STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

August 25, 2014

Opinion No. 14-77

Expunction of Records

QUESTIONS

1. Are juvenile-court clerks responsible for collecting the $350 fee designated for the Tennessee Bureau of Investigation and other entities as outlined in Tenn. Code Ann. § 40-32-101 for the expunction of records?

2. Is it possible for a party to have a record expunged by submitting an agreed order without filing a petition for expunction? If so, does this mean the party does not have to pay all of the fees associated with Tenn. Code Ann. § 40-32-101?

3. Does a judge or a magistrate have the authority to waive the expunction fee?

OPINIONS

1. Yes.

2. The filing of a petition is mandatory under the statute except in two limited circumstances, neither of which requires the imposition of a fee.

3. No.

ANALYSIS

1. Juvenile courts have authority to expunge records under Tenn. Code Ann. § 40-32-101. *See id.* § 40-32-101(a)(4), (f)(4) (providing that "'court' includes any court exercising juvenile jurisdiction"). The circumstances under which the expunction of records will trigger imposition of the $350 fee required by the statute are not likely to arise frequently in a juvenile court. *See* Tenn. Code Ann. § 40-32-101(d)(2) (requiring assessment of the fee for expunction where the charge was dismissed upon successful completion of a pretrial-diversion program); *id.* § 40-32-101(g)(10) (requiring assessment of the fee for expunction of certain felony and misdemeanor convictions); *id.* § 49-32-101(h)(2) (requirement assessment of the fee for expunction

of conviction for pardoned nonviolent crime).[1] Nevertheless, it is possible for a court with juvenile jurisdiction to order expunction under such a circumstance. *See, e.g.*, Tenn. Code Ann. §§ 37-1-104(b); 37-1-156(b) (providing for concurrent jurisdiction in the juvenile court for the adult offense of contributing to the delinquency of a minor, a Class A misdemeanor). Where the petition for expunction has been filed in a juvenile court and the fee must be assessed under § 40-32-101, the juvenile-court clerk would be responsible for transmitting the fee as directed by the statute. *See id.* § 40-32-101(d)(2), (g)(10).

2. Expunction of criminal records under Tenn. Code Ann. § 40-32-101 is available only in a limited set of circumstances. *See id.* § 40-32-101(a)(6). In all of these circumstances, except two, the statute specifically requires the filing of a petition to initiate the expunction process. The first exception occurs where a defendant is acquitted on all charges of which he or she was accused, in which case the trial judge is required to ask the defendant if he or she wishes to have all public records associated with the charges expunged without cost "and without the requirement that the person petition for destruction of such records." *Id.* § 40-32-101(a)(1)(F). If the defendant does not wish to have the records destroyed at that time but later desires to have them expunged, he or she is then "required to follow the petition procedure set out in this section." *Id.*

The second exception involves the expunction of public records of a person required to post bond under Tenn. Code Ann. § 38-3-109 after such person has been arrested pursuant to § 38-3-108 (offenses that break the peace). *See id.* § 40-32-101(a)(2), (f)(2). This expunction is automatic and thus not subject to the petition procedures set forth in the statute. *See id.* (providing for the expunction of records "upon the expiration of any bond required, if no surety on the bond is required to fulfill the obligations of the bond").

In all other instances, § 40-32-101 requires the person seeking expunction to file a petition in order to initiate the expunction proceedings. A person may therefore not have a record expunged under this statute by submitting an agreed order without filing a petition for expunction. *See id.* § 40-32-101(a)(1)(A) (public records of dismissals, no true bills, and arrests without charges expunged "upon petition"); § 40-32-101(a)(3), (f)(3) (public records where a court entered a *nolle prosequi* expunged "[u]pon petition"); § 40-32-101(a)(5) (public records of denied orders of protection expunged "upon petition"); § 40-32-101(f)(1) (public records of charges and convictions for challenging racially discriminatory laws expunged "upon petition"); § 40-32-101(g)(3) (person seeking expunction of one of the enumerated convictions "shall petition the court," and court clerk initiates the process "[u]pon the filing of the

[1] The statute recognizes that expunction is also available where the charge was dismissed upon successful completion of a judicial-diversion program under Tenn. Code Ann. § 40-35-313, *id.* § 40-32-101(a)(6), (e)(2), which likewise requires imposition of a $350 fee, *id.* § 40-35-313(d)(2).

petition"); § 40-32-101(h) (person convicted of a nonviolent crime and pardoned by the governor may "file a petition for expunction").[2]

3. The $350 statutory fee required by § 42-32-101 is mandatory and cannot be waived.[3] *See id.* § 40-32-101(d)(2) (defendant petitioning a court for expunction "shall be assessed" a $350 fee); § 40-32-101(g)(10) (except as provided by subdivision (g)(17), petitioner "shall pay to the clerk of the court" a fee of $350).[4] Indeed, the expunction of a conviction under subsections (g) and (h) of the statute will restore the petitioner to the same status occupied before the arrest, indictment, trial, and conviction only after the petitioner pays the fee. *See id.* § 40-32-101(g)(15)(B) ("Once the expunction order is granted *and the petitioner pays the fee required* by this subsection (g) or subsection (h), no direct or indirect collateral consequences . . . shall be imposed or continued.") (emphasis added).

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[2] The judicial-diversion statute, § 40-35-313, similarly requires the filing of an application. *See id.* § 40-35-313(b) (upon dismissal and discharge of the proceedings, "the person may apply to the court for an order to expunge").

[3] This opinion addresses only the $350 fee assessed under § 40-32-101(d)(2) and (g)(10), and not the court clerk's fee charged pursuant to § 8-21-401(d)(2). *But see* 2014 Tenn. Pub. Acts, ch. 1008, § 1 (amending § 40-32-101 to provide that a person applying for expunction of records "shall be charged the appropriate court clerk's fee pursuant to § 8-21-401, in addition to any other fees required by this section . . . , unless the person is entitled to have such records removed and destroyed without cost to the person").

[4] § 40-32-101(g)(17) permits a petitioner to enter into a payment plan with the clerk in order to pay the $350 fee in installments; however, it also expressly provides that "no order of expunction shall be granted . . . until the total amount of the fee is paid."

Requested by:

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