Excerpts from Relief Guide, CCAT, and Blogs: Expunctions, Certificates of Relief, and Collateral Consequences

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Excerpts from Relief from a Criminal Conviction Guide

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Relief from a Criminal Conviction

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MICROSITE

Relief from a Criminal Conviction

Frequently Asked Questions about Expunctions and Other Relief

John Rubin

This part of the guide provides answers to frequently asked questions about expunctions, certificates of relief, and other mechanisms for obtaining relief from a criminal conviction in North Carolina. Many questions are not specifically resolved by the North Carolina relief statutes. The answers reflect the interpretations of the author, John Rubin.

FAQs

Expand All

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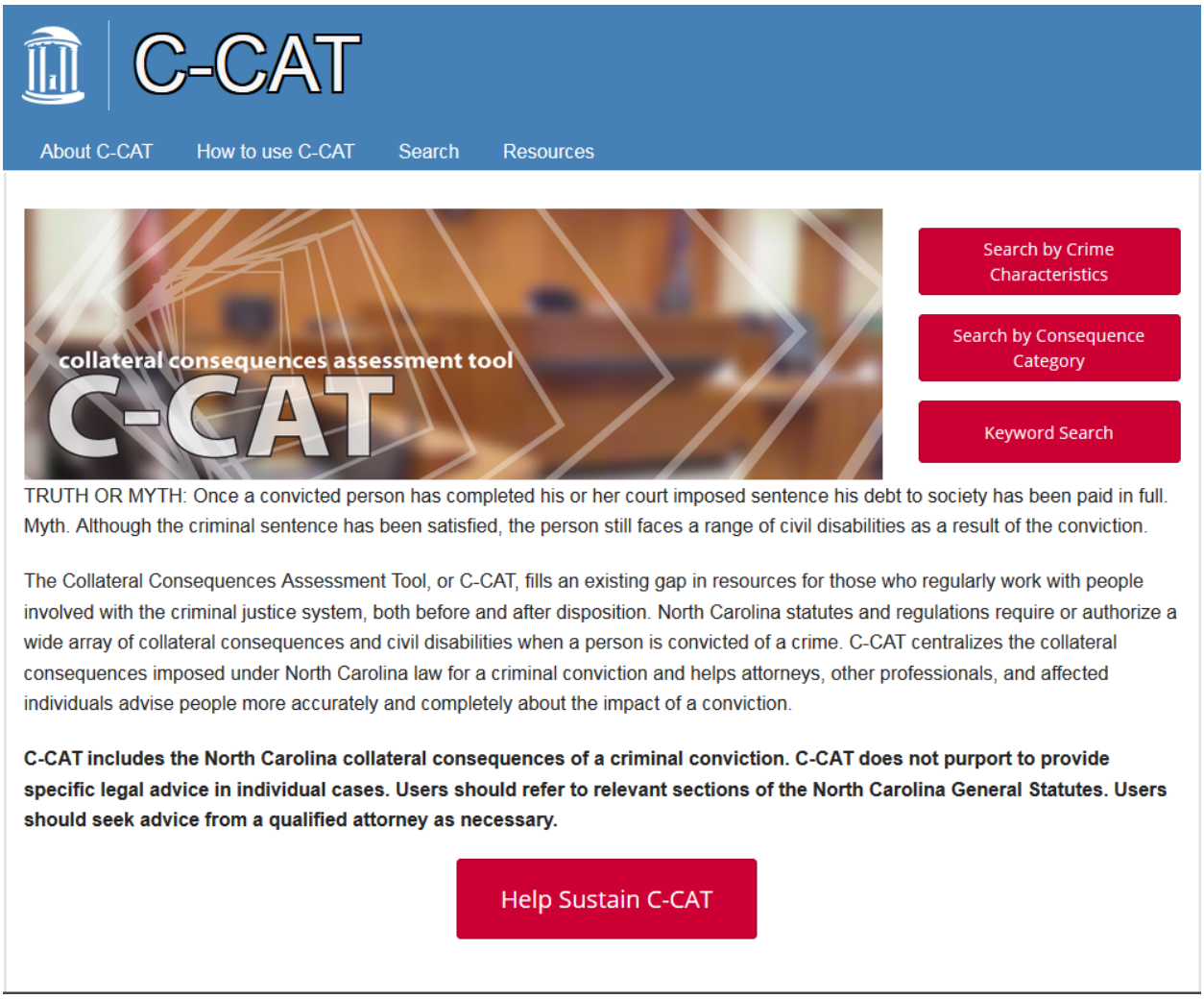

Papers on Sex Offender Registration Requirements
in Drop-down Menu under Resources on C-CAT

Sex Offender Registration Requirements

Consequences of Conviction of Offenses Subject to Sex Offender Registration (Mar. 2017)

Terminating Sex Offender Registration (July 2017)

Sex Offender Registration and Satellite-Based Monitoring (July 2017) (Flow Chart)

