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I N T H E
C O U R T O F A P P E A L S O F I N D I A N A

Deon Willford,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

December 6, 2022

Court of Appeals Case No.
21A-XP-2426

Appeal from the
Marion Superior Court

The Honorable
James B. Osborn, Judge

The Honorable
Hugh Patrick Murphy, Magistrate

The Honorable
Ross F. Anderson, Magistrate

Trial Court Case No.
49D21-2102-XP-5021

Shepard, Senior Judge.

- [1] Under Indiana’s statutes about expungement of convictions, those that resulted in serious bodily injury may be expunged only if the prosecutor has consented. In Deon Willford’s case, the trial court denied his petition for expungement, holding that it was barred by lack of prosecutorial consent.
- [2] Concluding that Willford’s conviction was not of the type that requires the State’s consent, we reverse the court’s denial of Willford’s petition to expunge his battery conviction and remand for consideration on the merits.

Facts and Procedural History

[3] In October 2006, Willford hit a man with his automobile. The State charged him with battery as a Class C felony¹ and failure to stop at the scene of a personal injury accident as a Class A misdemeanor. Trial to the bench in February 2007 yielded judgments of guilty on both counts. In February 2021, Willford petitioned to expunge his battery conviction. Following a hearing, the court determined that, without consent from the State, Willford was not entitled to expungement. Willford appeals this determination.²

[4] The language of the court's order denying expungement left us in doubt about whether it had made a finding that resultant serious bodily injury was proven at Willford's trial. Accordingly, we retained jurisdiction and requested the trial court to issue a revised order indicating whether resultant serious bodily injury was proven at Willford's trial based on the evidence before the court during the expungement hearing. We have received the trial court's response and proceed with a determination of Willford's appeal on the merits.

Issue

[5] Willford contends that expungement of his battery conviction does not require prosecutorial consent because his offense did not involve serious bodily injury.

¹ Indiana Code section 35-42-2-1 (2005).

² We held oral argument in this case on September 12, 2022 in the Court of Appeals courtroom. We thank counsel and amicus for their advocacy.

Discussion and Decision

- [6] Since 2013, Indiana has allowed people to clean up their criminal history by expunging certain convictions, and recently this topic has garnered a good deal of attention. *See, e.g.*, Eric J. Weitzel, *Fresh Start? Indiana Expungements*, RES GESTAE, July/August 2022, at 36.
- [7] Certain felony convictions are eligible for expungement if specific criteria are met. Depending on the felony, a petitioner must wait either eight or ten years after the conviction to petition for expungement with no convictions during that time, have no pending charges, and have satisfied all monetary obligations. In particular circumstances, as delineated in Section 35-38-9-5, prosecutorial consent is required for the expungement. Additionally, certain felony offenses are completely barred from expungement, including sex crimes and felonies that result in the death of another person.
- [8] Generally, we review the denial of a petition for expungement for an abuse of discretion. *Kelley v. State*, 166 N.E.3d 936 (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.* However, this appeal turns on the interpretation of a statute, and, as such, it presents a question of law that we review de novo. *Montgomery v. State*, 878 N.E.2d 262 (Ind. Ct. App. 2007).
- [9] Criminal statutes must be construed strictly against the State with ambiguities resolved in favor of the defendant. *Chastain v. State*, 58 N.E.3d 235 (Ind. Ct. App. 2016), *trans. denied*. They should not be enlarged by construction beyond

their fair meaning; yet they should not be so narrowly construed as to exclude cases they fairly encompass. *Id.*

[10] As we noted above, the crux of this case is whether the felony of which Willford was convicted is a felony “that resulted in serious bodily injury to another person.” Two statutes governing the conditions required for expungement of conviction records are at the heart of this issue. The first entitles an applicant to expungement of higher level felonies if the conditions just mentioned have been met. It does not apply to persons convicted of a felony that resulted in serious bodily injury and does not require the prosecutor’s consent. *See* Ind. Code § 35-38-9-4 (2019). The second statute applies to other high level felonies, such as those resulting in serious bodily injury, and permits expungement only upon prosecutorial consent. *See* Ind. Code § 35-38-9-5 (2019).

