IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 120496

ALISON ANNE DRESSNER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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STATEMENT OF THE CASE

This appeal, arising from a denial of a Petition for Expungement, pursuant to Code § 19.2-392.2, asks the Court to determine whether Appellant may have the original charge expunged from her record where the original charge was never dismissed and Appellant pled guilty to an amended charge.

ASSIGNMENTS OF ERROR

This Court granted review on the following issues:

1) THE TRIAL COURT ERRED BY HOLDING THAT DRESSNER'S POSSESSION OF MARIJUANA CHARGE HAD NOT BEEN OTHERWISE DISMISSED.

2) THE TRIAL COURT ERRD BY HOLDING THAT DRESSNER WAS NOT ELIGIBLE FOR EXPUNGEMENT OF THE POSSESSION OF MARIJUANA CHARGE ON THE BASIS THAT "EXPUNGING THE POSSESSION OF MARIJUANA CHARGE WOULD ALSO EXPUNGE THE RECORD SUPPORTING THE RECKLESS DRIVING CONVICTION AND THAT GRANTING THE PETITION FOR EXPUNGEMENT WOULD DISTORT THE PETITIONER'S RECORD IN A MANNER DEEMED IMPERMISSIBLE BY THE SUPREME COURT OF VIRGINIA IN *NECAISE V. COMMONWEALTH*."

3) THE TRIAL COURT ERRED BY HOLDING THAT DRESSNER WAS NOT ELIGIBLE FOR EXPUNGEMENT OF THE POSSESSION OF MARIJUANA CHARGE ON THE BASIS THAT DRESSNER PLED GUILTY TO AN AMENDED CHARGE THAT WAS NOT A LESSER-INCLUDED OFFENSE OF THE OFFENSE ORIGINIALLY CHARGED ON THE SUMMONS.

STATEMENT OF FACTS

On April 4, 2011, Fairfax County Police Officer T.B. Wallace issued the Appellant a summons for Possession of Marijuana in violation of Code § 18.2-250.1. (App. 8 and 11). The case was heard in Fairfax General District Court by Judge Donald P. McDonough on June 23, 2011. (App. 8 and 11). Pursuant to an unwritten plea agreement, the Commonwealth amended the original Possession of Marijuana charge to Reckless Driving under Code § 46.2-852. (App. 8 and 11). Following the arraignment on the Reckless Driving charge, Appellant pled guilty. Pursuant to the plea agreement, the court imposed a $200 fine. (App. 8 and 11).

MATERIAL PROCEEDINGS BELOW

On September 13, 2011, Dressner filed a "Petition for Expungement of Police and Court Records" seeking the expungement of her Possession of Marijuana charge in violation of Code § 18.2-250.1. (App. 1-3). Judge Charles J. Maxfield sitting in Fairfax County Circuit Court heard argument on Appellant's Petition for Expungement on December 21, 2011. (App. 9). The issue presented to the Fairfax County Circuit Court was whether the original charge should be expunged because either 1) the amendment to the charge served as an acquittal or 2) the charge had been "otherwise

dismissed" as outlined by Code § 19.2-392.2(A)(1)-(2). (App. 12). At the conclusion of the hearing, the trial court took the matter under advisement.

On December 29, 2011, the trial court issued an Order denying the Petition for Expungement. The trial court held that by expunging the Possession of Marijuana charge, the record supporting the Reckless Driving conviction would also be expunged because both charges were included on the same summons. (App. 9). Applying *Necaise v. Commonwealth*, 281 Va. 666, 669, 708 S.E.2d 864, 866 (2011), the trial court reasoned that the Petition for Expungement should not be granted because it would allow the Dressner's record to be impermissibly distorted. (App. 9).

ARGUMENT

I. Standard of Review

The granted issue on appeal requires the interpretation of the expungement statutes. "The construction of a statute is a question of law that [this Court] review[s] *de novo* on appeal." *Phelps v. Commonwealth*, 275 Va. 139, 141, 654 S.E.2d 926, 927 (2008).

II. Dressner does not have the right to seek expungement of her Possession of Marijuana Charge under Code § 19.2-392.2(A).

The threshold determination when considering a petition for expungement of police and court records relating to a criminal charge is whether the petitioner has a right to seek expungement of those records under an applicable provision of Code § 19.2-392.2(A). *Daniel v. Commonwealth*, 268 Va. 523, 530, 604 S.E.2d 444, 448 (2004). In relevant part, Virginia Code § 19.2-392.2 provides that:

> A. If a person is charged with the commission of a crime or any offense defined in Title 18.2, 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, 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. . . . the court shall conduct a hearing on the petition. 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, including electronic records, relating to the charge. Otherwise, it shall deny the petition.

