

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000190-MR

ALAN POWELL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 95-CR-003108

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: STUMBO AND THOMPSON, JUDGES; SHAKE,¹ SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Alan Powell (Powell) appeals from a Jefferson Circuit Court denial of his motion to expunge a prior felony conviction that was nullified by a gubernatorial pardon. Although nothing in Kentucky law bestows upon the trial court the authority to expunge a criminal record following a gubernatorial

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

pardon, Powell argues that trial courts have an inherent authority to expunge records. We disagree and, thus, affirm the Jefferson Circuit Court.

On September 19, 1997, in exchange for his plea of guilt, Powell pleaded guilty to three counts of first-degree trafficking in a controlled substance, cocaine. In accordance with his plea agreement, on September 19, 1997, Powell was sentenced to eight years imprisonment on each count. The charges ran concurrently for a total of eight years imprisonment. The Circuit Court suspended Powell's sentence and placed him on probation for five years. The Circuit Court later modified Powell's sentence to three years probation.

On December 10, 2007, Governor Ernie Fletcher signed an executive order pardoning Powell. On February 14, 2008, he moved the Jefferson Circuit Court to expunge his record and argued that the court had the inherent authority to do so. On March 17, 2008, the court held a hearing on this issue. On February 16, 2009, the Circuit Court denied Powell's motion based upon its lack of statutory authority. On February 26, 2009, Powell filed a motion for reconsideration. On December 4, 2009, the Circuit Court denied the motion. This appeal follows.

A gubernatorial pardon is an “act or an instance of officially nullifying punishment or other legal consequences of a crime.” *Anderson v. Com.*, 107 S.W.3d 193, 196 (Ky. 2003) (quoting Black's Law Dictionary (7th ed. 1999)). Although, “. . . a pardon will foreclose punishment of the offense itself, it does not

erase the fact that the offense occurred, and that fact may later be used to the pardonee's detriment.” *Fletcher v. Graham*, 192 S.W.3d 350, 363 (Ky. 2006).

Two Kentucky statutes grant trial courts the authority to expunge criminal records: KRS 431.076 and KRS 431.078. *Clements v. Com.*, 203 S.W.3d 710, 712 (Ky. App. 2006). KRS 431.076 grants courts the authority to expunge the criminal records of persons exonerated of the charges they faced by being found not guilty or whose charges have been dismissed with prejudice. KRS 431.078 grants courts the authority to expunge the criminal records of misdemeanor and violation convictions. Neither statute provides courts with the authority to expunge a criminal record following a gubernatorial pardon of a felony conviction.

In *Harscher v. Com.*, this Court concluded that the issuance of pardon does not confer upon its grantee the right to an expungement. *Harscher v. Com.*, 327 S.W.3d 519 (Ky. App. 2010). The Court provided, “. . . a pardon does not erase the fact that the individual was convicted, [therefore,] we conclude that a pardon does not entitle an individual to expungement of his criminal record.” *Id.* at 522.

While Powell concedes that the trial court did not have statutory authority to expunge his record, he claims that the court had inherent power to order the expungement. His argument is based upon a Sixth Circuit, U.S. Court of Appeals decision, *U.S.v. Doe*, 556 F.2d 391 (6th Cir. 1977), which stated in part, “It is within the inherent equitable powers of a federal court to order the expungement of a record in an appropriate case.” *Id.* at 393. Powell’s reliance is misplaced.

In *Clements v. Com.*, this Court expressly rejected this claim. *Clement*

v. Com., 203 S.W.3d at 711-12.

. . . [W]e decline to adopt Clements' notion that circuit courts have the inherent power to expunge felony convictions since, in this Commonwealth, circuit courts only have the power to expunge certain criminal charges that have been dismissed and certain misdemeanor convictions.

Id.

Because neither KRS 431.076 nor KRS 431.078 confer upon courts the authority to expunge criminal records of convictions that have been pardoned, we affirm the Jefferson Circuit Court Order denying Powell's motion for expungement.

ALL CONCUR.

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