[11] Here, Willford petitioned to expunge his battery conviction pursuant to Section 35-38-9-4. He argues that expungement of his conviction does not require prosecutorial consent because he was not charged with battery causing serious bodily injury but rather with battery by means of a deadly weapon (i.e., an automobile). A review of the applicable battery statute will prove helpful. At the time Willford committed the offense, the battery statute provided:

(a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery. The offense is

(3) a Class C felony if it results in serious bodily injury to any other person **or** if it is committed by means of a deadly weapon.

Ind. Code § 35-42-2-1 (emphasis added). Willford contends that where clauses are joined by the use of the conjunction “or,” the word “either” is implied. Applying this principle to the battery statute results in the following: the offense is a Class C felony if it *either* results in serious bodily injury to any other person *or* if it is committed by means of a deadly weapon. The State charged Willford only with committing the offense by means of a deadly weapon:

Deon Willford, on or about October 6, 2006, **by means of a deadly weapon**, that is: a 1988 blue, two-door Oldsmobile, did knowingly touch Stephen Jackson in a rude, insolent, or angry manner, that is: struck Stephen Jackson with the vehicle.

Appellant’s App. Vol. 2, p. 2 (emphasis added).

[12] Willford further claims that even if the resulting injury is taken into account, his offense resulted in only ordinary injury. At the expungement hearing, the court took judicial notice of the probable cause affidavit, which stated that the victim’s mouth was bleeding, and he complained of knee and hip pain but refused medical treatment. *Id.* at 5. Yet, the court denied expungement, stating:

The charge was pled as Battery with the deadly weapon element, and ordinary injury was also alleged.

Without consent by the State, P[etitioner] is not entitled to relief of expungement of this conviction.

Id. at 22.

[13] For its part, the State asserts that the burden is on the expungement-seeking defendant to show that the felony conviction did not result in serious bodily injury and that Willford did not meet this burden.

[14] In the course of this appeal, the Indiana University Robert H. McKinney School of Law Civil Practice Clinic was granted leave to appear as amicus curiae in support of Willford. Citing *Noble v. State* for support, amicus contends that the battery statute under which Willford was convicted contains two separate and distinct offenses—one requires proof of resulting serious bodily injury, the other requires proof of commission by a deadly weapon. 734 N.E.2d 1119 (Ind. Ct. App. 2000) (stating that although the two offenses in Section 35-42-2-1(a)(3) are similar, they each contain one element the other offense does not—one focuses upon the result of a touch and requires proof of resulting injury, and the other focuses upon the means used to accomplish a touch and requires proof of commission by a deadly weapon; consequently, they are separate and distinct offenses), *trans. denied*. Amicus asserts that Willford was not convicted of a crime that resulted in serious bodily injury but rather was charged with and convicted of battery by means of a deadly weapon, and thus he was correct to petition for expungement under Section 35-38-9-4.

[15] As earlier noted, we were unable to discern whether the trial court had made a finding that resultant serious bodily injury was proven at Willford's trial. On

request from this Court, the trial court reviewed the evidence from the expungement hearing and issued a revised order. It states the court “finds no indication from the available record that serious bodily injury was proven” at Willford’s trial. Amended Notice of Completion of Clerk’s Record p. 2 (Revised Order on Deon Willford’s Petition to Expunge).

[16] While the expungement statutes do not expressly place the burden of proof with the petitioner, we have consistently held that the petitioner bears the burden of proof when requesting the expungement of his record. *State v. Sotos*, 558 N.E.2d 909 (Ind. Ct. App. 1990), *trans. denied* (1991). Thus, it follows that in cases like this one, once the State raises the issue of its consent to an expungement, the defendant must persuade the court that the exceptions of Section 35-38-9-4(b) do not apply. As disclosed by the trial court’s revised order, Willford’s battery conviction did not result in serious bodily injury and thus the exception set forth in Section 35-38-9-4(b)(3) does not apply. Accordingly, he may proceed with his petition to expunge under Section 35-38-9-4(e).

Conclusion

[17] We conclude that the trial court erred by denying Willford’s petition to expunge his battery conviction and remand for further proceedings.

[18] Reversed and remanded.

Bradford, C.J., and Riley, J., concur.