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IN THE COURT OF APPEALS OF INDIANA

Brian J. Allen,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

January 25, 2022

Court of Appeals Case No. 21A-XP-368

Appeal from the Dearborn Superior Court

The Honorable James D. Humphrey, Judge

Trial Court Cause No. 15D01-1811-XP-44

May, Judge.

[1] Brian J. Allen appeals the denial of his petition for expungement. He argues the trial court abused its discretion when it denied his petition. We affirm.

Facts and Procedural History

[1] This appeal comes to us from a decision by the trial court following remand from our Indiana Supreme Court, which summarized the procedural facts of the underlying case in its opinion:

> In 2002, nineteen-year-old Brian J. Allen accompanied three of his friends to burglarize the home of Larry and Judith Pohlgeers in West Harrison, Indiana. Upon arriving, Allen and another man remained outside, keeping watch as their confederates - armed with a lead pipe - broke into the residence. At some point during the burglary, the men who entered the home struck Larry Pohlgeers repeatedly on the head with their cudgel, causing serious bodily injury to their victim.
>
> The State charged Allen with six counts: Class A felony attempted robbery, I.C. § 35-42-5-1 (1998), I.C. § 35-41-5-1, I.C. § 35-41-2-4; Class A felony conspiracy to commit robbery, I.C. § 35-42-5-1, I.C. § 35-41-5-2; Class A felony burglary, I.C. § 35-43-2-1(2) (Supp. 2002), I.C. § 35-41-2-4; Class A felony conspiracy to commit burglary, I.C. § 35-43-2-1(2), I.C. § 35-41-5-2; Class B felony aggravated battery, I.C. § 35-42-2-1.5; and Class C felony battery with a deadly weapon, I.C. § 35-42-2-1(a)(3). The State ultimately dismissed the six original counts in exchange for Allen agreeing to plead guilty to Class B felony conspiracy to commit burglary. *See* I.C. § 35-43-2-1(1) (Supp. 2002), I.C. § 35-41-5-2.
>
> Allen was sentenced to sixteen years of imprisonment. He later sought and received a modification of his sentence. Allen was placed on probation after serving just over thirty-four months of incarceration. He completed all the terms of his probation without any violations. After waiting the required three years, Allen, who had no prior criminal history, petitioned for expungement under Indiana Code section 35-38-9-4 (the Permissive Expungement Statute).

> At the hearing on his petition, the court heard testimony from Allen on his commitment to work and to his wife and two children. The expungement, he testified, would permit him to advance his career, to "do a better job of being able to provide for [his] family," and to teach his children responsibility. The court also admitted into evidence letters of recommendation from Allen's brother-in-law, his coworker, and a doctor - each of whom attested to Allen's good character and strong work ethic. And while neither of the Pohlgeers attended the expungement hearing, the court considered their testimony from other sources. Larry Pohlgeers, who had passed away, opined at an earlier sentence-modification hearing that Allen "should be given a break" since he'd "learned his lesson." For her part, Judith Pohlgeers informed a victims' advocate that she "was in agreement with Mr. Allen's conviction being expunged in this matter."
>
> Allen admitted at the hearing that Larry Pohlgeers had suffered serious bodily injury as a result of the burglary. Because of his admission, and because the Permissive Expungement Statute exempts convictions of crimes resulting in serious bodily injury, the State expressed doubt as to whether Allen was eligible for expungement. The trial court denied the petition for expungement without explaining its reasoning.

Allen v. State, 159 N.E.3d 580, 582 (Ind. 2020) (internal citations to the record omitted). Because the trial court may have denied the petition after incorrectly concluding Allen was ineligible for expungement under the Permissive Expungement Statute, our Indiana Supreme Court reversed the trial court's denial of Allen's petition for expungement and remanded for the trial court to exercise its discretion as to his petition. *Id*. at 586.

[2] On January 14, 2021, Allen filed a motion to set a hearing and asked the trial court to set a pretrial conference or other hearing as it deemed appropriate. On January 25, 2021, the trial court held a telephonic pre-trial conference with the parties. On January 29, 2021, the trial court issued an order noting the pre-trial conference and stating that, at the pre-trial conference, "the court and parties agreed that the Indiana Supreme Court Decision directed the Trial Court to render a decision consistent with the Supreme Court's Decision of 12/22/20 without the need for an additional hearing in this matter." (App. Vol. II at 131.) On February 4, 2021, the trial court issued an order denying Allen's petition for expungement in which the court found:

