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IN THE

Supreme Court of Virginia

RECORD NO. 170199

AYESHA RAJ ANEJA,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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AUTHORITIES AND ARGUMENT

The trial court erred in partially denying Aneja's expungement petition; it misinterpreted Va. Code §19.2-392.2 and disregarded evidence demonstrating the manifest injustice to Aneja that has been, and may be caused by the continued existence and possible dissemination of information about her arrest.

A. The records of Aneja's felony arrest are subject to expungement, because the underlying charge was "otherwise dismissed" within the meaning of Va. Code §19.2-392.2(A)(2).

Aneja disagrees with every facet of the Commonwealth's position respecting whether the felony charge was "otherwise dismissed" within the intendment of Va. Code §19.2-392.2(A)(2). *See* Dressner, 285 Va. at 6.

In the Amended Brief of Appellee ("Commonwealth's brief"), the Commonwealth attempts to avoid the dispositive holding of Dressner v. Commonwealth, 285 Va. 1 (2013). *See* Commonwealth's Brief, pp. 3-10. Its position, on the one hand, concedes that disorderly conduct is not a lesser-included offense of assault and battery of a law enforcement officer. Commonwealth's Brief, pp. 5, 8, 15; *and see* Opening Brief of Appellant ("Aneja's Brief"), pp. 18-20. Yet, on the other hand, it glosses over each offense's elements to assert that the misdemeanor is *akin* to the felony. Commonwealth's Brief, pp. 5, 8-9.

It then argues that Necaise v. Commonwealth, 281 Va. 666 (2011) should control. Id.

In fact, the Commonwealth's position contradicts its stance at trial. There, its counsel stated, "I agree if the Court does not see it as a lesser-included…then it would be expungeable." (App. 60) The Court should not permit the Commonwealth to assume such inconsistent positions at trial and on appeal. Cangiano v. LSH Bldg. Co., 271 Va. 171, 181 (2006)("A party may not approbate and reprobate by taking successive positions in the course of litigation that are either inconsistent with each other or mutually contradictory").

The Commonwealth contends that this case "presents circumstances that lie between those addressed" in Dressner and Necaise. Commonwealths Brief, p. 3. In so doing, it disregards the fact that the Williamsburg/James City County General District Court ("the GDC") amended the felony warrant to charge disorderly conduct. Commonwealth's Brief, pp. 2, 9, 10; *but see* (App. 5-6, 12-13). Instead, the Commonwealth constructs a factually inaccurate scenario, repeatedly asserting that the GDC "reduced" the felony charge to disorderly conduct. Id.

Upon its "reduced" charge premise, the Commonwealth argues that the felony charge and disorderly conduct "involve similar and related facts, where minor but relevant details dictate which charge is appropriate." Commonwealth's Brief, p. 8. The Commonwealth then purports to limit Dressner's scope to those situations wherein the amended charge is "arbitrary" in relation to the originally charged offense, "or at a minimum involve[s] the reliance on unrelated facts[.]" Commonwealth's Brief, at 10 (clarification added).

No such "middle ground" exists between Dressner and Necaise as that posited by the Commonwealth. In Necaise, the Court framed the issue as whether a petitioner properly may seek "expungement of felony charges disposed of by the court's acceptance of the defendant's guilty plea to lesser-included misdemeanor offenses." 281 Va. at 667. The Court answered that question in the negative. Id. It reasoned that because "the misdemeanors of which Necaise were 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 669.

In Dressner, the Court concluded "that a possession of marijuana charge, amended to a reckless driving charge, was 'otherwise dismissed' as contemplated by" Va. Code §19.2-392.2(A)(2). In reaching that result, the Court reasoned that "[r]eckless driving is not a lesser-included offense of possession of marijuana…In other words, 'the elements of the offense [ ] of which [Dressner] was convicted' were not 'subsumed within the [possession of marijuana charge] and did not 'form the sole bas[i]s for the conviction[ ].'" 285 Va. at 6, *quoting and distinguishing* Necaise, 281 Va. at 669. [Clarifications in original]. While the Court described reckless driving as "completely separate and unrelated" to marijuana possession, it premised its holding on the fact that reckless driving did not constitute a lesser-included offense of the possession offense. Id., at 6.

The Dressner Court also found it significant that Dresser entered no plea to the possession charge, "nor did the…court make any finding that the evidence was sufficient to establish guilt on that charge." 285 Va. at 6-7. It ruled that Dressner occupied the status of an innocent person "as to the possession of marijuana charge." Id., at 7. Likewise, Aneja entered no plea to the felony charge, and the

record proves that the GDC conducted no evidentiary proceedings upon, nor made any findings regarding it. (App. 6, 12, 13)

Neither Dressner nor Necaise provide support for the Commonwealth's subjective and unworkable "middle ground" formulation. Each case turned on whether the offense of which the petitioner was convicted was, or was not, a lesser-included offense of the charge for which the petitioner sought expungement.

