

RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3828-14T2

IN THE MATTER OF THE
EXPUNGEMENT PETITION
OF D.P.

Argued May 3, 2016 – Decided May 31, 2016

Before Judges Hoffman and Whipple.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Docket No.
62491.

Lila B. Leonard, Deputy Attorney General,
argued the cause for appellant State of New
Jersey (Robert Lougy, Acting Attorney
General, attorney; Ms. Leonard, of counsel
and on the brief).

John C. Iannelli argued the cause for
respondent D.P.

PER CURIAM

The State appeals a March 27, 2015 order granting an amended verified petition for expungement. We affirm.

In October 1995, D.P. was indicted for second-degree conspiracy to distribute a controlled dangerous substance (CDS) in violation of N.J.S.A. 2C:5-2. She entered a guilty plea on January 21, 1997 to the charge and was sentenced to 364 days in the Camden County Correctional Facility to be served in house

arrest; 250 hours of community service; unannounced urine monitoring; and drug evaluation and treatment.

On August 6, 2014, D.P. filed an amended verified petition for expungement seeking to expunge her conviction. The trial judge granted the petition on March 27, 2015 over the State's objection, and granted a stay pending the outcome of this appeal. This appeal followed.

The State argues one issue on appeal:

POINT I

DEFENDANT IS STATUTORILY PRECLUDED FROM EXPUNGEMENT OF HER CRIMINAL RECORD BECAUSE A CONVICTION FOR SECOND-DEGREE CONSPIRACY TO DISTRIBUTE METHAMPHETAMINE IS NOT EXPUNGABLE.

Because we are reviewing the grant of a petition for expungement, we review the trial court's decision de novo. State v. Gandhi, 201 N.J. 161, 176 (2010).

Expungement is not a right guaranteed by constitutional or common law; it is purely the product of legislation, and we are limited to the terms of the statute. In re G.P.B., 436 N.J. Super. 48, 50 (App. Div. 2014), aff'd sub nom In re Expungement Petition of J.S., 223 N.J. 54 (2015). Expungement is generally available for all criminal convictions, except for those

specifically listed as non-expungable in N.J.S.A. 2C:52-2.¹ Conspiracy pursuant to N.J.S.A. 2C:5-2 is not one of the offenses specifically excluded from the expungement statute.

N.J.S.A. 2C:52-2c also bars expungement, when a case involves a conviction for the sale or distribution of a controlled dangerous substance or possession thereof with intent to sell, except for crimes that involve twenty-five grams or less of marijuana; five grams or less of hashish; and any CDS

¹ Records of conviction for the following crimes are ineligible for expungement: N.J.S.A. 2C:11-1 et seq. (Criminal Homicide); N.J.S.A. 2C:13-1 (Kidnapping); N.J.S.A. 2C:13-6(1) (Luring or Enticing); N.J.S.A. 2C:13-8(1) (Human Trafficking); N.J.S.A. 2C:14-2 (Sexual Assault or Aggravated Sexual Assault); N.J.S.A. 2C:14-3(a) (Aggravated Criminal Sexual Contact); if the victim is a minor, N.J.S.A. 2C:14-3b (Criminal Sexual Contact); if the victim is a minor and the offender is not the parent of the victim, N.J.S.A. 2C:13-2 (Criminal Restraint) or N.J.S.A. 2C:13-3 (False Imprisonment); N.J.S.A. 2C:15-1 (Robbery); N.J.S.A. 2C:17-1 (Arson and Related Offenses); N.J.S.A. 2C:24-4a (Endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child, or causing the child other harm); N.J.S.A. 2C:24-4b(4) (Photographing or filming a child in a prohibited sexual act); N.J.S.A. 2C:24-4b(3) (Causing or permitting a child to engage in a prohibited sexual act); N.J.S.A. 2C:24-4b(5)(A) (Distributing, possessing with intent to distribute or using a file-sharing program to store items depicting the sexual exploitation or abuse of a child); N.J.S.A. 2C:24-4b(5)(B) (Possessing or viewing items depicting the sexual exploitation or abuse of a child); N.J.S.A. 2C:28-1 (Perjury); N.J.S.A. 2C:28-2 (False Swearing); N.J.S.A. 2C:34-1(b)(4) (Knowingly promoting the prostitution of the actor's child); N.J.S.A. 2C:38-2(2) (Terrorism); N.J.S.A. 2C:38-3(3)(a) (Producing or Possessing Chemical Weapons, Biological Agents or Nuclear or Radiological Devices); and, pertinent to this appeal, conspiracies or attempts to commit such crimes.

conviction of the third- or -fourth degree. In those minor drug cases expungement is available if the court "finds that expungement is consistent with the public interest, giving due consideration to the nature of the offense and the petitioner's character and conduct since conviction." N.J.S.A. 2C:52-2c(1)-(3).

The State asserts that D.P. is statutorily barred from expungement under the language of N.J.S.A. 2C:52-2c because she admitted to possessing, buying, and selling methamphetamine in quantities totaling over an ounce, making such conduct punishable as a first- or second-degree crime. We disagree.

