: 276-645-7210
Email address: cwilcox@bristolva.org

SUBJECT INDEX

PAGE

Subject Index.....i

Table of Citations.....ii

Assignments of Error.....1

Questions Presented.....1

Statement of the Case.....2

Statement of Facts.....3

Argument.....4

Relief Sought.....11

Certificate of Service.....12

TABLE OF CITATIONS

CASES **PAGE**

Commonwealth v. Dotson, 276 Va. 278, 661 S.E.2d 473 (2008)……..9

Commonwealth v. Jackson, 255 Va. 552, 499 S.E.2d 276 (1998).6, 7, 8, 9

Daniel v. Commonwealth, 268 Va. 523, 604 S.E.2d 444 (2004)…….7, 8, 9

Gregg v. Commonwealth, 227 Va. 504, 316 S.E.2d 741 (1984)……5

OTHER AUTHORITIES

Code of Virginia, 1950, as amended, § 18.2-251…….....9

Code of Virginia, 1950, as amended, § 18.2-371.1……....2

Code of Virginia, 1950, as amended, § 19.2-151…….....6, 8

Code of Virginia, 1950, as amended, § 19.2-392.1……..…..5

Code of Virginia, 1950, as amended, § 19.2-392.2……6

Code of Virginia, 1950, as amended, § 19.2-392.2(A)(2)……1, 6, 7

Rule 5:26, Rules of Supreme Court of Virginia……..……..1

Rule 5:26(d), Rules of Supreme Court of Virginia……12

Rule 5:27, Rules of Supreme Court of Virginia……1, 12

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

Pursuant to Rule 5:26 and 5:27 of the Rules of the Supreme Court of Virginia, comes now the Commonwealth, by and through her attorney, and respectfully submits this opening brief for consideration.

ASSIGNMENTS OF ERROR

1. The trial court erred by finding that Ms. Compton was innocent of the charge, qualifying her dismissal for expungement.
2. The trial court erred by holding that taking a case under advisement conditioned upon completion of terms and subsequent dismissal was a case that was "otherwise dismissed" pursuant to Virginia Code § 19.2-392.2(A)(2).
3. The trial court erred by finding that the continued existence of the charge on Ms. Compton's record constitutes manifest injustice.

QUESTIONS PRESENTED

1. Is a dismissal following a period of probation with terms a finding of innocence contemplated by the statute?
2. Does Ms. Compton's dismissal in this case qualify as "otherwise dismissed" pursuant to Virginia Code § 19.2-392.2(A)(2)?

3. If the Court finds that Ms. Compton's charge was "otherwise dismissed," did Ms. Compton show there was manifest injustice to leave the charge on her criminal record?

STATEMENT OF THE CASE

The Commonwealth is appealing the trial court's order granting expungement. Kimberly Dawn Compton was charged with felony child abuse pursuant to Virginia Code § 18.2-371.1 for leaving her child in a vehicle while she went into a store on November 3, 2002. On February 10, 2003, Kimberly Dawn Compton appeared in the Juvenile and Domestic Relations District Court. Ms. Compton and the Commonwealth agreed that the matter would be taken under advisement for a period of six months. Ms. Compton was ordered to submit a written parenting plan to the court and perform 20 hours of community service to be monitored by the Court Service Unit (CSU). It was contemplated that if at the end of the six months, and without any adverse reports, the case would be dismissed without appearances. On August 18, 2003, the Juvenile and Domestic Relations District Court entered an order stating that the matter was dismissed. The order also stated all requirements met, and no additional charges. On September 26, 2007, Ms. Compton submitted a petition to expunge her record. On September 28, 2007, the Commonwealth filed an

Answer to Ms. Compton's petition. On April 18, 2008, in a hearing, the trial court granted Ms. Compton's petition for expungement. A final order granting expungement was entered on May 16, 2008. The Commonwealth filed a notice of appeal on June 10, 2008.

STATEMENT OF FACTS

After being charged with felony child abuse, Ms. Compton agreed to have the matter taken under advisement contingent upon completion of several requirements of the court (i.e. 20 hours community service; submission of a parenting plan; and receiving no adverse reports from the Court Service Unit). The Juvenile and Domestic Relations District court order does not note a finding of probable cause on the felony nor does it show a reduction to a misdemeanor and a finding of facts sufficient to sustain a misdemeanor conviction. Even though Ms. Compton agreed to abide by court-ordered requirements, the trial court found that Ms. Compton's charge was "otherwise dismissed" and was eligible for expungement. Ms. Compton is not "innocent" of the charge. In her petition for expungement, she admits to leaving her child unattended in the car while she went into the store. Additionally, Ms. Compton agreed to complete a period of probation with conditions.