Thus, because the amended charge, disorderly conduct, did not constitute a lesser-included offense of the felony charge, Dresser controls. Pursuant to Dressner, the GDC "otherwise dismissed" the felony charge within the meaning of Va. Code §19.2-392.2(A)(2), and the records of Aneja's felony arrest are subject to expungement. 285 Va. at 6-7.; *and see* Va. Code §19.2-392.1 (statement of policy).

The law infers that the General Assembly concurs with the Court's interpretations of Va. Code §19.2-392.2(A)(2) in Dressner and Necaise. In none of the legislative sessions occurring since the Court decided those cases has the General Assembly amended the statute to abrogate their holdings. Yet, it has amended the statute in other respects. *See e.g.* 2016 Va. Acts ch. 617; 2015 Va. Acts ch. 426. As stated in Weathers v. Commonwealth, 262 Va. 803, 805 (2001),

"[w]hen the General Assembly acts in an area in which one of its appellate courts already has spoken, it is presumed to know the law as the court has stated it and to acquiesce therein[.]"

Finally, the Commonwealth attempts to rebirth the "record distortion" argument discussed in Necaise. Commonwealth's Brief, p. 15-16; *see* 281 Va. at 669-70. Once again, the Commonwealth contradicts a position that it took at trial. (App. 60, lines 15-19) And Dressner *explicitly* rejected that argument, ruling it "not a statutory basis" bearing on expungement eligibility. 285 Va. at 7.

B. The trial court misinterpreted the language of Va. Code §19.2-392.2(F) by considering the facts surrounding Aneja's felony arrest and the warrant's amendment, and finding them dispositive of the "manifest injustice" issue.

The Commonwealth belittles the strength of Aneja's evidentiary presentation on the "manifest injustice" issue. Commonwealth's Brief, pp. 12-14. In at least one instance, it outright misconstrues it by asserting that the delay in commencing Aneja's Disney ABC internship "stemmed from…a delay in the completion of the necessary background check." Commonwealth's Brief, p. 13. In truth, Aneja testified without rebuttal and produced supporting exhibits demonstrating that the discovery by Disney ABC of her felony arrest caused the delay in her internship's commencement.

(App. 34-35; *and see* App. 48, 70 (P-2), 71-72 (P-3)); Aneja's Brief, pp. 5-6.

Significantly, the Commonwealth does not directly address Aneja's assertions that the trial court misinterpreted Va. Code §19.2-392.2(F) by considering the facts surrounding Aneja's felony arrest and the warrant's amendment, or that it completely disregarded her probative evidence. Aneja's Brief, pp. 21-27. Nor does the Commonwealth expressly contradict Aneja's assertion that the strength of her evidence on the "manifest injustice" issue surpassed, or at least matched the strength of Matthew Paul Brown's evidence in Brown v. Commonwealth, 278 Va. 92 (2009). Aneja's Brief, pp. 27-30. In Brown, an unanimous Court held that Brown's evidence, as a matter of law, satisfied the statutory "manifest injustice" criteria of Va. Code §19.2-392.2(F).

What the Commonwealth does is take the firm position that the facts surrounding Aneja's arrest and the warrant's amendment bear relevance to the "manifest injustice" issue. Commonwealth's Brief, pp. 14-15. Aneja asserts that the Commonwealth's position finds *no*

support within the language of Va. Code §19.2-392.2(F), or in any decision of this Court. It thus constitutes a fallacy.[1]

In effort to justify its position, the Commonwealth attempts to fortify the criteria of Va. Code §19.2-392.2(F) by rephrasing the statutory language, and by creating additional criteria. For example, it contends that Aneja "must" show "an unfair negative impact," or evidence that "there may be an unfair impact….For felony offenses, there must be some injustice created by the continued existence of the information of the original arrest." Commonwealth's Brief, pp. 12, 14.

The Commonwealth further states, "the question that must be answered remains: is that impact a manifest injustice **in light of the circumstances of this case**?" Id., at 14 (emphasis added). And, "**those facts and circumstances** should not be dismissed as irrelevant when considering what if any injustice is being perpetrated against Aneja by the continued existence of **a true account of events that actually occurred**." Id., at 14-15 (emphasis added).

Yet Aneja asks, what language in Va. Code §19.2-392.2(F) casts the "manifest injustice" inquiry in the context of "the

[1] The Commonwealth's failure to cite authority for its position contravenes its obligation under Rule 5:28(d).

circumstances of this case," or, the "events that actually occurred?" What language of that provision casts the inquiry in terms of the factual circumstances surrounding the felony warrant's amendment? The answer to both questions is: None.

