

SUPREME COURT OF APPEALS OF WEST VIRGINIA

In re Petition of Mario Perito II for Expungement of Record

In re Perito · No. No. 20-0325 · Decided April 22, 2022

SUMMARY

This document is a dissenting opinion concerning whether res judicata barred Mario Perito II from seeking expungement of his criminal record under a statute enacted after his earlier petition was denied. The dissent argues that the earlier denial was not a final adjudication on the merits, that the statutory expungement claim was distinct from the earlier equitable claim, and that Perito was entitled to a statutory good-cause hearing.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Wooton, J.
JURISDICTION	West Virginia
DECIDED	April 22, 2022
DOCKET	No. 20-0325
PROCEDURAL POSTURE	Mario Perito II sought expungement of his criminal record in a 2019 petition after an earlier petition had been denied in 1999. The circuit court denied the 2019 petition on res judicata grounds. Justice Wooton dissented from the majority's affirmance or disposition, arguing that the 1997 petition had not been adjudicated on the merits and that the statutory cause of action differed from the earlier equitable request.
PRECEDENTIAL VALUE	Dissenting opinion; not controlling precedent.
PARTIES	Mario Perito II

TOPICS

- res judicata
- post-conviction relief
- statutory interpretation
- remedies
- civil procedure

PRACTICE AREAS

- civil procedure
- criminal record expungement
- post-conviction relief
- remedies

QUESTIONS PRESENTED

1. Whether the denial of Perito's 1997 expungement petition constituted a final adjudication on the merits for res judicata purposes.
2. Whether the equitable expungement claim asserted in 1997 was identical to the statutory expungement claim asserted in 2019.
3. Whether West Virginia Code section 5-1-16a created a right to a good-cause hearing that avoided the preclusive effect of the earlier proceeding.
4. Whether the circuit court's statement that Perito could bring his petition again upon discovering legal authority supported an exception to res judicata.

HOLDINGS

1. In Justice Wooton's view, the 1997 petition was denied because the circuit court believed it lacked statutory authority and refused to exercise or determine its inherent authority, so the denial was not a final adjudication on the merits.
2. In Justice Wooton's view, the equitable cause of action underlying the 1997 petition was separate and distinct from the statutory cause of action under West Virginia Code section 5-1-16a because the statute created a right to a good-cause hearing that did not previously exist.
3. In Justice Wooton's view, enactment of West Virginia Code section 5-1-16a and the passage of twenty-two years could alter the parties' rights and evidence sufficiently to avoid res judicata.

KEY QUOTATIONS

“the court having conceded that it had no authority upon which to grant or deny the petition, its alleged reasoning for thereafter denying the petition was of no moment — it was dicta, no more and no less.” (1)

“Surely a hard-and-fast rule by which the victim’s objection trumps any evidence brought forward by the petitioner cannot be deemed the exercise of sound discretion on the part of the circuit court in resolving a petition for expungement.” (3)

“In the absence of both inherent or statutory authority, the circuit court could not rule on the 1997 petition.” (6)

“From a purely objective standpoint, there is no way to construe the 1997 hearing as the “good cause” hearing contemplated by West Virginia Code § 5-1-16a; therefore, to the extent that the statute entitles Mr. Perito to such a hearing, the statutory cause of action differs significantly, and thus avoids the preclusive effect of res judicata.” (8)

“Therefore, I respectfully dissent.” (10)

FACTUAL BACKGROUND

Perito had criminal convictions resulting from a jury trial and later received a pardon. His 1997 expungement petition alleged that he had led a law-abiding life and that his convictions harmed his employment opportunities, but the circuit court heard virtually no evidence and focused on the victim's objection and the absence of

statutory authority. In 2019, after enactment of West Virginia Code section 5-1-16a, Perito again sought expungement, but the circuit court denied the petition without conducting the statutory good-cause hearing.

PROCEDURAL HISTORY

Perito filed an expungement petition in 1997, which the circuit court denied in a 1999 order. After the Legislature enacted West Virginia Code section 5-1-16a, Perito filed a second petition in 2019. The circuit court refused to consider evidence and held the second petition barred by res judicata. The supplied text is Justice Wooton's dissent from the Supreme Court of Appeals' decision.

REMAND INSTRUCTIONS

Justice Wooton did not determine whether expungement should be granted; he stated that the issue should remain within the circuit court's discretion after providing the good-cause process required by West Virginia Code section 5-1-16a.

CASES CITED

- In re A.N.T., 238 W. Va. 701, 704, 798 S.E.2d 623, 626 (2017)
- State ex rel. Barrick v. Stone, 201 W. Va. 569, 499 S.E.2d 298 (1997)
- United States v. Van Wagner, 746 F. Supp. 619 (E.D. Va. 1990)
- United States v. Doe, 556 F.2d 391 (6th Cir. 1977)
- Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969)
- White v. SWCC, 164 W. Va. 284, 290, 262 S.E.2d 752, 756 (1980)
- Huntington Brick & Tile Co. v. Public Service Commission, 107 W. Va. 569, 149 S.E. 677 (1929)
- Blethlen v. West Virginia Department of Revenue/State Tax Department, 219 W. Va. 402, 633 S.E.2d 531 (2006)