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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID NEWTON,)

Appellant-Petitioner,)

vs.)

No. 49A02-1101-CR-10

STATE OF INDIANA,)

Appellee-Respondent.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa F. Borges, Judge
The Honorable Stanley E. Kroh, Commissioner
Cause No. 49G04-0802-FC-48714

August 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

David Newton appeals the denial of his motion for expungement. Newton raises two issues, which we revise and restate as whether the trial court abused its discretion in denying his motion for expungement. We affirm.

The relevant facts follow. On February 29, 2008, the State filed a probable cause affidavit and an Information charging Newton with one count of child molesting as a class C felony.¹ The probable cause affidavit stated that Newton was L.C.'s stepfather and described three incidents involving Newton and L.C., who was born on April 5, 1997, one in which Newton said "Oh my God what is this?" and held his penis in his hand and showed it to L.C.; the second in which Newton walked into L.C.'s bathroom while she was taking a shower, scolded her for not closing the door all the way, and then "stood there looking at her for approximately 5 minutes" while she continued to shower; and the third in which Newton, after helping L.C. slice pizza and while her mother was upstairs asleep, grabbed L.C.'s vagina on the outside of her clothes, "held onto it for a short period of time," and asked her "do you have a problem with that?" Appellant's Appendix at 25-26.

On March 30, 2009, the State filed a motion to dismiss which noted "the following reasons for dismissal: . . . Evidentiary Problems." Id. at 30. The court granted the motion to dismiss.

¹ The charging information cited Ind. Code § 35-42-4-3 and alleged that Newton "did perform or submit to any fondling or touching with L.C., a child who was then . . . Ten (10) years of age, with intent to arouse or satisfy the sexual desires of L.C. and/or the sexual desires of David Newton." Appellant's Appendix at 23.

On August 16, 2010, Newton filed a verified motion for expungement and requested expungement of his records “because no offense was in fact committed; and or there was an absence of probable cause.” Id. at 31. Newton alleged that “[d]uring the discovery proceedings, it was learned that [L.C.] beat her four year old brother and lied about the matter in therapy, and told her mother she was considering suicide in order to make her angry, among other things” and that “[i]t was learned that [L.C.] had indications of a borderline personality and her ability to tell the truth was in question.” Id. at 32. Newton’s motion argued that “[b]ased on the facts elicited from depositions and expert examinations, no offense occurred and or there was not probable cause for an arrest to issue.” Id. The court ordered that copies of the petition be sent to, among others, the Marion County Prosecutor’s Office and the Indianapolis Metropolitan Police Department (“IMPD”), and the court set the matter for hearing.

The Marion County Prosecutor’s Office filed a brief in opposition to Newton’s motion arguing that “[t]he relevant allegations are not enough for [Newton] to meet his burden of proof that no offense in fact occurred, or that there was an absence of probable cause,” that “[m]erely because the victim lied about the matter in therapy does not mean that no offense in fact occurred,” that “the victim in this case was 10 years old when the incident was disclosed,” and that “[a]dditionally, throughout all the State’s meeting with L.C. regarding this case, there was no recantation about the allegations” and L.C. “kept asserting that [Newton] committed the crimes with which he was charged.” Id. at 38-39. The IMPD filed a verified objection and notice of opposition to Newton’s motion alleging that Newton had not established the statutory grounds for expungement and that

Newton had a record of arrests other than minor traffic offenses, namely, that Newton had been arrested for disorderly conduct on November 20, 2005.

The court held a hearing on Newton's motion on October 19, 2010, at which the parties presented arguments and the court admitted a verified declaration of L.C.'s mother and took judicial notice of its file and the probable cause affidavit. The declaration of L.C.'s mother stated that L.C. had told her "that she had lied about the allegations," that L.C. told her that "she knew if she made these accusations, [Newton] would be forced to move out," and that L.C. also told her "I made it all up." Petitioner's Exhibit A at 2. The declaration also stated that L.C. "had a history of making untrue statements in order to manipulate a situation to her liking" and that "[s]he was evaluated by Dr. Richard Lawlor, PhD, who found her to have a high IQ and to have serious credibility issues as it related to accusations she made against [Newton]." Id.

A short time after the declaration of L.C.'s mother was admitted at the hearing, the court asked the deputy prosecutor if she wished to add anything, and the deputy prosecutor stated "frankly this was a case where it came down to I thought proceeding with the charges . . . was going to do more harm." Transcript at 13. Newton's counsel stated "I'm going to object to personal testimony" and that "[t]his isn't argument on what's been submitted to the Court in evidence," and the court overruled the objection and asked if the deputy prosecutor had anything to add. Id. The deputy prosecutor then stated that the case "was causing a lot of animosity between the child and her mother," that after several meetings she "decided that the best thing to do would be to allow this family to move forward and to dismiss the case," and that "it wasn't because anyone

believed that this did not happen or that became the State's position." Id. at 14. The prosecutor also stated that "there was always some concern back and forth about what the child had told [her mother] on one day and what she had told her on the next day" and that she "wasn't really frankly sure who to believe." Id. at 15. Newton's counsel argued to the court: "I don't really think you'll find any evidence rules that it's a concern for the family well being. So, I think this is – was probably more an evidentiary issue which is the child . . . recanted and there wasn't any evidence of a crime." Id. Newton's counsel further argued: "So, I think we've met with the petition there's no evidence in opposition." Id. at 16. The deputy prosecutor stated that "this child never recanted to me and stood by her original allegations up until the date that I dismissed it." Id.

