In The

Supreme Court of Virginia

RECORD NO. 120496

ALISON ANNE DRESSNER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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Assignments of Error

I. The trial court erred by holding that Dressner's Possession of Marijuana charge had not been otherwise dismissed.

This Assignment of Error was preserved by Dressner's written and oral "Petition for Expungement," Appx. at 1-4, and by the "Memorandum of Law in Support of Petition", and the trial court's Order denying the Petition. Appx. at 9-10.

II. The trial court erred 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."

This Assignment of Error was preserved by Dressner's written and oral "Petition for Expungement," Appx. at 1-4, and by the "Memorandum of Law in Support of Petition", and the trial court's Order denying the Petition. Appx. at 9-10.

III. 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 originally charged on the summons.

This Assignment of Error was preserved by Dressner's written and oral "Petition for Expungement," Appx. at 1-4, and by the "Memorandum of Law in Support of Petition", and the trial court's Order denying the Petition. Appx. at 9-10.

Statement of the Case

In Necaise v. Commonwealth, 281 Va. 666 (2011), the Supreme Court of Virginia held that an individual cannot expunge the court records relating to the crime originally charged if the individual was ultimately found guilty of a lesser-included offense of the original charge sought to be expunged. The question at issue in this appeal is whether Petitioner may have the original charge expunged where the Petitioner has pled guilty to an unrelated amended charge, rather than a lesser-included charge, on the original summons.

Alison Anne Dressner filed a "Petition for Expungement…" on September 13, 2011, requesting expungement of a Possession of Marijuana charge. On November, 29, 2011, Dressner filed a "Notice of Hearing…" which set the court date for December 21, 2011. On December 2, 2011, Dressner filed a "Memorandum of Law in Support of Petition." On December 21, 2011, the trial court heard the Petition and took it under advisement. On December 29, 2011, the trial court issued from chambers an Order denying the Petition. A "Notice of Appeal" was filed on January 27, 2012, and an "Amended Notice of Appeal" was filed on January 30, 2012. An appeal was awarded by this Court on June 4, 2012.

Statement of the Facts

The following is verbatim, with some omissions, from the statement of facts agreed to by counsel and approved by the trial court, which is included in the Appendix:

On April 4, 2011, Officer T.B. Wallace of the Fairfax County Police Department issued a summons to Alison Anne Dressner, the Petitioner and Appellant (Hereinafter "Dressner") for Possession of Marijuana in violation of Virginia Code § 18.2-250.1. On June 23, 2011, the case was heard before the Honorable Donald P. McDonough of the Fairfax County General District Court. Dressner appeared with counsel at that hearing. Dressner never entered a plea of any kind to the Possession of Marijuana charge, and at no time did the General District Court make a finding on that charge or impose conditions of probation or other terms upon Dressner regarding the Possession of Marijuana charge. Appx. at 11.

At the beginning of the hearing on June 23, 2011, the Commonwealth amended the original marijuana charge, without objection, to Reckless Driving under Virginia Code § 46.2-852. Dressner was then arraigned upon the amended charge of Reckless Driving, and entered a plea of guilty. Pursuant to a plea agreement the Court imposed a fine of $200. Appx. at 11.

On September 13, 2011, Dressner filed a “Petition for Expungement” pursuant to Virginia Code § 19.2-392.2 with the Clerk of the Civil Division of the Fairfax County Circuit Court. Dressner was fingerprinted and the Virginia State Police completed a criminal history background check pursuant to Virginia Code § 19.2-392.2. The background check revealed no prior criminal convictions. Appx. at 12.

On November 29, 2011, Dressner filed a “Notice of Hearing” for the expungement petition, and provided the required notice to the Commonwealth that the hearing would be on December 21, 2011. On December 2, 2011, Dressner filed a “Memorandum of Law in Support of Petition.” The Commonwealth did not file a responsive pleading in the matter. Appx. at 12.

On December 21, 2011, the Honorable Charles J. Maxfield of the Fairfax County Circuit Court heard Dressner’s Petition. At that hearing, the Commonwealth did not contest that Dressner had demonstrated that a manifest injustice had occurred due to Dressner’s loss of employment as a result of a background check conducted by an employer, which revealed that she had been charged with Possession of Marijuana. The trial court made a finding that the Petitioner had demonstrated manifest injustice. Appx. at 12.

