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October 4, 2001

Opinion No. 01-155

Expunction of Records after Entry of *Nolle Prosequi*

QUESTIONS

1. Is an individual who has had criminal charges dismissed by a *nolle prosequi* at the request of the State entitled to have the records of his arrest and charges expunged under Tenn. Code Ann. § 40-32-101?

   a. If so, is the individual entitled to have such public records expunged immediately upon petition in the court where the *nolle prosequi* is entered?
   b. Upon a petition for the expunction of public records regarding arrest and charges which have been dismissed *nolle prosequi*, may the court refuse or delay the entry of an order of expungement for any reason (*e.g.*, delay the entry of such order for a period of months to see if any further criminal charges will be brought)?
   c. Upon the entry of an order of expunction, how long does the court clerk have to remove and destroy such records?

2. Upon the dismissal of charges by *nolle prosequi*, is the individual entitled to have all items of personal property which were taken from him immediately returned?

   a. If so, by what procedure?

   b. If a court order is required to release the items of personal property, upon what grounds may the court refuse to release the items of personal property? (*E.g.*, May the court refuse to release firearms that were legally owned or possessed by the individual? May the court refuse to release the items for a period of months to see if any further criminal charges will be brought?)

OPINIONS

1. Yes. Tenn. Code Ann. § 40-32-101(3) specifically requires a court to expunge public records upon the petition of a defendant who has had a *nolle prosequi* entered in his case.
   a. Tenn. Code Ann. § 40-32-102 requires that records be removed and destroyed

within sixty days of the date of the filing of the petition.

b. No. A court may not refuse or delay the expunction of public records after it receives a petition from a defendant who has had a *nolle prosequi* entered in his case.

c. See response to "a" above.

2. Yes. An individual is entitled to have his personal property returned upon entry of a *nolle prosequi*, provided it is not contraband, linked to a crime, or of a stolen character.

a. The individual may bring a motion in the trial court under Tennessee Rule of Criminal Procedure 41(f).

b. If the individual's personal belongings are not returned and he chooses to bring an action in court, the judge may deny his motion if the court determines that the items are contraband, linked to a crime, or of a stolen character. Thus the court may refuse to release legally owned firearms if the State demonstrates that they are linked to a crime. Other items may be withheld for the reasons stated above.

ANALYSIS

1. Expunction of public records in certain circumstances is authorized by Tenn. Code Ann. § 40-32-101. When the State enters a *nolle prosequi*[1], expunction is specifically required by the following provision:

> Upon petition by a defendant in the court which entered a nolle prosequi in the defendant's case, the court shall order all public records expunged.

Tenn. Code Ann. § 40-32-101(a)(3). "Public records," however, as defined by the statute, do not include arrest histories. Tenn. Code Ann. § 40-32-101(b) and *see State v. Bridges*, No. 01C01-9508-CC-00271, 1996 Tenn. Crim. App. LEXIS 433 (Tenn. Crim. App. July 26, 1996)(restricting application of Tenn. Code Ann. § 40-32-101(3) to public records).

This statute provides that the court "shall" order the expunction if so petitioned. Thus, once a qualifying petition is filed, the court must order the expunction. *See State v. McCary*, 815 S.W.2d 220 (Tenn. Crim.

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[1]Tennessee cases establish that a *nolle prosequi* is a discharge of the case without a conviction or acquittal; thus, a *nolle prosequi* is not a bar to a subsequent prosecution when entered prior to trial. A defendant, however, cannot be convicted unless the State begins a new criminal process against the defendant. *State ex rel. Hobbs v. Murrell*, 170 Tenn. 152, 93 S.W.2d 628, 630 (Tenn. 1936); *State v. Moore*, 713 S.W.2d 670, 674-75 (Tenn. Crim. App. 1985).

App. 1991)(under Tenn. Code Ann. § 40-32-101(a)(1), the trial judge has no discretion in granting the defendant's petition for expunction).

The time frame within which the records must be expunged is also set forth by statute. Tenn. Code Ann. § 40-32-102 requires that the clerk remove and destroy the records within sixty days of the request.

2. In a case in which the State has entered a *nolle prosequi*, the State may seek to retain any legally seized items that are thought to be related to a crime in anticipation of initiating a new criminal proceeding. *See State v. Ruff*, No. W1999-01536-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 44 (Tenn. Crim. App. Jan. 19, 2001)(stating that a *nolle prosequi* is not a bar to a subsequent prosecution when entered prior to trial).

If the State retains items that an individual believes should be lawfully returned, an individual may bring a motion under Rule 41(f) of the Rules of Criminal Procedure. This rule provides that a person may move for the return of unlawfully seized property. The rule further provides that the motion will be granted except as to contraband if the evidence in support of the motion demonstrates that the items were illegally seized.

The Court of Criminal Appeals has allowed an appellant to file such a motion in order to have returned to him personal property seized at the time of his arrest. *See, e.g., State v. Mayberry*, C.C.A. No. 35, 1987 Tenn. Crim. App. LEXIS 2089 (Tenn. Crim. App. Jan. 14, 1987) and *State v. Wrister*, C.C.A. No. 02C01-9212-CR-00293, 1993 Tenn. Crim. App. LEXIS 804 (Tenn. Crim. App. Dec. 1, 1993). In *Mayberry*, the court ordered the return of the property stating that even though it was seized as the result of a lawful search, the property "was not contraband, was not linked to the crime for which he was convicted, and was not shown to be of a stolen character." *Mayberry*, 1993 LEXIS 2089, at 1. The court thus concluded that "the retention of the property by the law enforcement authorities would constitute an unlawful seizure sufficient to allow the appellant the right to seek return of his property." *Id.*

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