

Circuit Court for Montgomery County  
Criminal Case No. 94184

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 772

September Term, 2018

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DAVID E. FUSTER

v.

STATE OF MARYLAND

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Berger,  
Arthur,  
Moylan, Charles E., Jr.  
(Senior Judge, Specially Assigned),

JJ.

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PER CURIAM

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Filed: June 11, 2019

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

By order dated June 4, 2018, the Circuit Court for Montgomery County denied the petition of David E. Fuster, appellant, for expungement of criminal charges. Mr. Fuster challenges that order, presenting one question for our review:

Was the trial court legally correct in denying Appellant’s Petition for [E]xpungement on grounds outside the provisions of Sections 10-105 and 10-107 of the Criminal Procedure Article?

We conclude that the court erred in denying the petition, and therefore reverse the judgment of the circuit court.

### **BACKGROUND**

The State charged Mr. Fuster, in a seven-count indictment, with committing various sexual crimes and related offenses upon three different minor victims during different time periods. Counts 1-4 charged Mr. Fuster with second-degree rape, child abuse, sexual offense and second-degree assault upon W.K on or about October 10, 2001. Counts 5 and 6 charged Mr. Fuster with committing child abuse and sexual offense upon K.R. between December 1, 1994 and February 1, 1997. Count 7 charged Mr. Fuster with child abuse upon S.Z. in March 1995.

Prior to trial, the court severed Counts 1-4 from Counts 5-7, and ordered that trial on Counts 1-4 would proceed first. At the conclusion of a jury trial in May 2003, Mr. Fuster was found guilty of Counts 1-4. Prior to sentencing, Mr. Fuster, who was free on bail, fled the country with his family. He was apprehended in Mexico three years later and was extradited to Maryland.

At the sentencing hearing in November 2017, the court imposed an aggregate sentence of 20 years. The State then nol prossed Counts 5-7 “in light of the extradition agreement that was entered in this case with the nation of Mexico.”

In November 2017, ten years after he was sentenced, Mr. Fuster filed a pro se petition for expungement of the nol prossed charges. The State opposed the petition on grounds that the “matter is not subject to expungement, as the defendant was found guilty on counts 1, 2 and 3 [sic]”<sup>1</sup> and “the charges were all issued for the same incident and set of facts, so they are a unit.”

A hearing on the petition for expungement was held on May 30, 2018, at which Mr. Fuster argued that the charges in Counts 5-7 did not arise from the same incident, transaction, or set of facts as the charges in Counts 1-4. The State argued that Mr. Fuster was not entitled to expungement because (a) Counts 5-7 were issued for the same incident and set of facts, (b) Mr. Fuster was serving a 20-year sentence and, therefore, he was not in a position to be seeking employment or admission to an educational institution, which the State posited was the purposes of the expungement statute,<sup>2</sup> and (3) Mr. Fuster had filed a petition for post-conviction for relief that was still pending, and, if he prevailed in that

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<sup>1</sup> As stated above, the jury returned a verdict of guilty on Counts 1-4.

<sup>2</sup> See *Stoddard v. State*, 395 Md. 653, 664 (2006) (one of the purposes of the expungement procedure is “to help protect individuals seeking employment or admission to an educational institution, by entitling them to expungement of unproven charges, so that those individuals could avoid being unfairly judged during their application processes.”)

proceeding and was granted a new trial, the State would be permitted to proceed on all charges, including those that had been nol prossed.

The court found that Counts 5 and 6, involving the same victim, K.R., “could be considered a unit[,]” “but not Count 7” which, the court noted, “involved a wholly separate individual and a completely different date[.]”<sup>3</sup> The court then stated:

the defendant is in the midst of a post-conviction proceeding . . . to determine whether or not he received effective legal representation. And as [the State] points out[,] should he be successful in that endeavor[,] the relief would be that he would be granted a new trial and start over. And in that instance the State would[,] if I were to grant expungement[,] would be precluded from bringing back charges[.]

The court stated that there was no indication that Mr. Fuster was paroled or was about to be paroled, “which would give rise to any issue of him trying to seek gainful employment or to further his education towards that goal or to rehabilitate himself.” The court then denied the motion, stating:

In these circumstances under the current situation of the post-conviction I don’t believe that Mr. Fuster - - that it is appropriate for this court to consider or to grant expungement relief given these circumstances and the potential that he could obtain a new trial.

This was not, as I said, any form of a guilty plea. And given the nature of the offenses, I don’t believe that expungement would be in the public interest either.

## DISCUSSION

A filed criminal charge that is concluded by the entry of a *nolle prosequi* is generally subject to expungement under § 10-105(a)(4) of the Criminal Procedure Article. The

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<sup>3</sup> The court did not specifically address Counts 1-4.

expungement statute “aims to prevent a person from unfairly suffering the social and professional stigma of a criminal charge that did not result in a conviction.” *Reid v. State*, 239 Md. App. 1, 14 (2018) (quoting *Robert B. v. State*, 193 Md. App. 620, 637 (2010)).

Section 10-105(e)(4) of the statute limits the right to expungement under two circumstances:

(e)(4) The person is not entitled to expungement if:

- (i) the petition is based on the entry of probation before judgment, except a probation before judgment for a crime where the act on which the conviction is based is no longer a crime, and the person within 3 years of the entry of the probation before judgment has been convicted of a crime other than a minor traffic violation or a crime where the act on which the conviction is based is no longer a crime; or
- (ii) the person is a defendant in a pending criminal proceeding.