The parties disagreed on the legal point of whether Dressner's Possession of Marijuana charge was "otherwise dismissed" as contemplated by Virginia Code §§ 19.2-392.2(A)(1) & (2). That question was the only issue in dispute before the trial court. Appx. at 12.

The Commonwealth argued that the amendment of the marijuana charge to Reckless Driving did not legally operate as an acquittal and that it did not operate as "otherwise dismiss[ing]" the Possession of Marijuana charge. The Commonwealth relied upon the Supreme Court of Virginia's reasoning in Necaise v. Commonwealth, 281 Va. 666 (2011). Appx. at 13.

Dressner argued that the amendment operated as "otherwise dismissing" the Possession of Marijuana charge and that the Petition must therefore be granted. Specifically, Dressner argued that she remained "innocent" and occupied the status of "innocent" of the Possession of Marijuana charge as that term relates to eligibility for expungement under the cases of Brown v. Commonwealth, 278 Va. 92 (2009), Daniel v. Commonwealth, 268 Va. 523, Commonwealth v. Dotson, 276 Va. 278 (2008), and Gregg v. Commonwealth, 227 Va. 504 (1984), and that the charge had been "otherwise dismissed" as required by Va. Code § 19.2-392.2 when the Commonwealth amended the charge to Reckless Driving. Dressner distinguished her case from Necaise by noting that she

did not plead guilty to a lesser-included offense of the original charge, and that Necaise's rationale very specifically turned on the fact that the Petitioner in that case pled guilty to a lesser-included offense of the original charge which left Necaise unable to stand in the status of a person wholly "innocent" of the crime charged on the original warrant. Appx. at 13.

After hearing argument, the Court took the matter under advisement and stated that the Petition would be granted if the Court found that the Commonwealth's amendment of the charge to Reckless Driving served as an acquittal or as otherwise dismissing the Possession of Marijuana charge. The trial Court considered the filings of counsel, and the legal authorities presented by the parties. On December 29, 2011, the Court issued an order from chambers denying the Petition. The Court held as grounds for denying the Petition that

> "the Possession of Marijuana charge was amended to Reckless Driving on the same summons and 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, 281 Va. 666, 669 (2011), It is therefore ORDERED that the Petition for Expungement is DENIED." *See Order*, December 29, 2011. Appx. at 14.

Argument

I. The trial court erred by holding that Dressner was not eligible for expungement of the Possession of Marijuana charge.

The relevant portion of the expungement statute is as follows:

> A. If a person is charged with the commission of a crime or any offense defined in Titled 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 record relating to the charge.
>
> ***
>
> F. 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 expungement of the police and court records, including electronic records, relating to the charge. Otherwise, it shall deny the petition.

Va. Code § 19.2-392.2 (2011).

By its unambiguous language, the statute requires proof of only two things in order for a petitioner to earn an expungement: (1) manifest injustice and (2) dismissal of the charge. The trial court made a finding that

Dressner had demonstrated manifest injustice. Therefore, pursuant to Code § 19.2-292.2(F), Dressner's Petition "shall" and *must* be granted if her charge was "otherwise dismissed."

a. Standard of Review

Whether a charge has been dismissed for purposes of an expungment is a matter of law which is reviewed de novo on appeal. See generally Necaise, 281 Va. 666 (2011) (conducting de novo review but not specifying the standard of review).

b. Under the traditional analysis applied by this Court, the Possession of Marijuana charge was "otherwise dismissed" by the Commonwealth's amendment of the charge to Reckless Driving.

The analysis to determine whether a charge was "otherwise dismissed" within the meaning of § 19.2-392.2(A) requires this Court to determine whether the Petitioner "occup[ies] the status of 'innocent' so as to qualify under the expungement statute as a person whose charge has been 'otherwise dismissed.'" Brown v. Commonwealth, 278 Va. 92, 99 (2009).