> a. That Petitioner, Allen, was originally charged with a series of offenses relating to a break-in robbery and beating of two (2) senior citizens, Larry and Judith Polhgeers. [sic]
>
> b. More specifically, the facts and circumstances of this case are that the Petitioner, Allen, and co-defendants planned and broke into the home of this elderly couple. The husband was semi-ambulatory and used a walker. This elderly couple was then brutally beaten with a pipe by one of the participants. Evidence further showed that some of the participants had previously broken into this same family's home.
>
> c. Petitioner, Allen, was originally charged in Count I with Burglary, a Class A felony, Count II, Aggravated Battery, a Class B felony, Count III, Aggravated Battery, a Class B felony, County [sic] IV, Conspiracy to Commit Burglary, a Class A felony. Allen was later charged under Count VII, Conspiracy to Commit Burglary, a Class B felony.

c. The Petitioner, Allen, subsequently entered a negotiated plea agreement whereby he pled guilty to Count VII, Conspiracy to Commit Burglary, a Class B felony. The agreement called for Petitioner, Allen, to be sentenced at the discretion of the Court. In return for this plea of guilty, the remaining counts were dismissed.

e. Following the sentencing hearing, Defendant was sentenced by the Court to a term of 5,840 days with 2,920 suspended. The sentence was subsequently modified over objections by the State of Indiana to 5,840 days with 3,738 days suspended. The balance of the modified sentence was to be served on Southeast Regional Community Correction in-home incarceration.

f. In the course of the investigation of this matter, an interview was conducted of the Petitioner, Allen, by detectives. Among the salient facts determined through Defendant's statement are the following:

> 1. That the defendant was aware of and involved in planning of this burglary of the elderly couple for approximately two weeks before the events occurred.
>
> 2. That multiple discussions continued with co-conspirators until the day that the burglary was committed.
>
> 3. Defendant was aware that some of the parties had committed a previous burglary at the Polhgeers' [sic] residence.
>
> 4. Petitioner's decision to participate in this crime was not a spur of the moment event or decision. Petitioner's

decision to participate was made over the course of the conspiracy that lasted at least two (2) weeks.

5. Petitioner agreed to drive and actually did drive the parties to the location on the weekend before the break-in as a dry run so they could "scope out the premises."

6. Petitioner was aware of discussion to potentially use a firearm to scare the individuals.

7. Petitioner was aware, prior to the break-in, that one of his co-participants "wasn't wrapped too tight" and that he was capable of doing anything and that he didn't care if someone got hurt.

8. The Petitioner was aware, through prior discussions with his codefendants, that some co-conspirators would show no pity on the elderly man and that they intended to tie up the elderly woman.

9. Petitioner indicated in his statement that he didn't know ahead of time if they intended to kill the elderly couple, but said "it didn't sound very good and I tried not to know."

10. That Petitioner was aware of discussions that co-defendants intended to cut the phone line so the victims could not call for help.

11. Petitioner was aware that one of the parties intended to take a hatchet with the handle wrapped in tape to the burglary.

12. That Allen agreed to and did drive the participants to the scene of the crime.

13. Allen put on dark clothing like the others involved.

14. Petitioner, Allen, was aware that one of the co-defendants was wanted for a probation violation.

15. That Petitioner indicates he was hiding outside the victims' home with others.

16. The Petitioner, Allen, indicated that he watched the break-in and saw one of the co-defendants beat the elderly man and that he was close enough that he could see the elderly man bleeding "like a stuck pig." Allen also saw that the elderly man used a walker.

17. Allen indicated that he could see and hear the blows being struck.

18. Petitioner learned that the elderly woman was attempting to protect herself and her husband and that she was also beaten with the pipe.

19. Petitioner admits seeing a "pile of blood" around the elderly man. He also observed the elderly man on his hands and knees.

20. Petitioner also indicated that based upon what he saw and heard, that he thought the elderly man might die but he did nothing to help.

> 21. The Petitioner's statement to detectives indicates that he was at least close enough to see and hear the beating of the Polhgeers [sic]. Allen's statement was inconsistent as to whether he actually entered the premises.

g. The evidence indicates that the crime caused victims Larry and Judith Polhgeers [sic] to receive extreme pain, multiple contusions, and/or lacerations as a result of the beating.

h. In sum, Defendant's statement and the evidence in the case reviewed by the Court indicates that his participation was knowing and that his involvement is not consistent with the limited involvement relayed to the Court at the hearing on expungement.

