

IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE  
DIVISION IV

**FILED**

10-2-19  
Date MR  
DC

[REDACTED]

v.

CASE NO. [REDACTED]  
Warrant Nos. [REDACTED]

STATE OF TENNESSEE

ORDER

THIS MATTER came before the Court for hearing on July 25, 2019, on the Defendant [REDACTED]'s timely appeal from the June 19, 2019, order of the General Sessions Court denying his Petition to Expunge Records of Conviction. The Defendant seeks expunction of records under Tenn. Code Ann. § 40-32-101(g)(1)(C) related to two convictions for misdemeanors committed before November 1, 1989. The State opposes the Defendant's petition, arguing that he is not eligible for relief because the offenses for which he was convicted contain as an element the "use, attempted use, or threatened use of physical force against the person of another," or "involve, by its nature, a substantial risk that physical force against the person of another would be used in the course of committing the offense." Tenn. Code Ann. §§ 40-32-101(g)(1)(C)(iv)(a), (b).

As a threshold matter, the Defendant urges this Court to find that the State waived its opposition to expungement of his conviction records and to effectively grant his request by default. The Court declines to do so in this matter. Tennessee Code Ann. § 40-32-101(g)(3) permits the district attorney general to "submit recommendations to the court" within sixty days after service of any petition seeking expunction. However, a response is not mandatory,

although it can certainly aid the Court in the proper application of the expunction statute. Moreover, this Court's review is *de novo*, which "entitles the parties 'to a reexamination of the whole matter of law and fact,'" without concern for what took place in the General Sessions Court. *State v. Kirk*, 392 S.W.3d 622, 624 (Tenn. Crim. App. 2011) (quoting *State v. Cunningham*, 972 S.W.2d 16, 18 (Tenn. Crim. App. 1998)). In other words, "the matter is tried as if no other hearing had occurred." *Id.* Thus, on *de novo* review, this Court has considered the State's recommendation on the disposition of the Defendant's petition.

This case is complicated by the age, nature, and circumstances of the Defendant's convictions. First, the convictions did not occur in a court of record, and the documentary evidence substantiating them is not a model of clarity. Consequently, the Defendant's actual conviction offenses are at least reasonably debatable. This is especially important because the Defendant's convictions are for common law offenses, which may be either eligible or ineligible for expunction under Tenn. Code Ann. § 40-32-101(g)(1)(C)(iv) depending on the form of assault for which the Defendant was convicted. In making a decision on an expunction petition, the Court "shall consider all evidence and weigh the interests of the petitioner against the best interests of justice and public safety." Tenn. Code Ann. § 40-32-101(g)(5). The Court is also mindful of the trend in Tennessee law since 2012 toward broadening of the categories of persons eligible for expungement. *See Blackwell v. Haslam*, 2013 WL 3379364, \*7-8 (Tenn. Ct. App. June 28, 2013) (perm. app. denied). After considering the evidence related to the petition and applicable law, the Court concludes that the Defendant's petition for expunction shall be GRANTED for the reasons set forth below.

Tennessee Code Ann. § 40-32-101(g)(3) permits an eligible petitioner to seek the expunction of public records related to certain criminal convictions under highly circumscribed

circumstances. As relevant here, first, the petitioner may have no more than two convictions, which may be either two misdemeanors or one felony and one misdemeanor. Tenn. Code Ann. § 40-32-101(k)(1)(B). Second, at the time of filing a petition for expunction, at least five years must have elapsed since the completion of the sentence imposed for the most recent offense. Tenn. Code Ann. § 40-32-101(k)(1)(C). Third, the petitioner must have fulfilled all of the requirements of the sentences imposed by the court for each offense the petitioner is seeking to expunge. Tenn. Code Ann. § 40-32-101(k)(1)(D). Fourth—and the only disputed requirement here—if the convictions at issue were for a felony or misdemeanor committed before November 1, 1989, the offense for which the person was convicted may not “have as an element the use, attempted use, or threatened use of physical force against the person of another” or may not “involve, by its nature, a substantial risk that physical force against the person of another would be used in the course of committing the offense.” Tenn. Code Ann. § 40-32-101(g)(1)(C)(iv)(a), (b).

The Defendant has petitioned to expunge all public records of his convictions for misdemeanor assault under Warrant Nos. [REDACTED] and [REDACTED]. The records related to the convictions are sparse to say the least. Documentation presented by the parties as to Warrant No. [REDACTED] consists of a General Sessions Legacy Case Summary report, which reflects a disposition of “guilty” with no disposition date or offense description. The report also reflects an arrest date of September 29, 1978, and a court fine of \$25.00. Accompanying that report is a photocopy of a page from a warrant log, which includes the following notation associated with No. [REDACTED]: “State of Tennessee v. [REDACTED]” along with multiple dates, the most current being December 1, 1978. The computer report specifies no disposition offense or date.

Documentation presented by the parties as to Warrant No. [REDACTED] is somewhat more informative and includes an affidavit and warrant issued July 20, 1987, charging [REDACTED] with “Assault & Battery.” The documents reflect that the Defendant pled guilty on November 23, 1987, and was sentenced to ten days in jail, which was suspended, and six months on probation. Again, however, the waiver associated with the judgment order does not specify the conviction offense. The General Sessions Legacy Case Summary report indicates a conviction of July 20, 1987, for “simple assault.”<sup>1</sup>

Against this backdrop, the sole question before the Court is whether the offenses for which the Defendant was convicted had “as an element the use, attempted use, or threatened use of physical force against the person of another” or “involve[d], by its nature, a substantial risk that physical force against the person of another would be used in the course of committing the offense.” Tenn. Code Ann. § 40-32-101(g)(1)(C)(iv)(a), (b). Because the offenses were committed before November 1, 1989, the current statutory definition of assault is not dispositive on the elements question. Rather, the Court must be guided by the common law definitions of the offenses.