Under this analysis, a petitioner is ineligible for expungement if she has acknowledged guilt of the charge sought to be expunged by entering a plea of guilty or nolo contendere, even if the charge is later dismissed. See Id. at 99-103. A Petitioner is also barred from expungement in cases

where she enters a plea of not guilty and the charge is later dismissed, if the dismissal comes upon the completion of tasks compelled by court order. See Id. at 99-103; See also Commonwealth v. Dotson, 276 Va. 278, 283 (2008).

On the other hand, a Petitioner remains "innocent" and is not precluded from eligibility for expungement if her case is dismissed subsequent to an agreement with the court or the Commonwealth to do certain "tasks", if those tasks are not accompanied by a court order compelling their performance, nor a plea of guilty or nolo contendere, nor a finding by the court of facts sufficient for guilt. See Brown, 278 Va. at 102 (citing Gregg, 227 Va. at 507) ("We liken the dismissals at issue to a nolle prosequi or accord and satisfaction; each dismissal took place without a determination of conditions imposed by judicial authority. Thus,. . . .we conclude that [petitioner] occup[ies] the status of innocent so as to qualify under the expungement statute as a person whose charge has been 'otherwise dismissed.'").

Petitioner never entered a plea of "guilty" or "no contest" to the Possession of Marijuana charge, nor was she ever found guilty of Possession of Marijuana. And, no terms were imposed upon Dressner as a condition of having the original Possession of Marijuana charge amended

to Reckless Driving. Based upon the traditional analysis, Dressner's charge was otherwise dismissed by legal operation the Commonwealth's amendment of the charge to Reckless Driving: she retains her status as "innocent" with respect to the Possession of Marijuana charge. Should this Court agree, then it may reverse the trial court on that basis alone.

It is essential in the expungement regime that the Court consider the amendment of a charge to be a dismissal of the original charge for the purposes of the expungement statute. If not, it is unclear what – if anything - to call the disposition of the original charge. Necaise held that a charge is not dismissed when the Commonwealth voluntarily reduces the original charge to a lesser-included offense in exchange for the Petitioner's plea of 'guilty.' Necaise supports this conclusion with the strange logic that the definition of "acquittal" is somehow different in the context of Double Jeopardy case law than it is in relationship to the expungement statute. Necaise, 281 Va. at 670 n. 3.

This holding creates substantial dissonance in the body of Virginia law. Virginia law considers the accused acquitted of the original charge when he is convicted of a lesser-included offense. See Buck v. City of Danville, 213 Va. 387, 388 (1972) ("when the court convicted him of the lesser included offense of impaired driving he was acquitted of the driving

under the influence of alcohol charge.”). Necaise is therefore a deviation from 40 years of court precedent and the rules of statutory interpretation. The terms “acquittal” and “dismissal” are legal terms of art. The Virginia Code does not define those terms differently as they apply to expungements. As a result, the canons of legal interpretation demand that the expungement statute’s use of those terms be consistent with their use as terms of art in other parts of Virginia’s jurisprudence. See, e.g., Locklear v. Commonwealth, 7 Va. App. 659, 663 (1989) (rejecting appellant’s claim that the word “complaints” should be given its ordinary meaning, because it was used as a legal term of art and “the principles of ejusdem generis and common sense dictate” that “complaints” be read as a legal term of art.).

Thus, under the rationale of Necaise, one can be acquitted of the crime charged, but not be able to expunge it even though that person would meet the simple elements of the expungement statute, which requires only that the Petitioner be acquitted and show manifest injustice. This scenario illustrates that Necaise has impermissibly narrowed the expungement statute beyond its plain elements. A narrowing construction of the expungement statute is especially inappropriate because the expungement statute is a remedial statute that should be broadly interpreted. Harper v. Virginia Dep’t of Taxation, 250 Va. 184, 195 (1995)

("it must be remembered…that the [refund] statute is remedial, and that its avowed purpose is to provide an expedition and inexpensive remedy for relief against taxes which have been erroneously assessed or collected, and that remedial statutes are not strictly construed, but are given a liberal construction with the view of advancing the remedy sought to be applied in accordance with the true intent and purpose of the legislature.").

c. The primary holding of Necaise v. Commonwealth does not preclude expungement in Dressner's case because it is not factually controlling.

