



ILLINOIS STATE BAR ASSOCIATION

TRAFFIC LAWS & COURTS

The newsletter of the Illinois State Bar Association's Section on Traffic Laws & Courts

To expunge or seal, what do you do?

By Lisa Dunn

Let's presume that you represented your client in a criminal matter. You consider your representation successful. You advise your client to expunge his record. Perhaps your client responds:

- I received supervision, so I don't have a record.
After 5 (7, 10 or some other period of time), my conviction will automatically disappear.
My case was dismissed. There is no record.
The court will automatically expunge the re-

cord when I complete supervision.

Your client is wrong. It is your job to inform your client that in many instances the case should be expunged or sealed. First, you need to understand the difference between expunging a record and sealing a record. Second, you need to know where to look in the statute to determine if your client's record can be expunged or if not

Continued on page 2

2013 changes to Article 36: Seizures and forfeitures

By Tony Bruno

As of January 1, 2013 the Illinois legislature is making it easier for the State to take your car.

Effective for the past nine months, a vehicle is now subject to seizure and forfeiture if the person driving is charged with doing so on a suspended or revoked license and the suspension or revocation is the result of a DUI. The January amendment to 625 ILCS 5/6-303 allows the State to seize and forfeit a vehicle being driven by a person whose license was revoked, inter alia, as a result of a DUI conviction, or statutorily summary suspended following a DUI arrest.

The language of the updated 625 ILCS 5/6-303(g) reads:

- (g) The motor vehicle used in a violation of this Section is subject to seizure and forfeiture as provided in Sections 36-1 and 36-2 of the Criminal Code of 2012 if the person's driving privilege was revoked or suspended as a result of:
(1) a violation of Section 11-501 of this Code, a similar provision of a local

ordinance, or a similar provision of a law of another state;

- (2) a violation of paragraph (b) of Section 11-401 of this Code, a similar provision of a local ordinance, or a similar provision of a law of another state;
(3) a statutory summary suspension or revocation under Section 11-501.1 of this Code or a similar provision of a law of another state; or
(4) a violation of Section 9-3 of the Criminal Code of 1961 or the Criminal Code of 2012 relating to the offense of reckless homicide, or a similar provision of a law of another state.

In these tough economic times, police departments across Illinois are looking for new ways to cut costs and increase revenue. Article 36 vehicle seizures and forfeitures are expected to dramatically increase as a result of this amendment. ■

INSIDE

To expunge or seal, what do you do?..... 1

2013 changes to Article 36: Seizures and forfeitures 1

Chasing zero: The NTSB recommendation to lower BAC limits from .08 to .05 ... 4

Case note: License plates, Trailer ball hitches, and the Illinois Vehicle Code— According to the Fourth District Appellate Court, section 3-413(b) of the Vehicle Code does not prohibit trailer ball hitches obstructing the visibility of a vehicle's registration plate..... 5

Upcoming CLE programs 7

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To expunge or seal, what do you do?

Continued from page 1

expunged, then sealed.

Clearing Criminal Records

There are three ways to clear adult records in Illinois. Certain records can be expunged, others can be sealed, and records can be cleared by executive clemency (pardon) process. This article will focus on expungements and sealing of records. The statutory authority is found in the Criminal Identification Act, 20 ILCS 2630/5.2.

For many defendants, the collateral consequences of a conviction will be much more severe than the underlying sentence. A potential employer may conduct a background check. This will detrimentally affect your client if there are other candidates with no criminal background. Additionally, convictions, even for relatively minor misdemeanor offenses may limit housing opportunities, occupational licensing, FOID card eligibility, and student loan eligibility.

What can be expunged?

Only Illinois criminal records can be expunged. This seems simple, but it is not as straightforward as one might presume. No out-of-state arrests or charges can be expunged. No federal arrests or charges can be expunged. Criminal offenses are defined by the statute and include municipal ordinance violations, petty and business offenses, misdemeanors and felonies. That definition differs from what criminal defense attorneys typically consider "criminal" offenses. Criminal offenses are *not* petty traffic offenses (petty offense, business offense, or Class C misdemeanor offenses under the Vehicle Code), Orders of Protection, divorce records or other civil proceedings.

Who is eligible?

In order to expunge, your client must not have any criminal convictions. Your client will be eligible if he has no criminal convictions and the arrest resulted in an acquittal, dismissal, SOL (stricken with leave to reinstate), finding of no probable cause, nolle pros, or no charges were filed. Court supervisions, first offender probations (Sect. 10, Sect. 410, Sect. 70) and TASC probations that are successfully completed are not considered convictions. A conviction or supervision order

for a minor traffic offense will not affect your client's eligibility to expunge (or seal) his records.

A disposition of supervision for driving under the influence of alcohol (625 ILCS 5/11-501) or a similar provision of a local ordinance is not eligible for expungement. A supervision order for reckless driving (625 ILCS 5/11-503) is not eligible for expungement unless your client was under the age of 25 prior to the date of the offense and he has no other conviction for DUI or reckless driving. (20 ILCS 2630/5.2 (a)(3)(A)).

When are you eligible to file?

You may immediately file an expungement if your client was acquitted, found not guilty or the case was dismissed. (20 ILCS 2630/5.2 (b)(2)(A)).