The court entered an order denying Newton's motion for expungement, concluding that Newton "failed to meet his burden of establishing that he falls within the provisions of I.C. 35-38-5-1" and that "[b]ased upon the record before the Court, the Court does not disturb the prior finding of probable cause for the arrest, nor does the Court find that, in fact, no offense was committed." Id. at 51.

The issue is whether the trial court abused its discretion in denying Newton's motion for expungement. Ind. Code § 35-38-5-1 governs the expungement of arrest records, and subsection (a) provides:

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:

* * * * *

- (B) no offense was in fact committed; or
- (C) there was an absence of probable cause;

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

The expungement statute is the “exclusive means” for expunging arrest records when no charges were filed or the charges were dropped. Zagorac v. State, 943 N.E.2d 384, 389 (Ind. Ct. App. 2011) (citing State ex rel. Ind. State Police v. Arnold, 906 N.E.2d 167, 169 (Ind. 2009)), reh’g denied. Because charges were filed against Newton in relation to the arrest at issue, the arrest may be expunged from his record only if he qualifies under this statute. See id. 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 has discretion to either grant or deny a petition for expungement. See Arnold, 906 N.E.2d at 171 (stating that “[w]e do not believe that the Legislature intended to give the trial court almost unfettered discretion to grant summarily or to deny summarily a petition for expungement without a hearing, only to take away that discretion completely when the court decides to conduct a fact-finding hearing”) (citations omitted).

Newton argues that he introduced an affidavit from L.C.’s mother which “clearly states that [L.C.] said she made up the allegations.” Appellant’s Brief at 8. Newton asserts that “IMPD presented no evidence to rebut this testimony” and the “[t]he only evidence submitted to rebut Newton’s evidence that [L.C.] recanted and admitted lying

was the statements by the deputy prosecutor to the trial court during the expungement hearing.” Id. Newton argues that the court “erroneously allowed the deputy prosecutor who prosecuted the case to opine about her reasons for dismissing the case and her reaction to [L.C.’s mother’s] affidavit” and that “[t]hese statements were not under oath, and the deputy prosecutor was not subject to cross-examination.” Id.

In support of its argument, Newton cites to Zagorac, 943 N.E.2d 388, and notes that the prosecutor’s office in that case submitted a sworn statement from a deputy prosecutor that the State believed it could prove its case beyond a reasonable doubt but could not move forward with the case because the child witness became ill because of his fear of testifying. Newton argues that his case is distinguishable from Zagorac, that the deputy prosecutor’s reason for dismissing the charge in his case was “evidentiary problems,” that “evidentiary problems are consistent with recantation,” and that “Newton’s prosecutor made not a single reference that pursuing [sic] this charge would result in harm to [L.C.] or her family.” Id. at 10. Newton also argues that the “Marion County Prosecutor’s Office chose not to file an objection and sworn statement in support.” Id. Newton asserts that “[w]ithout the improperly considered statements, the trial court is left with unrefuted evidence that [L.C.] admitted to lying about the accusations, a motive for lying, and a psychologist’s assessment that [L.C.] was not credible regarding the accusations.” Id. at 11.

The State argues that the court did not abuse its discretion in permitting statements from the deputy prosecutor during the hearing. Specifically, the State argues that Newton did not adequately challenge the admissibility of the deputy prosecutor’s testimony at the

hearing and thus the evidentiary issues raised on appeal have not been preserved. The State further argues that the court properly permitted the deputy prosecutor to provide a statement regarding Newton's proffered evidence of the declaration of L.C.'s mother. Specifically, the State argues that "there is no statutory requirement that prosecutors attach sworn written statements that discuss their reasons for dismissal of charges to objections to expungement petitions" and "prosecutors are not considered ordinary witnesses under Indiana law, but are held to a higher ethical standard by virtue of their position." Appellee's Brief at 13. The State further argues that any error in the court's consideration of the deputy prosecutor's statements at the hearing was harmless as the trial court found that Newton "has failed to meet his burden of establishing that he falls within the provisions of the [sic] I.C. 35-38-5-1," that "[t]he Order denying expungement in no way suggests the denial was based on the statements" of the deputy prosecutor, and that "[i]nstead, it appears the court did not find [Newton's] evidence sufficiently credible to meet his evidentiary burden and chose instead to believe the evidence supporting the preliminary finding of probable cause in the criminal proceeding." *Id.* at 15. The State argues that this court may not reweigh the evidence and that substantial evidence of probative value supports the trial court's decision. The State also asserts that "[e]ven if the Deputy Prosecutor's evidence is excluded—and it should not be—Newton's evidence was still not 'uncontroverted,' as suggested on appeal," that "[i]nstead, the trial court also took notice of the criminal proceedings, including the evidence supporting the initial finding of probable cause," and that "the decision to deny the request for expungement

specifically noted that the court found [Newton's] evidence insufficient to disturb the prior finding of probable cause.” Id. at 17 (citation and quotation marks omitted).²

Even if the court should not have permitted the deputy prosecutor to make certain statements regarding the reason for the State's dismissal of the molesting charges, at least to the extent those statements did not constitute argument, we note that the court was also able to consider the declaration of L.C.'s mother, the probable cause affidavit, and the arguments of the parties at the hearing and as set forth in the motion and response filings.