In Necaise, the Supreme Court held that a Petitioner was not eligible for expungement of the records of the offense originally charged where, as part of a plea agreement, he entered a plea of guilty to a lesser-included offense of the original charge on the original warrant. 281 Va. at 669-670.

The Court in Necaise reasoned:

> The parties agree that the dispositive question is whether those charges were "otherwise dismissed" under the language of Code § 19.2-392.2(A)(2), quoted above. The simple answer is that the charges were never dismissed. Rather they were reduced to lesser included offenses that resulted in convictions.
>
> Because the misdemeanors of which Necaise was convicted were lesser included offenses of the felonies with which he was charged, all of the elements of the offenses of which he was convicted were subsumed within the felony charges and they form the sole bases for the convictions.

Id. at 668-669.

This logic does not apply to Dressner. Dressner's charge was not "reduced"; it was amended to a more serious, but unrelated offense. It is therefore certainly not a lesser-included offense. First offense Possession of Marijuana is codified in Title 18.2 of the Code and is an unclassified misdemeanor with a maximum penalty of 30 days in jail and up to a $500.00 fine. See Va. Code § 18.2-250.1(A). That punishment threshold is below the maximums for a Class 2 misdemeanor (6 months in jail and a $1000 fine). See Va. Code § 18.2-11. In contrast, Reckless Driving is a Class 1 misdemeanor, codified in Title 46.2 of the Code, with maximum penalties of 12 months in jail and a fine of $2500.00. See Va. Code §§ 46.2-868; 46.2-852.

"[A]ll the elements of the offense of which [Dressner] was convicted" were not subsumed in the Possession of Marijuana charge, and Dressner's case falls outside the legal reasoning that justified denial of the Petition for Expungement in Necaise. 281 Va. at 669.

Therefore, Dressner remains "innocent" of the charge of Possession of Marijuana, and she is entitled to the expungement.[1]

II. The trial court erred by holding that second rationale offered by the Court in Necaise precluded expungement of Dressner's Possession of Marijuana charge. For a variety of reasons, the second holding in Necaise is not applicable to Dressner's petition.

a. The second rationale of Necaise does not control because it is not factually on-point.

Necaise offered a second rational for denying the expungement petition in that case:

> 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.
>
> A more fundamental reason for our holding is provided by the statement of legislative policy contained in Code § 19.2-392.1, which was enacted simultaneously with Code § 19.2-392.2 to explain its purpose. Styled "Statement of policy," Code § 19.2-392.1 provides:
>
>> The General Assembly finds that arrest records can be a hindrance to an innocent citizen's ability to obtain employment, an education and to obtain

[1] See (as persuasive authority) MacDonald v. Commonwealth, 2011 Va. Cir. LEXIS 192, Case No. CL-2010-13130 (Fairfax Cir., Nov. 30, 2011) (Hon. L. Nordlund ordering expungement of Reckless Driving charge that was amended to Improper Driving because Improper Driving was not a lesser-included offense of Reckless Driving, and the rational of Necaise therefore did not apply to preclude eligibility for expungement of the original charge.).

> credit. It further finds that the police and court records of those of its citizens who have been absolutely pardoned for crimes for which they have been unjustly convicted can also be a hindrance. This chapter is intended to protect such persons from the unwarranted damage which may occur as a result of being arrested and convicted.
>
> The legislative intent underlying the expungement statutes is made clear by the quoted language. It was not to distort the record of events that actually occurred, but was to avoid injustice to an innocent citizen falsely accused and unjustly convicted.
>
> One who is found guilty is not an "innocent citizen" entitled to the benefit of the expungement statutes….Necaise, **having been found guilty of offenses charged within the warrants upon which he was arrested**, was not an "innocent citizen" entitled to the benefit of the expungement statutes.

Id. at 669-671 (emphasis added).

