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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO)	
)	Supreme Court Docket No. 45595-2017
)	Kootenai County Docket No. CR-2005-7362
Plaintiff/Respondent)	
)	Supreme Court Docket No. 45596-2017
)	Kootenai County Docket No. CR-2009-7362
vs.)	
)	
JAMES E. MCDAY,)	
)	
Defendant/Appellant)	
_____)	

RESPONDENT'S BRIEF

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I.

STATEMENT OF THE CASE

A. Nature of the Case.

The Idaho State Police, Bureau of Criminal Identification (BCI) issued a declaratory ruling in this case pursuant to IDAHO CODE § 67-3004(10) and Idaho Administrative Code 11.10.02.000 *et seq.* BCI determined that Mr. McDay's criminal history precluded him from the expungement of his criminal history records from BCI's database. On October 14, 2016, BCI issued this decision according to the law that controls the expungement of its criminal records.

Instead of seeking judicial review under a new civil case proceeding, Mr. McDay appealed under his two previous criminal case numbers, which had long since expired for any type of appeal. The district court upheld BCI's determination in the matter, but did not rule on the jurisdictional issue.

B. Relevant Facts and Procedural Background.

Only relevant facts will be addressed for the sake of judicial economy.

Sometime before October 14, 2016, Mr. Mc Day applied to have his criminal history records expunged. R. Vol. 1, p. 14.

On October 14, 2016, BCI issued a Findings of Fact and Conclusions of Law in response to Mr. McDay's request to have his criminal history record(s) expunged. R. Vol. 1, pp. 63-68.¹

¹ No agency record was ever prepared (or paid for by the Petitioner) in this case, as noted by Judge Mitchell. R. Vol. 1 pp. 318-325. To the extent an agency record is found, it would consist of the documents submitted by Mr. McDay in support of his expungement request and the agency's determination that he was ineligible for expungement as noted above.

BCI determined that Mr. McDay did not qualify for expungement of his criminal history records according to the facts of his case. *Id.*

On October 24, 2016, Mr. McDay filed a Notice of Appeal to Expunge in (only) criminal case number, CR-2005-0007362. R. Vol. 1 p. 9 and an Affidavit Statement for both criminal case numbers CR-2005-0007362 and CR-2009-6228. R. Vol. 1, pp. 7-8.

On November 4, 2016, the Kootenai County Prosecutor's Office filed an objection to Mr. McDay's appeal stating Mr. McDay had already been denied an expungement by Judge Stow on November 8, 2010 and the time to appeal had passed. R. Vol. 1, pp. 15-16.

On December 7, 2016, Mr. McDay filed a Motion for Judgment of Acquittal in both criminal cases. R. Vol. 1, pp. 26-28.

On December 30, 2016, Judge Stow entered an order denying Mr. McDay's motions for acquittal and forwarded the agency's expungement decision as a petition for judicial review to the district court. R. Vol. 1, pp. 31-32.

On January 3, 2017, Judge Mitchell was assigned to the district court appeal, under the previous criminal case numbers. R. Vol. 1, p. 33.

On April 7, 2017, Mr. McDay filed his opening brief in support of appeal for relief expungement. R. Vol. 1, pp. 47-49.

On May 5, 2017, the Kootenai County Prosecuting Attorney's Office filed a responsive brief. R. Vol. 1, pp. 50-52.

On May 22, 2017, Judge Mitchell entered an order, clarifying the fact that agency action on appeal rose solely from BCI's determination and that a new briefing schedule be issued. R.

Vol. 1, pp.54-56.

On August 2, 2017, BCI filed an Objection to Notice of Appeal to Expunge and Memorandum in Support of Denial. R. Vol. 1, pp. 93-102; attached to BCI's Objection was the Affidavit of Stephanie Altig along with incorporated exhibits 1-4. R. Vol. 1, pp. 58-92.

On August 7, 2017, Mr. Mc Day filed a response and memorandum to BCI's Objection. R. Vol. 1, pp.103-111. No legal authority was cited to in order to support his position.

On September 20, 2017, Judge Mitchell heard the matter. Mr. McDay was present and presented his case. Cheryl Rambo, Deputy Attorney General appeared on behalf of BCI. R. Vol. 1, pp. 122-124.

On September 27, 2017, Judge Mitchell entered a Memorandum Decision and Order Affirming Respondent's Administrative Decision. R. Vol. 1, pp.125-137.

On November 3, 2017, Mr. McDay appealed to the Idaho Supreme Court from the district court's Memorandum Decision and Order. R. Vol. 1, pp.138-139. Under both criminal case numbers.

On December 13, 2017, the Idaho Supreme Court Clerk issued an order conditionally dismissing Mr. McDay's appeal for failure to pay a filing fee and conditionally consolidated the criminal case numbers on appeal. R. Vol. 1, p. 149.

On January 18, 2017, Mr. McDay filed an Amended Notice of Appeal in Kootenai County and the Idaho Supreme Court, along with an affidavit. R. Vol. 1, pp. 162-173.