A. Dressner was not acquitted

Dressner argues that she was acquitted for the Possession of Marijuana charge because her marijuana charge was amended to a violation of Reckless Driving. Dressner cites *Buck v. City of Danville*, 213

Va. 387, 388 192 S.E.2d 758, 759 (1972), to support her proposition. However, Buck did not involve the expungement statute; in that case, the defendant challenged, under double jeopardy principles, her conviction of a higher offense in a separate trial after she had already been convicted of the lesser-included offense. The Court held that, once Buck had been tried and convicted in the lower court of the lesser-included offense, this operated as an acquittal of the higher offense charged. *Id.* The Court reasoned that Buck was already put in jeopardy for the higher offense as soon as the jury was sworn at the first trial. *Id.* It would have been a violation of double jeopardy to allow the defendant to be retried of the higher offense. *Id.*

Dressner's reliance on *Buck*, however, is misplaced becuase this Court has expressly held the considerations of *Buck* are inapplicable in expungement cases where the defendant plead guilty to an offense. *Necaise*, 281 Va. at 670 n.3, 708 S.E.2d at 866 n.3. Unlike the defendant in *Buck* who was tried for a higher offense and was convicted of a lesser included offense, Dressner pled guilty to Reckless Driving, in violation of Code § 46.2-852, pursuant to a plea agreement, and unlike the defendant in *Buck*, Dressner's guilty plea was a bargained for exchange. There was one criminal proceeding, one conviction, and one punishment. The double

jeopardy principles do not apply here. Accordingly, Dressner was not acquitted of the Possession of Marijuana charge; and therefore, does not meet the threshold requirements for an expungement under Code § 19.2-392.2(A)(1).

B. Dressner's Possession of Marijuana Charge was not "Otherwise Dismissed"

Dressner argues, in the alternative, that if she was not acquitted of the Possession of Marijuana charge, then the Possession of Marijuana charge should be considered "otherwise dismissed" within the meaning of the expungement statutes. "One 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.'" *Gregg v. Commonwealth*, 227 Va. 504, 507, 316 S.E.2d 741, 743 (1984). Dressner, however, maintains that she retains the status of "innocent" because she never entered a plea of "guilty" or "no contest" to the Possession of Marijuana charge, nor was she found guilty of Possession of Marijuana. Dressner likens her position to Brown and Compton in *Brown v. Commonwealth*, 278 Va. 92, 102, 677 S.E.2d 220, 225-26 (2009), where the Court ruled that Brown and Compton occupied the status of "innocent" because **the trial court dismissed** the respective charges "without a determination of guilt,

without a finding of evidence sufficient to establish guilt, and without penalties or conditions imposed by judicial authority."

However, Dressner's argument misses the mark. Unlike Brown and Compton, Dressner's Possession of Marijuana charge was never dismissed. Rather, the Possession of Marijuana charge was amended and the amended charge resulted in a conviction. When a charge is amended and the amended charge results in a conviction, the initial charge is not "otherwise dismissed" within the meaning of the expungement statutes. *See, e.g.*, *Necaise*, 281 Va. at 668-69, 708 S.E.2d at 866. Dressner was Possession of Marijuana charge was not dismissed; and therefore, she does not meet the threshold requirements for an expungement under Code § 19.2-392.2(A)(2).

III. Expungement of Dressner's Possession of Marijuana Charge would distort the record

In *Necaise*, the petitioner sought the expungement of all police and court records pertaining to two felony charges and misdemeanors that had been dismissed by the Commonwealth's nolle prosequi. *Necaise*, 281 Va., at 668, 708 S.E.2d at 865. The trial court granted the expungement to the misdemeanors but denied expungement for the felony offenses because Necaise had entered a guilty plea to two lesser included offenses that

stemmed from the felony charges. *Id.* This Court affirmed the trial court decision. *Id.* In its decision the Court stated:

> Expungement of the felony charges would distort the record by leaving the convictions without any foundation, suggesting that they had been arbitrarily imposed. The record as it stands contains a true account of the events that actually occurred and creates no injustice to either party.

Necaise, 281 Va. at 669, 708 S.E.2d at 866.