The nexus between the Court's reasoning in Necaise and its denial of Necaise's Petition, as highlighted in bold text above, is that the offenses for which Necaise was convicted were lesser included offenses of those charged on the warrants upon which he was arrested. The Court rejected Necaise's effort to "distort" the record on that specific basis. The reasoning of Necaise is inapplicable to this Petitioner, who was not convicted of a lesser included offense, but rather a traffic offense found in a different Title of the Virginia Code. Petitioner's effort to expunge the Possession of Marijuana records can hardly be considered in the same light as Necaise's,

as it is not an effort to "distort" the record, but rather to cleanse the record of a charge which does not form the basis for her Reckless Driving conviction and of which she was, and remains, wholly innocent.

b. Necaise's second rationale is dicta.

"Dicta are opinions of a judge which do not embody the resolution or determination of the court and, made without argument or full consideration of the point, are not the professed deliberate determination ns of the judge himself." Harmon v. Peery, 145 Va. 578, 583 (1926). "Black's Law Dictionary defines dicta as: 'Opinions of a judge which do not embody the resolution or determination of the specific case before the courts. Expressions in the court's opinion **which go beyond the facts before the court** and therefore are the individual views of author of opinion and not binding in subsequent cases as precedent.'" Hardesty v. Hardesty, 40 Va. App. 663, 678 (2003) (en banc) (Annunziata, J. dissenting) (quoting Black's Law Dictionary 454 (6th Ed. 1990)).

In Necaise, the Court specifically held that Necaise was ineligible for expungement because his charge was not "otherwise dismissed." Id. at 668-69. That holding was all that was necessary to resolve the case. The court's other reasoning regarding the administrative difficulties of expunging Necaise's charge were dicta, as it was unnecessary to resolve

the issue before the court. See Id. at 669-70. And, as discussed in greater detail below, that portion of Necaise was an opinion that went "beyond the facts before the court" because it was offered without proper development of a factual record upon which the Supreme Court could offer a valid and precedentally binding opinion.

The trial court in Dressner's case therefore inappropriately concluded that it was barred from granting Dressner's Petition for Expungement based on that dicta.

c. Necaise's second rationale violated this Court's rules regarding appellate fact finding and the right result of the wrong reason doctrine.

In Perry v. Commonwealth, the Supreme Court of Virginia provided clarification of the appropriate application of the "right result for the wrong reason" doctrine, and its recognition that the Supreme Court should not engage in factual speculation or appellate fact finding to support a ruling of a trial court:

> Under the right result for the wrong reason doctrine, "it is the settled rule that how[ever] erroneous . . . may be the reasons of the court for its judgment upon the face of the judgment itself, if the judgment be right, it will not be disturbed on account of the reasons. Schultz v. Schultz, 51 Va. (10 Gratt.) 358, 384 (1853).
>
> In Whitehead, we properly embraced the correct focus of the right result for the wrong reason doctrine when we stated that cases are only proper for application of the right result for

> the wrong reason doctrine when the evidence in the record supports the new argument on appeal, and the development of additional facts is not necessary. 278 Va. at 115, 677 S.E.2d at 270. If the record does not support the arguments made for the first time on appeal, then application of the right result for the wrong reason doctrine is inappropriate and those new arguments will not be considered.
>
> ***
>
> Failure to make the argument before the trial court is not the proper focus of the right result for the wrong reason doctrine. Consideration of the facts in the record and whether additional factual presentation is necessary to resolve the newly-advanced reason is the proper focus of the application of the doctrine.
>
> ***
>
> An appellate court is not limited to the grounds offered by the trial court in support of its decision, and it is "entitled to affirm the court's judgment on alternate grounds, *if such grounds are apparent from the record."* (emphasis in original).
>
> Perry v. Commonwealth, 280 Va. 572, 579-82 (2010) (emphasis in original).

Inherent in the Perry analysis is a recognition that Virginia's appellate courts are barred from engaging in fact finding that reaches outside the factual record of the trial court. Otherwise, there would be no requirement limiting an appellate court to grounds "apparent from the record." Id. In apparent contravention of that rule, and citing no factual record or legal authority, Necaise stated that "Expungement of the felony charges would distort the record by leaving the convictions without any foundation,

suggesting that they had been arbitrarily imposed." Necaise, 281 Va. at 669. The Court's conclusion in Necaise is invalid appellate fact finding.[2] Moreover, because Necaise lacks this factual foundation, it appears to affirm the trial court on a basis not set forth in the record, and therefore the second rational provided in Necaise also violates the requirement that a factual record be adequately established to employ the right result for the wrong reason analysis. See Perry, 280 Va. 579-82.

