COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-506

COMMONWEALTH

vs.

A.G.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, A.G., appeals from a District Court judge's order denying his petition for expungement. See G. L. c. 276, § 100K. In this appeal, A.G. maintains that he did not receive an adequate hearing and that the judge erred by concluding that the record did not support a finding that there had been "demonstrable errors by law enforcement." G. L. c. 276, § 100K (a) (3). We affirm.

Background.[1] A.G. was charged with assault and battery, see G. L. c. 265, § 13A (a), on September 5, 2006, for allegedly pushing his mother. The day had been marked by a series of escalating disputes between A.G.'s mother, sister, and ex-wife.

[1] Because A.G.'s record was sealed at the time of the expungement hearing, we recount only those facts apparent from the record submitted by A.G., including his affidavit appended to his petition for expungement.

According to his affidavit, A.G. called the police three times to request their assistance in calming the situation and to remove his sister from the house as she became increasingly hostile to him and his ex-wife. A police officer informed A.G. during the first response that he could not force his sister to leave because it was his mother's house, and during the second response told A.G. that he could not do so because there had been no physical altercation. After A.G.'s third call to the police, two additional police officers joined the first officer to respond a third time and interviewed the parties separately before arresting A.G. By that time, A.G.'s sister had fled, but his mother told the officers that A.G. had pushed the mother. A.G.'s affidavit states that he acted in self-defense: "Not in control of her actions and having a clinical diagnosis of being bi-polar my mother then proceeded to attack me . . . . I defended myself by restraining her to mitigate her frontal assault on my person."

The court dismissed the charge on December 4, 2006, for failure to prosecute. The defendant succeeded in petitioning the court to seal the case on August 29, 2008. See G. L. c. 276, § 100C. On March 25, 2019, A.G. filed a petition to expunge his record, contending that police had made a demonstrable error in not arresting his sister or issuing an all-persons bulletin for her apprehension. He further contended

that the police erred in arresting him for assaulting his mother, because no such assault occurred and he had, in fact, made repeated attempts to summon aid and obtain assistance from the police. In addition, he claimed that the Commonwealth declined to prosecute the case after reading his description of the surrounding circumstances. Following a hearing the next day, the court denied A.G.'s petition for expungement because an arrest for assault and battery was a "judgment call," not "the kind of demonstrable error contemplated by the statute."

Discussion. 1. Due process. A.G. contends that he did not receive the process due him in the hearing on his petition for expungement, because the judge refused to consider A.G.'s sealed record and denied A.G.'s petition for expungement without having a copy of the statute available.

A.G.'s right to due process was not violated. A.G. requested and promptly received a hearing. See G. L. c. 276, § 100K (b) ("the court shall hold a hearing if requested by the petitioner or the district attorney"). At the hearing, the motion judge properly noted that, because A.G.'s record was sealed, he could not open the file to the parties to consider matters in the sealed file.[2] See Pixley v. Commonwealth, 453

[2] A.G. has since successfully petitioned to unseal his record. This memorandum and order is without prejudice to A.G.'s right to file a new petition for expungement and to present the newly unsealed record at that time.

Mass. 827, 836 n.12 (2009) ("A document is normally ordered 'sealed' when it is intended that only the court have access to the document"). The judge did look at some portion of the file, as he was entitled to do, see id., and determined that the case had not been dismissed immediately and was in fact dismissed on a scheduled trial date. A.G. had the docket and told the judge that he had the police reports, which he did not submit on appeal and appear not to have been given to the motion judge. The judge indicated that it was unlikely that there would be more in the file, and informed A.G. of his appeal rights, how to go about unsealing and resealing the record, and his right to petition the commissioner of probation. The judge adhered to the requirements of the sealing statute.

The motion judge also stated that the law was so new that it was "not even in the binder of laws I have up here." However, the judge correctly analyzed the applicable bases for expungement set forth in G. L. c. 276, § 100K, which were set forth on the face of the petition and on the findings used by the judge.[3] The judge was fully aware of the statutory requirements and applied the factors to A.G.'s case.

[3] These reasons include: "(1) false identification of the petitioner or the unauthorized use or theft of the petitioner's identity; (2) an offense at the time of the creation of the record which at the time of expungement is no longer a crime, except in cases where the elements of the original criminal offense continue to be a crime under a different designation;

2. Demonstrable error. A judge has discretion to expunge a criminal record only, as applicable here, "if the court determines based on clear and convincing evidence that the record was created as a result of . . . demonstrable errors by law enforcement." G. L. c. 276, § 100K (a). Then, and only then, will the judge decide whether to expunge the record "based on what is in the best interests of justice." G. L. c. 276, § 100K (b). On this limited record, the judge was entitled to find that A.G. had not produced clear and convincing evidence of demonstrable error by law enforcement. A.G.'s mother told police that he pushed her. Although A.G. told the police that the act had been in self-defense, the mother's report provided probable cause for arrest, and the officers were not required to credit his version of events.[4] See Commonwealth v. Geordi G., 94 Mass. App. Ct. 82, 85 (2018) (probable cause for assault complaint based on police report in which two witnesses described defendant "pushing" victim). The fact that the

---

(3) demonstrable errors by law enforcement; (4) demonstrable errors by civilian or expert witnesses; (5) demonstrable errors by court employees; or (6) demonstrable fraud perpetrated upon the court." G. L. c. 276, § 100K (a).

[4] "The crime of an intentional assault and battery requires proof that the [defendant] touched the victim without having any right or excuse to do so[,] that [his] touching of the victim was intentional[,] [and that] the touching was with such violence that bodily harm is likely to result (harmful battery), or occurred without the victim's consent (offensive battery)" (quotations and citations omitted). Commonwealth v. Geordi G., 94 Mass. App. Ct. 82, 85 (2018).

Commonwealth later declined to prosecute does not in and of itself mean that there was demonstrable error. Similarly, the police had the discretion to decide whether to arrest the sister or issue an all-points bulletin for her apprehension. See G. L. c. 209A, § 6 (7). Because A.G. did not establish by clear and convincing evidence that there had been a "demonstrable error[] by law enforcement," the court did not err in denying A.G.'s petition for expungement.

Since we conclude that the record does not support a threshold finding of "demonstrable errors by law enforcement," G. L. c. 276, § 100K (a), we do not reach the question of whether expungement is in the interests of justice.

Order denying petition for expungement affirmed.

By the Court (Sullivan, Blake & Ditkoff, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: June 26, 2020.

[5] The panelists are listed in order of seniority.