The burden was on Newton as the petitioner to provide evidence to prove the charge against him was dropped because he did not commit the offense. See Sotos, 558 N.E.2d at 911. While Newton's counsel presented the declaration of L.C.'s mother stating that L.C. had told her that she “made it all up” and that L.C. had some “serious credibility issues,” see Petitioner's Exhibit A at 2, the declaration also stated that L.C.'s mother was married to Newton and the court was able to consider and assign weight to the statements in the declaration. The State's March 30, 2009 motion to dismiss, which cited “Evidentiary Problems” as the reason for dismissal, did not state the nature of the problem or specify that L.C. had recanted or would not testify for some other reason. See Appellant's Appendix at 30. The trial court was within its discretion to find, based upon the evidence before it, that Newton did not carry his burden of proof that the criminal charges filed against him were dropped because no offense was in fact committed. We

² Newton also argues that “once the court proceeded to a hearing, summarily denying the petition was not a statutory option” and that “[g]iven the absence of required findings and the decision to hold a hearing, the trial court's order summarily denying the petition was error and should be reversed.” Appellant's Brief at 7. The State argues that the court did not enter summary denial of Newton's motion for expungement but instead entered denial after conducting a hearing. The court's order was entitled “Order Summarily Denying Petition to Expunge Arrest Record.” Appellant's Appendix at 49. However, we note that the court held a hearing prior to entering its order and findings.

also observe that the court took judicial notice of and was able to consider the probable cause affidavit, which was specific in its description of Newton's alleged offenses as described above, and determine that the criminal charges against Newton were not dropped because of an absence of probable cause.

Based upon the record and the evidence and argument before the trial court, we cannot say that the court abused its discretion in denying Newton's motion for expungement. See Arnold, 906 N.E.2d 167, 169 (noting that "[i]f, after conducting a hearing, the court finds that the conditions in [Ind. Code § 35-38-5-1(a)] have not been met . . . , then the individual has no standing even to petition the court for expungement and the court must therefore deny the petition") (internal quotation marks omitted); Zagorac, 943 N.E.2d at 391 (holding that the denial of Zagorac's petition for expungement without holding a hearing was not an abuse of the "trial court's 'almost unfettered discretion'") (citation and footnotes omitted). Accordingly, we affirm the judgment of the trial court.

Affirmed.

KIRSCH, J., concurs.

BAKER, J., dissents with separate opinion.

**IN THE
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DAVID NEWTON,)	
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Appellant-Petitioner,)	
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vs.)	No. 49A02-1101-CR-10
)	
STATE OF INDIANA,)	
)	
Appellee-Respondent.)	

BAKER, Judge, dissenting.

I must respectfully part ways with the majority. Initially, I highlight the fact that Newton is still presumed innocent. As the majority states, under Indiana Code section 35-38-5-1, Newton was required to show by a preponderance of the evidence that no offense was committed or that there was an absence of probable cause. State v. Sotos, 558 N.E.2d 909, 911 (Ind. Ct. App. 2011).

Here, Newton met this burden. More particularly, in a verified declaration, L.C.'s mother stated that L.C. admitted that she had lied about the allegations so that Newton would be forced to move out. Likewise, the declaration stated that L.C. had been evaluated by Dr. Lawlor who concluded that L.C. had a high IQ but had serious

credibility issues and “had a history of making untrue statements in order to manipulate a situation to her liking.” Petitioner’s Ex. A. p. 2. The mother’s verified declaration was consistent with State’s motion to dismiss, which noted “Evidentiary Problems” as the reason for dismissing the charges. Appellant’s App. p. 30.

To rebut this evidence the deputy prosecutor opined that she dismissed the charges because she thought that proceeding was creating animosity between L.C. and her mother. But what the deputy prosecutor “thought” is not evidence, and we presume that during a bench trial, the trial court follows the law. Berry v. State, 725 N.E.2d 939, 943 (Ind. Ct. App. 2000). Accordingly, the only evidence presented shows that L.C. lied about the allegations against Newton. That being said, if Newton presented insufficient evidence to satisfy the requirements under the expungement statute, it is difficult to imagine what evidence would satisfy it.

Moreover, I cannot agree with the majority’s conclusion that the trial court properly relied on the initial probable cause affidavit to determine that criminal charges against Newton were not dropped because of an absence of probable cause. In cases such as this, where the alleged victim has admitted to fabricating the allegations, it will be almost impossible for them to prove that no offense was committed or that there was an absence of probable cause if the trial court may rely almost solely on the initial probable cause affidavit. This is contrary to the intent of the expungement statute. Consequently, I would reverse the trial court.