In The

Supreme Court of Virginia

RECORD NO: 081588

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

KIMBERLY DAWN COMPTON,

Appellee.

BRIEF OF APPELLEE

Michael A. Bishop (VSB No. 34241)
MICHAEL A. BISHOP , P.C.
P.O. Box 2557
Abingdon, VA 24212
(276) 628-1500 (office)
(276) 623-1504 (fax)
mbishop9922@yahoo.com

Counsel for Appellee

Gibson Moore Appellate Services, LLC
421 East Franklin Street ♦ Suite 230 ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

TABLE OF CONTENTS

PAGE:

TABLE OF CITATIONS ii

AMPLIFICATION OF STATEMENT OF FACTS 1

LAW AND ARGUMENT 2

A. The Commonwealth's First Assignment of Error is Curious 2

B. The Legislature Intended Some Meaning to the Terms "or otherwise dismissed"..... 3

C. The Commonwealth's Assertion that "No Evidence as to Manifest Injustice was Introduced" is patently false and based upon the evidence, the trial court was correct in finding Manifest Injustice. Further, the Commonwealth has waived this argument..... 12

CONCLUSION 15

CERTIFICATE 17

TABLE OF CITATIONS

PAGE:

CASES:

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

Daniel v. Commonwealth,
604 S.E.2d 444, 268 Va. 523 (2004) 5-6

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

AMPLIFICATION OF STATEMENT OF FACTS

On November 2, 2002, Kimberly Dawn Compton (hereinafter referred to as "Ms. Compton") was charged with a violation of Title 18.2-371.1. Said charge alleged that, while being a parent, guardian or a person responsible for the care of a child under the age of 18 years of age, Ms. Compton committed a willful act or omission in the care of such child so gross and wanton as to show a reckless disregard for human life. The charge was a class 6 felony.

At the time that said offense was charged, Ms. Compton was a certified school teacher. On February 10, 2003, Judge Charles F. Lincoln, Juvenile and Domestic Relations Court Judge, without taking a plea or hearing evidence, took the matter under advisement for six months, requiring the submission of a parenting plan and twenty hours of community service. No finding of probable cause was reached on the felony charge. No findings of facts sufficient to sustain probable cause or guilt were reached. On August 18, 2003, the felony charge was dismissed by

Judge Charles F. Lincoln, Juvenile and Domestic Relations Court Judge.

On April 18, 2008, at the hearing on Ms. Compton's Petition for Expungement, Judge Larry B. Kirksey, Circuit Court Judge, found from the evidence that the continued presence of the charge on Ms. Compton's record has created an inability for Ms. Compton to find permanent employment in her chosen field, that of teaching. The Court found that Ms. Compton has been denied several teaching opportunities as a result of the nature of the charge on her criminal record. (Final Order of May 16, 2008; Agreed Statement of Facts).

LAW AND ARGUMENT

A. The Commonwealth's First Assignment of Error is Curious

The Commonwealth asserts that Judge Kirksey found Ms. Compton "innocent" of the felony charge of abuse and neglect of her child. A plain reading of his Final Order clearly indicates that he found that expungement was justified because the case was "otherwise dismissed." Why

this Assignment of Error was included is unknown. However, since the Commonwealth brought it up, the disposition in this case by those trained in the law, not those who brought the charge in the first place, suggests that Ms. Compton was indeed "innocent" of the very serious felony charge of abuse and neglect.

B. <u>The Legislature Intended Some Meaning to the Terms "or otherwise dismissed"</u>

This is an "or otherwise dismissed" case. The law presumes that statutory terms have meaning. In this instance, the terms "or otherwise dismissed" must be presumed to intend something. We clearly know what it does not mean. We know from Title 19.2-392.1, because the following are specifically mentioned, that dismissals by acquittal, nolle prossequi, absolute pardon, and by accord and satisfaction do not mean "or otherwise dismissed." We further know, from this Court's prior decisions, that dismissals under the first offender statutes, where pleas are taken and findings of sufficient evidence are reached, and where defendants plead not guilty but after a trial, the trial

court finds facts sufficient to sustain a finding of guilt beyond a reasonable doubt and places the defendant on terms, that those instances do not qualify under the expungement statute as being "or otherwise dismissed."