Section 10-107(b) further limits the right to expungement, providing that, “[i]f a person is not entitled to expungement of one charge or conviction in a unit, the person is not entitled to expungement of any other charge or conviction in the unit.” Charges are considered to be a “unit” if they “arise from the same incident, transaction, or set of facts[.]” *Crim. Pro. § 10-107(a)(1)*. Charges that do not arise from the same incident, transaction, or set of facts are not a “unit” within the meaning of § 10-107, even if the charges are part of a continuing scheme or plan. *Stoddard v. State*, 395 Md. 653, 671-72 (2006).

The expungement statute “lodge[s] no discretion in the court, but to mandate either granting or denying the relief based upon statutorily defined entitlement, or the lack of it.” *Reid*, 239 Md. App. at 13 (citations omitted). Accordingly, our task is to determine whether the circuit court’s ruling on Mr. Fuster’s petition for expungement was legally

correct, without giving deference to the legal conclusion of the circuit court. *Robert B.*, 193 Md. App. at 626.

Mr. Fuster contends that he is eligible for expungement of the charges in Counts 5-7 of the indictment because they were not based on the same incident, transaction, or set of facts as the charges in Counts 1-4, and they were not pressed more than 3 years ago.<sup>4</sup> He asserts that the circuit court’s reasoning for denial of the petition for expungement is legally incorrect because the statute does not preclude expungement of charges based on the nature of the offense or public interest considerations.

We agree with Mr. Fuster that the circuit court erred in denying his petition for expungement of Counts 5-7 of the indictment on grounds that he had a pending petition for post-conviction relief and upon a finding that expungement would not serve the public interest. The expungement statute contains no provision that disqualifies a person from expungement of criminal charges on such grounds.

The State suggests that we should decline to consider the merits of Mr. Fuster’s claim that Counts 5-7 of the indictment were separate “units” from Counts 1-4, because Mr. Fuster did not provide a record in support of that claim. The State contends that we cannot consider the merits of the claim without a record of what evidence was offered in support of the convictions on Counts 1-4.

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<sup>4</sup> Pursuant to Crim. Pro. § 10-105(c)(1), a petition for expungement based on an acquittal, a nolle prosequi, or a dismissal may not be filed within 3 years after the disposition.

We note that the record was corrected, after the State filed its brief, to include the remainder of the record, including transcripts of the trial. In any event, review of the transcripts is unnecessary as we previously reviewed and summarized the evidence presented at trial in our unreported opinion in Mr. Fuster’s direct appeal. There, we noted that “[t]he events resulting in [Mr. Fuster’s] convictions [on Counts 1-4] took place on October 10, 2001 in Bethesda, Maryland. The victim of the crimes was W.K.[,] age 15.” *Fuster v. State*, No. 2306, Sept. Term 2007 (October 9, 2009), sl. op. at 2. By contrast, Counts 5-7 are based on allegations of criminal conduct that occurred four to seven years earlier, involving different victims.

In *Stoddard*, the Court of Appeals held that burglaries allegedly committed by the defendant in different locations, on different days, over a period of time, were not based on the same incident, transaction or set of facts for purposes of § 10-107. *Stoddard*, 395 Md. at 669-70. Applying the same rationale to the facts in this case, we conclude that the offenses charged in Counts 5-7 did not arise from the same “incident, transaction, or set of facts” as the charges in Counts 1-4, and therefore, were not ineligible for expungement pursuant to § 10-107.<sup>5</sup>

The State contends that, even if § 10-107 does not bar expungement, Mr. Fuster is nonetheless ineligible under §10-105(e)(4)(ii) because he is a “defendant in a pending

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<sup>5</sup> As alternative grounds for relief, Mr. Fuster asserts that the State did not file an objection to the petition for expungement with the court within the time prescribed in § 10-105(d)(2), and therefore, the circuit court was without jurisdiction or authority to deny the petition for expungement. Because we conclude that the circuit court’s denial of the petition for expungement was legally incorrect, and grant relief on that basis, we need not address this alternative contention.

criminal proceeding” by virtue of his petition for post-conviction relief. We disagree. *See State v. Bundy*, 52 Md. App. 456, 459 n.2 (1982) (“a post conviction proceeding is deemed to be civil in nature[.]”); *Maryland Bar Ass’n, Inc. v. Kerr*, 272 Md. 687, 689-90 (1974) (a post-conviction proceeding “does not constitute part of the original criminal cause, but is an independent and collateral civil inquiry into the validity of the conviction and sentence.”)<sup>6</sup>

**JUDGMENT OF THE CIRCUIT COURT  
FOR MONTGOMERY COUNTY  
REVERSED. CASE REMANDED TO  
THAT COURT WITH INSTRUCTIONS TO  
ORDER EXPUNGEMENT OF ALL  
POLICE RECORDS AND COURT  
RECORDS ABOUT THE CHARGES IN  
COUNTS 5-7 OF THE CHARGING  
DOCUMENT. COSTS TO BE PAID BY  
MONTGOMERY COUNTY.**

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<sup>6</sup> The State’s reliance on *Gray v. State*, 388 Md. 366, 379-82 (2005), in support of its contention that a post-conviction proceeding is a criminal proceeding is misplaced. We find no support for that interpretation in our reading of *Gray*.