ADDITIONAL ISSUES PRESENTED ON APPEAL

A. Does this Court have jurisdiction when the civil petition for judicial review was

filed under two previous criminal cases instead of a new civil action?

B. Was the district court correct in affirming the BCI's action in this case?

ATTORNEY FEES ON APPEAL

Idaho Appellate Rule 40 provides that “[w]ith the exception of post-conviction appeals and appeals from proceedings involving the termination of parental rights or an adoption, costs shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court.” I.A.R. 40.

IDAHO CODE § 12-117 provides that:

Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

IDAHO CODE § 12-117(1).

This Court has awarded attorney fees pursuant to IDAHO CODE § 12-117 when a nonprevailing party “continued to rely on the same arguments used in front of the district court, without providing any additional persuasive law or bringing into doubt the existing law on which the district court based its decision.” *City of Blackfoot v. Spackman*, 162 Idaho 302, 310, 396 P.3d 1184, 1192 (2017) (citing *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 812, 367 P.3d 193, 207 (2016)).

On appeal, Mr. McDay has tendered substantially the same argument that previously failed before the district court. He has not presented any new persuasive law, nor did he

significantly challenge the existing law upon which the district court relied in dismissing his petition for judicial in favor of the State. *See Blackfoot*, 162 Idaho 302, 396 P.3d at 1192 and *State v. Hudson*, 407 P.3d 202, 208 (Idaho 2017).

ANALYSIS AND ARGUMENT

A. Does this Court have jurisdiction when the civil petition for judicial review was filed under two previous criminal cases instead of a new civil action?

Standard of Review

Jurisdictional questions are fundamental issues that this Court must address regardless of whether the parties themselves have raised them. *State v. Hartwig*, 150 Idaho 326, 328, 246 P.3d 979, 981 (2011). “This Court’s ability to sua sponte review jurisdiction extends to an examination of the district court’s jurisdiction.” *Id.* “Absent a statute or rule extending its jurisdiction, the trial court’s jurisdiction to amend or set aside a judgment expires once the judgment becomes final, either by expiration of the time for appeal or affirmance of the judgment on appeal.” *State v. Jakoski*, 139 Idaho 352, 354, 79 P.3d 711, 713 (2003). “The timely filing of a notice of appeal is jurisdictional.” *In re Universe Life Ins. Co.*, 144 Idaho 751, 755, 171 P.3d 242, 246 (2007). This Court’s ability to sua sponte review jurisdiction extends to an examination of the district court’s jurisdiction. *State v. Lundquist*, 134 Idaho 831, 835, 11 P.3d 27, 31 (2000); *see also H & V Eng’g, Inc.*, 113 Idaho at 648, 747 P.2d at 57. Questions of jurisdiction are questions of law over which this Court has free review. *Bach v. Miller*, 144 Idaho 142, 145, 158 P.3d 305, 308 (2007).

It is noteworthy that a district court’s dismissal of a criminal case is equivalent to a

judgment and is final 42 days later, during the time for an appeal runs. *See* I.A.R. 11(c)(4) (providing that any order terminating a criminal action is an appealable order); I.A.R. 14(a) (providing that an appeal must be filed within 42 days of when the district court enters the appealable order). Jurisdiction of a criminal matter thus expires 42 days after the district court dismisses the case unless an appeal or some statute or rule extends that jurisdiction.

In this case, Mr. McDay's criminal case CR-2009-0006228 was dismissed on May 6, 2009. R. Vol. 1, p. 145. The appeal deadline in this case would have expired by operation of law on June 17, 2009. In Mr. Mc Day's other criminal case CR-2005-0007362, a dismissal was issued on August 3, 2005. R. Vol. 1, p. 142. Thus the same 42-day deadline, to seek an appeal of any kind, would have expired on September 14, 2005. In either instance, Mr. McDay is precluded from appealing for judicial review under the criminal case numbers due to the following reasons. In an analogous situation, this Court stated, when it found it did not have jurisdiction:

Sexual offenders seeking SORA exemption under I.C. § 18-8310(1) must therefore file their petition in a new civil action if their criminal case has been dismissed or fully adjudicated, and the time for appeal has run.

State v. Johnson, 152 Idaho 41, 48 (2011). *Johnson* is instructive. The Court based its ruling on the lack of jurisdiction also upon the fact that an action to seek relief from a registration requirement is civil in nature and that Johnson should have sought relief by filing a new civil action before the district court instead of under the expired criminal cases. *See generally Johnson*, 152 Idaho 47-48.

Similar to Johnson's civil action, Mr. McDay seeks judicial review of an agency action.

Agency actions are also civil in nature thus, Mr. McDay would be required to petition the district court under a new civil case number. He did not do this.

BCI respectfully requests that the Court dismiss Mr. McDay's appeal for lack of jurisdiction of the criminal cases just as it did in *Johnson*. In the alternative, BCI respectfully requests that this Court affirm the findings of the district court.

B. Was the district court correct in affirming the BCI's action in this case?

Standard of Review

IDAHO CODE § 67-5279 controls the Court's review of an administrative action in a case such as this. The statute provides in relevant part:

(1) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

...

