When Agencies Disagree with Criminal Court Decisions

Author : John Rubin

Categories : Uncategorized

Date : November 1, 2016

In criminal proceedings, court orders can affect other agencies. When the court imposes a sentence of imprisonment, the Division of Adult Correction has the responsibility of carrying it out. If the court issues a limited driving privilege in a traffic case, a person can drive even though the Division of Motor Vehicles has revoked the person's license. A court may grant an expunction petition, requiring law enforcement agencies to destroy records of the criminal case. What happens if the affected agency believes that the order is unlawful? A recent decision, *In re Timberlake* (Oct. 18, 2016), provides some clarity about the procedures to follow, at least in the context of that case.

The facts. In *Timberlake*, the petitioner was convicted of an offense in South Carolina requiring that he register as a sex offender once he moved to North Carolina. After ten years on the registry in North Carolina, he filed a petition in superior court to terminate his registration and be removed from the registry. An Assistant District Attorney (ADA) appeared on behalf of the State of North Carolina as provided by the statutory procedures for the hearing of termination petitions. *See* G.S. 14-208.12A(a2). The ADA presented no evidence or argument in opposition to the petition. On October 6, 2014, the trial judge granted the petition, finding that the petitioner met the requirements for termination—he had been on the registry for at least ten years, had not been arrested for another crime requiring registration, was not a threat to public safety, and met the federal requirements for termination. The State did not appeal.

On October 16, 2014, on behalf of the North Carolina Division of Criminal Information (DCI), an Assistant Attorney General (AAG) wrote a letter to the superior court judge raising questions about the judge's order. DCI is the agency responsible for maintaining the sex offender registry. The letter stated that under federal law, the petitioner's offense might require that he register as a sex offender for life, without the possibility of termination. The letter asked the judge to review his order and stated that if the agency did not receive any response by November 1, 2014, the agency would proceed with removing the petitioner from the sex offender registry. Thereafter, on May 8, 2015, the trial judge entered an "amended-corrected order" denying the petition to terminate registration on the ground that federal law did not permit termination. The petitioner appealed.

The decision. The Court of Appeals held that the trial judge did not have jurisdiction to reconsider his order terminating the petitioner's registration because the State did not oppose termination at the trial level and did not appeal. The State did not present evidence or reasons to the superior court as to why it should deny the petition, as provided in G.S. 14-208.12A(a2), and did not appeal the superior court's order, as allowed by G.S. 7A-27.

The Court of Appeals also held that the AAG's letter did not meet the requirements for a motion requesting the trial judge to reconsider his order under North Carolina Rule of Civil Procedure 59(a)(8) or 60(b). To utilize Rule 59(a)(8), the moving party must show that the trial judge committed a legal error and that the moving party objected to the error. *Timberlake*, slip op. at 6–7 (citing decision to that effect). To utilize Rule 60(b), the moving party must establish one of the grounds listed in the rule, such as that the judgment is "void." A judgment is not void merely because of an error or misapplication of law; the court must lack the authority to decide the matter. *See also Timberlake*, slip op. at 6–7 (citing decision stating that erroneous judgments may be corrected only by appeal and that Rule 60 is not a substitute for appellate review).

Even if the letter could be considered a motion for reconsideration, it did not meet these requirements. The court concluded that the letter did "not comply with the processes provided in our general statutes and did not vest the trial

This blog post is published and posted online by the School of Government to address issues of interest to government officials. This blog post is for educational and informational Copyright © 2009 to present School of Government at the University of North Carolina. All rights reserved. use and may be used for those purposes without permission by providing acknowledgment of its source. Use of this blog post for commercial purposes is prohibited. To browse a complete catalog of School of Government publications, please visit the School's website at www.sog.unc.edu or contact the Bookstore, School of Government, CB# 3330 Knapp-Sanders Building, UNC Chapel Hill, Chapel Hill, NC 27599-3330; e-mail sales@sog.unc.edu; telephone 919-966-4119; or fax 919-962-2707.

court with jurisdiction to review the termination order for errors of law." *Timberlake*, slip op. at 8. The court therefore vacated the trial judge's amended-corrected order.

The impact. The letter submitted to the trial judge in *Timberlake* is not unheard of. Other agencies have used this method to question orders. The practice has support in the decision of *Hamilton v. Freeman*, 147 N.C. App. 195 (2001), in which the court held that the Division of Adult Correction (DAC) could not modify a sentence it considered illegal but could inform the sentencing judge of the problem and ask the judge to reconsider the order. As a result, DAC now sends a letter to the court and parties when it has concerns about a sentence. *See* Jamie Markham, DAC's Auditing Authority, N.C. Crim. L., UNC Sch. of Gov't Blog (Apr. 21, 2015). What is the effect of *Timberlake* on this letter procedure? It depends on the order and the agency.