* * * * *

j. The evidence in this case, and Allen's own prior statements, show that he certainly was aware of the intent and likely terrible outcome of this conspiracy. Although he now downplays his knowledge and involvement, Mr. Allen's own statement shows that the was fully aware of the risk of harm to the victims. Allen was, in fact, specifically told by one of his co-conspirators, "who wasn't wrapped too tight" that he would show no pity to the man and tie up the woman. Mr. Allen also confirmed in his statement that he knew the potential seriousness of this event. Again, he stated that he didn't know ahead of time <u>if</u> they intended to kill the elderly couple but that "it didn't sound very good and I tried not to know."

k. The Court notes the positive evidence presented on behalf of Petitioner, Allen. The Court finds that Petitioner, Allen, has received the benefit of a plea to a reduced charge and a modification of sentence which included in-home incarceration.

> 1. As the Supreme Court has indicated, some crimes are too awful to warrant expungement, and this is one of those crimes. The crime Mr. Allen committed was reprehensible and Mr. Allen's involvement was knowing and significant. Mr. Allen has significantly minimized his involvement and advance knowledge of the events involved in this crime.

(App. Vol. III at 4-7) (emphases in original) (internal citations to the record omitted).

[3] On March 4, 2021, Allen filed a notice of appeal in which he requested the January 25, 2021, telephonic pre-trial conference be transcribed for his appeal. On March 16, 2021, the trial court issued an order that noted Allen's request for a transcript of the January 25, 2021, telephonic pre-trial conference and further stated:

> [T]he Court having examined said request and being duly and sufficiently advised, now finds that a Pretrial Hearing was held by telephone on January 25, 2021 regarding the Indiana Supreme Court Decision. The Court issued an Order on Request for Hearing or Pretrial Conference, signed on January 29, 2021, which memorialized said Telephonic Pretrial.
>
> It is therefore considered, ordered and adjudged that Petitioner's Notice of Appeal requesting a transcript cannot be granted as no formal hearing was held following the decision of the Indiana Supreme Court[.]

(*Id*. at 85) (original formatting omitted).

[4] On April 1, 2021, Allen filed a petition for this court to stay his appeal and remand the matter to the trial court for evidentiary hearings as well as a verified statement of evidence[1] regarding the unrecorded telephonic pretrial conference. In this petition to stay, Allen argued:

> 6. In the Affidavit submitted with the [statement of evidence], Allen's Counsel, Judson G. McMillin, swears that during the telephonic pretrial conference, the trial court and the parties, at the suggestions of the trial court, agreed that there was no need for an additional hearing due to the fact that the judge indicated there was no need for any additional evidence to be put on the record. Furthermore, the parties and the trial court agreed that it appeared the Indiana Supreme Court's order simply required the

[1] Indiana Appellate Rule 31 governs the use of a statement of evidence when no transcript is available and provides:

> A. Party's Statement of Evidence. If no Transcript of all or part of the evidence is available, a party or the party's attorney may prepare a verified statement of the evidence from the best available sources, which may include the party's or the attorney's recollection. The party shall then file a motion to certify the statement of evidence with the trial court or Administrative Agency. The statement of evidence shall be submitted with the motion.
>
> B. Response. Any party may file a verified response to the proposed statement of evidence within fifteen (15) days after service.
>
> C. Certification by Trial Court or Administrative Agency. Except as provided in Section D below, the trial court or Administrative Agency shall, after a hearing, if necessary, certify a statement of the evidence, making any necessary modifications to statements proposed by the parties. The certified statement of the evidence shall become part of the Clerk's Record.
>
> D. Controversy Regarding Action of Trial Court Judge or Administrative Officer. If the statements or conduct of the trial court judge or administrative officer are in controversy, and the trial court judge or administrative officer refuses to certify the moving party's statement of evidence, the trial court judge or administrative officer shall file an affidavit setting forth his or her recollection of the disputed statements or conduct. All verified statements of the evidence and affidavits shall become part of the Clerk's Record.

> judge to issue a new order that complied with the Supreme Court's Order.
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> 7. Following the telephonic pretrial conference, the trial court issued a 69-page Order denying Brian Allen's expungement for the second time. The trial court included evidence that the parties neither discussed, nor had an opportunity to rebut, despite the fact that the petitioner had requested a hearing.
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> * * * * *
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> 9. Counsel submit that staying this matter and remanding to the trial court for an evidentiary proceeding would promote judicial economy and is necessary for the administration of justice.
>
> 10. Specifically, this Court would not need to spend time deciding issues based on an incomplete record, and Brian Allen would have a fair opportunity to rebut the evidence that the trial court relied upon to reach its decision, which is necessary for the administration of justice and fundamental fairness.

