

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

HAROLD Z. EUBANKS

APPELLANT

VS.

CAUSE NO. 2009-CA-01922

T

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of the Mississippi Supreme Court and Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Jim Hood, Mississippi Attorney General
2. Hal Kittrell, District Attorney 15th Circuit Court District
3. Honorable Prentiss G. Harrell Circuit Judge
4. Harold Z. Eubanks, the Appellant
5. Lee Turner, Counsel for the Appellant

SO CERTIFIED on this the 4th day of April, 2010.

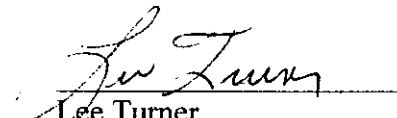

Lee Turner

TABLE OF CONTENTS

| | |
|--|-----|
| CERTIFICATE OF INTERESTED PARTIES | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iii |
| STATEMENT OF THE ISSUE | iv |
| STATEMENT OF THE CASE | 1 |
| 1. Nature of the Case and Course of Proceedings | 1 |
| 2. Statement of Facts | 3 |
| SUMMARY OF THE ARGUMENT | 5 |
| STANDARD OF REVIEW | 7 |
| ARGUMENT | 7 |
| I. Whether the Circuit Court of Pearl River County Erred in Failing to Utilize Its Inherent Equitable Powers and Adopt Equitable Expungement to Expunge All Public Records Relating to Eubanks' Conviction. | 7 |
| CONCLUSION | 11 |
| CERTIFICATE OF SERVICE | 12 |

TABLE OF AUTHORITIES

CASES

| | |
|--|-------|
| <i>Diamond v. United States</i> , 649 F.2d 496 (7 th Cir. 1981) | 7 |
| <i>Gibson v. Commonwealth</i> , 291 S.W. 3d 686 (Ky. 2009) | 8 |
| <i>Mauney v. State</i> , 707 So.2d 1093 (Miss. 1998) | 7 |
| <i>Seymour v. Brunswick</i> , 655 So.2d 892 (Miss. 1995) | 7 |
| <i>State of Schultz</i> , 676 N.W. 2d 337 (Minn. Ct. App. 2004) | 8 |
| <i>Turner v. State</i> , 876 So.2d 1056 (Miss. App. 2004) | 5,8,9 |
| <i>United States v. Doe</i> , 935 F.Supp. 478 (S.D.N.Y. 1996) | 7,9 |
| <i>United States v. Rosen</i> , 343 F.Supp. 804 (S.D.N.Y. 1972) | 7 |
| <i>United States v. Wagner</i> , 746 F.Supp. 619 (E.D. Va. 1990) | 7 |

STATUTES

| | |
|--------------------------------------|---|
| Miss. Code Ann. § 99-15-26 | 5 |
| Miss. Code Ann. § 63-11-30 | 9 |

SECONDARY SOURCES

| | |
|--|---|
| Fruquan Mouzon, <i>Forgive Us Our Trespasses: The Need for Federal Expungement Legislation</i> , The University of Memphis Law Review Volume 39. | 9 |
|--|---|

STATEMENT OF THE ISSUES

- 1. Whether the Circuit Court of Pearl River County Erred in Failing to Utilize Its Inherent Equitable Powers and Adopt Equitable Expungement to Expunge All Public Records Relating to Eubanks' Conviction.**

STATEMENT OF THE CASE

1. Nature of the Case and Course of Proceedings

This case arises out of Eubanks' efforts to have his 1993 conviction for Felony DUI expunged by the Circuit Court of Pearl River County. More simply, the central issue is whether the Mississippi Supreme Court or Court of Appeals should recognize and find where applicable equitable expungement as adopted by numerous federal and state courts. R. at 60¹. On September 11, 1992 Eubanks was indicted by the Grand Jury of Pearl River County on two counts of Felony DUI. R. at 2. Subsequently, on June 21, 1993, he entered a guilty plea to one count of Felony DUI. R. at 4. Following the completion of a pre-sentence investigation, which included the preparation of Victim Impact Statement, Eubanks was sentenced on August 16, 1993. R. at 32.