Indeed, subpart (F) language makes the "manifest injustice" inquiry one with an outlook of concern for Aneja's current ability and future prospects to "obtain employment, an education and to obtain credit." Va. Code §19.2-392.1. And in Daniel v. Commonwealth, 268 Va. 523, 530 (2004), the Court made clear that judicial inspection of "the petitioner's arrest and trial" records is limited to the inquiry of Va. Code §19.2-392.2(A). That inquiry is whether the charge for which expungement is sought was subject to acquittal, nolle prosequi or was otherwise dismissed. It has nothing to do with the "manifest injustice" issue.

The trial court's preoccupation with the facts surrounding Aneja's arrest and the felony warrant's amendment arose from its incorrect conclusion that Va. Code §19.2-392.2(F) enabled it to *punitively* deny Aneja's expungement petition. (App. 59-66) Indeed, the trial court confirmed that it would deny Aneja's expungement

petition without regard to a showing of detriment to her employment prospects. (App. 65-66)

The trial court effectively ruled, as the Commonwealth contends on appeal, that Aneja should pay a price for her felony arrest and the warrant's amendment. (App. 61-62, 65-66) That price includes her having to explain the arrest's circumstances for the rest of her life to prospective employers, and to law school and master's program admissions officers. (App. 65-66)

But the trial court's punitive purpose is foreign the plain, unambiguous language of Va. Code §19.2-392.2(F). It also violates the General Assembly's legislative intent as expressed in Va. Code §19.2-392.1. Aneja therefore asks the Court to reverse the trial court's partial denial of her expungement petition. [2]

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[2] Even if the facts surrounding her felony arrest and the warrant's amendment were relevant to the "manifest injustice" issue, Aneja should prevail on appeal. Before the trial court, Aneja denied that she assaulted any law enforcement officer. (App. 40-41) The Commonwealth offered no contrary evidence. It also concedes that in the GDC, "there was no opportunity to test the merits of the…felony offense." Commonwealth's Brief, p. 7. In light of the trial court's reliance on its pejorative hypothetical scenario, the only evidence before the trial court undermined its ruling on Aneja's expungement petition. (App. 59-60, 65-66)

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

The records of Aneja's felony arrest are expungeable because the underlying charge was "otherwise dismissed" within the meaning of Va. Code §19.2-392.2(A)(2). To the extent that the trial court's rulings may be interpreted to the contrary, it committed reversible error.

The trial court misinterpreted the language of Va. Code §19.2-392.2(F). It failed to consider the statutory factors relevant to the "manifest injustice" issue. Instead, it incorrectly considered the facts surrounding Aneja's felony arrest and the warrant's amendment. It erred in finding those facts dispositive of the "manifest injustice" issue.

The trial court incorrectly disregarded Aneja's evidence on the "manifest injustice" issue. Her evidence established as a matter of law that the continued existence and possible dissemination of information relating to her felony arrest causes or may cause circumstances constituting a manifest injustice to her. *See* Brown v. Commonwealth, 278 Va. 92, 103 (2009); Opening Brief of Appellant, pp. 27-30.

Aneja requests the following relief:

(a) That the Court reverse the trial court's judgment that partially denied her expungement petition; and

(b) That the Court remand the case to the trial court with a directive that it forthwith enter an order of expungement respecting her felony arrest.

In the alternative, if the Court determines not to enter the relief requested in (b), above, Aneja requests that the Court reverse the trial court and remand the case with a directive that it further consider her evidence on the "manifest injustice" issue according to a correct interpretation of Va. Code §19.2-392.2(F).

Respectfully submitted,

AYESHA RAJ ANEJA

By *Norman A. Thomas /s/*_____
Norman A. Thomas

CERTIFICATE

1. On the 30th day of August, 2017, counsel for the appellant filed an electronic version of this Reply Brief of Appellant in Portable Document Format ("PDF") with the Clerk of this Court, and ten printed copies hereof, in accordance with Rule 5:26. In addition, by electronic mail, counsel for the appellant served a PDF copy hereof upon counsel for the Commonwealth of Virginia, the Honorable Nathan R. Green, Commonwealth's Attorney for the City of Williamsburg, 5201 Monticello Avenue, Suite Four, Williamsburg, VA 23188-8213, at the following email address: ngreen@wjcc-ca.hrcoxmail.com.

2. The Reply Brief of Appellant complies with the limitations of Rule 5:26(b). It does not exceed 15 pages or 2,625 words, exclusive of its cover page, table of contents, table of authorities, and certificate.

3. The appellant has complied with the requirements of Rules 5:6 and 5:26, and reiterates her request for oral argument of her appeal before the Court.

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