

**SUPREME COURT OF LOUISIANA**

**No. 2018-C-1342**

**STATE OF LOUISIANA**

**VERSUS**

**BRADY T. FLYNN**

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,  
FIRST CIRCUIT, PARISH OF ST. TAMMANY**

**JOHNSON, C.J., would grant the writ application and assigns reasons.**

I would grant the writ application to consider whether Mr. Flynn is entitled to an expungement of his conviction for possession with intent to distribute marijuana, where his sentence was suspended rather than deferred.

Relative to expungement, Louisiana Code of Criminal Procedure article 978 provides in part:

A. Except as provided in Paragraph B of this Article, a person may file a motion to expunge his record of arrest and conviction of a felony offense if either of the following apply:

(1) The conviction was set aside and the prosecution was dismissed pursuant to Article 893(E).

(2) More than ten years have elapsed since the person completed any sentence, deferred adjudication, or period of probation or parole based on the felony conviction, and the person has not been convicted of any other criminal offense during the ten-year period, and has no criminal charge pending against him. The motion filed pursuant to this Subparagraph shall include a certification obtained from the district attorney which verifies that, to his knowledge, the applicant has no convictions during the ten-year period and no pending charges under a bill of information or indictment.

B. No expungement shall be granted nor shall a person be permitted to file a motion to expunge the record of arrest and conviction of a felony offense if the person was convicted of the commission or attempted commission of any of the following offenses:

\* \* \*

(3) A violation of the Uniform Controlled Dangerous Substances Law, except for any of the following which may be expunged pursuant to the provisions of this Title:

(a) A conviction for possession of a controlled dangerous substance as provided for in R.S. 40:966(C), 967(C), 968(C), or 969(C), or 970(C).

(b) A conviction for possession of a controlled dangerous substance with the intent to distribute.

(c) A conviction for a violation of the Uniform Controlled Dangerous Substances Law which is punishable by a term of imprisonment of not more than five years.

(d) A conviction for a violation of the Uniform Controlled Dangerous Substances Law which may be expunged pursuant to Article 893(E).

Article 893 (E) provides:

(1)(a) When it appears that the best interest of the public and of the defendant will be served, the court may defer, in whole or in part, the imposition of a sentence after conviction of a first offense noncapital felony under the conditions set forth in this Paragraph. When a conviction is entered under this Paragraph, the court may defer the imposition of sentence and place the defendant on probation under the supervision of the division of probation and parole.

(b) The court shall not defer a sentence under this provision for an offense or an attempted offense that is designated in the court minutes as a crime of violence pursuant to Article 890.3 or that is defined as a sex offense by R.S. 15:541, involving a child under the age of seventeen years or for a violation of the Uniform Controlled Dangerous Substances Law that is punishable by a term of imprisonment of more than five years or for a violation of R.S. 40:966(A), 967(A), 968(A), 969(A), or 970(A).

(2) Upon motion of the defendant, if the court finds at the conclusion of the probationary period that the probation of the defendant has been satisfactory, the court may set the conviction aside and dismiss the prosecution. The dismissal of the prosecution shall have the same effect as acquittal, except that the conviction may be considered as a first offense and provide the basis for subsequent prosecution of the party as a multiple offender, and further shall be considered as a first offense for purposes of any other law or laws relating to cumulation of offenses. Dismissal under this Paragraph shall occur only once with respect to any person.

(3)(a) When a case is accepted into a drug court division probation program pursuant to the provisions of R.S. 13:5304 and at the conclusion of the probationary period the court finds that the defendant has successfully completed all conditions of probation, the court with the concurrence of the district attorney may set aside the conviction and dismiss prosecution, whether the defendant's sentence was suspended under Paragraph A of this Article or deferred under Subparagraph (1) of this Paragraph. The dismissal of prosecution shall have the same effect as an acquittal, except that the conviction may be considered as a first offense and provide the basis for subsequent

prosecution of the party as a multiple offender, and shall be considered as a first offense for purposes of any other law or laws relating to cumulation of offenses.

(b) The court may extend the provisions of this Paragraph to any person who has previously successfully completed a drug court program and satisfactorily completed all other conditions of probation.

(c) Dismissal under this Paragraph shall have the same effect as an acquittal for purposes of expungement under the provisions of Title XXXIV of the Code of Criminal Procedure and may occur only once with respect to any person.

(4) When a defendant, who has been committed to the custody of the Department of Public Safety and Corrections to serve a sentence in the intensive incarceration program pursuant to the provisions of Article 895(B)(3), has successfully completed the intensive incarceration program as well as successfully completed all other conditions of parole or probation, and if the defendant is otherwise eligible, the court with the concurrence of the district attorney may set aside the conviction and dismiss prosecution, whether the defendant's sentence was suspended under Paragraph A of this Article or deferred under Subparagraph (1) of this Paragraph. The dismissal of prosecution shall have the same effect as an acquittal, except that the conviction may be considered as a first offense and provide the basis for subsequent prosecution of the party as a multiple offender, and shall be considered as a first offense for purposes of any other law or laws relating to cumulation of offenses. Dismissal under this Subparagraph shall have the same effect as an acquittal for purposes of expungement under the provisions of Title XXXIV of the Code of Criminal Procedure and may occur only once with respect to any person.

The majority of the court of appeal found defendant's original sentence was suspended, not deferred, under La. C.Cr. P. art. 893, thus the trial court lacked the authority to set aside the conviction and dismiss the prosecution in this case. *State v. Flynn*, 17-1327 (La. App. 1 Cir. 4/11/18), 249 So. 3d 834, 836. As a consequence, the court determined that expungement was not available. *Id.* at 837. However, Judge McClendon dissented, finding the court was bound to follow its earlier decision in *State v. A.R.W.*, 17-1162 (La. App. 1 Cir. 2/16/18), 242 So. 3d 648. In *A.R.W.*, the court opined that Article 893(E) has four separate distinct sections relating to expungement, and that each one should be considered independently of the others. 242 So. 3d at 654. The court held that Article 978

unequivocally provides for expungement for conviction for possession of a controlled dangerous substance with intent to distribute; La. C.Cr. P. art. 893E provides three separate ways in which this can be accomplished, namely, E(2), (3), and (4). The court found expungement was proper in that case because one of the sections, 893(E)(2), had been met. *Id.* Mr. Flynn argues the same reasoning is applicable in his case.

Resolution of the specific issue in this case is dependent on consideration of the interplay between Articles 978 and 893(E), and proper interpretation of the numerous provisions of Article 893(E). I would grant Mr. Flynn's writ application to allow this court the opportunity to fully consider the issue.