Dressner's petition for expungement creates a similar problem; it would leave Dressner's conviction for Reckless Driving without any foundation. Such an expungement would "distort the record of events that actually occurred" and runs afoul of the legislative intent underlying the expungement statutes. *Id.*

IV. Public policy supports denying Dressner's Petition for Expungement

Dressner also contends that equity dictates the granting her petition. In essence, Dressner argues that the expungement statute is too restrictive as it does not contemplate those situations where a higher offense is amended to a lesser offense and the defendant pleads guilty to the lesser offense. Dressner asserts that a defendant is no position to demand that the Commonwealth enter a nolle prosequi to the higher charge and issue a

new warrant for the lesser charge so that the defendant may be eligible for an expungement for the higher charge. However, if the expungement of the higher offense is essential to the defendant such a result can be accomplished through the plea agreement process. If plea agreements were crafted in such a way it would create more certainty in expungement process. Defendants and the Commonwealth would understand what charges are eligible for expungement and neither party would be surprised with the results of an expungement proceeding. Certainty and predictability of law are essential public policy concerns.

In Dressner's case, the Commonwealth amended her Possession of Marijuana charge, in violation of Code § 18.2-250.1, to a Reckless Driving charge, in violation of Code § 46.2-852, to which she plead guilty. It is inequitable to expunge her Possession of Marijuana charge when the Commonwealth did not dismiss that charge and intended to remove it from the purview of the expungement statutes.

In construing expungement statutes and the legislative intent in enacting these statutes, a more fundamental public policy issue that supports the denial of Dressner's petition. "The expungement statue applies to innocent persons, not to those who are guilty.". *Gregg*, 227 Va.

at 507, 316 S.E.2d at 742-43. "In construing statutes, courts are charged with ascertaining and giving effect to the intent of the legislature." *Crown Cent. Petroleum Corp. v. Hill*, 254 Va. 88, 91, 488 S.E. 2d 345, 346 (1997).

This Court has consistently held that those individuals who pled guilty, or where the trial court makes a finding of guilt, or where the trial court makes a finding that there is evidence sufficient to find the defendant guilty are ineligible for an expungement under Code § 19.2-392.2. *See Necaise*, 281 Va. at 669, 708 S.E.2d at 866; (expungement of two felony offenses inappropriate where defendant plead guilty to two lesser-included offenses); *Commonwealth v. Dotson*, 276 Va. 278, 284, 661 S.E.2d. 473, 476 (2008) (expungement inappropriate where court dismissed charge after granting defendant "first offender" status, as court had found evidence sufficient to support conviction); *Daniel*, 268 Va. at 530, 604 S.E.2d at 447 (expungement inappropriate where court found evidence sufficient to convict but withheld a finding of guilt, and ultimately dismissed the charge after defendant's compliance with terms of supervision); *Commonwealth v. Jackson*, 255 Va. 552, 557, 499 S.E.2d 276, 279 (1998)(same); *Gregg*, 227 Va. at 507, 316 S.E.2d at 743 ("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.").

The Court's decisions have been guided by the legislative intent underlying the expungement statue which was enacted "to avoid injustice to an 'innocent citizen' falsely accused and unjustly convicted." *Necaise*, 281 Va. at 669, 708 S.E.2d at 866. The trial court's denial of Dressner's Petition for Expungement falls squarely within these rulings and the intent of the expungement statutes because Dressner is not an "innocent citizen."

CONCLUSION

The Circuit Court of Fairfax County correctly denied Dressner's expungement petition because Dressner was not acquitted or did not have her Possession of Marijuana charge "otherwise dismissed" as contemplated in the expungement statute. Furthermore, the expungement of Dressner's Possession of Marijuana charge would distort the record of events that actually occurred. Accordingly, the judgment of the trial court should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
Appellee herein.

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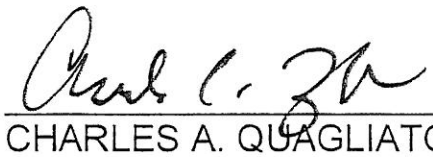

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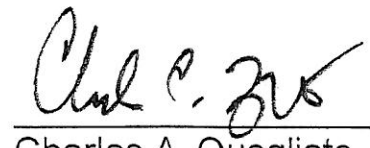
CERTIFICATE OF SERVICE

On August 9, 2012, the required number of copies of this brief were hand delivered to the Clerk of this Court and three copies were mailed to: **Patrick M. Blanch, Esquire, Elders, Zinicola & Blanch, PLLC, 4085 Chain Bridge Road, Suite 302, Fairfax, Virginia 22030**, counsel for the appellant.

Pursuant to Rule 5:26(b), I certify the Brief of Appellee contains 2,191 words.

In compliance with Rule 5:26(e), a digital copy of this brief was submitted to the Clerk of this Court and transmitted to opposing counsel via e-mail delivery.



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