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Opinion No. 02-099

Tenn. Code Ann. §40-35-313

QUESTIONS

1. Does a judge have jurisdiction to convert or otherwise amend a judgment of conviction after 30 days has expired to provide that it will be expungeable under the terms of the judicial diversion statute, Tenn. Code Ann. §40-35-313?

2. May a judge grant a motion or sign an order for an expungement ex parte without formal notification to the District Attorney General?

OPINIONS

1. A valid judgment of conviction precludes expungement under §40-35-313.

2. A trial court may not conduct ex parte proceedings involving §40-35-313.

ANALYSIS

1. Expungement returns a person to the position "occupied before such arrest or indictment or information." *State v. Schindler*, 986 S.W.2d 209, 211 (Tenn.1999) Tenn. Code Ann. §40-32-101(a)(1) is the general expungement statute and provides, in pertinent part, that a trial court may expunge the record "of a person who has been charged with a misdemeanor or a felony, and which charge has been dismissed, or a no true bill returned by a grand jury, or a verdict of not guilty returned by a jury or a conviction which has by appeal been reversed...." There is no authority allowing the courts of this state to expunge the record of a valid criminal conviction. *State v. Anderson*, No. 02C01-9707-CC-00241, 1998 WL 8701 (Tenn.Crim.App. Jan. 13, 1998)(app. denied Sept. 14, 1998); *see also Mauldin v. State*, No. M1999-00532-CCA-R3-CD, 2000 WL 284179 (Tenn.Crim.App. March 17, 2000)(conviction offenses are not subject to expungement); *Sneed v. State*, No. 01C01-9803-CC-00117, 1999 WL 298222 (Tenn.Crim.App. May 12, 1999)(app. denied Nov. 29, 1999)(defendant not entitled to expungement of valid convictions); *State v. Slate*, No. 03C01-9511-CC-00352, 1996 WL 596948 (Tenn.Crim.App. Oct. 18, 1996)(app. denied Jan. 27, 1997)(defendant charged with first degree murder but convicted of second degree murder not entitled

to expungement since “expunction statute appears to provide relief only in situations where, for the reasons stated therein, criminal charges fail to result in any conviction.”).

Judicial diversion permits certain qualified defendants to enter into a period of probation, which, if successfully completed, results in expungement of the criminal record in that case. *See* Tenn.Code.Ann. § 40-35-313; *State v. Anderson*, 857 S.W.2d 571 (Tenn.Crim.App.1992). Judicial diversion is similar to pretrial diversion with the exception that the trial court, not the district attorney, makes the determination regarding a defendant’s suitability for the program. *Id.* The statute provides that upon a finding of guilt, "[t]he court may defer further proceedings against a qualified defendant and place such defendant on probation upon such reasonable conditions as it may require without entering a judgment of guilty." Tenn.Code Ann. § 40-35-313(a)(1)(A). In other words, the trial court makes a finding of guilt but does not enter a judgment of conviction into the record. *State v. Johnson*, 15 S.W.3d 515, 517 (Tenn.Crim.App. 1999). If a defendant successfully completes the terms of his probation, the statute provides for expungement from "all official records ... all recordation relating to the person's arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section." Tenn.Code Ann. § 40-35-313(b). If the defendant fails to successfully complete probation, the trial court conducts a probation revocation hearing and then enters the judgment of conviction. *Johnson*, 15 S.W.3d at 518.

Thus, §40-35-313, while necessitating a *finding* of guilt by the trial court, requires that the court *defer entry of the actual judgment of conviction*, pending the outcome of the defendant’s probation. If the defendant successfully completes the judicial diversion program, then his criminal record is expunged. This is consistent with the general expungement statute, *supra*, which precludes any expungement if a judgment of conviction has been entered against a defendant.