Although D.P. was convicted of conspiracy (and not the substantive crime of possessing CDS or possession with intent to distribute), the State asserts that her conviction is non-expungable because expungement is only available for minor drug offenses. The State also asserts that, because petitioner had the intent to sell methamphetamine in furtherance of the conspiracy, her conviction is non-expungable because her possession of CDS was performed with the intent to sell rather than merely distribute. The State also submits the bar is applicable here because a conviction for conspiracy to distribute CDS requires the same mental state as a conviction

for possession of CDS with the intent to sell, a crime which is statutorily barred from expungement. N.J.S.A. 2C:52-2c.

The State relies on In re D.A.C., 337 N.J. Super. 493, 498 (App. Div. 2001), where we concluded that a conviction for accomplice liability acts as a bar against expungement, despite the fact that accomplice liability is conceptually distinct from a substantive crime. There we noted that, when drafting the expungement statute, "our Legislature had the knowledge that an accomplice's crime is treated the same in New Jersey law as the crime of the principal." Ibid. The State submits that we should interpret N.J.S.A. 2C:52-2c to include conspiracy to distribute CDS, especially where, as here, the defendant admitted to selling CDS.

The State also submits that petitioner's criminal conviction was based on underlying facts that indicate she was involved in buying and selling CDS. In State v. P.L., 369 N.J. Super. 291, 294 (App. Div. 2004), we concluded that expungement is only barred in cases where a petitioner seeking expungement was convicted of possession with intent to distribute, and the mode of distribution was by sale. In In re G.R., 395 N.J. Super. 428, 432 (App. Div.), certif. denied, 193 N.J. 275 (2007), we further concluded that the court must consider whether the facts underlying petitioner's conviction evince an

intent to sell rather than merely distribute without sale. Accordingly, the State asserts that we must consider the facts adduced during petitioner's allocution and give appropriate weight to petitioner's admitted activity in buying and selling drugs. See State v. P.K., 369 N.J. Super. 291, 294 (App. Div. 2004). We disagree.

We have said that the language of N.J.S.A. 2C:52-2c is unambiguous, and should accordingly be construed by its literal terms. P.L., supra, 369 N.J. Super. at 293 (citing State v. Thomas, 166 N.J. 560, 567 (2001)). The expungement statute must be narrowly construed, even if anomalies arise when applying the literal language of the statute. State v. A.N.J., 98 N.J. 421, 427 (1985); State v. N.W., 329 N.J. Super. 326, 334 (App. Div. 2000); N.J.S.A. 1:1-1. When engaging in statutory construction, our "overriding goal is to give effect to the Legislature's intent." State v. D.A., 191 N.J. 158, 164 (2007) (citing DiProspero v. Penn, 183 N.J. 477, 492 (2005)). The best indicator of that intent is "the plain [statutory] language chosen by the Legislature." State v. Perry, 439 N.J. Super. 514, 523 (App. Div.), certif. denied, 222 N.J. 306 (2015) (citing Gandhi, supra, 201 N.J. 161, 176 (2010)). We may not "rewrite a statute or add language that the Legislature

omitted." State v. Munafo, 222 N.J. 480, 488 (2015) (citations omitted).

N.J.S.A. 2C:52-2(a) provides that expungement is available to all persons convicted of a crime, "except as herein provided[.]" No provision in the statute bars the grant of an expungement petition when a petitioner is convicted of conspiracy to distribute CDS, as opposed to the substantive crime of distribution of CDS (convictions for which are subject to a bar against expungement pursuant to N.J.S.A. 2C:52-2(c)(3)).

The State asserts that, because the CDS bar against expungement includes convictions on the basis of accomplice liability, conspiracy liability should provide a basis for a bar against expungement. We reject that argument. Theories of conspiracy liability and accomplice liability, although linked, are conceptually different in important respects. See State v. Samuels, 189 N.J. 236, 254 (2007). A criminal defendant convicted pursuant to a theory of accomplice liability is treated as having committed the underlying substantive crime for purposes of criminal liability, whereas conspiracy forms the basis for an altogether different charge. State v. Gerald, 113 N.J. 40, 93 (1988) (citations omitted) (superseded by statute on other grounds); N.J.S.A. 2C:2-6. New Jersey courts have also

distinguished the requisite mental states necessary to convict accomplices and co-conspirators. See State v. Roldan, 314 N.J. Super. 173, 189 (App. Div. 1998) (explaining that, unlike a co-conspirator, an accomplice must have the intent to aid another in the commission of a specific crime).

We conclude that conspiracy to distribute CDS does not automatically bar a petition for expungement, unlike accomplice liability. The treatment of accomplice liability and substantive crimes are so linked as to treat a criminal conviction similarly for expungement purposes. Conspiracy, as a crime, lies completely separate from the substantive crime in terms of criminal intent and punishment. An accomplice's crime is treated like that of the principal in terms of criminal punishment. Conspiracy, on the other hand, is an entirely different criminal conviction generally meriting lesser punishment.

The trial judge considered D.P.'s previous disorderly person's offense in municipal court, found that D.P. disassociated herself from unlawful activity, and was not a periodic offender of the law whose activities did not merit a grant of expungement. See In re Kollman, 210 N.J. 557, 568 (2012) (explaining the requirements for the grant of an expungement petition). The trial judge determined D.P.

demonstrated the objective requirements of the petition. Id. at 572-73. D.P. also demonstrated (as required) that expungement is in the public interest. Id. at 574-75. The trial judge considered the nature of the offense, and D.P.'s character and conduct since conviction. Ibid. We discern no reason to disturb the judge's findings which were supported by the record.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION