UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SEAN McGINNIS PLAINTIFF

v. CIVIL ACTION NO. 3:96CV-261-S

RAYMOND A. TAITANO DEFENDANT

MEMORANDUM OPINION AND ORDER

This matter is before the court on motion of the plaintiff, Sean McGinnis seeking an order *in limine* precluding the defendant from offering evidence of an expunged conviction in the trial of this matter. On January 30, 1998, the court entered the tendered order *in limine*, as no response had been filed to the motion. The defendant subsequently moved to vacate the order and permit late filing of a response. The trial having been continued for a period of four months due to the illness of the plaintiff, the court agreed to permit the late filing of the defendant's response and to consider the motion with the benefit of additional briefs. Upon consideration of the matter, the court will vacate its order of January 30, 1998.

On April 3, 1996, McGinnis pled guilty to second degree burglary, a felony under California law. He was ordered to pay a fine, to perform 200 hours of volunteer work, and to satisfy a term of probation. Ten months after his sentencing, McGinnis moved the California court to reduce his felony conviction to a misdemeanor. In his motion, made under California Penal Code §17(b)(3)[1], he recited that he had completed the requirements of his sentence. He also made reference to this lawsuit. He stated: "A felony conviction would greatly prejudice his (McGinnis') position in the lawsuit." On February 18, 1997, McGinnis' felony conviction was reduced to a misdemeanor,

[1]The motion was made under §17(b)(3), but the order reducing the conviction recites §17(b)(5).

without objection by the State. Six months later, McGinnis petitioned the court to terminate his probation and expunge the conviction. On August 12, 1997, the motion was granted.

McGinnis has moved for an order precluding the use of the felony conviction for impeachment in the trial of this personal injury action. He contends that Fed. R. Evid. 609(c) mandates that the matter be precluded.

Fed. R. Evid. 609(a) states the general rule:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant...

Subsection (c) adds the proviso:

> Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year...

McGinnis contends that his felony conviction was the subject of an "equivalent procedure," having obtained an expungement, and that the order expunging the conviction, although silent on the matter, evidence an implicit finding by the judge of McGinnis' rehabilitation. We disagree.

In order to measure the effect of the order expunging the conviction, we must look to the statutory law of the State of California. *See, i.e. United States of America v. Moore*, 556 F.2d 479, 484 (10th Cir. 1977); *United States v. Jones*, 647 F.2d 696, 700 (6th Cir. 1981).

McGinnis pled guilty to a felony. The reduction to a misdemeanor occurred some ten months after sentencing, after McGinnis had completed the public service and fine requirements of his sentence. As noted by the court's order, McGinnis remained on the same terms of probation after the reduction of the conviction to a misdemeanor. We are therefore dealing with a felony

conviction for purposes of impeachment under Fed. R. Evid. 609(a), despite its transformation into a misdemeanor at a later time.

The California Penal Code draws a distinction between an expungement and a certificate of rehabilitation. The distinction is made apparent by the language of California Evidence Code §788, governing impeachment of a witness with a prior felony conviction in a State proceeding:

> For the purpose of attacking the credibility of a witness, it may be shown by examination of the witness or by the record of the judgment that he has been convicted of a felony unless:
>
> ...(b) A certificate of rehabilitation and pardon has been granted to the witness under the provisions of Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code...
>
> (c) The accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4, but this exception does not apply to any criminal trial where the witness is being prosecuted for a subsequent offense...

California Penal Code §1203.4, the expungement statute, states:

> In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation...the defendant shall...be permitted by the court to withdraw his or her plea of guilty...and enter a plea of not guilty...and...the court shall thereupon dismiss the accusations or information against the defendant...

The statute specifically states that

> The probationer shall be informed, in his or her probation papers, of...his or her right, if any, to petition for a certificate of rehabilitation and pardon...

The procedures for obtaining a certificate of rehabilitation are set out in §§4852.01 through 4852.19. The process is an extensive one, which distinguishes it from the more ministerial process of expungement. §4852.01(c) provides:

> Any person convicted of a felony...the accusatory pleading of which has been dismissed pursuant to Section 1203.4, may file a petition for certificate of rehabilitation and pardon pursuant to the provisions of this chapter if the petitioner has not been incarcerated...since the dismissal of the accusatory pleading and is not on probation for the commission of any other felony, and the petitioner presents

> satisfactory evidence of five years residence in this state prior to the filing of the petition...

Additionally,

> 1) A person cannot apply until satisfaction of at least a two-year period of rehabilitation and the five-year residence requirement (§4852.03).
>
> 2) The applicant must file a petition for ascertainment of the fact of his or her rehabilitation and of matters incident thereto, and for a certificate of rehabilitation in the superior court of the county in which the applicant resides (§4852.06), and must give notice to the district attorney and to the office of the Governor (§4852.07).
>
> 3) The applicant is entitled to counsel, retained or appointed (§4852.08), is entitled to a hearing (§4852.13), may be required to provide testimony and/or documentation of rehabilitation (§4852.1), and may be subject to an investigation ordered by the court (§4852.12).
>
> 4) The court is required to make findings that the petitioner has demonstrated rehabilitation by his or her course of conduct in order to issue a certificate of rehabilitation (4852.13).

McGinnis obtained expungement of the conviction. No finding of rehabilitation was made by the court.

Fed. R. Evid. 609(c) explicitly requires a finding by the court of rehabilitation, and delineates only those processes which are, or are equivalent to, a pardon, annulment, or a certificate of rehabilitation. In light of the rule's emphasis on rehabilitation, we find that the process of expungement under the California Penal Code does not fall within the purview of Rule 609(c).

In order for a felony conviction to be admissible under 609(a), the court must balance the probative value of this evidence against the prejudicial effect of its use against McGinnis in this case. As a practical matter, all impeachment materials are prejudicial to the witness against whom

they are offered. Felony convictions which are less than ten years old are proper impeachment material unless their use would be result in undue prejudice.

We conclude that the probative value of this evidence outweighs its prejudicial effect in this case. The sole issue for trial is the extent of the injury suffered by McGinnis in the 1994 automobile accident. The defendant has challenged the veracity of the plaintiff in his representation of the nature and extent of his injuries. The condition of Reflex Sympathetic Dystrophy ("RSD") from which McGinnis claims he suffers as a result of the accident is to be proven, in part, through the his subjective assessment of the pain he suffers. His credibility is therefore a central issue in this case.

His conviction for burglary occurred in early 1996, two years after the accident and during the pendency of this action. The relative recency of this conviction lends further support to our determination that its probative value outweighs its prejudicial effect.

For the reasons set forth herein above, and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that:

1. The Order of this court of January 30, 1998 granting the motion of the plaintiff, Sean McGinnis for an order *in limine* precluding evidence of his prior felony conviction (DN 109) is **VACATED**.

2. The motion of the plaintiff, Sean McGinnis, for an order *in limine* precluding evidence of his prior felony conviction (DN 89) is **DENIED**.

IT IS SO ORDERED this _____ day of _____, 1998.

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CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record