

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

IN RE: PETITION FOR EXPUNGEMENT OF	)	MISC. CIV. NO.: ST-13-MC-04
CRIMINAL RECORDS CONCERNING	)	
CHANEL A. DORSET,	)	PETITION FOR EXPUNGEMENT
	)	
Petitioner.	)	
_____	)	

LESLIE LEVI PAYTON, ESQ.
Attorney for the Petitioner

VINCENT FRAZER, ESQ.
Office of the Attorney General
Department of Justice

MEMORANDUM OPINION

This Memorandum Opinion is pursuant to the Request for Designation of Magistrate from Judge James S. Carroll III for the undersigned magistrate to hear and determine a pretrial matter pursuant to 4 V.I.C. § 123(b)(1) and (2).

Summary

Dorset requests expungement of records concerning her conviction for aggravated assault and battery, in violation of 14 V.I.C. § 298. The Petition contains several deficiencies that must be corrected before it can be considered. Therefore, the Petition should be denied. However, even if these deficiencies are corrected, the Court may lack the statutory authority to expunge records related to a misdemeanor conviction.

Facts

In *People of the Virgin Islands vs. Chanel A. Dorset*, case number ST-97-CR-F518, Dorset pled guilty to “aggravated assault and battery” in violation of 14 V.I.C. § 298.¹ The Court entered a Judgment on February 24, 1998 sentencing Dorset to ninety (90) days imprisonment, all suspended, with one (1) year of supervised probation. Dorset successfully completed probation and was discharged on February 5, 1999. In a motion dated February 12, 2010, Dorset moved the Court to expunge her record. In the Court’s March 10, 2010 Order, Dorset’s motion was dismissed without prejudice based on several deficiencies in the motion. Dorset now files a Petition for Expungement through her attorney, Leslie Levi Payton, Esq., who signed the Petition on her behalf.

¹ This offense can be a felony if combined with acts of domestic violence. In this matter, the Defendant pled guilty to a misdemeanor.

Discussion

While not specifically pled, it appears that Dorset seeks expungement of the criminal records related to her 1997 aggravated assault and battery misdemeanor conviction pursuant to Superior Court Rules 400.6 and 400.6.1.

Rule 400.6.1 specifies the period of time that one must wait after final discharge from the jurisdiction of the Court before filing a petition for expungements. Because the maximum incarceration to which Dorset pled guilty does not exceed one year, her petition is timely under 400.6.1.(c).

Though timely, Dorset's Petition contains deficiencies which must be corrected. First, the Petition is signed by Dorset's attorney. While this may not be prohibited, the Petition was not signed before a notary as required by Superior Court Rule 400.2(b). Second, the Petition contains only the offense for which Dorset was convicted and does not list the offense for which she was arrested as required by 5 V.I.C. § 3735(a)(2) and Superior Court Rule 400.2(b)(4). Additionally, Dorset failed to state her address as of the date of the offense as required by Superior Court Rule 400.2(b)(3). Lastly, Dorset failed to provide proof that the Petition was served on the Department of Justice as required by 5 V.I.C. § 3725(c) and Superior Court Rule 400.2(c). Therefore, Dorset's petition should be denied at this time.

Correcting the deficiencies in the Petition will not, however, address a more fundamental issue in this matter.

Whether court rules permitting the expungements of misdemeanor convictions in the absence of legislation authorizing the expungements of records for misdemeanor convictions is valid?

Based on the undersigned's reading of 5 V.I.C. § 3731 *et seq.*, it appears that Super. Ct. R. 400.6 and R. 400.6.1 are *ultra vires*.

The Virgin Islands statutory rules of construction clearly mandate that "[t]he following matter does not constitute part of the law . . . (2) the descriptive headings or catch lines, other than the section numbers contained therein, immediately preceding the texts of the individual sections of this Code..."² The Superior Court's rule-making authority derives from the Revised Organic Act: "[t]he rules governing the practice and procedure of the courts established by local law... shall be governed by local law or the rules promulgated by those courts."³ The Third Circuit has stated that "[i]t is clear from this provision that the rules promulgated by the [Superior] Court must be respectful of the legislature's power to enact substantive law."⁴ The Virgin Islands Supreme Court has distinguished between procedural rules and substantive rules of law:

² V.I. Code Ann. tit. 1 § 45 (1995).

³ 48 U.S.C. § 1611(c) (2006). *See also Government v. Durant*, 49 V.I. 366, 373 (Sup. Ct. 2008).

⁴ *In re: Richards*, 42 V.I. 469, 483 (3rd Cir. 2000).