Necaise glaringly fails to explain why it reached its unsubstantiated conclusion that expunging the police and court records regarding the Possession of Marijuana charge would leave the Reckless Driving conviction without foundation.[3] This failure is likely due to the obvious inaccuracy of that conclusion. In the case of a summons, such as Dressner's case, the summons was amended to read "Reckless Driving."

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[2] On information and belief, there were no facts in the Record in Necaise to support the Court's ruling regarding the administrative difficulties involved, particularly the allegation that expunging any reference to the original charge would leave the record of conviction without foundation.

[3] This attorney has previously had a Reckless Driving charge expunged in a case where it was amended to Speeding under Va. Code § 46.2-870. See Berghoffer v. Commonwealth, Prince William County Circuit Court Case # CL10002121-00 (2010). Counsel can provide the State Police letter confirming completion of the expungement, which reported no difficulty with the process. See Also D.W. v. Commonwealth, 72 Va. Cir. 132, 2006 Va. Cir. LEXIS 300, Record No. 06-158 (Charlottesville Cir., Oct. 4, 2006) (granting expungement of original offense after conviction on amended charge).

The original charge of Possession of Marijuana can merely be blotted out so as to render it unreadable. The origin of the Reckless Driving conviction would remain unaffected – the summons number, case number, and other information would still exist. Dressner would receive the benefit of having references to Possession of Marijuana deleted from the police and court records, but that would not affect the validity of the Reckless Driving conviction. The Reckless Driving conviction would still be found in the court file with a valid summons number and all of the other accompanying paperwork.

The same is true whether a person is charged on a summons, a warrant, or an indictment. A summons, warrant, or indictment can always be amended at the Commonwealth's election, upon the consent of the accused, and in many cases without such consent. See Va. Code § 19.2-231 (2011). Even under the facts of Necaise, where a felony was reduced to a misdemeanor, deletion of the felony language would not render the charge to appear arbitrarily imposed. The final amended charge appears on a valid charging document. Only the original charging information would be deleted. Dressner fails to see how deletion of the original charging information would render the conviction without foundation where the conviction is based upon a valid charging document which states

the charge for which the defendant was arraigned (after amendment) and convicted.

Even if there are facts in the Necaise record to support its assertion that doing expungements in this scenario would be administratively difficult or that it would "distort the record," such concerns do not give authority to Virginia's courts to ignore the Assembly's directive that expungements shall be granted, so long as the factual predicates are met. "Distort[ing] the record" by deleting charges that have been dropped or dismissed is the expressed purpose of the expungement statute. There is nothing to suggest that the courts could not adopt an administrative method that would comply with the Assembly's statutory directive.

Because the trial court based its denial of Dressner's Petition for Expungement on this portion of Necaise, and because this language is dicta and was inappropriately decided in violation of the Supreme Court's own procedures governing appellate fact finding, the trial court's ruling should be reversed. The trial court's denial of the Petition for Expungement solely on the basis of Necaise's second rationale provided in the trial court's order would judicially engraft requirements into the expungement statute that the legislature declined to require, and was clear error. As noted above, § 19.2-392.2(A) requires only dismissal and manifest

injustice. If the legislature wished to limit the availability of expungements based on the hypothetical administrative difficulty of doing so, it could very easily have written those limitations into the expungement statute.

d. Necaise's second rationale relies upon a flawed reading of the Expungement statutes.

The Court's statement in Necaise that "[o]ne who is found guilty is not an "innocent citizen" entitled to the benefit of the expungement statutes" fails to distinguish between the charge one is seeking to expunge and the charge of which one was "found guilty." Id. at 669-670. A person who is charged with Possession of Marijuana, but who is instead convicted of Reckless Driving on the original Possession of Marijuana summons may seek to expunge the police and court records relating to the marijuana charge because they are not "one who [has been] found guilty" of the charge they are seeking to expunge. Rather, they are "one who [has been] found guilty" of Reckless Driving. Dressner never asked the trial court to expunge a charge for which she was found guilty, or even one of which she could be considered not "innocent." Dressner remains "innocent" of Possession of Marijuana and is entitled to expunge the charge.