(*Id*. at 87-8.) On April 6, 2021, the trial court set a hearing for May 14, 2021, on Allen's verified statement of evidence of the unrecorded telephone pretrial conference, indicating that it "may hear additional evidence in this matter as permitted by law, and as agreed by the parties." (*Id*. at 98.) On April 15, 2021, this court granted Allen's motion to stay appeal and remand to the trial court for further proceedings. In our order, we also required the trial court to "either certify the Statement of Evidence pursuant to Appellate Rule 31(C) or file with the Dearborn Circuit or Superior Courts Clerk an affidavit pursuant to Appellate Rule 31(D)." (*Id*. at 96.)

[5] On May 14, 2021, the trial court held a hearing and permitted Allen to supplement the record by testifying on his behalf and presenting the testimony of his wife "regarding Mr. Allen's life improvements and the possible benefits of receiving an expungement." (*Id.* at 98.) On May 21, 2021, the trial court issued an order in which it found Allen's testimony "regarding his lack of memory regarding these significant events [was] not credible" and noted other testimony "was similar to that previously presented at the April 1, 2019 hearing." (*Id.*) Based thereon, the trial court confirmed its previous order denying Allen's petition for expungement and denied Allen's motion to reconsider. The same day, Allen filed a motion with this court to hold the appeal in abeyance; he contemporaneously filed a motion to transcribe the May 14, 2021, hearing. On May 26, 2021, this court granted Allen's motion to hold the appeal in abeyance and ordered the Dearborn County Circuit and Superior Courts Clerk to file a transcript of the May 14, 2021, hearing within thirty days of our court's order.

Discussion and Decision

[6] Generally, we review the denial of a petition for expungement for an abuse of discretion. *Kelley v. State*, 166 N.E.3d 936, 937 (Ind. Ct. App. 2021). An abuse of discretion occurs if the trial court's decision is clearly against the facts and circumstances before it. *Id.* In our review, we do not reweigh evidence or otherwise "substitute our judgment for that of the trial court." *W.R. v. State*, 87 N.E.3d 30, 33 (Ind. Ct. App. 2017). Allen argues the trial court abused its discretion when it denied his petition for expungement because "it failed to

properly take into consideration Allen's overall good character, and further failed to give appropriate weight to Allen's rehabilitation following this serious, but isolated criminal act." (Br. of Appellant at 22.)

[7] Under Indiana Code section 35-38-9-4(e), a trial court may order a person's criminal record expunged:

> (e) If the court finds by a preponderance of the evidence that:
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> (1) the period required by this section has elapsed;
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> (2) no charges are pending against the person;
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> (3) the person has paid all fines, fees, and court costs, and satisfied any restitution obligation placed on the person as part of the sentence; and
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> (4) the person has not been convicted of a felony or misdemeanor within the previous eight (8) years (or within a shorter period agreed to by the prosecuting attorney if the prosecuting attorney has consented to a shorter period under subsection (c))

However, pursuant to Indiana Code section 35-38-9-4(b)(3), a "person convicted of a felony that resulted in serious bodily injury to another person" is not eligible for expungement of their criminal record.

[8] In *Allen*, our Indiana Supreme Court was asked to interpret Indiana Code section 35-38-9-4(b)(3). *Allen*, 159 N.E.3d at 583. The State argued Allen was not eligible for expungement because, even though he was convicted of a crime

that did not have serious bodily injury as an element, the facts of Allen's crime included serious bodily injury to the Pohlgeers. *Id.* Our Indiana Supreme Court determined, based on the plain language of the statute:

> While Allen was charged with crimes that involved bodily injury to another person (e.g., aggravated battery and battery with a deadly weapon), those charges were dismissed when he pled guilty to conspiracy to commit burglary. Conspiracy to commit burglary doesn't result in bodily injury to another person. Allen isn't excluded from eligibility for expungement under the SBI [serious bodily injury] Exclusion because he wasn't "convicted of a felony that resulted in serious bodily injury to another person." I.C. § 35-38-9-4(b)(3).

Id. at 584. The Court concluded Allen was eligible for expungement, but it noted his eligibility was not the end of the analysis:

> Because the Permissive Expungement Statute excludes from eligibility persons convicted of certain offenses, but vests in the court discretion to either grant or deny a petition, a trial court should engage in a two-step process when considering a petition for expungement. First, a court must determine whether the conviction is eligible for expungement and the petitioner has met the requirements. I.C. §§ 35-38-9-4(b), -4(e). If the conviction is ineligible, the inquiry ends there. But if the court determines that the conviction is eligible for expungement, it must then collect enough information to determine whether it should grant or deny the petition. In issuing its decision, a trial court may consider a broad array of information, including the nature and circumstances of the crime and the character of the offender.