(3) When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

(4) An agency action shall be affirmed unless substantial rights of the appellant have been prejudiced.

Or in the alternative:

If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.

The courts in Idaho have held, "[b]efore a district court may exercise judicial review of an agency decision, there must be a statute granting a right of review. *See, In re City of Shelley,*

151 Idaho 289, 292 (2011). Once a right of review has been established, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial and competent evidence in the record. *Urrutia v. Blaine County, ex rel. Bd. of Comm'rs*, 134 Idaho 353, 357 (2000); *Marshall v. Idaho Dep't of Transp.*, 137 Idaho 337, 340 (Ct. App. 2002).

Even then, an agency's actions are afforded a strong presumption of validity... [and] “[t]his Court may not substitute its judgment for that of the agency as to the weight of the evidence on factual matters.” *Id.* IDAHO CODE § 67-5279 (1). *Cooper v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 134 Idaho 449, 454 (2000).

Furthermore, the “party challenging the agency decision must demonstrate that the agency erred in a manner specified in IDAHO CODE § 67–5279(3) and that a substantial right of that party has been prejudiced.” *Price v. Payette County Bd. of County Comm'rs*, 131 Idaho 426, 429 (1998); *Marshall*, 137 Idaho at 340. If the agency's decision is not affirmed on appeal, “it shall be set aside . . . and remanded for further proceedings as necessary.” IDAHO CODE § 67-5279(3).

The BCI is statutorily authorized to expunge a person’s criminal history record only if one of two circumstances is present, under IDAHO CODE § 67-3004(10):

1. The person was arrested but not criminally charged within one (1) year of the arrest; or
2. The person was acquitted of all offenses arising from an arrest or criminal summons.

When considering a request to expunge a criminal history record based on

acquittal, BCI relies on the administrative Rules Governing State Criminal History Records and Crime Information, IDAPA 11.10.02.010.01, which defines “acquittal” for purposes of criminal history expungement requests as: “The legal certification by a jury or judge that a person is not guilty of the crime charged.” In order to qualify for expungement of a criminal history record based on acquittal, the person seeking expungement must provide “a certified copy of the court’s order of acquittal finding the applicant was not guilty of the crime charged.” IDAPA 11.10.02.021.03.

In this case, the district court correctly concluded that Mr. McDay failed to demonstrate how the BCI erred in one of the six ways listed in IDAHO CODE § 67-5279(3) and (4), when it determined Mr. McDay was not eligible to have his criminal history records expunged. Memorandum Decision and Order Affirming Respondent’s Administrative Decision. R. Vol. 1, p. 323, ll.1-21. The district court also noted correctly, that if sufficient material (documents) were provided to the court to have a record, and if BCI has shown no prejudice, then it may be permissible for the appellate court to reach the merits of the appeal. *Id.* at. pp. 320-323 (district court following the reasoning in *Alvarez v. IBP, Inc.*, 696 N.W. 2d 1 (Iowa 2005).

The district court also correctly determined that IDAHO CODE § 19-2604 does not entitle Mr. McDay to have his criminal history record expunged, and the court has no authority under that statute to order BCI, the FBI, or any other agency to expunge Mr. McDay’s criminal history records. Memorandum Decision and Order Affirming Respondent’s Administrative Decision. R. Vol. 1, pp. 324-325.

The district court agreed with BCI, that according to *State v. Parkinson*, 144 Idaho 825, 828 (2007), the court does not have the authority to order expungement of criminal history records under IDAHO CODE § 19-2604 (holding that “IDAHO CODE § 19-2604 does not require or authorize complete expungement of all records and references to [a criminal] charge.” Memorandum Decision and Order Affirming Respondent’s Administrative Decision. R. Vol. 1, p. 324.

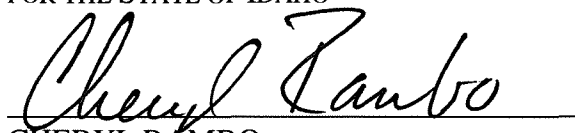
In this instance, the district court made the correct decision by upholding BCI’s determination that Mr. McDay’s criminal history records did not qualify him for expungement.

CONCLUSION

Based on the foregoing, BCI respectfully requests this Court, to either dismiss this appeal, or affirm the district court’s determination that BCI acted within the scope and bounds of its legal authority when it denied Mr. Mc Day’s request for expungement of his criminal history records and for its attorney fees and costs.

Dated this 20th day of June 2018.

OFFICE OF THE ATTORNEY GENERAL
FOR THE STATE OF IDAHO



CHERYL RAMBO
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE

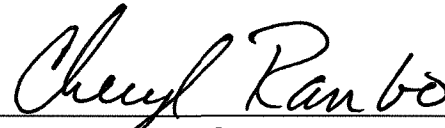
I hereby certify that on this 20th day of June, 2018, I caused to be served a true and correct copy of the foregoing **Respondent's Brief** in the above-referenced matter to the following by the method indicated:

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