In *Reese v. State*, 457 S.W.2d 877 (Tenn. Crim. App. 1970), the Tennessee Court of Criminal Appeals defined assault and battery as “the unlawful touching or striking of the person of another by the aggressor himself or by any other substance put in motion by him, done with the intention of bringing about a harmful or offensive contact or apprehension thereof which is not legally consented to by the other and not otherwise privileged.” *Id.* at 881. The Court observed, however, that the touching “need not be in the form of a blow but may consist of any sort of contact; it may include every touching or laying hold, however slight, of another or his

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<sup>1</sup> The Court observes that a six-month sentence is consistent with the classification of non-violent misdemeanor assault under Tenn. Code Ann. § 39-13-101(a)(3).

clothes in an angry, revengeful, rude, insolent, or hostile manner; or the direct or indirect application of force either by the aggressor himself, or by some substance or agency placed in motion by him.” *Id.* at 880 (citing *Huffman v. State*, 292 S.W.2d 738 (Tenn. 1956)).

From this, it appears that, at common law, assault and battery could be committed with or without the use, attempted use, or threatened use of physical force. Thus, under a plain reading of the expunction statute, the offense of assault and battery does have “*as an element* the use, attempted use, or threatened use of physical force against the person of another.” Tenn. Code Ann. § 40-32-101(g)(1)(C)(iv)(a) (emphasis added). Moreover, assault and battery at common law is akin to simple assault under Tenn. Code Ann. §§ 39-13-101(a)(1) and (2), which are ineligible for expunction. *See* Tenn. Code Ann. § 40-23-101(g)(1)(B)(i). But given the ambiguity in the Defendant’s conviction offenses on the evidence before the Court, that does not end the inquiry.

In *Reese*, after finding no element of personal injury in the case before it, the Court of Criminal Appeals then differentiated between assault and battery and the lesser included offense of simple assault, explaining that “[t]he assault is the beginning of a crime, the motive of which is the infliction of some corporal hurt upon another without that person’s consent, as, for example, an assault with intent to commit rape. *As soon as the person assaulted is touched*, no matter how trifling the hurt or touch may be, the battery has been committed.” *Id.* at 881 (emphasis added). Thus, at common law, physical contact was not an element of simple assault, let alone “physical force” within the meaning of the expunction statute. As such, a conviction for common law simple assault is eligible for expunction, a result entirely consistent with the

expunction statute as applied to assault under the current criminal code. *See* Tenn. Code Ann. § 40-32-101(g)(1)(B)(i).<sup>2</sup>

In sum, this Court cannot conclude on the record before it that the offenses for which the Defendant was actually convicted included an element of the use, attempted use, or threatened use of physical force against the person of another because the evidence before the Court does not clearly demonstrate the Defendant's conviction offenses. The expunction statute specifically excludes from eligibility convictions for simple assault committed under Tenn. Code Ann. § 39-13-101(a)(1) and (2), but not simple assault committed under Tenn. Code Ann. § 39-13-101(a)(3). *See* Tenn. Code Ann. § 40-23-101(g)(1)(B)(i). Neither of the collective exhibits submitted to establish the Defendant's convictions as to Warrant [REDACTED] clearly show the conviction offense, and given the legislature's apparent intention to permit expunction of at least one form of simple assault, the Court will draw no adverse inference against the Defendant here. Nor can the Court conclude that the common law offenses of assault and battery or simple assault, by their nature, involve a *substantial risk* that physical force—a term associated with violence<sup>3</sup>—against the person of another would be used in the course of committing the offense. As noted above, assault may be accomplished by violent or non-violent means.

Finally, the State has presented no evidence that any public safety interest would be adversely affected by granting expunction in this case. *See* Tenn. Code Ann. § 40-32-101(g)(5).

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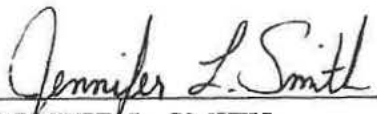
<sup>2</sup> Although not directly applicable to this case, the Court has reviewed the legislature's treatment of post-1989 assault to gain insight into legislative intent regarding simple assault convictions in the expunction context.

<sup>3</sup> "Violence is defined as physical force unlawfully exercised so as to injure, damage or abuse." *State v. Henderson*, 531 S.W.3d 687, 692 (Tenn. 2017) (quoting *State v. Bowles*, 52 S.W.3d 69, 80 (Tenn. 2001)).

In light of the evidentiary deficiencies in this case, and considering the age of the Defendant's convictions and the absence of clear authority excluding from expunction eligibility the common law offense of simple assault, the Court concludes that the interests of justice support GRANTING the petition for expunction.

IT IS, THEREFORE, ORDERED that all public records related to convictions under Davidson County Warrant [REDACTED] be expunged and immediately destroyed upon payment of all costs to the Clerk.

ORDERED on the 2<sup>nd</sup> day of October, 2019.

  
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JENNIFER L. SMITH  
Judge, Criminal Court Division IV

Cc: Michael Claire Bottoms, Assistant District Attorney  
Daniel Horwitz, Counsel for Petitioner