ARGUMENT

Expungement of court and police records is an extraordinary remedy reserved only for the innocent. When a person petitions a court for an expungement, the court examines whether the case would procedurally qualify by determining if the person was acquitted or pardoned, whether a *nolle prosequi* was entered or whether the case was "otherwise dismissed." If the case procedurally qualifies for expungement, then the court considers, in felony cases, whether the existence of the charge on a person's record constitutes a manifest injustice. Ms. Compton does not meet any of the criteria for the expungement of her record because she is not innocent of the charge, the case was not "otherwise dismissed," and there was no showing of manifest injustice. Ms. Compton is not "innocent" of the charge. In her petition for expungement, she admits to leaving her child unattended in the car while she went into the store. Further, Ms. Compton agreed to a period of probation and to abide by court-ordered requirements. Dismissal, following completion of terms ordered by the court, does not qualify under the expungement statute's "otherwise dismissed" category. The lack of a specific finding of guilt or evidence sufficient for guilt by the trial court does not make her case "otherwise dismissed." Finally, there was no showing at all that Ms. Compton has

suffered any loss much less manifest injustice by the existence of the arrest on her record.

1. Is a dismissal following a period of probation with terms a finding of innocence contemplated by the statute?

Virginia Code § 19.2-392.1 was enacted because "arrest records can be a hindrance to an innocent citizen's ability to obtain employment, an education and to obtain credit." Ms. Compton was not innocent of felony child abuse when she admitted that some amount of neglect took place, agreed to take the matter under advisement and complete required court designated terms and conditions. While the court did not make a finding of facts sufficient or a finding of probable cause, Ms. Compton by not disputing the charge and by agreeing to complete terms designated by the court tacitly agreed that there were facts sufficient for the charge. The Court in *Gregg v. Commonwealth*, 227 Va. 504, 316 S.E.2d 741 (1984), states that "[t]he expungement statute applies to innocent persons, not to those who are guilty." *Id*. at 507. The *Gregg* case further clarifies that "[o]ne who is 'guilty' cannot occupy the status of 'innocent' so as to qualify under the expungement statute as a person whose charge has been 'otherwise dismissed.'" *Id*. Ms. Compton does not hold the status of an innocent person that qualifies for expungement.

Further, in *Commonwealth v. Jackson*, 255 Va. 552, 499 S.E.2d 276 (1998), the Court held that "[a] person deferred from judgment following a determination that the evidence is sufficient to support a conviction is not 'innocent' of the offense regardless of the plea originally entered." *Id*. at 557. The *Jackson* case holding clearly does not contemplate Ms. Compton as an innocent person whose record should be expunged.

2. Does Ms. Compton's dismissal in this case qualify as "otherwise dismissed" pursuant to Virginia Code § 19.2-392.2(A)(2)?

Virginia Code § 19.2-392.2 lists the occasions when an expungement may be sought: "A. If a person is charged with the commission of a crime and

1. Is acquitted, or

2. A *nolle prosequi* is taken or the charge is otherwise dismissed, including dismissal by accord and satisfaction pursuant to 19.2-151, or

3. Is granted an absolute pardon . . ."

Ms. Compton was not acquitted or pardoned of this charge, nor was a *nolle prosequi* entered in her case. The sole question is whether an order dismissing the charge, after completion of conditions, is a case that is "otherwise dismissed." There is no Virginia case law that holds that when a

matter is taken under advisement for satisfaction of terms and conditions, and then subsequently dismissed, it is a dismissal that is considered "otherwise dismissed" under Virginia Code § 19.2-392.2(A)(2).

In fact, in the *Jackson* case, the Court specifically held that "a dismissal following satisfaction of the terms of that deferral [does not] render the case 'otherwise dismissed' for purposes of the expungement." *Jackson* at 557. In the *Jackson* case, Jackson was charged with concealment of merchandise. Jackson pled *nolo contendere* to the charge. The court found evidence sufficient to convict, but deferred the sentence conditioned upon good behavior, payment of court costs, and no trespass on the store's property. After one year, and after Jackson complied with the terms of probation, the court dismissed the charge. Jackson subsequently filed a petition to expunge the charge stating she was innocent. The Court held that when a person is on probation and completes terms and conditions, any subsequent dismissal is not "otherwise dismissed." *Id*.

Similarly, in *Daniel v. Commonwealth*, 268 Va. 523, 604 S.E.2d 444 (2004), the defendant was charged with assault and battery and pled not guilty to the charge. After trial, the court found the evidence sufficient for a finding of guilt but deferred a finding, ordered the defendant to pay

restitution and complete community service. After Daniel completed the conditions of the court order, the charge was dismissed. When Daniel requested an expungement, the Court, relying on the reasoning in the *Jackson* holding, held that the "charge against Daniel was not 'otherwise dismissed'" and was not eligible for expungement. *Daniel* at 530.

The Court has previously held that the fact that a court orders an additional probationary term with conditions is indeed significant. In the *Jackson* case, the court held that a dismissal pursuant to Virginia Code § 19.2-151 occurs without "imposition of penalty by judicial authority." *Jackson* at 556. Likewise in the *Daniel* case, the Court states a dismissal by an accord and satisfaction "may not include any additional terms, such as requiring the defendant to perform community service or to be on good behavior for a period of probation." *Daniel* at 530 *citing* Code of Virginia § 19.2-151.