A careful reading of the expungement statute and Necaise reveals that Necaise adopts a flawed reading of the expungement statute which conflates the "innocent" standard with those who have been pardoned:

> The legislative intent underlying the expungement statutes is made clear by the quoted language. It was not to distort the record of events that actually occurred, **but was to avoid injustice to an innocent citizen falsely accused and unjustly convicted**.
>
> **One who is found guilty is not an "innocent citizen" entitled to the benefit of the expungement statutes**….Necaise, having been found guilty of offenses charged within the warrants upon which he was arrested, was not an "innocent citizen" entitled to the benefit of the expungement statutes.

Necaise, 281 Va. at 669-670.

The bolded statements above misread the statute. The use of the term "also" in the second sentence of § 19.2-392.1 indicates that statute addresses two categories of eligible persons: (1) those who were not convicted of the offense that they seek to have expunged, and who therefore remain "innocent;"[4] and (2) those who have been convicted of the

[4] Sentence 1 of § 19.2-392.1: "The General Assembly finds that arrest records can be a hindrance to an innocent citizen's ability to obtain employment, an education [sic] and to obtain credit."

offense they seek to have expunged, but were pardoned.[5] Instead, Necaise erroneously finds that the purpose of the statute was to avoid injustice to an innocent citizen who is both falsely accused *and* unjustly convicted. That is plainly untrue.

e. If Necaise applies to the facts of Dressner's Petition for Expungement, the public policy of Virginia and the efficiency of its courts will be undermined.

Imagine a scenario in which the Commonwealth brings a warrant for a felony, and then as part of a plea agreement the first felony warrant is nolle prosequied and the Commonwealth obtains a new misdemeanor warrant for the defendant to plead guilty upon. The defendant in this scenario can plainly expunge the original felony warrant because it was nolle prosequied. But, if the original felony warrant is merely amended to a misdemeanor and the defendant pleads guilty, then the defendant is ineligible for expungement under Necaise. In either case, the defendant seeks to expunge only that charge for which he remains innocent, and the record of conviction will remain for the charge of which he was found guilty. To read the statute to allow an expungement in the first scenario, but not in the second scenario leads to a patently absurd result.

[5] Sentence 2 of § 19.2-392.1. "It [The General Assembly] further finds that the police and court records of those of its citizens for which they have been unjustly convicted can **also** be a hindrance."

The defendant is not generally in a position to demand that the Commonwealth enter a nolle prosequi and issue a new warrant to protect his right to an expungement of the original charge. The Commonwealth is generally permitted by Code § 19.2-231 to amend the warrant without the consent of the accused. And, Code § 19.2-231 does not limit the Commonwealth to amending charges only to lesser-included offenses covered by Necaise. Rather, Code § 19.2-231 limits amendments so that they may not change the "nature and character" of the indictment or warrant. That limitation will permit some charges to be amended to non-lesser-included offenses, such as Reckless Driving § 46.2-852 to Reckless Driving § 46.2-853.[6]

It may be said that the accused in this hypothetical scenario need only try his case and be acquitted to protect his right to an expungement. But due to the distinction drawn in Necaise between the meaning of "acquittal" in this statute and in the Double Jeopardy context, an acquittal is no longer enough to prevail under Necaise because the defendant may be

[6] Even if the defendant were in the position to demand that the Commonwealth enter a nolle prosequi and obtain a new, lesser, warrant in each case where there is a plea agreement, this procedure would be absurdly inefficient and would needlessly consume the time and resources of the trial courts, the Commonwealth's Attorney, the police, witnesses, and the defendant and her counsel. The expungement statute surely should not be construed to require such an absurd result.

found guilty of a lesser-included offense and denied his expungement of the original charge.