Expanded Expunction Opportunities

Author : John Rubin

Categories : Crimes and Elements, Procedure, Uncategorized

Tagged as : expunction, expungementrelief

Date : August 1, 2017

In S.L. 2017-195 (S 445), the General Assembly made several changes to North Carolina's expunction laws. Most importantly, the act expands the availability of relief in two ways: it reduces the waiting period to expunge older nonviolent felony and misdemeanor convictions, and it allows a person to obtain an expunction of a dismissal regardless of whether the person received any prior expunctions. Because the act states that it applies to petitions filed on or after December 1, 2017, the revised statutes apply to offenses, charges, and convictions that occur before, on, or after December 1, 2017. The tradeoff for this expansion is that expunged files that are otherwise confidential are available for review by the prosecutor and useable to calculate prior record level at sentencing if the person is convicted of a subsequent offense. This part of the act applies to expunctions granted on or after July 1, 2018. The act makes other changes to create more consistency and uniformity in the expunction process.

Reduction of waiting period. G.S. 15A-145.5 has allowed a person to expunge older felony and misdemeanor convictions if the offense was nonviolent as defined in the statute, 15 years have elapsed, and person satisfies the other statutory conditions. The act amends G.S. 15A-145.5(c) to reduce the 15-year waiting period to 10 years for nonviolent felonies and to 5 years for nonviolent misdemeanors. The remaining criteria for an expunction remain the same.

The act does not clarify an ambiguity about when this waiting period begins. The amended statute states that the petition may not be filed earlier than 10 years after the date of conviction for a nonviolent felony and 5 years for a nonviolent misdemeanor or when any sentence has been completed, whichever occurs later. This language appears to mean that a person must wait until (i) 5 or 10 years have passed from the date of conviction depending on whether it is for a misdemeanor or felony or (ii) the person completes the terms of his or her sentence, whichever occurs later. Thus, a person always must wait the specified number of years from the date of conviction before petitioning for an expunction. If the person has not completed his or her sentence within that period, he or she must wait any additional time it takes to complete the sentence. The provision does not require the person to wait an additional 5 or 10 years after completing his or her sentence, which would render the conviction date meaningless since sentences always end on or after the conviction date. For a further discussion of this issue, see John Rubin, Relief from a Criminal Conviction (hereinafter Relief Guide), Older Nonviolent Misdemeanor and Felony Convictions (UNC School of Government 2016).

Elimination of limit on expunctions of dismissals. G.S. 15A-146 has allowed a person to expunge dismissals by the court or prosecutor and findings of not guilty if the person has not previously obtained an expunction under various statutes and satisfies other statutory conditions, such as not having been convicted of a felony. The act amends G.S. 15A-146 to eliminate the prior expunction bar. Three subsections of G.S. 15A-146 allow expunctions without regard to whether the person has obtained a previous expunction.

- Amended subsection (a) continues to authorize expunction of dismissals.
- Amended subsection (a1) allows expunction of multiple dismissals and eliminates the requirement that the offenses be alleged to have occurred within the same 12-month period. Further, the amended language reinforces that a person may obtain an expunction of a dismissed charge even if he or she is convicted of misdemeanors in the same case. This has been the law because a misdemeanor conviction, whether it occurs before, at the same time, or after a dismissal, does not bar expunction of a dismissal. *See* Relief Guide,

Dismissal or Finding of Not Guilty of Misdemeanors, Felonies, and Certain Infractions. Amended subsection (a1) reinforces this result because it states that if a person is charged with multiple offenses and the charges are dismissed, the person is entitled to expunge each of the dismissed charges (assuming the other requirements are met); previously, the subsection referred to "all" charges being dismissed.

- New subsection (a2) allows expunction of findings of not guilty, which previously were covered by subsection (a). Not guilty findings appear to have been moved to a separate subsection because they are not subject to the new reporting requirements to prosecutors, discussed below.

Elimination of the prior expunction bar for dismissals and not guilty findings also addresses a potentially odd result under G.S. 15A-145.5. That statute has allowed expunction of multiple convictions of older nonviolent misdemeanors and felonies from the same session of court, which are now subject to the shorter waiting period discussed above. But, the statute does not expressly allow expunctions of dismissals even if related to the convictions being expunged. And, under the previous version of G.S. 15A-146, a person may not have been able to obtain an expunction of the dismissed charge if he or she received an expunction of a conviction under G.S. 15A-145.5 because a prior expunction barred relief. Now, a person may obtain an expunction of a conviction under G.S. 15A-145.5 and an expunction of a dismissal under G.S. 15A-146, whether related or unrelated to the conviction, because the prior expunction bar has been eliminated. G.S. 15A-146 continues to bar expunctions if a person has a felony conviction, but an expunged conviction, because it has been expunged, should not count as a conviction except for calculating the person's prior record level, discussed below. *See* Relief Guide, Expunged Convictions.