Accordingly, we know what the term does not mean. However, we know that "or otherwise dismissed" must mean something.

What other ways are there for criminal cases to be dismissed? One is upon the expiration of the statute of limitations on misdemeanors. Another is upon expiration of the defendant's guarantees to a Speedy Trial as guaranteed by the Constitutions of the Commonwealth and the United States and as defined by the Code of Virginia. Neither of these mechanisms for dismissal have anything to do with "innocence." Further, and more importantly, such are so specific reasons for dismissal, the legislature simply could have included those specific examples as it included acquittals, pardons and nolle prosequied cases. The specifically mandated reasons for expungement contained in

the statute are very specific reasons for dismissals, not unlike the statute of limitations or violation of Speedy Trial. If the legislature had intended the expiration of the statue of limitations or violation of Speedy Trial to be reasons for expungement, it would have said so.

Rather, the legislature provided room for flexibility and common sense. "Or otherwise dismissed" is broad enough to encompass less specific reasons for dismissal of criminal charges. Ms. Compton submits that, for the statutory language to have any meaning whatsoever, her case must fall within the "or otherwise dismissed" category. That term definitely means something and we are running out of options as to what it can possibly mean.

In no way, shape or form is the decision of the trial court in error. In every expungement case decided by this Court, there has either been a plea of guilty, findings made by the trial court as to the sufficiency of the evidence, or both. (See, e.g., **Gregg v. Commonwealth**, 316 S.E.2d 741, 227 Va. 504 (1984); **Daniel v. Commonwealth**, 604

S.E.2d 444, 268 Va. 523 (2004); **Commonwealth v. Jackson**, 499 S.E.2d 276, 255 Va. 552 (1998)).

In this case, Ms. Compton was charged with a very serious felony. No evidence was heard. No findings were made. There is no indication that Ms. Compton even stepped foot into the courtroom. The parties clearly resolved this matter outside the courtroom. The Juvenile and Domestic Relations Court did not even find evidence sufficient to sustain even a finding of probable cause, a lesser standard than has been before this Court than in any prior case.

The Commonwealth states that Ms. Compton was put on probation. That is an incorrect description of the record. No where in any order whatsoever does Judge Lincoln place Ms. Compton on probation. It was simply an agreement between the parties that if Ms. Compton completed a parenting class and 20 hours of community service, the charge would be dismissed. In light of the severity of the charge, such disposition was clearly recognition by the

Court, defense counsel and the Commonwealth's Attorney at the time, that the charge was misplaced.

In Virginia, and particularly in this case, charges are placed by police officers or private citizens to magistrates. The training and experience of police officers vary from jurisdiction to jurisdiction. Charges are officially lodged by magistrates. Their qualifications vary and are, particularly in this area, far less than that of attorneys. Any police officer, regardless of their training, or for that matter, any private citizen, can allege conduct to a magistrate and obtain felony warrants, and ruin lives and careers, absent expungement or taking the chance on a trial. (While we must uphold our system as a search for the truth, we all know, and such knowledge is shared by an increasingly skeptical public, that from time to time, injustices occur in the courtroom. Such are proven monthly by new evidence or new technology – i.e., DNA evidence. No matter what, going to trial is taking a chance. Who could argue with Ms. Compton accepting an

offer of almost nothing to avoid even entering a plea in a very serious felony case?)

A manifest injustice is what has occurred in Ms. Compton's case. As stated in the Commonwealth's brief, she left her sleeping child, while it was raining, in November, in his car seat, in a locked car, while she briefly ran into a store. Such conduct, while perhaps negligent, cannot be deemed, and clearly was not deemed, to be felony conduct. This Court's law on felony abuse and neglect is clear. Had she taken a chance and gone to trial, under the law of this Court, the worst she probably would have received would have been a misdemeanor conviction, if even that. But, the parties saw fit to not even saddle Ms. Compton with such an option.