A procedural rule “regulates... the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”⁵ ... “A substantive rule of law [, on the other hand,] creates and defines the rights, duties, and obligations that are subsequently administered by procedural rules of law.”⁶ ... “While a procedural rule may affect a substantive right, any such effect must be incidental and may not materially modify a right granted by the substantive rule of law.”⁷

Therefore, any rule of the Superior Court that “creates rights” for which there is no legislative authorization would violate the Revised Organic Act.

Act No. 7136, which amended title 5 of the Virgin Islands Code by adding sections 3731 through 3741, allowing for the expungements of certain criminal records, was passed by the Legislature on November 10, 2009 and signed into law by the Governor on November 25, 2009. Prior to this Act, expungement of records was limited to very specific instances, which included certain arrests for controlled substances⁸ and certain family court matters.⁹ No general expungement statute had ever been in effect.¹⁰ On July 20, 2010, in response to the enactment of the expungement law, the Court established relevant rules and procedures in Court Order SX-10-MC-13, which were codified in Part X of the Rules of the Superior Court as Rules 400 *et seq.*

Sections 3731 *et seq.* clearly and comprehensively provide for the expungement of records involving criminal matters where the defendant has never been convicted and lists very specific circumstances in which expungement is mandatory or discretionary.¹¹ Likewise, there is a corresponding court rule.¹² No provision of Act 7136, however, authorizes the expungement of criminal matters that ended in a conviction.

The “heading” of § 3734 reads “Expungement of misdemeanor conviction.” The text that follows the heading states: “A person who wishes to have his record expunged under this section, must petition the Superior Court of the Virgin Islands and send a copy of the petition to the Department of Justice.”¹³ This text does nothing more than require that a petition for expungement be served on the Attorney General. The rule merely sets forth the procedural requirement that is authorized in § 3735(c). Therefore, the heading for § 3734, “Expungement of misdemeanor conviction,” is not law and cannot be treated as law.

⁵ *Government v. Durant*, 49 V.I. at 373 (quoting *Hanna v. Plumer*, 380 U.S. 460, 465 (1965) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941))).

⁶ *Government v. Durant*, 49 V.I. at 373 (quoting *In re Richards*, 40 V.I. 161 (D.V.I. 1999), *aff'd in part and rev'd in part*, *In re: Richards*, 42 V.I. at 469 (3rd. Cir. 2000) (citing *Hanna*, 380 U.S. at 464)).

⁷ *Id.*

⁸ See V.I. Code Ann. tit. 19 § 607 (1995).

⁹ See V.I. Code Ann. tit. 5 § 2531 (1997).

¹⁰ *Santiago v. People*, 51 V.I. 283, 294 (Sup. Ct. 2009).

¹¹ See V.I. Code Ann. tit. 5 §§ 3732, 3733 (1997 & Supp. 2010).

¹² See Super. Ct. R. 400.5.

¹³ V.I. Code Ann. tit. 5 § 3734.

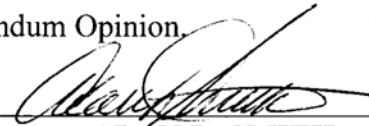
Act No. 7136 only authorizes the expungement of records in certain criminal matters that have been disposed of without a conviction. Absent legislation authorizing the expungement of misdemeanor convictions, Rules 400.6 and 400.6.1 appear to create substantive rights in violation of the Revised Organic Act, as well as the holding of the Virgin Islands Supreme Court in *Santiago*.

Conclusion

Dorset's Petition for Expungement contains several deficiencies which must be corrected before it can be considered by the Court. On that basis, the Court will deny the Petition. Additionally, if Dorset submits a corrected Petition, the Court foresees an issue as to whether the Superior Court has exceeded its rulemaking authority. Specifically, there is no statutory basis for the rules allowing the expungement of records associated with a misdemeanor conviction.

An Order will be issued in accordance with this Memorandum Opinion.

DATED: March 26, 2013

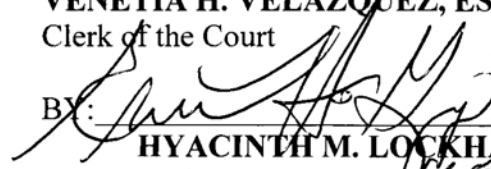


ALAN D. SMITH
Magistrate of the Superior Court
of the Virgin Islands

ATTEST:

VENETIA H. VELAZQUEZ, ESQ.

Clerk of the Court

BY: 

HYACINTH M. LOCKHART

Senior Deputy Clerk 3/26/13