Eubanks was sentenced to ten years in the custody of the Mississippi Department of Corrections; however, the Court noted his lack of a record and suspended his jail sentence and placed him on supervised probation for a period of five years. R. 33. In addition, Eubanks was ordered to pay approximately 14,000 in total restitution and all costs of court. *Id.* On August 10, 1998, the Mississippi Department of Corrections filed a Termination of Probation Petition on the grounds that Eubanks had paid all fines, restitution and did well on probation, which was granted on the same day. R. at 44 and 45.

Eubanks initial efforts to obtain an Expungement were ultimately denied and or vacated by the Circuit Court of Pearl River County. R. at 46-57. On September 10, 2009, Eubanks filed a Renewed Motion to Expunge based on new grounds not previously

¹ For ease of reading the multiple zeros utilized in the bates numbering system have been removed, for example 00002 is cited simply as R at 2.

raised. R. at 60. The trial court while sympathetic denied the requested relief. R. at 86.

However, the Circuit Judge did make the following important findings:

This court finds that the precedent set forth in *Turner v. State*, 816 So. 2d 1056 (Miss. Ct. App. 2004) that circuit judges are without inherent power to expunge should be revisited....Moreover, the case fails to address a court's inherent equitable power to expunge criminal records.

R. at 85.

Furthermore the Circuit Judge held concerning a criminal record:

"It is a reality in today's job market that a criminal background check has become a prerequisite to obtaining even low-skilled employment."

R. at 86.

The trial court entered a final order denying the Renewed Motion to Expunge on November 19, 2009. R. at 87. Aggrieved by the decision, Mr. Eubanks timely appealed the denial of his Renewed Motion to Expunge. R. at 88.

2. Statement of Facts

Mr. Eubanks was an eighteen year old student in the midst of his freshman year at Jones County Junior College when the tragedy leading to his arrest and conviction occurred. R. at 61. Prior to his arrest and indictment he had no criminal history of any kind. R. at 61. He later plead guilty to one count of Felony DUI, and was sentenced shortly thereafter following a preparation of a pre-sentence report. R. 39. Of particular importance, the pre-sentence report contained a Victim Impact Statement, which stated that the families of the victims did not oppose Eubanks receiving probation. R. at 31. After considering the pre-sentence report, he was sentenced to ten years in the custody of the Mississippi Department of Corrections, but the court suspended the imposition of the sentence and placed him on five years supervised probation. R. at 33. Likewise, at sentencing Judge Eubanks placed an emphasis on Eubanks furthering his education. R. at 40.

Since successful completion of the terms of his probation and discharge, Eubanks has amassed a host of impressive accomplishments. See generally, 75-81. Most notably, heeding the Court's direction he obtained an Engineering Degree from the University of South Alabama, graduating with high honors. R. at 75. Moreover, he utilized his drafting and design skills to successfully register a patent with U.S. Patent Office. R. at 76. Likewise, Eubanks' renewed motion was replete with numerous letters of recommendation commending his work habits as well as bearing witness to his remorseful nature. In particular, a letter from Cathy Norris detailed Eubanks remorseful nature, admirable work ethic, as well as her opinion that he has been fully rehabilitated

and worthy of a clean slate. R. at 73. Furthermore, via exhibit 6² to his renewed motion, Eubanks in his own words expresses his sincere remorse for his actions. R. at 82. Indeed he states that he recounts daily those tragic events and that they weigh heavily on his mind and that he has never forgiven himself. *Id.*

Despite his accomplishments the public record of his conviction is restricting him from achieving his full professional potential and completely engage in civil society some eighteen years after his conviction. R. 62. In particular, the record of his conviction bars him from sitting for the Alabama Professional Engineers Exam. *Id.* Consequently, his inability to sit for the examination prevents him from obtaining full employment as a Professional Engineer. *Id.* Along with diminished job opportunities Eubank's record prevents him from voting, possessing a firearm, and fully reintegrating into society. *Id.*

² Said exhibit was inadvertently not numbered, but given the numbering sequence it should have been labeled as number six. The exhibit is a sworn statement by Eubanks.

