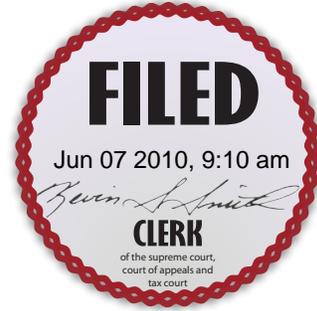


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOSEPH MCKAY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 79A02-1003-CR-261

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0802-FC-10

June 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Joseph McKay (“McKay”) appeals from the denial of his petition for expungement of records by the Tippecanoe Circuit Court, presenting the sole issue of whether the trial court erred by refusing to grant the petition. We affirm.

Facts and Procedural History

On February 8, 2008, the State charged McKay with Intimidation, as a Class C felony,¹ Pointing a Firearm, as a Class D felony,² and Criminal Recklessness, as a Class D felony,³ as a result of events reportedly occurring on January 5, 2008. According to the probable cause affidavit, McKay had entered the residence of Kenny Villarreal, armed with a gun and a large hunting knife. McKay had pointed the gun at Villarreal, threatened to kill him, and demanded to know if he was “selling drugs with Chris Grenat.” (App. 9.) Grenat was an individual who had previously lived with McKay’s daughter. Allegedly, McKay had in the past threatened Grenat verbally and with a weapon to his head.

On May 9, 2008, McKay filed his Notice of Alibi. On January 8, 2009, the State moved to dismiss the charges “based on there being insufficient evidence.” (App. 34.) On the same day, the trial court ordered that the charges be dismissed, with prejudice.

On January 21, 2009, McKay filed a Petition for Expungement, pursuant to Indiana Code Section 35-38-5-1 (“the Expungement Statute”), asserting that the criminal charges against him had been dismissed due to mistaken identity. The State filed its Notice of

¹ Ind. Code § 35-45-2-1.

² Ind. Code § 35-47-4-3(b).

³ Ind. Code § 35-42-2-2.

Opposition, contending that the dismissal had been due to “insufficient evidence” as opposed to mistaken identity. (App. 39.)

On October 1, 2009, the trial court conducted a hearing at which McKay presented alibi witnesses as to his whereabouts on January 5, 2008. The State did not present evidence, but relied upon the probable cause affidavit, the existence of which the trial court had taken judicial notice, to argue that there had been probable cause for the arrest.⁴ The State argued that McKay’s alibi witnesses had left a small window of opportunity in which McKay could have confronted Villarreal and thus, McKay had shown neither the lack of a crime or mistaken identity.

The trial court denied McKay’s petition for expungement, finding “the conditions in I.C. 35-38-5-1(a) have not been met.” (App. 44.) This appeal ensued.

Discussion and Decision

The Expungement Statute provides in relevant part:

(a) Whenever:

- (1) an individual is arrested but no criminal charges are filed against the individual; or
- (2) all criminal charges filed against an individual are dropped because:
 - (A) of a mistaken identity;
 - (B) no offense was in fact committed; or
 - (C) there was an absence of probable cause;

⁴ At the outset of the hearing, McKay’s counsel requested that the trial court take judicial notice of all “filings” in the matter. (Tr. 1.) At the conclusion of the hearing, the State requested admission of the “public cause affidavit” [sic] and the trial court responded, “Those are contained in the record.” (Tr. 43.) Accordingly, we deny McKay’s motion to strike those portions of the State’s brief reciting factual allegations of the probable cause affidavit and developing corresponding arguments.

the individual may petition the court for expungement of the records related to the arrest.

...

(d) ... Any agency desiring to oppose the expungement shall file a notice of opposition with the court setting forth reasons for resisting the expungement along with any sworn statements from individuals who represent the agency that explain the reasons for resisting the expungement within thirty (30) days after the petition is filed.... The court shall:

(1) summarily grant the petition;

(2) set the matter for hearing; or

(3) summarily deny the petition, if the court determines that:

(A) the petition is insufficient; or

(B) based on information contained in sworn statements submitted by individuals who represent an agency, the petitioner is not entitled to an expungement of records.

(e) If a notice of opposition is filed and the court does not summarily grant or summarily deny the petition, the court shall set the matter for a hearing.

(f) After a hearing is held under this section, the petition shall be granted unless the court finds:

(1) the conditions in subsection (a) have not been met;

(2) the individual has a record of arrests other than minor traffic offenses; or

(3) additional criminal charges are pending against the individual.

The foregoing statute provides the exclusive means for expunging arrest records when no charges are filed against an arrestee or the charges are dropped. State ex rel. Indiana State Police v. Arnold, 906 N.E.2d 167, 169 (Ind. 2009). The petitioner bears the burden of proof when requesting expungement of his record. State v. Sotos, 558 N.E.2d 909, 911 (Ind. Ct. App. 1990), trans. denied. The trial court does not have the discretion to grant expungement of arrest records when the petitioner has failed to meet his burden of proving that he falls within the provisions of the statute. Kleiman v. State, 590 N.E.2d 660, 662 (Ind. Ct. App. 1992). Indeed, “[i]f, after conducting a hearing, the court finds that ‘the conditions in

subsection (a) have not been met' (factor (1)), then the individual has no standing even to petition the court for expungement and the court must therefore deny the petition.” Arnold, 906 N.E.2d at 170 (quoting Ind. Code § 35-38-5-1(a)).

After a hearing, the trial court found that McKay had not met his statutory burden of proof. In light of this finding, the trial court had no obligation to grant a petition for expungement. McKay has demonstrated no reversible error.

Affirmed.

MAY, J., and BARNES, J., concur.