As a general rule, a trial court's judgment of conviction becomes final thirty days after its entry unless a timely notice of appeal or a specified post-trial motion is filed. *See State v. Boyd*, 51 S.W.3d 206, 210 (Tenn. Crim. App. 2000)(citations omitted). Once a judgment becomes final, or a timely notice of appeal has been filed, the trial court loses jurisdiction over the matter. *Id.* However, various statutes extend a trial court’s jurisdiction beyond 30 days. Tenn.R.Crim.P. 35 provides that within 120 days, a defendant may file a motion with the trial court for correction or reduction of sentence. Tenn.R.Crim.P. 36 provides for the correction of clerical errors. Tenn. Code Ann. § 40-35-212(c) provides that a trial court will retain “full jurisdiction over the manner of the defendant’s sentence service” so long as the defendant is not in the custody of the Tennessee Department of Correction.

These statutes seem to suggest some authority for expungement by a trial court after 30 days. However, statutes relating to the same subject or sharing a common purpose must be construed together in order to advance their common purpose or intent. *LensCrafters, Inc. v. Sundquist* 33 S.W.3d 772 (Tenn.2000); *Wilson v. Johnson County*, 879 S.W.2d 807 (Tenn.1994). If the legislative intent is unclear from the face of the questioned statute, those statutes relating to the same subject matter must be construed together, the language of some provisions aiding the interpretation of the

other, and viewing the statutes as a whole consistent with their legislative purpose. *State v. Blouvett*, 904 S.W.2d 111, 113 (Tenn.1995); *Lyons v. Rasar*, 872 S.W.2d 895, 897 (Tenn.1994); *Laney v. State*, 826 S.W.2d 117, 118 (Tenn.1992).

Applying these rules, it is the opinion of this office that, while a trial court may retain the power to alter or amend a defendant's sentence after 30 days, it has no authority to expunge a defendant's criminal record pursuant to Tenn. Code Ann. §40-35-313 if the defendant has not been sentenced pursuant to the terms of that section and a valid judgment of conviction is in effect. To conclude otherwise would effectively render Tenn. Code Ann. §40-32-101(a)(1) moot. Accordingly, a defendant not sentenced under the provisions of either pretrial or judicial diversion would, as a prerequisite, need to successfully challenge the underlying conviction before moving to have his record expunged. Nor may a trial court, pursuant to Tenn.R.Crim.P. 35, amend its judgment within 120 days to allow a defendant into the judicial diversion program. *See State v. Turco*, W2001-01085-CCA-R3-CD, 2001 WL 1078284, at *4 (Tenn. Crim. App. Sept. 14, 2001)(app. granted Feb. 19, 2002)(there is "no sentencing authority which permits judicial diversion following adjudication of guilt [entry of judgment of conviction] or imposition of sentencing.")[1]

2. Ex parte hearings or contacts are disfavored in Tennessee. *State v. Barnett*, 909 S.W.2d 423, 428 (Tenn. 1995) A judge is prohibited, "except as authorized by law," from considering "ex parte or other communications concerning a pending or impending proceeding." Tenn.Sup.Ct.R. 10, Canon 3(A)(4). *Id.* In *Barnett*, the court held that due process concerns constituted an exception to this rule, permitting an ex parte hearing for indigent defendants seeking state-funded psychiatric evaluation, but only for the purpose of determining if the defendant can establish a "threshold showing of particularized need" for the assistance. *Id*. at 431. However, even in these situations, the State is entitled to notice. *Id.* at 429.

There is nothing in §40-35-313 that authorizes a trial court to conduct any ex parte proceedings regarding judicial diversion. Section (a)(1)(B) specifically imposes a continuing duty on both the trial court *and* the district attorney to "make sufficient inquiry into the defendant's background to determine [eligibility for the program]." Accordingly, it is the opinion of this office that a trial judge may not entertain any ex parte actions regarding judicial diversion or expungement pursuant to §40-35-313.

[1]This case is expected to be argued before the Tennessee Supreme Court in November 2002.

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