SUMMARY OF THE ARGUMENT

From the outset, the Petitioner recognizes that there presently exists no statutory basis for the requested relief; however, Eubanks urges this Court to utilize its inherent equitable powers and adopt “equitable expungement” as advocated by a number of courts. While the Mississippi Supreme Court failed to recognize equitable expungement in *Turner v. State*, the issue is ripe for reexamination due to the ever-increasing societal costs associated with offenders being unable to fully reintegrate into society.

Given the extremely narrow scope of Mississippi’s expungement statute found at Miss. Code Ann. § 99-15-26, this Court should adopt the “balancing of the equities test” utilized by a majority of federal courts, as well as numerous state courts in granting expungements. More simply, if the adverse consequences to the individual outweigh the public interest in maintaining the record then expunction is appropriate.

Here considering Eubanks’ pre and post-sentence record as well as other attendant circumstances applying the balancing of the equities test clearly favors him. The record reflects that that he is being denied full employment, and is unable to realize the fruits of his lengthy education pursuits in being barred from sitting for the Alabama Professional Engineers Exam. Likewise, since the termination of this probation, Eubanks has led and exemplary and trouble free life. Furthermore, given that the five-year look back window for DUI enhancement has long since lapsed it is difficult to envision what useful purpose maintaining a public record of his conviction serves.

Lastly, a tragic one-time lapse in judgment by the eighteen-year old Eubanks should not permanently label him with a “Scarlet Letter” long after the completion of his

sentence. Accordingly equitable expungement should be adopted as it is needed to mitigate the lingering effects of unfortunate guilt.³

³ The phrase “unfortunate guilt” was coined by Alexander Hamilton in Federalist Paper 74.

ARGUMENT

1. Whether the Circuit Court of Pearl River County Erred in Failing to Utilize Its Inherent Equitable Powers and Adopt Equitable Expungement to Expunge All Public Records Relating to Eubanks' Conviction.

Standard of Review:

It is well established that that the standard of review is *de novo* in analyzing questions of law. *See, Mauney v. State*, 707 So.2d 1093, 1095 (Miss. 1998) (an expugement case citing *Seymour v. Brunswick*, 655 So.2d 892, 895 (Miss. 1995)).

At present a majority of federal courts utilize their inherent equitable powers to grant expungements on a case by case basis. *See generally, United States v. Doe*, 935 F.Supp. 478, 480 (S.D.N.Y. 1996); *See also, United States v. Van Wagner*, 746 F.Supp. 619, 621 (E.D. Va. 1990). Further, the judicial remedy of expungement is inherent and not dependent on express statutory authority. *See, United States v. Rosen*, 343 F.Supp. 804, 807 (S.D.N.Y. 1972).

In determining whether expungement is proper federal courts have adopted a balancing of the equities test. *See, Diamond v. United States*, 649 F.2d 496, 499 (7th Cir. 1981). Specifically, expungement is appropriate where, “the dangers of unwarranted adverse consequences to the individual outweigh the public interest in maintenance of the records.” *See, Van Wagner* at 621 citing *Diamond*.

For example in *Unites State v. Doe*, the Court applying the balancing test found that expunging the defendant’s conviction for three counts of making false claims and one count of mail fraud appropriate. *Id.* at 479. The court in doing so noted that defendant’s conviction occurred twenty years ago, his conviction had an actual impact on

his employment status, and he was convicted under the Youth Corrections Act. *Id.* at 480, 481.