Sharing of expunction with prosecutor and use for prior record level for subsequent offenses. New G.S. 15A-151.5 allows prosecutors to access and use most expunctions to determine a person's prior record level for subsequent offenses if the record was expunged on or after July 1, 2018. Although people may obtain expunctions under the new provisions beginning December 1, 2017, the later effective date of this requirement appears to be for the purpose of giving the Administrative Office of the Courts (AOC) more time to implement it. The new statute applies to expunctions under G.S. 15A-145, 15A-145.1, 15A-145.2, 15A-145.3, 15A-145.4, 15A.145.5, 15A-145.6, 15A-146(a), and 15A-146(a1). It does not apply to expunctions of not guilty findings under new G.S. 15A-146(a2).

Subsection (a) of new G.S. 15A-151.5 requires the AOC to make the confidential files it maintains of the above expunctions available electronically to all prosecutors in the State. Under amended G.S. 15A-151(a), the confidential files consist of the names of people who received expunctions and the granted petitions. (G.S. 15A-151 also continues to allow law enforcement entities to obtain these files for expunctions under G.S. 15A-145.4, 15A-145.5, and 15A-145.6 for certification and employment purposes.) Subsection (b) of G.S. 15A-151.5 authorizes the use of expunged criminal records, other than expunged dismissals under G.S. 15A-146, to calculate a person's prior record level if the person is convicted of a subsequent criminal offense. The act makes conforming changes to other expunction statutes to reflect this authority. Subsection (c) of G.S. 15A-151.5 provides that the information provided by the AOC is prima facie evidence of an expunged conviction for purposes of calculating prior record level and is admissible in evidence at a subsequent criminal sentencing hearing.

Other than this access and use, the effect of an order of expunction remains the same under North Carolina law. The person for whom an order has been entered is restored to the status he or she occupied before the criminal proceeding and may not be held to have given a false statement by not disclosing the expunged matter. *See, e.g.,* G.S. 15A-145.5(c), (d). Agencies must purge their records of all entries of the case. *See, e.g.,* G.S. 15A-150(b). The previous version of this statute stated that agencies must expunge rather than purge their records, but the change in terminology does not appear to make a legal difference.

Notice by clerk. Amended G.S. 15A-150 requires the clerk of superior court to file granted petitions and orders with the AOC and to provide a certified copy of an order of expunction to the person receiving it as well as to agencies required to expunge their records. The amended statute clarifies that the clerk should send the orders to the Combined Records Section of the Department of Public Safety and to the State Bureau of Investigation, which is then responsible for forwarding the orders to the Federal Bureau of Investigation. The act also amends G.S. 15A-146, as well as G.S.

15A-147 (expunction based on identity theft or mistaken identity) and G.S. 15A-148 (expunction of DNA records), to require that a petition for expunction be on a form approved by the AOC, presumably to make the records submitted by the clerk to the AOC more uniform. In some instances, the AOC forms seek to resolve inconsistencies and ambiguities in the expunction laws. The requirement that AOC forms be used does not preclude a petitioner from arguing and a judge finding that the expunction laws may warrant greater relief.

Record check process. The act also amends the expunction statutes to clarify the responsibilities of the clerk of court for record checks. The amended statutes state that the petitioner's application for a record check is filed with the clerk of court and the clerk is responsible for forwarding the request to the Administrative Office of the Courts (to check for prior expunctions) and the Department of Public Safety (to check for prior criminal record). *See* G.S. 15A-145(a)(4), 15A-145.1(a)(4a), 15A-145.2(3a), 15A-145.3(a)(3a), 15A-145.4(c)(4), 15A-145.5(c)(4), 15A-146(c).

Venue. Last, the act amends several statutes to clarify that a petition for an expunction under the applicable statute must be filed in the court of the county of conviction. *See* G.S. 15A-145(a), 15A-145.1(a), 15A-145.4(b), 15A-145.5(c), 15A-145.6(b). Likewise, the act amends statutes on expunction of a discharge and dismissal to require that the petition be filed in the court of the county where the defendant was charged. *See* G.S. 15A-145.2(a), 15A-145.3(a).

Hurry Up and Have that DWI Expunged

Author : Shea Denning

Categories : Motor Vehicles, Sentencing

Tagged as : conditional discharge, deferred prosecution, DWI, DWI sentencing, expunction, expungement, legislation S.L. 2015-150

Date : July 22, 2015

If you've been dragging your feet about having an old DWI expunged, you had better hurry up. A law enacted last week removes convictions for offenses involving impaired driving from the types of convictions that may be expunged. The change is effective for petitions filed ***or pending*** on or after December 1, 2015. So if you are eligible for such an expunction, your window of opportunity is closing fast. Read on to find about the other changes S.L. 2015-150 makes to the state's DWI laws.

