

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-661

21-P-663

COMMONWEALTH

vs.

STEVEN PHINNEY.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The petitioner sought and received an order from a District Court judge that expunged from his criminal record for (1) a 2003 conviction for possession of marijuana, and (2) a 2005 conviction for resisting arrest. Fifty-nine days after the expungement order issued, the Massachusetts Probation Service (Probation), which was not named as a party to the expungement proceedings, filed a motion for reconsideration, which the judge granted. The petitioner appeals from the judge's order rescinding the expungement, arguing (1) that the judge should not have considered Probation's reconsideration motion because it was untimely, and (2) that the judge erred in applying the expungement statute, G. L. c. 276, § 100K. We affirm the portion of the judge's order refusing to expunge the resisting

arrest conviction, but we vacate the portion pertaining to the possession of marijuana conviction, and remand for further proceedings consistent with this opinion.

Background. The petitioner was convicted of possession of marijuana in 2003, at age eighteen, and of resisting arrest in 2005, at age twenty. In May of 2020, the petitioner filed a motion to expunge both convictions pursuant to G. L. c. 276, § 100K.¹ In particular, the petitioner argued that because marijuana possession is no longer a crime in the Commonwealth, the possession conviction should be expunged pursuant to § 100K (a) (2); he also argued that the resisting arrest conviction should be expunged in the "best interests of justice," relying on § 100K (b). The petitioner served the

¹ General Law c. 276, § 100K, reads, in relevant part:

"(a) . . . [A] court may order the expungement of a record created as a result of criminal court appearance . . . if the court determines based on clear and convincing evidence that the record was created as a result of:

"(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.

"(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.

"(b) The court shall have the discretion to order an expungement pursuant to this section based on what is in the best interests of justice."

motion to expunge on the district attorney's office, but not on Probation.

The district attorney's office did not respond to the motion. In July of 2020, and prior to any hearing, the judge issued the following ruling: "misdemeanor crime of possession of marijuana is no longer a crime . . . [a]lthough the petitioner's record on this matter is sealed, the Court treats the petition as a motion to unseal record for purposes of expungement under § 100K." The judge also checked boxes on the form order indicating that the petition for expungement was granted based on the best interests of justice. As to the resisting arrest conviction, the judge found that the petitioner "present[ed] a prima facie case," and ordered that the district attorney's office be notified of a scheduled zoom hearing.

On August 10, 2020, the judge held a hearing on the petitioner's motion to expunge. The motion was unopposed, and no representative for the Commonwealth appeared. The judge ruled in a written order that the petitioner was entitled to "time-based expungement" pursuant to G. L. c. 276, § 100G (rather than § 100K),² as to both convictions. On the form

² As noted, the defendant's motion identified § 100K as the basis for expungement, often called "reason-based expungement." In the Matter of Expungement, 489 Mass. 67, 71 (2022). General Laws c. 276, § 100G, provides a different basis for expungement, often termed "time-based expungement." Id. at 69. Section 100G (a) allows a petitioner with fewer than three convictions

order, however, the judge checked boxes for expungement under both § 100G and § 100K.

On October 8, 2020 -- fifty-nine days after the expungement order issued -- Probation filed a "motion for clarification or reconsideration" regarding the expungement order.³ Probation urged the judge to reconsider because time-based expungement under § 100G was not available to the petitioner, since he had not followed the procedures required by § 100G, and could not meet its criteria. Probation further requested that, to the extent that the expungement order was based on § 100K, the judge should clarify the order and make findings as to which § 100K (a) criteria applied. The petitioner opposed Probation's reconsideration motion, arguing that the motion was untimely, and also barred by res judicata.

The judge held a hearing on the reconsideration motion in November of 2020. In his oral ruling, the judge found that he

to petition the commissioner of Probation to expunge his or her criminal record. If the petitioner's record is eligible under § 100G, the commissioner then forwards the petition to the court, following notice to the district attorney's office. G. L. c. 276, § 100G (a)-(b).

³ Probation filed separate, but substantially identical, reconsideration motions for each conviction. Accordingly, we discuss them collectively as a single motion herein. We note, however, that Probation received notice of the respective expungement orders on different dates. Probation received notice regarding expungement of the marijuana conviction on July 21, 2020, and notice regarding expungement of the resisting arrest charge on August 27, 2020 (forty-two days prior to the reconsideration motion).

did not have the authority to grant time-based expungement under § 100G, and that none of the § 100K criteria applied in the petitioner's case. The judge noted that "arguably possession of [marijuana] is no longer a crime, but possession with intent still is." The judge also ruled that he could not grant expungement solely based on the interests of justice, because "that would be an abuse of the Court's authority . . ."

Accordingly, the judge granted the reconsideration motion and rescinded the expungement order.

Discussion. 1. Timeliness of the reconsideration motion.

The petitioner first argues that the judge erred in considering the reconsideration motion, because the motion was untimely.⁴ While we agree that the motion was untimely, the judge in any event had discretion regarding whether to consider the motion, and did not abuse his discretion in doing so.

