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Loder v. Municipal Court, 43 Cal. App. 3d 231, 117 Cal. Rptr. 533 (1974)

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Joseph Loder was arrested and charged with disturbing the peace, battery, and resisting arrest for attacking a police officer who was clubbing Mrs. Loder. Under a covenant not to sue, the charges against him were dismissed. Loder then petitioned for a writ of mandate to have the record of his arrest removed from the police files. The petition was denied. The Court of Appeals affirmed.[1]

Loder was not rehired when information of his arrest was given to the San Diego Unified School District pursuant to California Education Code sections 13169.2 and 13588.[2] The court noted that his absenteeism may have been a factor in this decision. Loder's claim that the dissemination of his arrest record was an unconstitutional invasion of his privacy was rejected in a summary manner by the court. "The sealing of an arrest record is a matter of legislative grace; the court has no power to seal or expunge the record unless there is statutory authorization."[3]

The current statutory scheme for the sealing of arrest and conviction records in California extends only to juvenile offenders and defendants convicted of misdemeanors committed while under the age of eighteen.[4] A minor who has been adjudged a ward or dependent child of the court, or has been taken before a probation officer, or any other law enforcement officer may, after five years or upon reaching majority, petition the court to seal all records of the case. This relief will only be granted where the person has not, since the termination of jurisdiction, been convicted of a felony

1. Loder v. Municipal Court, 43 Cal. App. 3d 231, 117 Cal. Rptr. 533 (1974) [hereinafter *Loder*].

2. CAL. ED. CODE § 13169.2 (West 1969) authorizes the State Bureau of Criminal Identification and Information (C.I.I.) to furnish all information pertaining to any applicant to the State Board of Education. CAL. ED. CODE § 13588 (West 1969) provides for the transfer of records of arrest or conviction of applicants to the local school district.

3. 43 Cal. App. 3d at 233, 117 Cal. Rptr. at 533.

4. CAL. PEN. CODE §§ 1203.4, 1203.4a, 851.7 (West 1970). *See* Baum, *Wiping Out a Criminal or Juvenile Record*, 40 CAL. J. ST. B. 816, 828-29 (1965) for an outline of the statutory scheme in California.

or any misdemeanor involving moral turpitude and has been rehabilitated to the satisfaction of the court.[5] The effect of "sealing" is to completely erase the events themselves. The proceedings are "deemed never to have occurred and the person may respond accordingly to any inquiry about the events, records of which are sealed."[6]

A juvenile who is merely arrested for a misdemeanor may also have his records sealed if he is released, acquitted, or if the charges are dismissed, unless the arrest was for a sex offense requiring registration, a narcotics offense under Division 10 of the Health and Safety Code, or a traffic violation.[7] A recent holding has extended this relief to persons convicted of a misdemeanor under Division 10 of the Health and Safety Code if the offense is not "punishable as a felony" under § 11362 of the Health and Safety Code.[8] Sealing is also available to a defendant who is convicted of a misdemeanor, committed while under the age of eighteen, who has fulfilled the conditions of his probation or has complied with the sentence of the court.[9]

Another type of relief, commonly referred to as "expungent," is available to an adult convicted of a crime who has fulfilled the conditions of his parole[10] and to a defendant convicted of a misdemeanor committed while under the age of eighteen who has complied with the sentence of the court.[11] The defendant is permitted to withdraw his plea of guilty and enter a plea of not guilty, or the court will set aside a verdict of guilty. Thereupon, the court dismisses the accusation or information against the defendant and releases him from all penalties and disabilities resulting from his conviction.[12]

Expungement is not nearly as extensive as the relief granted to juveniles under the sealing statutes.[13] Although many of the for-

5. CAL. WELF. & INST. CODE § 781(a) (West 1972).
6. CAL. WELF. & INST. CODE § 781(a) (West 1970).
7. CAL. PEN. CODE § 851.7 (West 1970).
8. People v. Ryser, 40 Cal. App. 3d 1, 5, 114 Cal. Rptr. 688, 670 (1974).
9. CAL. PEN. CODE § 1203.45 (West 1970).
10. CAL. PEN. CODE § 1203.4 (West 1970).
11. CAL. PEN. CODE § 1203.4a (West 1970).
12. CAL. PEN. CODE §§ 1203.4, 1203.4a (West 1970).
13. *See* Booth, *The Expungement Myth*, 38 L.A. BAR BULL. 161, 163 (1963), "[U]nless he is under [eighteen] at the time of the offense, the expungement process offers little more than mythical benefits."