No statutory deferred prosecution or conditional discharge for DWI. G.S. 15A-1341 sets forth a statutory scheme pursuant to which certain defendants may be placed on probation as part of a deferred prosecution agreement or as part of an agreement following a determination of the defendant's guilt. This first type of agreement and probation commonly is referred to as "***statutory*** deferred prosecution" so as to distinguish it from other ad hoc deferred prosecution arrangements that may be entered into by a district attorney and a criminal defendant. The second is commonly called a "conditional discharge." A defendant's successful completion of probation leads to dismissal of the charges under either arrangement. *See* G.S. 15A-1342(i) (granting a defendant immunity from prosecution upon the expiration of probation imposed after deferral of prosecution). Charges are dismissed by the prosecutor if the defendant is placed on probation before entering a plea. *See* G.S. 15A-1341(a1), (a2). Charges are dismissed by the court and the defendant discharged if the defendant pleads or is found guilty before being placed on probation. *See* G.S. 15A-1341(a4), (a5), (a6).

Two groups of defendants are eligible for statutory deferred prosecution and conditional discharge. Jamie described the first type of defendant in this post. In general, these are defendants charged with a low-level felony or a misdemeanor offense who have not previously been convicted of a felony or a misdemeanor involving moral turpitude. The second type of defendant is one who is eligible for a drug treatment court program established pursuant to the North Carolina Drug Treatment Court Act.

Some defendants charged with DWI under G.S. 20-138.1 qualify under either category. DWI is a misdemeanor offense and the legislature has identified reducing alcohol dependence crimes such as DWI as a central purpose of drug treatment courts.

However, S.L. 2015-150 amends G.S. 15A-1341 to provide that defendants charged with or convicted of misdemeanor DWI are ***not*** eligible for statutory deferred prosecution or conditional discharge. The amendments are effective for orders placing a defendant on probation on or after December 1, 2015.

Re-sentencing not always required on remand. The legislature enacted G.S. 20-38.7 in 2006 to prevent a defendant from escaping enhanced punishment in a DWI case by appealing a prior DWI conviction to superior court and then withdrawing the appeal after he was sentenced for a subsequent DWI. When that occurred, a defendant benefited from two low-level DWI sentences, neither of which was enhanced by the prior conviction. Current G.S. 20-38.7 provides that district court sentences for DWI are vacated upon the giving of notice of appeal and requires a district court to hold a new sentencing hearing and consider new convictions when a DWI appeal to superior court is withdrawn or a case is remanded from superior to district court. But because DWIs aren't always appealed to superior court solely for the

purpose of dodging sentencing enhancements for prior convictions, G.S. 20-38.7 requires resentencing in some circumstances where the parties agree there are no new sentencing factors for the court to consider. S.L. 2015-150 amends G.S. 20-38.7(c) to provide that a district court sentence is not vacated and no new sentencing hearing is required if the appeal is properly withdrawn and the case remanded and the prosecutor has certified to the clerk in writing that she has no new sentencing factors to offer the court. These amendments are effective for appeals filed on or after December 1, 2015.

Stay tuned as the session wraps up for posts on other significant DWI and motor vehicle legislation.

When Agencies Disagree with Criminal Court Decisions

Author : John Rubin

Categories : Uncategorized

Date : November 1, 2016

In criminal proceedings, court orders can affect other agencies. When the court imposes a sentence of imprisonment, the Division of Adult Correction has the responsibility of carrying it out. If the court issues a limited driving privilege in a traffic case, a person can drive even though the Division of Motor Vehicles has revoked the person's license. A court may grant an expunction petition, requiring law enforcement agencies to destroy records of the criminal case. What happens if the affected agency believes that the order is unlawful? A recent decision, *In re Timberlake* (Oct. 18, 2016), provides some clarity about the procedures to follow, at least in the context of that case.

The facts. In *Timberlake*, the petitioner was convicted of an offense in South Carolina requiring that he register as a sex offender once he moved to North Carolina. After ten years on the registry in North Carolina, he filed a petition in superior court to terminate his registration and be removed from the registry. An Assistant District Attorney (ADA) appeared on behalf of the State of North Carolina as provided by the statutory procedures for the hearing of termination petitions. *See* G.S. 14-208.12A(a2). The ADA presented no evidence or argument in opposition to the petition. On October 6, 2014, the trial judge granted the petition, finding that the petitioner met the requirements for termination—he had been on the registry for at least ten years, had not been arrested for another crime requiring registration, was not a threat to public safety, and met the federal requirements for termination. The State did not appeal.

On October 16, 2014, on behalf of the North Carolina Division of Criminal Information (DCI), an Assistant Attorney General (AAG) wrote a letter to the superior court judge raising questions about the judge's order. DCI is the agency responsible for maintaining the sex offender registry. The letter stated that under federal law, the petitioner's offense might require that he register as a sex offender for life, without the possibility of termination. The letter asked the judge to review his order and stated that if the agency did not receive any response by November 1, 2014, the agency would proceed with removing the petitioner from the sex offender registry. Thereafter, on May 8, 2015, the trial judge entered an "amended-corrected order" denying the petition to terminate registration on the ground that federal law did not permit termination. The petitioner appealed.