If an amendment does not work as a dismissal of the original charge under the expungement statute, then Virginians will have no remedy in instances where they are "overcharged" with a crime. Surely this was not the intention of the Assembly when it authorized the expungement of court and police records pertaining to charges for which one is innocent. Any practicing lawyer or judge knows that the sometimes Commonwealth realizes at trial or preliminary hearing that it cannot prove the offense charged, and moves to amend it. Under Necaise, the Commonwealth or (more worryingly) any private citizen can obtain a warrant charging any person with any crime in the Code, and have the trial court amend the charge later to reflect some more realistic offense, whether lesser-included or not, for which the defendant is actually guilty. See Va. Code § 19.2-231 (permitting the amendment of charging documents). Should the accused be found guilty of the amended charge, she will in this scenario have no recourse to cleanse her record of the permanent stain created by her arrest for the more serious, but meritless, original charge of which she is *innocent*. Granting an expungement to Dressner does not "distort the record." It protects citizens who are innocent of the originally charged offense from

having to live with the permanent stain of being erroneously, unjustly, or vindictively overcharged with an offense more serious than the one committed. This is well within the ambit of § 19.2-392.1's "Statement of Policy" explaining the purpose of the expungement statute.

The equities support Dressner's argument. Much hangs in the balance for the accused who is convicted of a different offense from that originally charged. The original offense for which a defendant is arrested is the offense for which she is fingerprinted, and that fingerprint and offense information is forwarded to the state police and the FBI, and will exist until expunged. See Va. Code §§ 19.2-390; 19.2-392; 19.2-391; 19.2-389; It will appear on credit checks and background checks, and has limitless negative consequences. This will happen to many Virginians simply because a police officer charged the wrong offense by mistake, or sought leverage over an accused by charging a crime too aggressively, or because a magistrate issued a warrant with the wrong charge on it by mistake, or because a private citizen with a grudge took out a warrant by shading the facts. Or, it will happen as it did in this case: because a police officer charged an offense the Commonwealth could not prove, but the Commonwealth amended the offense to a charge that the prosecution could prove.

Dressner committed a driving offense, but was wrongly charged with a drug offense. Dressner lost a job because of the police officer's decision to charge her with the drug offense. Dressner should not have to spend the rest of her life hoping that employers will not find out about the Possession of Marijuana charge, or that employers will accept her explanation for an offense of which she is innocent. The General Assembly has given her a remedy, under a remedial statue that is to be liberally construed. This Court should allow Dressner to have her remedy.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court to vacate the Order of the trial court and to direct the trial court to enter an Order granting the Petition for Expungement, or to remand this matter for actions not inconsistent with the opinion issued by this court, and such other appropriate remedy as may be provided by law.

Respectfully Submitted,
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Certificate

I, Patrick M. Blanch, certify as follows:

(a) The appellant's name is Alison Anne Dressner. Her current address is: 4305 Mission Court, Alexandria, Virginia 22310.

(b) Counsel for Appellant is Patrick M. Blanch, VSB # 72738, Elders, Zinicola & Blanch, PLLC, 4085 Chain Bridge Road, Suite 302, Fairfax, Virginia 22030. Telephone: (703) 934-8580. Fax: (703) 934-8583. E-mail: Patrick.Blanch@ezblaw.com

(c) The Appellee is the Commonwealth of Virginia. Counsel for Appellee is Raymond Morrogh, Commonwealth Attorney for Fairfax County, 4110 Chain Bridge Road, Room 123, Fairfax, Virginia 22030. Telephone: (703) 246-2776. Fax: (703) 691-4004. E-mail: Raymond.Morrogh@fairfaxcounty.gov

(d) Fifteen paper copies and one electronic copy of this Brief of Appellant and Appendix were hand-filed with Patricia Harrington, Clerk of the Court, Supreme Court of Virginia, 100 North Ninth Street, 5th Floor, Richmond, Virginia 23219. The required number of paper copies and one electronic copy of the same were served, via UPS Ground Transportation, to Raymond Morrogh, Esq., Office of the Commonwealth's Attorney, 4110 Chain Bridge Road, Room 123, Fairfax, Virginia 22030. All filing and service was made on July 13, 2012.

(e) Counsel for Appellant is retained.

(f) Counsel for Appellant certifies that this brief and this certificate comply with Rules 5:6, 5:26(h), and 5:27 of the Supreme Court of Virginia.

(g) Counsel for Appellant respectfully requests oral argument.

Patrick M. Blanch, Esq.