While both the *Jackson* and *Daniel* cases have in common the fact that there was a finding sufficient for guilt, the lack of a finding of evidence sufficient does not transform the case into a matter that is "otherwise dismissed." The treatment and conclusion of the *Compton* case, the *Jackson* case, and the *Daniel* case, are all the same. Recently, the Court held that a dismissal, following completion of terms of probation, pursuant

to the drug first offender statute under Virginia Code § 18.2-251, whose original order did not reflect a finding of guilt or facts sufficient for a finding of guilt was not a case that was "otherwise dismissed." *Commonwealth v. Dotson*, 276 Va. 278, 284, 661 SE.2d 473 (2008). While Ms. Compton's case was not dismissed pursuant to a statute that required a finding of sufficiency, the Commonwealth asserts that even absent a finding noted on the court order, the case cannot be found to be "otherwise dismissed" because Ms. Compton agreed to complete probationary terms, e.g. community service, a parenting plan, and good behavior. Ms. Compton was placed on probation upon conditions and terms just like the cases of *Jackson* and *Daniel*. *See Commonwealth v. Jackson*, 255 Va. 552, 499 S.E.2d 276 (1998); *Daniel v. Commonwealth*, 268 Va. 523, 604 S.E.2d 444 (2004). The Court clearly held that "a dismissal following satisfaction of the terms of that deferral [does not] render the case 'otherwise dismissed' for purposes of the expungement." *Jackson* at 557.

3. If the Court finds that Ms. Compton's charge was "otherwise dismissed," did Ms. Compton show there was manifest injustice to leave the charge on her criminal record?

Ms. Compton presented no factual information and made no showing of manifest injustice by leaving this arrest on her record. She presented a

resumé showing she has experience in childhood education, and is seeking a job in elementary education. She did not give the names of any jobs that she was denied due to this offense showing on her record. It is Ms. Compton's burden to show that manifest injustice exists by leaving the charge on her record. Ms. Compton did not meet her burden showing she has or will in the future suffer manifest injustice by leaving this charge on her record. A bare allegation that she has suffered manifest injustice without any factual support cannot meet the requirements of the court that she has suffered any harm, much less manifest injustice. While the trial court order states that it found that the continued presence of the charge on her record has created an inability for Kimberly Dawn Compton to find permanent employment in her chosen field, and that Kimberly Dawn Compton has been denied several teaching opportunities as a result of the nature of the charge on her criminal record, there was nothing presented during the expungement hearing to support the finding. In fact, there is nothing anywhere in the record or in the statement of facts that supports the trial court's finding. The trial court holding that it found manifest injustice is plainly in error as no evidence was presented at all showing any detriment whatsoever.

Further, if Ms. Compton's record was expunged, similar leniency may be extended to her if she has a like charge in the future since the record of her arrest will no longer exist in her criminal history. With the expungement of such records, it prevents the Commonwealth or any other state from knowing that Ms. Compton received such treatment for the prior charge. It would further prevent a prospective employer from knowing of, or considering the effects of this previous charge in considering whether to offer employment opportunities involving children. This would make the process of doing background checks on prospective employees worthless if her record is expunged where Ms. Compton by her own petition for expungement admits there was some amount of child neglect that took place.

RELIEF SOUGHT

The Commonwealth respectfully requests that the Court reverse the trial court's judgment directing that police and court records related to Ms. Compton's charge be expunged.

Respectfully submitted,
COMMONWEALTH OF VIRGINIA

By: _____
Colette Marie Wilcox
Assistant Commonwealth's Attorney
for the City of Bristol

CERTIFICATE

Pursuant to Rule 5:26(d) and 5:27 of the Rules of the Supreme Court of Virginia, I hereby certify that on this 17th day of February, 2009:

1. Twelve true and correct copies of the foregoing Opening Brief was mailed by certified mail no. 7005 1160 0003 1130 4332, return receipt requested, to Ms. Patricia Harrington, Clerk, Supreme Court of Virginia, 100 North Ninth Street, 5th Floor, Richmond, VA, 23219;
2. An electronic copy in Word format was also filed contemporaneously with the mailing of the brief via email to scvbriefs@courts.state.va.us; and
3. Three true and correct copies of the foregoing Opening Brief was mailed by first class mail to counsel for the appellee, Michael A. Bishop, Esq., PO Box 2557, Abingdon, VA 24210.

_____

Colette Marie Wilcox (VSB No. 51109)
Assistant Commonwealth's Attorney
for the City of Bristol
PO Box 1058
Bristol VA 24203-1058
Telephone number: 276-645-7200
Facsimile number: 276-645-7210
Email address: cwilcox@bristolva.org