Id. at 585-6. Further, our Indiana Supreme Court held "a trial court, when deciding whether to exercise its discretion, is not prohibited from considering

the facts of the incident leading to the conviction - even if the conviction itself doesn't require proof of those facts." *Id*. at 585. Noting the trial court below did not "articulate why it denied Allen's petition[,]" our Indiana Supreme Court reversed the trial court's order denying Allen's petition for expungement and remanded for the trial court to exercise its discretion as to whether Allen's conviction should be expunged. *Id*. at 586.

[9] On February 4, 2021, the trial court denied Allen's petition for expungement. The court confirmed that denial on May 21, 2021, after the trial court received additional testimony from Allen and Allen's wife. The trial court's decision, as noted *supra*, examined the circumstances of the crime and Allen's involvement in the criminal incident from which his conviction stemmed. The trial court recognized Allen did not participate in the attack on the Pohlgeers insofar as striking any blows, but also noted his inaction in obtaining medical help for Mr. Pohlgeer, who Allen saw "bleeding like a stuck pig" and "on his hands and knees" in a "pile of blood[.]" (App. Vol. III at 5.) The trial court recognized the "positive evidence" presented on Allen's behalf, but the trial court ultimately determined "some crimes are too awful to warrant expungement, and this is one of those crimes." (*Id*. at 7.)

[10] Allen argues that the trial court did not give sufficient weight[2] to the rehabilitative efforts Allen has made since his conviction, which our Indiana Supreme Court noted in its decision:

> At the hearing on his petition, the court heard testimony from Allen on his commitment to work and to his wife and two children. The expungement, he testified, would permit him to advance his career, to "do a better job of being able to provide for [his] family," and to teach his children responsibility. The court also admitted into evidence letters of recommendation from Allen's brother-in-law, his coworker, and a doctor - each of whom attested to Allen's good character and strong work ethic. And while neither of the Pohlgeers attended the expungement hearing, the court considered their testimony from other sources. Larry Pohlgeers, who had passed away, opined at an earlier sentence-modification hearing that Allen "should be given a break" since he'd "learned his lesson." For her part, Judith Pohlgeers informed a victims' advocate that she "was in agreement with Mr. Allen's conviction being expunged in this matter."

Allen, 159 N.E.3d at 582. Allen's argument is an invitation for us to reweigh the evidence, which we cannot do. *See W.R.*, 87 N.E.3d at 33 (Ind. Ct. App.

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[2] Allen argues his rehabilitative efforts should have been given more weight by the trial court because "expungement statutes must be liberally construed . . . [as to apply] the remedial nature and purpose of expungement, which is to promote redemption and rehabilitation." (Br. of Appellant at 26.) In support of that argument, Allen relies upon *Ball v. State*, 165 N.E.3d 130 (Ind. Ct. App. 2021), in which our court stated, "expungement statutes are inherently remedial and, as such, should be liberally construed to advance the remedy for which they were enacted." *Id*. at 136. We acknowledge and agree with the statement in *Ball* and the precedent upon which it relies, and we note that liberally construing a statute does not mean increasing the weight of any factor presented for consideration or lessening the discretion assigned to the trial court in expungement cases. Further, we note that some of the factors to be consider in the case before us, i.e., the violent nature of the underlying incident, were not present in *Ball*. *See Ball*, 165 N.E.3d at 135 (noting Ball's crime was not violent in nature).

2017) (appellate court does not reweigh evidence in expungement cases). The trial court's findings make clear that it considered the nature and circumstances of Allen's crime and Allen's character, including his rehabilitation efforts since his conviction, and in light of those findings we conclude the trial court did not abuse its discretion when it denied Allen's petition for expungement. *Cf. Ball v State*, 165 N.E.3d 130, 139 (Ind. Ct. App. 2021) (reversing denial of petition for expungement of two convictions of Class C felony burglary because the trial court abused its discretion by citing reasons for expungement that were improper and ignoring significant rehabilitative efforts by Bell in the twenty years since the non-violent crimes occurred).

Conclusion

[11] The trial court did not abuse its discretion when it denied Allen's petition for expungement. We accordingly affirm the decision of the trial court.

[12] Affirmed.

Brown, J., and Pyle, J., concur.