In cases in which the trial judge has granted a petition to terminate sex offender registration requirements, *Timberlake* does not allow DCI, itself or through the Attorney General's Office, to express its disagreement by merely sending a letter to the court. The State must oppose the order at the trial level and, if dissatisfied with the result, appeal. Treating a termination petition as a civil matter, *Timberlake* recognizes that the State may file a motion for reconsideration in the trial court under Rules 59 or 60 of the North Carolina Rules of Civil Procedure. *Timberlake* further recognizes the limited grounds for such motions. For a further discussion of the procedure and grounds for such motions, see my colleague Ann Anderson's book, Relief from Judgment in North Carolina Civil Cases (UNC Sch. of Gov't, 2015). *See also* Meredith Smith, Clerks, Adoptions and Division Review (Part 1), On the Civil Side, UNC Sch. of Gov't Blog (Feb. 4, 2015) (discussing propriety of agency letters questioning adoption orders issued by clerks of court).

Timberlake probably does not affect DAC's practice of writing the court when it identifies a legal error in a sentence. In criminal cases, a trial court has jurisdiction to modify an illegal sentence, whether the modification favors the defendant or the State. Although motions are the typical method of requesting relief from a court, *Hamilton* approved the less formal approach of writing a letter to the court.

Timberlake also doesn't affect the practice of the Division of Motor Vehicles (DMV) of notifying the court when it concludes that a limited driving privilege isn't permissible. By statute, DMV has this authority. *See* G.S. 20-179.3(k); *see also* Shea Riggsbee Denning, The Law of Impaired Driving and Related Implied Consent Offenses in North Carolina at 213 & n.26 (UNC Sch. of Gov't, 2014).

What about orders granting expunctions? The State Bureau of Investigation (SBI) has sometimes written the trial judge after entry of an expunction order when it has concerns about the validity of the order. *See, e.g., In re Spencer*, 140 N.C. App. 776 (2000). The SBI, through the Attorney General's Office, has also filed challenges in the trial court well after entry of an expunction order. *See, e.g., State v. Frazier*, 206 N.C. App. 306 (2010). Whether or not it filed a motion to reconsider in the trial court, the Attorney General's Office also has sought appellate review of an expunction order by petitioning for a writ of certiorari. *See, e.g., In re Robinson,* 172 N.C. App. 272 (2005). These decisions allowed the challenges without specifically addressing whether the court had jurisdiction to consider them. *See also In re Kearney*, 174 N.C. App. 213 (2005) (holding that trial judge had authority to consider challenge to expunction order in place of retired judge who had entered order; court did not specifically address whether jurisdiction existed to reconsider expunction order).

In *Timberlake*, the State argued that these decisions impliedly determined that there are "no jurisdictional limits" precluding the trial court from reconsidering expunction orders. The *Timberlake* court did not decide the proper procedure in expunction cases, holding only that the decisions did not control cases involving petitions to terminate registration. Slip op. at 7–8.

The required procedure for reconsidering expunction petitions may differ because expunctions may be a criminal matter. An expunction petition is statutorily designated as "a motion in the cause" in the case in which the petitioner was convicted. *See, e.g.,* 15A-145.5(c)(3). The requirements for post-judgment motions in civil cases, reflected in

This blog post is published and posted online by the School of Government to address issues of interest to government officials. This blog post is for educational and informational Copyright © 2009 to present School of Government at the University of North Carolina. All rights reserved. use and may be used for those purposes without permission by providing acknowledgment of its source. Use of this blog post for commercial purposes is prohibited. To browse a complete catalog of School of Government publications, please visit the School's website at www.sog.unc.edu or contact the Bookstore, School of Government, CB# 3330 Knapp-Sanders Building, UNC Chapel Hill, Chapel Hill, NC 27599-3330; e-mail sales@sog.unc.edu; telephone 919-966-4119; or fax 919-962-2707.

Rules 59 and 60 of the North Carolina Rules of Civil Procedure, therefore may not apply.

In other respects, however, expunction proceedings are comparable to termination proceedings. Both take place well after the criminal case has ended. In both, the District Attorney has the statutory responsibility to represent the State. Both types of orders require the affected agencies to take certain ministerial actions—destroying criminal records in the case of an expunction order and removing a person from the sex offender registry in the case of a termination order. Unlike an unlawful sentence received by DAC, agencies subject to an expunction or termination order do not have an ongoing obligation to administer what may be an unlawful order. *See also Robinson*, 172 N.C. App. at 280–81 (Tyson, J., dissenting) (expressing concern about the prejudice to the petitioner of having a conviction reappear on his or her record after having taken action in reliance on it being expunged).

Whether expunction proceedings are criminal or civil, *Timberlake* may stir reconsideration of the limits on reconsidering expunction orders, particularly when the State hasn't appealed or made a motion for reconsideration.

This blog post is published and posted online by the School of Government to address issues of interest to government officials. This blog post is for educational and informational Copyright © 2009 to present School of Government at the University of North Carolina. All rights reserved. use and may be used for those purposes without permission by providing acknowledgment of its source. Use of this blog post for commercial purposes is prohibited. To browse a complete catalog of School of Government publications, please visit the School's website at www.sog.unc.edu or contact the Bookstore, School of Government, CB# 3330 Knapp-Sanders Building, UNC Chapel Hill, Chapel Hill, NC 27599-3330; e-mail sales@sog.unc.edu; telephone 919-966-4119; or fax 919-962-2707.