The decision. The Court of Appeals held that the trial judge did not have jurisdiction to reconsider his order terminating the petitioner's registration because the State did not oppose termination at the trial level and did not appeal. The State did not present evidence or reasons to the superior court as to why it should deny the petition, as provided in G.S. 14-208.12A(a2), and did not appeal the superior court's order, as allowed by G.S. 7A-27.

The Court of Appeals also held that the AAG's letter did not meet the requirements for a motion requesting the trial judge to reconsider his order under North Carolina Rule of Civil Procedure 59(a)(8) or 60(b). To utilize Rule 59(a)(8), the moving party must show that the trial judge committed a legal error and that the moving party objected to the error. *Timberlake*, slip op. at 6–7 (citing decision to that effect). To utilize Rule 60(b), the moving party must establish one of the grounds listed in the rule, such as that the judgment is "void." A judgment is not void merely because of an error or misapplication of law; the court must lack the authority to decide the matter. *See also Timberlake*, slip op. at 6–7 (citing decision stating that erroneous judgments may be corrected only by appeal and that Rule 60 is not a substitute for appellate review).

Even if the letter could be considered a motion for reconsideration, it did not meet these requirements. The court concluded that the letter did "not comply with the processes provided in our general statutes and did not vest the trial

court with jurisdiction to review the termination order for errors of law." *Timberlake*, slip op. at 8. The court therefore vacated the trial judge's amended-corrected order.

The impact. The letter submitted to the trial judge in *Timberlake* is not unheard of. Other agencies have used this method to question orders. The practice has support in the decision of *Hamilton v. Freeman*, 147 N.C. App. 195 (2001), in which the court held that the Division of Adult Correction (DAC) could not modify a sentence it considered illegal but could inform the sentencing judge of the problem and ask the judge to reconsider the order. As a result, DAC now sends a letter to the court and parties when it has concerns about a sentence. *See* Jamie Markham, DAC's Auditing Authority, N.C. Crim. L., UNC Sch. of Gov't Blog (Apr. 21, 2015). What is the effect of *Timberlake* on this letter procedure? It depends on the order and the agency.

In cases in which the trial judge has granted a petition to terminate sex offender registration requirements, *Timberlake* does not allow DCI, itself or through the Attorney General's Office, to express its disagreement by merely sending a letter to the court. The State must oppose the order at the trial level and, if dissatisfied with the result, appeal. Treating a termination petition as a civil matter, *Timberlake* recognizes that the State may file a motion for reconsideration in the trial court under Rules 59 or 60 of the North Carolina Rules of Civil Procedure. *Timberlake* further recognizes the limited grounds for such motions. For a further discussion of the procedure and grounds for such motions, see my colleague Ann Anderson's book, Relief from Judgment in North Carolina Civil Cases (UNC Sch. of Gov't, 2015). *See also* Meredith Smith, Clerks, Adoptions and Division Review (Part 1), On the Civil Side, UNC Sch. of Gov't Blog (Feb. 4, 2015) (discussing propriety of agency letters questioning adoption orders issued by clerks of court).

Timberlake probably does not affect DAC's practice of writing the court when it identifies a legal error in a sentence. In criminal cases, a trial court has jurisdiction to modify an illegal sentence, whether the modification favors the defendant or the State. Although motions are the typical method of requesting relief from a court, *Hamilton* approved the less formal approach of writing a letter to the court.

Timberlake also doesn't affect the practice of the Division of Motor Vehicles (DMV) of notifying the court when it concludes that a limited driving privilege isn't permissible. By statute, DMV has this authority. *See* G.S. 20-179.3(k); *see also* Shea Riggsbee Denning, The Law of Impaired Driving and Related Implied Consent Offenses in North Carolina at 213 & n.26 (UNC Sch. of Gov't, 2014).

What about orders granting expunctions? The State Bureau of Investigation (SBI) has sometimes written the trial judge after entry of an expunction order when it has concerns about the validity of the order. *See, e.g., In re Spencer*, 140 N.C. App. 776 (2000). The SBI, through the Attorney General's Office, has also filed challenges in the trial court well after entry of an expunction order. *See, e.g., State v. Frazier*, 206 N.C. App. 306 (2010). Whether or not it filed a motion to reconsider in the trial court, the Attorney General's Office also has sought appellate review of an expunction order by petitioning for a writ of certiorari. *See, e.g., In re Robinson,* 172 N.C. App. 272 (2005). These decisions allowed the challenges without specifically addressing whether the court had jurisdiction to consider them. *See also In re Kearney*, 174 N.C. App. 213 (2005) (holding that trial judge had authority to consider challenge to expunction order in place of retired judge who had entered order; court did not specifically address whether jurisdiction existed to reconsider expunction order).

In *Timberlake*, the State argued that these decisions impliedly determined that there are "no jurisdictional limits" precluding the trial court from reconsidering expunction orders. The *Timberlake* court did not decide the proper procedure in expunction cases, holding only that the decisions did not control cases involving petitions to terminate registration. Slip op. at 7–8.