But, absent expungement, such felony charge of abuse and neglect shows up on Ms. Compton's background check for any employment in her field as teacher. She, understandably, has had difficulty finding employment in her field. (See Final Order of May 16, 2008).

The Commonwealth argues that if Ms. Compton, or anyone else for that matter, were not guilty, then they must take their case to preliminary hearing or trial and be found innocent before the expungement provisions of the Code of Virginia are applicable.

However, such ignores common sense and the very nature of the criminal justice system. It also is hypocritical in light of the Commonwealth's day to day practices. It was the Commonwealth that offered Ms. Compton the opportunity to do very little and avoid even entering a plea. It was the agents of the Commonwealth that lodged this charge from the outset.

Ms. Compton, being charged with a very serious felony, was offered, without any findings whatsoever against her, to do 20 hours of community service and not commit further crimes in exchange for **dismissal** (emphasis added) of her charges. Who wouldn't do such, when faced with a felony charge, especially if **no finding of guilt or of facts**

sufficient for even probable cause are reached by the Court? (Emphasis Added).

Such is the nature of our system. The Commonwealth's argument attempts to restate the expungement provisions without any teeth whatsoever and to restrict such provisions to cases only where a Court finds a defendant actually innocent. The Commonwealth's argument makes the terms "or otherwise dismissed" meaningless and ignores the other provisions of the statute.

When the Commonwealth elects to nolle prosse charges, does that only occur when people are actually innocent? Who knows? Such is within the sole discretion of the Commonwealth's Attorney. I know that I've had numerous cases where admittedly guilty people have been the beneficiary of such due to cooperation by the defendant or a lack of cooperation by Commonwealth Witnesses.

Is someone who pays off an assault and battery by accord and satisfaction not guilty? Not necessarily, but under the expungement statute if such person has the

money and falls into a charge that provides for accord and satisfaction as a resolution, then such can be expunged.

Expungement is not solely limited to the innocent.

The key, obviously, is what was intended by the legislature. The specific provisions applying to nolle prosequi, absolute pardons and accord and satisfaction clearly indicate where expungement is permissible. However, the legislature left the door open for other instances where cases are "otherwise dismissed." This Court has consistently held that where findings of guilt are made or pleas of guilty or nolo contendere are entered then those cases were not "otherwise dismissed."

In this instance, the disposition that the underlying court reached is far more consistent with actual innocence than with guilt of a serious felony offense. Given the disposition, and the facts alleged, it is clear that Ms. Compton **was** innocent of felony child abuse and neglect. The Court did not select the charge. The Commonwealth's Attorney did not select the charge. The charge was selected

by the officer and the magistrate. This charge should have never been placed from the beginning.

C. **The Commonwealth's Assertion that "No Evidence as to Manifest Injustice was Introduced" is patently false and based upon the evidence, the trial court was correct in finding Manifest Injustice. Further, the Commonwealth has waived this argument.**

This matter was submitted to this Court upon an agreed statement of facts and upon the record before the trial court. The Commonwealth, in its brief, attempts to argue that Ms. Compton presented no evidence and made merely a "bare allegation" of manifest injustice as to this charge remaining on her record. Such ignores the Final Order in this case and misrepresents the facts to this Court. To state that no such evidence was introduced is patently false and counsel for the Commonwealth knows otherwise. The undersigned is dismayed that counsel for the Commonwealth would allege to this Court that "**there was nothing presented during the expungement hearing to support [Judge Kirksey's] finding**." (Opening Brief of Commonwealth, page 10, emphasis added). This is not

saying that the record or the agreed statement of facts does not reflect such. This is saying that such was not introduced. There is a huge difference. The Commonwealth's assertion is patently false and the undersigned would encourage a hearing on this issue alone. The Commonwealth made no such assertion in her very detailed objections to the Final Order. In Petition for appeal, the Commonwealth did not go so far as to say that "there was nothing presented in the hearing." Only now, in the opening brief, does the Commonwealth contend that no such evidence was introduced. In essence, the Commonwealth now contends, for the first time, that Judge Kirksey simply made up his findings concerning manifest injustice or created them from thin air.

Testimony concerning the very facts behind the trial court's findings was introduced and counsel for the Commonwealth had nothing with which to dispute the testimony as to Ms. Compton's record or her inability to find employment. Judge Kirksey would not have found such if

such were not before him. As stated above, there is a huge difference between arguing that something is not in the "agreed statement of facts" and that something completely did not happen. This counsel for the Commonwealth argues that it did not happen. The findings themselves are factual and are part of this record.

While the Commonwealth made very detailed objections to the Final Order, this assignment of error **was not** an objection that was raised at that time in her very detailed objections. The undersigned avers that counsel has waived any such argument by not objecting to such in the Final Order.

Judge Kirksey found from the evidence that the Ms. Compton is a certified teacher. He found that she has no criminal convictions and no other criminal charges whatsoever. From the testimony, he found that she has been denied several teaching opportunities. From the testimony, he found that the existence of this charge on her record has created an inability for her to obtain employment

in her chosen field. Such is all contained in the Final Order of the trial court.

The trial court was not in error. In light of the conduct involved and the very modest disposition involved, forever ruining employment opportunities is clearly a manifest injustice.

CONCLUSION

The statutory language "or otherwise dismissed" is presumed to mean something. The undersigned cannot imagine what it could possibly mean if this case does not fall within that category. There was not even a finding of probable cause. There was no plea taken whatsoever. While this Court has held that expungement is a remedy for the "innocent," (notwithstanding cases that are nolle prossed or "settled" by accord and satisfaction), in this instance, the disposition reached by the attorneys and the trial court cries out that Ms. Compton was indeed innocent of the **felony** charge of abuse and neglect. The charge itself was placed by individuals less trained in the law than those

who disposed of it, however, those individuals were agents of the Commonwealth and if she is clearly not guilty of that particular charge, as she is not, then it should be expunged.

The Commonwealth has cited no cases to this Court that suggest that a charge not supported by at least a finding sufficient to sustain a finding of guilt cannot be expunged. No finding whatsoever, not even of probable cause, was made in Ms. Compton's case. She has suffered immensely with respect to employment in her field as a result of the charge. The Trial Court was correct and the petitioner was entitled to expungement of her very serious charge.

Respectfully submitted,

KIMBERLY DAWN COMPTON

By Counsel

Michael A. Bishop
Michael A. Bishop, P.C.
P. O. Box 2557
Abingdon, VA 24212-2557
(276) 628-1500
(276) 623-1504 [FAX]
Bar No.: 34241

CERTIFICATE

Counsel for the Appellee hereby certifies that in compliance to Rule 5:26(d):

1) The Appellee is Kimberly Dawn Compton.

2) The name and address and telephone number of Counsel for the Appellee is:

   Michael A. Bishop (VSB No. 34241)
   Post Office Box 2557
   Abingdon, VA 24212
   (276) 628-1500; (276) 623-1504 Facsimile

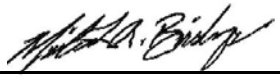
3) The Appellant is the Commonwealth of Virginia.

4) The names and addresses of Counsel for the Appellant are:

   Colette Marie Wilcox
   Assistant Commonwealth's Attorney
   P. O. Box 1058
   Bristol, VA 24203-1058

5) Counsel for the Respondent desires to be informed of the date and time of the oral argument so that he may participate.

6) That fifteen of copies of this Brief of Appellee were hand delivered to the Clerk of the Supreme Court of Virginia this 13th day of March, 2009 and on the same day, the three copies were mailed via First Class U.S. Mail to Counsel for the Appellant.



Michael A. Bishop