

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

HAROLD Z. EUBANKS

APPELLANT

VS.

NO. 2009-CA-1922

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The grand jury of Pearl River County indicted Harold Eubanks for Felony DUI two counts, one resulting in the death of Shirley Jo Burge and the other involving injuries to C.J. Sanders. (Indictment c.p. 2-3). In 1993 defendant entered into a plea agreement defendant and pled guilty to one count of felony DUI and was sentenced to 10 years suspended with five years of probation. (C.p. 32-37). In 1998 Eubanks had successfully completed his sentence and was discharged. (C.p. 45).

A Motion to Expunge was filed in May of 2009, which was granted by the trial court. (C.p. 49-51). Within 2 weeks the Mississippi Department of Public Safety filed a motion to vacate the order of expungement, which was vacated in June of 2009.

(Order vacating expungement, c.p. 56-57).

A couple of months later in September of 2009 Eubanks filed a 'Renewed Motion to Expunge' based not on statutory law but principles of 'equitable expungement'. (C.p. 60). The motion was denied, and became final on or about the 20th of November, 2009. (C.p. 84-87).

A notice of appeal from that final order was timely noticed. (C.p. 88).

STATEMENT OF FACTS

Harold Z. Eubanks and a friend were drinking, they got in a vehicle with defendant driving and he dozed off rear-ended a vehicle on Interstate 59 in Pearl River County. As a result of defendants impaired condition (blood alcohol over .01) and negligent driving one person was killed (Shirley Jo Burge) and another seriously injured (C. J. Sanders). A petition to plead guilty was filed and defendant admitted in open court that he was, in fact, guilty.

SUMMARY OF THE ARGUMENT

I.

THE CIRCUIT COURT DOES NOT HAVE THE AUTHORITY TO EXPUNGE A CONVICTION OF AN IMPLIED CONSENT LAW VIOLATION.

The Mississippi legislature has made it clear that charges and conviction for violation of our state implied consent law or driving under the influence are not to be expunged. Further, circuit courts do not have the statutory power to expunge driving under the influence convictions, nor is there any recognized 'inherent' authority or equitable expungement that would allow same.

While petitioner may not seek remedy from the courts of Mississippi he is not without remedy in seeking relief to ameliorate his situation.

ARGUMENT

I.

THE CIRCUIT COURT DOES NO HAVE THE AUTHORITY TO EXPUNGE A CONVICTION OF AN IMPLIED CONSENT LAW VIOLATION.

Counsel for petitioner seeks to invoke *Miss. Code Ann.* § 99-15-26 and a revising of the holding in *Turner v. State*, 856 So.2d 1056 (Miss. App. 2004). Quite succinctly that statute has nothing to do with this case and was never applicable to this case.

Further, *Turner* was decided by the Court of Appeals of the State of Mississippi. The controlling case if it were even applicable (which it is not) would be *Caldwell v. State*, 564 So.2d 1371 (Miss. 1990). There is no mention in either case of ‘equitable expungement’ as an alternative to our statutory scheme.

Further, it is clear the legislature has enacted laws allowing criminal records to be expunged in limited circumstances. However, the Mississippi Legislature is consistent in that “... no expunction of an implied consent violation shall be allowed.” *Miss. Code Ann.* § 9-23-23.

Further as noted in *Turner* and *Caldwell* any pretrial diversion or sentence amelioration is not even an option as:

A person shall not be eligible to qualify for release in accordance with this section if such person has been charged . . . with an offense under the Mississippi Implied Consent Law.

Miss. Code Ann. § 99-15-26

There is simply no authority, whatsoever, for the circuit court to expunge any record either after conviction or in a pre-trial diversion program involving any violation of the implied consent law.

Now within the brief of petitioner on appeal there is mention of Alexander Hamilton coining the phrase ‘unfortunate guilt’ and that such is applicable to the facts of this case. It should be made clear that the guilt in question is not, to repeat, is not *unfortunate guilt*. To imply that the consequences of his ‘guilt’ were unfortunate belies the serious nature of the crime to which he pled guilty. To imply that it was unfortunate that an intelligent young man got drunk (in violation of law), then chose to drive while impaired (in violation of the law) and pled guilty to a crime resulting in the death of one individual, injury to another is not ‘unfortunate’ – it was and is criminal.

What petitioner seeks is to now garner relief because of the unfortunate circumstances that conviction has beset upon his life.

While the reference to ‘unfortunate guilt’ from the *Federalist Papers* is inapposite to the issue here, the actual theme of the cited piece *The Command of the Military and Naval Forces, and the Pardoning Power of the Executive, No. 74* might offer the proper remedy. The piece discussed the power to pardon granted to the

President. While the power of the President to pardon power does not extend to state convictions, the Governor of Mississippi does have extensive powers to pardon.

Additionally, and while not even claiming any expertise or knowledge in Alabama law, it would appear there are exceptions allowing a convicted felon to take the professional exam upon restoration of 'civil rights' – however that be interpreted under Alabama administrative law. Alabama Administrative Code 330-X-3-.01(9). It should also be noted it would appear he would be unable sit for the professional exam even with some misdemeanor convictions, so he is not being singled out because of his conviction.

Petitioner also aims he is unable to vote, however, it would appear that the crime for which he stands convicted, is not a disenfranchising crime under Mississippi law. See, Mississippi Attorney Generals Opinion to The Honorable Wallace Heggie, 2009 WL 2517257 (July 9, 2009).

So, in conclusion, the Circuit Court Judge was correct in his denial of the motion to expunge and no relief should be granted on this claim of trial court error.


CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the trial court denial of motion to expunge criminal conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

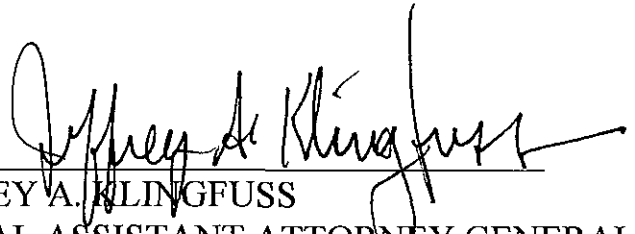
I, Jeffrey A. Klingfuss, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 14th day of July, 2010.



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