Generally, a motion to reconsider an order of expungement must be filed within thirty days of the order. See Commonwealth v. Balboni, 419 Mass. 42, 43-44 (1994). Probation did not meet

⁴ The petitioner also argues that the reconsideration motion was barred by res judicata and collateral estoppel. This argument is without merit, because res judicata and collateral estoppel apply when a party attempts to relitigate an issue or claim which was already subject to a final judgment in an earlier case. See Duross v. Scudder Bay Capital, LLC, 96 Mass. App. Ct. 833, 836 (2020). Neither doctrine applies here because there is no earlier case; rather, Probation is seeking reconsideration in the original case.

the thirty-day deadline here, but rather filed its motion fifty-nine days after the final expungement order entered, and forty-two days after it received notice of that order. The thirty-day deadline, however, is not a jurisdictional bar to a motion for reconsideration, and the judge had discretion to consider the motion even though it was untimely. See Commonwealth v. Boe, 456 Mass. 337, 339 n.4 (2010) (considering reconsideration motion filed seventy-four days after expungement order). Given the relatively modest delay here, we cannot say the judge abused his discretion by allowing Probation's reconsideration motion.⁵

2. The application of § 100K. The petitioner also argues that the judge erred in rescinding the expungement order, because the petitioner's convictions were eligible for reason-based expungement under § 100K.⁶ We disagree as to the

⁵ As an additional consideration, we note that Probation was not named as a party to the defendant's motion to expunge, nor was it served with the motion. Even though it was not named, the Supreme Judicial Court has held that Probation has standing in expungement cases, based on its responsibilities set forth in the statute and its "role as record-keeper for criminal records in the Commonwealth." In the Matter of Expungement, 489 Mass. at 73. Indeed, the expungement statute requires that the court provide the commissioner of Probation with notice of the expungement order. G. L. c. 276, § 100K (c). Under circumstances where Probation was not initially served with the motion to expunge, however, the rules applicable to Probation's efforts to gain reconsideration -- including the deadlines for appeal or motions to reconsider -- are less than clear.

⁶ As all parties agree that time-based expungement pursuant to G. L. c. 276, § 100G, is not appropriate here, we do not address the judge's findings on that issue.

expungement of the resisting arrest conviction, but remand for further proceedings as to the marijuana possession conviction.

As set forth above, § 100K allows expungement if a judge first determines that one of the six statutory criteria set forth in subsection (a) is met. See G. L. c. 276, § 100K (a). The petitioner's motion for expungement argued that the marijuana possession conviction was eligible for expungement pursuant to § 100K (a) (2), on the grounds that it was "an offense at the time of the creation of the record which at the time of expungement is no longer a crime . . ." As to the resisting arrest conviction, although it fit within none of the six enumerated categories in § 100K (a), the petitioner requested expungement under § 100K (b), which states that the judge has "discretion to order an expungement pursuant to this section based on what is the best interests of justice."

A recent Supreme Judicial Court decision is dispositive of the petitioner's argument regarding the resisting arrest conviction. In In the Matter of Expungement, 489 Mass. at 75-76, the Court held that subsection (b) of § 100K does not provide a stand-alone basis for expungement. Rather, a judge can only expunge a record under § 100K if the petitioner's record falls within one of the six enumerated categories in § 100K (a), and the judge also finds that expungement is in the "best interests of justice" per § 100K (b). Id. at 76. Here,

the resisting arrest conviction does not fall within one of the six enumerated categories in § 100K (a), and therefore the judge correctly reasoned that the resisting arrest conviction is not eligible for expungement.

As to the marijuana conviction, however, expungement may be available. The petitioner was convicted of "possession of marijuana,"⁷ which in 2003 was a criminal offense. G. L. c. 94C, § 34 (2003). Since the defendant's conviction, the Commonwealth has decriminalized possession of marijuana, as long as the amount possessed was not more than two ounces. G. L. c. 94C, § 32L.⁸ As such, the petitioner's conviction for marijuana possession may be eligible for expungement pursuant to G. L. c. 276, § 100K (a) (2), depending on (1) the quantity of marijuana that he was convicted of possessing, and (2) whether the judge concludes that expungement is consistent with "the best interests of justice" pursuant to § 100K (b).⁹

⁷ The judge may have been under the erroneous impression that the petitioner was convicted of possession with intent to distribute, but the Commonwealth concedes on appeal that the petitioner was convicted of simple possession, second offense.

⁸ "Notwithstanding any general or special law to the contrary, possession of 2 ounces or less of marihuana shall only be a civil offense, subjecting an offender who is 18 to 21 years of age, inclusive, to a civil penalty . . . but not to any other form of criminal or civil punishment or disqualification." G. L. c. 94C, § 32L.

⁹ The petitioner has represented that some of the records pertinent to this conviction were destroyed pursuant to the expungement order, prior to the judge's decision on reconsideration. Under the circumstances, any destruction of

We therefore remand for further proceedings regarding the applicability of \$ 100K to the marijuana conviction.

That portion of the order dated November 19, 2020, allowing reconsideration and rescinding the prior order of expungement of the petitioner's 2005 conviction for resisting arrest, is affirmed. That portion of the order dated November 19, 2020, allowing reconsideration and rescinding the prior order of expungement of the petitioner's 2003 conviction for possession of marijuana, is vacated, and the matter is remanded for further proceedings consistent with this decision.

So ordered.

By the Court (Meade,
Englander & Grant, JJ.¹⁰),



Clerk

Entered: May 12, 2022.

the records should not redound to the detriment of the defendant in the proceedings on remand.

¹⁰ The panelists are listed in order of seniority.