Your client must wait 5 years from the satisfactory completion of supervision, if he received supervision for: operating an uninsured motor vehicle (625 ILCS 5/3-707), suspended registration for noninsurance (625 ILCS 5/3-708), displaying of false insurance (625 ILCS 5/3-710), failure of scrap dealer to keep records (625 ILCS 5/5-401.3), domestic battery (720 ILCS 5/12-3.2), criminal sexual abuse (720 ILCS 5/11-1.50). 20 ILCS 2630/5.2 (b)(2)(B)(i)).

However, please note that while the statute still allows for the expungement of court supervisions for domestic battery and criminal sexual assault, these offenses are no longer eligible for supervision. So, in reality, the only expungement available for these cases is the older cases.

The five-year wait applies to all offenses that result in qualified probation: Section 10 ("710"), Section 410 ("1410"), or Section 70 probation ("first offender" drug probation) or 40-10 probation ("TASC" probation). (20 ILCS 2630/5.2 (b)(2)(C)).

Your client must be 25 years of age to expunge or seal a supervision order of reckless driving that occurred prior to your client reaching the age of 25, and your client has no other conviction for DUI or reckless driving. (20 ILCS 2630/5.2 (b)(2)(B)(i-5)).

If your client was placed on court supervision for something other than what is listed above, he may qualify for expungement 2 years after the successful completion of su-

pervision. (20 ILCS 2630/5.2 (b)(2)(B)(ii))

What does it mean to have a record expunged?

Expunged records are destroyed or returned to the petitioner. The agency destroys your client's records and removes the petitioner's name from the public record. Keep in mind that in the age of the Internet, some information never goes away. Your client needs to keep a copy of the court's order granting the expungement for this very purpose.

Sealing

If your client's records are not eligible to be expunged, they may be eligible to be sealed.

When records are sealed, they are physically and electronically maintained but are unavailable without a court order. 20 ILCS 2630/5.2 (a)(1)(K). What records can be sealed? Eligible records are "arrests" or "charges" not initiated by arrest that have resulted in various dispositions, including dismissal, acquittal, or conviction. (20 ILCS 2630/5.2(c)(2). Certain records cannot be sealed, such as sex offenses as defined by article 11 of the Criminal Code of 1961 (720 ILCS 5/art. 11).

The issue of what are eligible records arose recently in the case *Duncan v. People ex. Rel. Brady*, 2013 IL App. (3d) 120044 (Ill. App., 2013). The Appellate Court held that the Criminal Identification Act does not allow for the sealing of records that are neither arrests nor charges initiated by arrest. In this case, the petitioner had registered as a sex offender following his conviction for aggravated criminal sexual abuse as a juvenile. Later, the juvenile court found the petitioner posed no risk to the community and terminated his registration requirement. Petitioner requested to seal the police records that were generated by his compliance with his obligation to register as a sex offender. These reports did not reflect arrests or charges against the petitioner. The Court found that the reports were non-incident reports, not arrests or charges, and the Court thus lacked authority to seal.

What can be sealed?

For those clients who are ineligible to expunge, they may be able to seal a record in certain circumstances. Most non-violent mis-

demeanors qualify to be sealed, regardless of the disposition. (20 ILCS 2630/5.2(c)(2) (A through F). This now includes Class 4 felony convictions if they are non-violent, non-sexual and non-gun related. (20 ILCS 2630/5.2(c)(2)(F). Class 4 possession of a controlled substance or cannabis, class 4 prostitution, and first offender probation drug cases may also be sealed. (20 ILCS 2630/5.2(c)(2)(E).

When can a record be sealed?

You may immediately request to seal a file if your client was acquitted, found not guilty or the case was dismissed. (20 ILCS 2630/5.2(c)(3)(A). In general, supervision orders and convictions may be sealed four years after the end of your client's sentence. (20 ILCS 2630/5.2(c)(3)(B, C & D).) If your client is convicted of a felony after the date of sealing a prior felony conviction, the most recent felony conviction cannot be sealed. (20 ILCS 2630/5.2(c)(4)).

What does it mean to have a sealed record?

A sealed record is maintained by the agency under seal and may only be released as allowed by law. This includes for law enforcement purposes, school districts, child-care employers, DCFS and the military.

Practice pointer

When representing your client in the

underlying case, you must be mindful of whether your client has a previous conviction. If your client has no prior conviction, you will want to negotiate a plea for supervision or a first offender probation so he will have the ability to expunge the arrest. If your client does have a prior conviction, then his best hope is a disposition that will allow him to seal the record. A plea to a non-violent offense (as defined in the Crime Victims Compensation Act) misdemeanor offense will greatly increase the likelihood of eventual sealing of the record.

Your client may not understand the difference between being convicted and not having a record. Your client may not realize that a plea for supervision now will detrimentally affect his ability to secure employment or a professional license in the future. However, you as his lawyer should be aware of the results of a supervision order or conviction. You should be able to counsel your client on whether he will eventually be able to expunge or seal the offense for which you are representing him. ■

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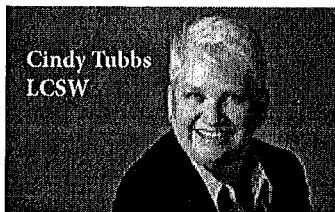
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