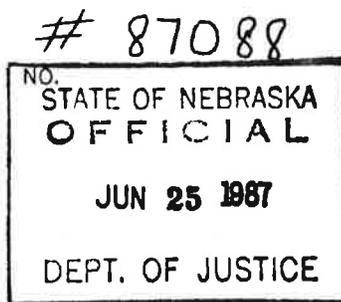


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509



ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: June 17, 1987

SUBJECT: Set Aside and Expungement of Motor Vehicle
Offense Convictions Neb.Rev.Stat. §29-2264

REQUESTED BY: Margaret L. Higgins,
Department of Motor Vehicles

WRITTEN BY: Robert M. Spire, Attorney General
Yvonne E. Gates, Assistant Attorney General

You have requested our opinion in answer to three inter-related questions. First, are the terms "set aside conviction" and "expunge" properly interpreted as synonymous with regards to records of motor vehicle offense convictions? Second, is the Department of Motor Vehicles required to remove from its records a motor vehicle offense conviction, upon receipt of a court order setting the conviction aside? Last, is the department subject to contempt of court charges if the record is not removed?

Although often used interchangeably the terms "expunge" and "set aside conviction" are not synonymous. A minute nuance in meaning results in the practical effect of the terms being different.

Black's Law Dictionary (Fifth Ed. 1979) defines expunge as meaning "to destroy; blot out; obliterate; erase. . . The act of physically destroying information -including criminal records- in files, computers or other depositories." Id. at 522. Conversely, set aside means "to reverse, vacate, cancel, annul or revoke a judgment, order etc." Id. at 1230. Reversing a judgment has been interpreted as "to overthrow it by contrary decision, to make void, undo or annul it for error." Atlantic Coast Line R. Co. v. St. Joe Paper Co., 216 F.2d. 832, 833 (1954)

When a record is expunged the slate is wiped clean, so to speak. When a conviction is set aside the conviction has no force or legal effect but remains on the slate.

L. Jay Bartel
Martel J. Bundy
Janie C. Castaneda
Elaine A. Catlin
Dale A. Comer
Laura L. Freppel

Lynne R. Fritz
Yvonne E. Gates
Royce N. Harper
William L. Howland
Marilyn B. Hutchinson

Mel Kammerlohr
Sharon M. Lindgren
Charles E. Lowe
Lisa D. Martin-Price
Steve J. Moeller

Harold I. Mosher
Fredrick F. Neid
Bernard L. Packett
Marie C. Pawol
Jill Gradwohl Schroeder

LeRoy W. Sievers
James H. Spears
Mark D. Starr
John R. Thompson
Susan M. Ugai
Linda L. Willard

Margaret L. Higgins
June 17, 1987
Page -2-

Such an interpretation is consistent with Neb.Rev.Stat. §29-2264 which provides for the setting aside of convictions. Section 29-2264 authorizes a court to grant a motion to have a conviction set aside upon the successful completion of probation. The court's order, issued upon the granting of such a motion, nullifies the conviction, subsection (4)(a), and restores the probationer's civil rights "as though a pardon had been issued." Subsection 4(b). While there may be a question of constitutionality in subsection 4(b) that is discussed later in this opinion.

Subsection (5) provides that a conviction, though set aside, may function as proof of commission of a crime in order to impeach the probationer as a witness, subsection (5)(c); in determination of a sentence following a subsequent conviction of the probationer for another offense, subsection (5)(d); in a trial of the probationer for a subsequent offense, subsection (5)(e); and in determining whether to set aside a subsequent conviction, subsection (5)(f).

The evidentiary functions enumerated in §29-2264(5)(c-f) could not be served by a conviction that had been expunged. The inclusion of these evidentiary functions implies an intent on the Legislature's part to have convictions set aside without expungement of the record. If expungement were intended, the enumeration of evidentiary functions would be surplusage. Statutes in general are to be construed so as to give effect to all their parts. Adkisson v. City of Columbus, 214 Neb. 129, 133, 333 N.W.2d 661, 664 (1983).

Furthermore, the Legislature has explicitly authorized expungement of records in several instances. Regarding child protection cases §28-721 authorizes the Department of Social Services to expunge any record upon a showing of good cause; §28-723 outlines a procedure by which the subject of a record may seek its expunction; §28-724 provides for notice of expungement to be served upon the subject of the expunged record. The existence of these sections implies that expungement will be specifically authorized when the Legislature intends it.