The required procedure for reconsidering expunction petitions may differ because expunctions may be a criminal matter. An expunction petition is statutorily designated as "a motion in the cause" in the case in which the petitioner was convicted. *See, e.g.,* 15A-145.5(c)(3). The requirements for post-judgment motions in civil cases, reflected in

Rules 59 and 60 of the North Carolina Rules of Civil Procedure, therefore may not apply.

In other respects, however, expunction proceedings are comparable to termination proceedings. Both take place well after the criminal case has ended. In both, the District Attorney has the statutory responsibility to represent the State. Both types of orders require the affected agencies to take certain ministerial actions—destroying criminal records in the case of an expunction order and removing a person from the sex offender registry in the case of a termination order. Unlike an unlawful sentence received by DAC, agencies subject to an expunction or termination order do not have an ongoing obligation to administer what may be an unlawful order. *See also Robinson*, 172 N.C. App. at 280–81 (Tyson, J., dissenting) (expressing concern about the prejudice to the petitioner of having a conviction reappear on his or her record after having taken action in reliance on it being expunged).

Whether expunction proceedings are criminal or civil, *Timberlake* may stir reconsideration of the limits on reconsidering expunction orders, particularly when the State hasn't appealed or made a motion for reconsideration.

Can You Expunge a PJC?

Author : Jamie Markham

Categories : Sentencing, Uncategorized

Tagged as : expunction, expunge, expungement, PJCprayer for judgment continued

Date : July 29, 2010

I am sometimes asked if a conviction for which prayer for judgment has been continued (a PJC) can be expunged. It's a sensible question, given—as I'll discuss in a moment—that a PJC is treated like a conviction for most purposes in North Carolina. A person has virtually the same incentive to seek expungement of a PJC as he or she does for any other conviction. The general view (at least among the judges and lawyers who have posed the question to me) appears to be that a PJC may not be expunged.

I think there's a decent argument that at least some PJCs may be expunged.

First, I should clarify which type of expunction I'm talking about. If anything, I think a PJC would fall under G.S. 15A-145 (for expunction of misdemeanor convictions for first-time offenders under age 18), not G.S. 15A-146 (for expunction of dismissed or acquitted charges). Indeed, the crux of the argument for expungeability is that a PJC is a conviction. A judge can only continue prayer for judgment after the defendant's guilt has been established, and the courts have now held that a guilty verdict—not entry of judgment—is the touchstone of a conviction. See State v. McGee, 175 N.C. App. 586 (2006) ("[U]nder the traditional definition, 'conviction' refers to the jury's or factfinder's guilty verdict."). That's the rationale for why a PJC counts as a conviction for prior record level points, State v. Hatcher, 135 N.C. App. 524 (2000) (as I discussed here). [Note: In 2009, the first version of the bill (H 726) that was eventually passed this year as an act to "clarify expunctions" would have amended G.S. 15A-146 (not -145) to say that the record of a defendant's charge could be expunged if prayer for judgment was continued in the case—treating the PJC the same as a dismissal or finding of not guilty. By the time the bill reached its third iteration that provision was gone—sensibly, I think, given that a PJC is not like a dismissal or acquittal, and the incongruity between expunging records of a defendant's charge for a PJC that would certainly be treated as a conviction for future prior record level calculations.]

G.S. 15A-145 refers only to "convictions" (there is no requirement for entry of judgment) and applies to any otherwise eligible person who "pleads guilty to or is guilty of a misdemeanor other than a traffic violation." It seems to me that if a PJC is a conviction for other purposes, it arguably falls within the conviction language of G.S. 145.

I am not, however, prepared to say that all PJCs can be expunged. There are different kinds of PJCs.

First, if a purported PJC included conditions amounting to punishment, it wasn't really a PJC at all. As Jessie discussed in this post, almost anything other than a requirement to pay costs (per G.S. 15A-101(4a)) or a general requirement to "obey the law," State v. Brown, 110 N.C. App. 658 (1993), will convert a PJC into an entered judgment. State v. Popp, 676 S.E.2d 613 (2009). And if the PJC was really an entered judgment, there's little doubt it can be expunged under G.S. 15A-145 (assuming the petitioner is otherwise eligible).

What about true PJCs, ones with no conditions attached, and for which judgment clearly has not been entered? Even among those there are different types. There is the "dispositional" PJC—one which all parties believe to be the final outcome of the case, entered with the idea that no further sentencing will occur. Then there's the PJC "from term to term," entered with the understanding that the state may later pray judgment if the defendant commits a new crime or engages in some other bad behavior. And finally there's a PJC to allow the judge to obtain additional information needed for sentencing—really a simple continuation of the sentencing hearing itself.