In addition to the host of federal courts a number of state courts have applied similar balancing tests in utilizing their inherent equitable powers to expunge. Unlike federal courts, which have not underlying statutory authority for expunging records some states allow for equitable expungement despite specific limiting statutory authority. *See, generally, State v. Schultz*, 676 N.W.2d 337, 340 (Minn. Ct. App. 2004) (two legal basis provide for expungement: statutory and court's inherent power). Similar to the balancing of equities test the Court in *Schultz*, held that expungment is proper when "it will yield a benefit to the petitioner commensurate with the disadvantages to the public from the elimination of the record and the burden on the court in issuing, enforcing and monitoring an expungement order. *Id.* at 341.

Likewise, the Supreme Court of Kentucky in *dicta* recently opined that upon a showing of extraordinary circumstances expungement might be proper in spite of the limited scope of Kentucky's Expungement statute. *See, Gibson v. Commonwealth*, 291 S.W.3d 686 (Ky. 2009). In particular one justice advocated in favor of adopting the balancing test when it comes to expungment as set forth in *Diamond v. U.S.*, 649 F.2d 496 (7th Cir. 1981).

As stated previously the Mississippi Supreme Court's decision in *Turner v. State*, should be revisited in light of the wealth of case law emanating from both federal and state jurisdictions utilizing equitable expungement. Although ultimately denying Eubanks renewed Motion to Expunge for lack of authority the trial judge endorsed

reexamination of the *Turner* decision on equitable grounds. R. at 85. In the present case, adoption of the balancing of the equities test would clearly favor Eubanks.

First, Eubanks conviction occurred over sixteen years ago when he was a college freshman and save for this tragedy he has led an exemplary life. Since that time he has not had any incidents with the law, successfully completed probation, remained gainfully employed and obtained an engineering degree. Indeed, his post-sentence behavior coupled with his genuine remorse makes him worthy of expungement.

Second, Eubanks has shown that he is being denied full employment and is unable to sit for the Alabama Professional Engineers Exam, despite graduating with honors. R. at 64. As in *Poe*, Eubanks has demonstrated that his sixteen-year old conviction has had an actual impact on his employment status. *See, Poe*, 935 F.Supp. 481. In addition, the public record of his conviction prevents him from fully reintegrating into society by denying him the right to vote, participate in civic affairs, and own a firearm. R. at 82. Consequently, the failure to afford expungement in this case and others can be counterproductive and even impede a person's willingness and desire to reform and avail themselves of rehabilitative opportunities. *See generally, Fruquan Mouzon, Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, The University of Memphis Law Review Volume 39.

Third, given the five-year look back window for DUI enhancement pursuant to Miss Code Ann. §63-11-30 has long since expired, it is difficult to see what useful law enforcement purpose would be served in maintaining a public record of his conviction.

Lastly, a one-time lapse in judgment should not create a permanent under-class of citizens still punished long after they have served whatever punishment meted out by the

Court. Thus, equitable expungement is needed to realize his full rehabilitation and remove the lifelong handicap imposed by maintaining a record of his conviction.

CONCLUSION

For the foregoing reasons the Judgment of the Circuit Court of Pearl River County should be reversed and this Court should recognize and adopt equitable expungement as utilized by numerous state and federal courts.

CERTIFICATE OF SERVICE

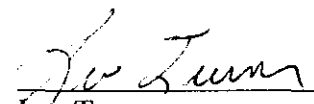
I, Lee Turner, do hereby certify that I have this day served via first class mail postage prepaid, a true and correct copy of the Appellant's Brief and Record Exerpts to the following parties:

Honorable Prentiss G. Harrell
Circuit Judge
P.O. Box 488
Purvis, MS 39475

Honorable Jim Hood
Attorney General
P.O. Box 220
Jackson, MS 39205

Honorable Hal Kittrell
District Attorney
500 Courthouse Square, Suite Three
Columbia, MS 39429

SO CERTIFIED on this the 14th day of April, 2010.



Lee Turner
Attorney for Appellant