mal disabilities created by law for convicted felons are removed, the conviction may nevertheless be used in proceedings under professional and occupational licensing laws.[14] The statutes, by their terms, allow use of the conviction in a subsequent criminal proceeding against the defendant.[15] The real disability not eliminated by expungement is the stifling effect of the conviction on chances for employment and economic advancement.[16]

Unlike the sealing provisions relating to juveniles, the expungement statutes do not permit a person to deny that he was arrested or convicted when asked by prospective employers.[16a] The sealing laws related to juveniles contemplate that the records of the case be returned to the juvenile court for safekeeping or be destroyed in order to protect the juvenile from unauthorized disclosure.[17] The "expungement" of records with respect to adults provides no procedure for reporting the dismissal entered pursuant to Penal Code § 1203.4 to the State Bureau of Criminal Identification and Investigation.[18]

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14. *In re* Phillips, 17 Cal. 2d 55, 109 P.2d 344 (1951) (disbarment); Meyer v. Medical Board, 34 Cal. 2d 62, 206 P.2d 1085 (1949) (suspension by state Medical Board); CAL. BUS. & PROF. CODE § 117 (West 1974).

15. CAL. PEN. CODE § 1203.4a (West 1970).

16. A survey by the New York Civil Liberties Union indicated that 75% of New York area employment agencies would not accept for referral an applicant with an arrest record. Another survey of 75 employers indicated that 66 of them would not consider employing a man who had been arrested for assault and acquitted. Schwartz and Skolnik, *Two Studies of Legal Stigma*, 10 SOCIAL PROB. 133 (1962).

16a. *See* In Re Phillips, 17 Cal. 2d 55, 109 P.2d 344 (1941), in which the Supreme Court rejected the petitioner's argument that the action taken under Penal Code section 1203.4 operated to set aside the judgment of conviction so that there was never a final judgment upon which the Court could have based its order of disbarment. "[I]t cannot be assumed that the legislature intended that such action by the trial court under section 1203.4 should be considered as obliterating the fact that the defendant had been finally adjudged guilty of a crime. . . . That final judgment of conviction is a fact; and its effect cannot be nullified for the purpose here involved, disbarment either by the order of probation or by the later order dismissing the action after judgment." The courts have not considered whether a person convicted of a misdemeanor can deny that fact when asked. Since there are no penalties or disabilities attached to the conviction of a misdemeanor, the expungement statutes would be of no practical effect to a person whose misdemeanor conviction was expunged thereunder.

But see 1 OPS. CAL. ATTY. GEN. 611 (1943) in the case of an applicant for a real estate license whose conviction of a felony had been expunged, the Attorney General indicated that the applicant must answer "yes" in response to a question which asked whether he had ever been convicted of any violation of law. However, the applicant is free to add that the conviction was expunged pursuant to the relevant section of the Penal Code.

17. T.N.G. v. Superior Court, 4 Cal. 3d 767, 778, n.12, 484 P.2d 981, 987, n.12, 94 Cal. Rptr. 813, 819, n.12 (1971).

18. 36 OPS. CAL. ATTY. GEN. 1 (1960).

A further provision of the Penal Code allows a peace officer to release a person arrested without a warrant before taking him to a magistrate, if the officer is satisfied that there is no ground for a criminal complaint. Such a detention is not deemed an arrest and the record must so disclose.[19] However, there is no further provision for sealing, obliterating, or preventing dissemination of such records.

An adult who is arrested and subsequently exonerated has no right under the law of California to require that his fingerprints, photographs, or other criminal identification or arrest records be expunged, or that their dissemination be restricted.[20] The courts of California have declined to grant relief on the grounds that the question whether such records should be expunged or restricted is particularly within the province of the legislature and that, in the absence of authorization from the latter, the court is powerless to grant relief.[21] Relief was denied in *Loder* on this basis.[22] The court rejected, without any serious consideration, the contention that dissemination of the petitioner's arrest record was an unconstitutional invasion of his right to privacy.[23]

The recent California decision in *People v. Ryser*[24] was relied upon.