Regarding the final type, it's pretty clear that those shouldn't be expunged. It's unlikely to come up, I think, given that G.S. 15A-145 requires that a person must wait at least two years from the date of conviction before petitioning for an expunction. But even if a judge did need to continue a case for that long, I don't think G.S. 15A-145 should operate to short-circuit the judge's discretion. Similarly, when prayer for judgment has been continued from term to term and the state could still reasonably act on it by praying judgment, an expunction would seem improper. Exactly how long the state has to act has been the subject of a few cases in North Carolina, including one just last week. In State v. Craven, the court of appeals determined that a two-year delay was not unreasonable when the defendant consented to the continuation and never requested sentencing. In an earlier case the court said a five-year delay was reasonable when the defendant was not prejudiced by the delay. State v. Lea, 156 N.C. App. 178 (2003).

So the expunction process probably shouldn't be used to pull the conviction rug out from under the judge or the state when entry of judgment is still possible. If, however, the court entertaining an expunction petition for a defendant who received a PJC is able to determine (a) that neither it (nor any other judge) is still awaiting information for sentencing; and (b) that the PJC was at its inception or has become, on account of a delay that would make entry of judgment unreasonable, dispositional in nature, I think an otherwise eligible conviction for which prayer for judgment has been continued could be expunged under G.S. 15A-145.

There are probably arguments to the contrary that I haven't thought of, and I hope you'll raise them in the comments. If nothing else, the Attorney General has noted in an opinion letter that the expunction statute operates as an exception to the general prohibition against alteration of records, and should thus be strictly construed. That same letter, though, notes that the expunction statute is remedial in nature and should thus be subject to a rule of liberal construction.

Certificate of Relief from Collateral Consequences of a Criminal Conviction

Author : John Rubin

Categories : Procedure, Sentencing, Uncategorized

Tagged as : collateral consequences

Date : August 8, 2011

In 2010, the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws) adopted the Uniform Collateral Consequence of Conviction Act to assist states in developing strategies for addressing the collateral consequences of a criminal conviction. Collateral consequences are effects that generally are not imposed as part of a criminal sentence but arise as a result of the criminal conviction and in many instances continue long after the person completes his or her sentence. North Carolina and other states impose a wide range of collateral consequences, such as licensing and employment bars and benefit disqualifications, for criminal convictions.

In the uniform act, the Uniform Law Commission recommended that states allow ex-offenders to apply for relief, according to specified criteria, from collateral consequences that could impede their ability to reintegrate into society. Effective December 1, 2011, the North Carolina General Assembly enacted such a procedure in new Article 6 of G.S. Chapter 15A (G.S. 15A-173.1 through 15A-173.6), allowing certain ex-offenders to apply to the court for a certificate of relief from collateral consequences. *See* S.L. 2011-265 (H 641). The North Carolina act is more limited than the uniform act, but it allows ex-offenders convicted of lower level felonies and misdemeanors to obtain some relief. Because the act does not contain any limiting language on the effective date of December 1, 2011, the procedure is available to ex-offenders who meet the requirements for relief whether their offenses or convictions occurred before or after that date.

The basic requirements for relief, contained in new G.S. 15A-173.2, are as follows:

1. The person must have been convicted of no more than two Class G, H, or I felonies or misdemeanors in one session of court and have no other convictions for a felony or misdemeanor other than a traffic violation.
2. The person must petition the court in which the convictions occurred—specifically, the senior resident superior court judge if the convictions were in superior court and the chief district court judge if the convictions were in district court. These judges may delegate their authority to hold hearings and issue, modify, or revoke certificates of relief to other judges or to clerks or magistrates in their district. The procedure for the filing and hearing of the petition, such as the giving of notice to the district attorney's office, is described in new G.S. 15A-173.4. *See also* G.S. 15A-173.6 (requiring the victim witness coordinator in the district attorney's office to give notice of the petition to the victim).
3. The person must establish certain matters by a preponderance of the evidence, including that twelve months have passed since the person completed his or her sentence, that the person is engaged in or is seeking to engage in a lawful occupation or activity, and that the person has no criminal charges pending.

If granted, a certificate of relief applies to two types of collateral consequences: "collateral sanctions," defined as a penalty, disability, or disqualification imposed by operation of law, such as a mandatory bar on obtaining a license for a particular occupation; and "disqualifications," defined as a penalty that an agency, official, or court may impose based on the conviction, such as a discretionary bar on an occupational license. A certificate of relief relieves the person of all automatic "collateral sanctions" except for those listed in new G.S. 15A-173.3 (for example, sex offender registration requirements and firearm disqualifications); those imposed by the North Carolina Constitution or federal law (for example, the state constitutional ban on holding the office of sheriff if previously convicted of a felony and the federal

bans on federally-assisted housing and food stamp benefits for certain convictions); and those specifically excluded in the certificate**.** A certificate of relief does not bar an entity from imposing a discretionary "disqualification" based on the conviction, but the entity may consider the certificate favorably in deciding whether to impose the disqualification. A certificate of relief also does not result in an expunction or pardon of the conviction; a person must use other mechanisms, if available for the conviction in question, to obtain those forms of relief.