Moreover, the Governor, Attorney General, and Secretary of State are exclusively empowered by the state constitution to grant pardons, in their capacity as the Board of Pardons. Section 83-1,126. Once pardoned a convict's right to vote and hold office may be restored, §29-112 as well as the right to possess a firearm §83-1130; however, nowhere in the statutes does a pardon require expungement of the offender's record of conviction.

Additionally, both the United States Supreme Court and the Court of Appeals for the Eight Circuit have addressed the question of expungement or expunction of convictions. In Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983), the Court stated that:

[E]xpunction does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty. Expunction in Iowa means no more than that the State has provided a means for the trial court not to accord a conviction certain continuing effects under State law.

The issue in Dickerson involved the effect of the expunction of a state criminal conviction on a disability imposed under federal law. However, the Eighth Circuit applied Dickerson in United States v. Germaine, 720 F.2d 998 (1983). There the Eighth Circuit addressed the effect of a Nebraska court's expunction of the defendant's prior conviction of possession of marijuana with the intent to distribute under state law upon a federal statute relating to receipt of firearms in interstate commerce by a person previously convicted of a crime punishable by imprisonment for a term exceeding one year. Germaine relied on language in Dickerson which deals with a conviction being rendered a nullity. In rejecting that rationale the Court stated:

Equating the "nullity" language of Dickerson with the nullification provision in Neb.Rev.Stat. §29-2264 (4)(a), Germaine argues that the expunction of his record eliminates the underlying basis of his alleged violation of §922(h). We believe, however, that this argument relies too heavily on a purely fortuitous similarity of language. . .

There are thus several reasons to conclude that expunction of conviction records is not required when a conviction is set aside under §29-2264. First, reading the section to require expunction would require ignorance of §29-2264(5) in direct contravention of accepted Nebraska principles of statutory construction. Second, the Legislature has explicitly provided for expunction of other types of records elsewhere in the statutes; this implies that the Legislature would have explicitly included expungement in the provisions of §29-2264 if expungement of records was intended. Third, pardons do not require expungement of conviction records. Last, federal courts have recognized the nuance between nullifying and expunging a conviction.

Margaret L. Higgins
June 17, 1987
Page -4-

The answer to your question concerning contempt charges is more complex. A County Court may have inherent authority to issue an order that conviction records be expunged. In State v. Adamson, 194 Neb. 592, 233 N.W.2d 925 (1975) the court found that the District Court could only act under statute in a case once a valid sentence had been executed. This seems to imply that where there is no statutory authority to do so, a District Court may not order a conviction record expunged once the sentence had been executed. Although Adamson pertained to the powers of the District Courts the county courts have concurrent original jurisdiction with the district courts in certain civil and criminal matters pursuant to §§24-517(4) and (5) which implies existence of the same inherent powers. The Supreme Court has yet to precisely delineate the power of District Courts to expunge records of conviction under §29-2264 4(b). It is entirely possible that subsection 4(b) infringes upon the exclusivity of the Board of Pardons created by Neb.Const. Art. IV, Sec. 13. Until that issue is affirmatively decided the statute is presumed constitutional.

In failing to comply with a court order, the Department may be subject to contempt of court. In Jenkins v. State, 59 Neb. 68, 80 N.W. 268 (1899), the court held that, when the District Court has jurisdiction of the parties and the subject matter, refusal to obey an order of the court is contemptuous even if the order is erroneous. Id. at 70, 80 N.W. at 269. A party may also be held in contempt even though the order in question is ambiguous. "When there is a question as to what a court intends by its order, and one acts on his own interpretation, he does so at his peril." Kasperek v. May, 174 Neb.732, 740, 119 N.W.2d 512, 518 (1963)

It is our opinion that when a conviction has been set aside pursuant to §29-2264 the Department of Motor Vehicles is required to note the judgment setting aside the conviction on the driver's record. Yet, in each case where the order also demands expungement of the record the department must seek legal advice on how to proceed.

Respectfully submitted,

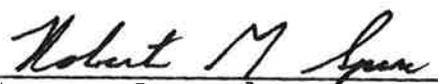
ROBERT M. SPIRE
Attorney General



Yvonne E. Gates
Assistant Attorney General

YEG:pa

APPROVED:



Attorney General