

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

THE PEOPLE OF THE VIRGIN ISLANDS)
) **Plaintiff**)
) Vs.)
))
))
DENISE C. SMITH)
) **Defendant**)

CASE NO. ST-09-CR-0000168

ACTION FOR: 14 V.I.C. 296

**NOTICE OF ENTRY OF
MEMORANDUM
OPINION AND ORDER**

TO: VINCENT A. FULLER, JR., ESQ., DEFENSE ATTORNEY
VENETIA H. VELASQUEZ, ESQ., CLERK OF THE COURT
SUPERVISORS, CIVIL/CRIMINAL
LOFTON P. HOLDER, ESQ., ASSISTANT ATTORNEY GENERAL
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✓ IT DIVISION

Please take notice that on August 12, 2010 a(n) MEMORANDUM OPINION AND ORDER dated August 09, 2010 was entered by the Clerk in the above-entitled matter.

Dated: August 12, 2010

Venetia H. Velazquez, Esq.
CLERK OF THE SUPERIOR COURT



COLLEEN SALEM
COURT CLERK SUPERVISOR

IN THE SUPERIOR COURT THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,)

CASE NO. ST-09-CR-168

Plaintiff,)

vs.)

DENISE SMITH)

Defendant.)

MEMORANDUM OPINION

This matter is before the Court on Defendant's *pro se* July 1, 2010, Petition for Expungement. The Department of Justice has not filed a Response.¹

FACTS AND PROCEDURAL HISTORY

Defendant was arrested on March 30, 2009, after being identified by, Margaret Richardson as the person who entered a class room at Bertha C. Boschulte Middle School in St. Thomas and sprayed Richardson's face with pepper spray.

As a result, on April 14, 2009, Information was filed that charged Defendant with second degree assault and disturbance of the peace. Subsequently, on June 12, 2009, the People filed a Motion to Amend the Information, which was granted by the Court on June 16, 2009, reducing the charges against Defendant to simple assault and disturbance of the peace. On June 24, 2009, at the People's request, the Court directed Defendant to enter

¹ 5 V.I.C. § 3735(c) requires the Petitioner to serve her Petition for Expungement on the Department of Justice. Petitioner's *pro se* Petition did not provide proof of service. However, because Petitioner is appearing *pro se*, the Court will still consider the Petition.

the Pretrial Diversion Program (“the PIP”) and continued the case until September 14, 2009. After Defendant’s successful completion of the PIP, the Court dismissed the charges against Defendant with prejudice through a September 17, 2009, Order.

STANDARD OF REVIEW

The Virgin Islands legislature adopted Act No. 7136, on November 25, 2009, permitting expungement of criminal records in certain circumstances. Title 5 of the Virgin Islands Code was amended by adding chapter 314 containing 5 V.I.C. § 3732(1), which delineates instances in which the Court may expunge a record upon Petition to the Court and provides, for the first time that arrest records may be expunged when “[a] personal successfully completes the Pretrial Intervention Program under Title 5 V.I.C., Section 4611 et seq.” Prior to Act No. 7136 no provision of Virgin Islands law provided for expungement following completion of PIP.

DISCUSSION

If the statute were applicable, Defendant would meet the requirements of 5 V.I.C. § 3732(1) because she successfully completed the PIP. However, Defendant’s case was dismissed on September 17, 2009, and 5 V.I.C. § 3732(1) had not been enacted at that time. In *Gov’t of the V.I. v. Robinson*, Case No. ST-95-CR-0121, Memorandum Opinion at *6 (V.I. Super Ct. March 26, 2010), the court held that Act No. 7136 is not to be applied retroactively and reasoned that “it can be inferred from the ‘clear and unambiguous language’ of the statute and other expungement statutes within Chapter 314 that the legislature intended the statute to give effect prospectively.” Consequently, this Court finds that Defendant is ineligible for expungement under the Act.

Even assuming *arguendo* that Act No. 7136 is to be applied retroactively, the determination of whether expungement in this matter is warranted would be a matter subject to the Court's discretion. See 5 V.I.C. § 3732(1). "Retaining and preserving arrest records serves the important function of promoting effective law enforcement. Such records help to meet the 'compelling public need for an effective and workable criminal identification procedure.'" *Gov't of V.I. v. Richardson*, 45 V.I. 326, 328 (Terr. Ct. 2004) (quoting *United States v. Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977)) (citations omitted). Therefore, "[t]he government's need to maintain arrest records must be balanced against the harm that the maintenance of arrest records can cause citizens." *Id.* As a result, there is a presumption in favor of the government maintaining arrest records and the petitioner seeking expungement must overcome this presumption. *Id.* (citing *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695 (5th Cir. 1997)) (citations omitted). Expungement is within the Court's discretion and is reserved for only extreme cases. *Id.*, at 329.


"Legal precedent instructs that absent extraordinary circumstances, the prosecutor aborting an action is not a basis for expungement." *Santiago v. People of the V.I.*, 51 V.I. 283, 295 (V.I. 2009). In *Gov't of V.I. v. Nugent*, 48 V.I. 257,262 (V.I. Super Ct. 2007), the court determined that defendant's argument that his arrest may impede his plans of joining the U.S. Marines did not qualify as "extraordinary circumstances nor [did] it outweigh the Government's interests."

Moreover, in *U.S. v. Schnitzer*, *supra* at 540, the defendant moved to have his arrest record expunged because it would create problems for him as a rabbinical student.

The court refused to expunge defendant's arrest record because "the situation [was] not harsh or unique. Such an explanation may be expected from those about to enter a profession, such as a religious or legal profession." *Id.* The court further reasoned that "[t]he harm, if any, which may result does not fall within the narrow bounds of the class of cases where expungement has been declared appropriate." *Id.*

The Court notes that the P.I.P. Statute, 5 V.I.C. § 4611, does not contain a provision authorizing expungement after completion of the program. Therefore, even were the Act applicable, Defendant still would not qualify for expungement because she has not provided the Court with an extraordinary reason why her record should be expunged. As a result, Defendant's Motion will be denied. A separate Order shall follow.

Dated: August 8, 2010


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

Attest: _____
Venetia H. Velazquez, Esq.
Clerk of the Court / /

by: Colleen Salem
Colleen Salem
Chief Deputy Clerk 8/10/10

CERTIFIED A TRUE COPY
Date: 8/12/2010
Venetia H. Velazquez, Esq.
Clerk of the Court
By: Colleen Salem
Court Clerk

IN THE SUPERIOR COURT THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,)
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DENISE SMITH)
)
Defendant.)
_____)

CASE NO. ST-09-CR-168

ORDER

The Court having rendered a Memorandum Opinion this date, in accordance with that opinion it is

ORDERED that Defendant's Petition for Expungement is **DENIED**; and it is

ORDERED that a copy of this Order shall be personally served on the Defendant Denise Smith, and that a copy thereof shall be directed to Counsel of Record.

Dated: August 9, 2010



HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

Attest:

Date: August _____, 2010
Venetia H. Velasquez, Esq.
Court Clerk Supervisor ___/___/___

CERTIFIED A TRUE COPY

Date: 8/12/2010
Venetia H. Velasquez, Esq.
Clerk of the Court

by: Colleen Salem
Colleen Salem
Chief Deputy Clerk 8/10/10

By: Colleen Salem
Court Clerk