> (T)he perpetrator of a public offense may not characterize the public consequences of arrest and conviction as an invasion of a *constitutionally* protected right of privacy.[25]

Ryser involved the petition of a juvenile to seal the records of his conviction for a misdemeanor. When an individual is exonerated, rather than convicted, the determination whether privacy has been invaded requires analysis based upon other considerations.

The Supreme Court of the United States first held that there was a constitutional right to privacy in *Griswold v. Connecticut.*[26] The court, in giving substance to this right, held that the right to

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19. CAL. PEN. CODE § 849 (West 1974).
20. Sterling v. Oakland, 208 Cal. App. 2d 1, 4, 24 Cal. Rptr. 696, 698 (1962).
21. People v. Ryser, 40 Cal. App. 3d 1, 114 Cal. Rptr. 668 (1974).
22. 43 Cal. App. 3d at 233, 117 Cal. Rptr. at 533.
23. *Id.* 117 Cal. Rptr. at 534.
24. 40 Cal. App. 3d 1, 114 Cal. Rptr. 668 (1974).
25. 43 Cal. App. 3d at 233, 117 Cal. Rptr. at 534.
26. 381 U.S. 479 (1965).

privacy is so rooted in the traditions and conscience of our laws that it is a fundamental right.[27]

The courts of other jurisdictions have concluded that the retention or dissemination of the arrest record of one who has been exonerated is an unconstitutional invasion of privacy and that such record should be expunged or returned when the harm to the individual's right to privacy or the dangers of unwarranted adverse consequences outweigh the public interest in retaining the records.[28]

There is a direct correlation between the loss of privacy and the retention of the arrest records as an exonerated person. His privacy and dignity as a human being is invaded so long as the government keeps his records in a criminal identification file.[29] This information, labeled as a record of arrest, may subject the individual to serious difficulties if it becomes known. Opportunities for education, employment, and professional licenses may be restricted or non-existent.[30] The decision of the school district not to re-hire Loder is a case in point. A further consequence is the exhibition of the arrestee's photograph to other citizens in a rogue's gallery of the kind commonly used by police to identify potential suspects.[31] Increased police scrutiny and the extrajudicial consequences resulting from an arrest record are substantial invasions of privacy and must rest upon a showing of compelling necessity by the state for their retention.[32]

The public interest in effective law enforcement requires the retention of criminal records. Upon arrest, the right of privacy of the accused is outweighed by the necessity of protecting society, no matter how mistaken the arrest may have been.[33]

However, when he is exonerated, no public good is accomplished by the retention of these records. The value of the records depends upon whether the accused did in fact commit the crime. When he is exonerated the reason for retaining the records no longer exists.[34]

The consequences of Joseph Loder's arrest record on his employ-

27. *Id.* at 487 (concurring opinion).
28. Kowall v. United States, 53 F.R.D. 211 (D.C.P.R. 1971); United States v. Kalish, 271 F. Supp. 968, 970 (D.C. Mich. 1967). Davidson v. Dill, 503 P.2d 157 (Colo. 1972); Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211, Annot., 46 A.L.R.3d 889 (1971).
29. United States v. Kalish, 271 F. Supp. 968, 970 (1967).
30. Kowall v. United States, 53 F.R.D. 211, 214-215 (1971).
31. Eddy v. Moore, 5 Wash. App. 334, 338, 487 P.2d 211, 216 (1971).
32. 5 Wash. App. at 338, 487 P.2d at 217.
33. 271 F. Supp. at 970.
34. 5 Wash. App. at 338, 487 P.2d at 216.

ment amply demonstrates the degree to which an individual's privacy may be infringed by police retention of arrest records.

The legislature is the most appropriate agency for devising a scheme to balance the rights of society against the invasion of the individual's right to privacy. However, it is the function of our courts to hold the line against an assault upon privacy where the legislature has failed to act.

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