Through a grant from the Z. Smith Reynolds Foundation, the indigent defense education group at the UNC School of Government is developing a searchable, electronic database, specific to North Carolina, of the collateral consequences of criminal convictions. This collateral consequences assessment tool (C-CAT) will be available in early 2012. The database will assist people in identifying the collateral consequences that apply to different types of convictions and the potential relief available under the new certificate-of-relief procedure. For additional information about C-CAT, contact Whitney Fairbanks, Civil Defender Educator at the School of Government.

Appeals of Expunction Decisions

Author : John Rubin

Categories : Procedure

Tagged as : appeal, certiorari, confidentiality, expunction, expungementpseudonym

Date : October 10, 2017

A short opinion issued recently by the Court of Appeals, *State v. J.C.*, ___ N.C. App. ___ (Sept. 19, 2017), concerns two open questions about appellate review of a trial judge's expunction decision. How can a party obtain appellate review? And, how can the person who petitions for an expunction make sure that the records of the appellate proceeding remain confidential? The Court's opinion does not expressly address those issues, but the case provides guidance on both.

Appeal or Certiorari? In *J.C.,* the State appealed a superior court judge's order granting an expunction of a conviction and a dismissal. The Court of Appeals recognized that unless authorized by statute, a party does not have the right to appeal—in other words, the right to have a higher court review the case. The Court held that G.S. 15A-1445 governs the State's right to appeal, and it "does not include any reference to a right of the State to appeal from an order of expunction." Slip Op. at 2.

The Court's reliance on G.S. 15A-1445 implicitly addresses a key question about expunctions—whether they are criminal or civil matters. At least for purposes of appeal, the Court's decision treats expunctions as criminal and therefore governed by criminal appeal statutes, in this instance by G.S. 15A-1445.

The Court noted that in previous cases it has reviewed expunction orders at the State's request pursuant to a petition for writ of certiorari, suggesting that a cert. petition would be an appropriate way for the State to seek review. Unlike an appeal, review by writ of certiorari is in the court's discretion. Because the State did not file a cert. petition, the Court of Appeals concluded that it did not have jurisdiction to proceed and granted the petitioner's motion to dismiss the State's appeal.

How does *J.C.* affect appellate review when a trial court *denies* an expunction petition? Under *J.C.*, an appeal by the petitioner in an expunction case would likewise appear to be a criminal matter, governed by criminal statutes. Because no decisions appear to have addressed a petitioner's statutory right to appeal the denial of expunction relief, to be safe a petitioner may want to file a notice of appeal *and* a petition for a writ of certiorari.

In cases in which a district court denies relief, the petitioner would head to superior court if expunctions are considered criminal. In district court criminal cases, G.S. 15A-1431 provides for appeals by criminal defendants to superior court. G.S. 15A-1444(f) provides generally for review by writ of certiorari without specifying the court of review, but Rule 19 of the General Rules of Practice for the Superior and District Courts gives superior courts the authority to issue a writ of certiorari to review district court decisions. *See State v. Hamrick*, 110 N.C. App. 60 (1993) (applying rule). In contrast, in civil cases, a party appealing a district court decision must go to the Court of Appeals. *See* G.S. 7A-27(b)(2).

Assuring Confidentiality of Appellate Records. The opinion in *J.C.* does not address how the petitioner can protect the confidentiality of the proceedings, but the Court of Appeals took steps to do so. Such steps are necessary because it isn't clear how or whether an expunction order applies to appellate court records. If it does apply, by the time the appellate court rules, the filings and other information about the case will already have become public, undermining any relief that the appellate court orders.

The most obvious step taken by the Court of Appeals in *J.C.* was to use the pseudonym J.C. for the petitioner in the caption and opinion. In some cases, pseudonyms in appellate proceedings are required by rule, as in abuse, neglect, dependency, and termination of parental rights appeals. *See* N.C. R. App. P. 3.1(b). In criminal cases, the appellate courts have used pseudonyms to protect the privacy of people involved in the case, such as minor victims and witnesses. *See, e.g., State v. Watkins*, ___ N.C. App. ___, 785 S.E.2d 175, 176 n.1 (2016); *State v. Pierce,* 238 N.C. App. 537, 539 n.1 (2014). Because the appellate rules and case law do not establish a requirement or regular practice of pseudonyms in expunction cases, counsel for the petitioner (whether the appellant or respondent on appeal) should make a motion to the appellate court. The motion should specify any potential identifying information that should be omitted or redacted. Thus, in addition to using a pseudonym, the *J.C.* opinion does not refer to the trial court case number.

Another notable step taken by the Court in *J.C.* was to restrict access to the underlying records in the case, effectively sealing them. Thus, the electronic filing site for the appellate courts shows that the case records are restricted and not available online. Again, counsel for the petitioner should make a specific motion to the appellate court to that effect.

Counsel for petitioners should make these motions as early in the appeals process as possible, which will minimize the need for additional requests to remove or redact materials that were already filed and that contain identifying information. Counsel also needs to be vigilant about monitoring the record of the proceedings. Because few expunction cases are appealed, the appellate courts may not be as accustomed to taking the steps taken in other cases to protect the confidentiality of the proceedings.