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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002019-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOPF, JUDGE
ACTION NO. 00-CR-000446

FELIX CASTILLO

APPELLEE

AND

NO. 2011-CA-000429-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 00-CR-000446

FELIX CASTILLO

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: KELLER, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: This consolidated appeal concerns the Jefferson Circuit Court's dismissal of a case with prejudice and the expungement of the case records. The Commonwealth argues that the trial court did not have the authority to dismiss the case with prejudice. It also argues that the records should not have been expunged. We agree with the Commonwealth and reverse and remand.

On February 23, 2000, Felix Castillo was charged with first-degree assault. He was later indicted on the charge. Upon investigation, the Commonwealth chose not to pursue the case. On September 15, 2000, the case was dismissed without prejudice.

On June 3, 2010, Castillo filed a motion to expunge the case. The Commonwealth responded that under Kentucky Revised Statutes (KRS) 431.076(1), expungement is only authorized in cases that are dismissed with prejudice. On June 10, 2010, Castillo moved to dismiss the case with prejudice. The Commonwealth argued that the circuit court could not dismiss an indictment with prejudice absent the consent of the Commonwealth. On June 28, 2000, the trial court dismissed the case with prejudice. The trial court then granted the motion to expunge the assault charge because the case had been dismissed with prejudice. This appeal followed.

The Commonwealth is appealing two orders. The first is the order dismissing the case with prejudice. The Commonwealth argues that it was a violation of the separation of powers for the trial court to dismiss the case with prejudice absent consent by the Commonwealth. We agree.

The power to define crimes and establish the range of penalties for each crime resides in the legislative branch. The power to charge persons with crimes and to prosecute those charges belongs to the executive department, and by statute, is exercised by the appropriate prosecuting attorney. The power to conduct criminal trials, to adjudicate guilt and to impose sentences within the penalty range prescribed by the legislature belongs to the judicial department.

Gibson v. Commonwealth, 291 S.W.3d 686, 689-690 (Ky. 2009). “[S]ubject to rare exceptions usually related to a defendant’s claim of a denial of the right to a speedy trial, a trial judge has no authority, absent consent of the Commonwealth’s attorney, to dismiss, amend, or file away before trial a prosecution based on a good indictment.” *Hoskins v. Maricle*, 150 S.W.3d 1, 13 (Ky. 2004). Here, the Commonwealth did not consent to a dismissal with prejudice, even though there has been no attempt to prosecute for ten years. The dismissal of the case with prejudice was in error and is, therefore, reversed.

Also of significance is the passage of time between the initial order dismissing without prejudice and the order appealed from here. More than ten years separate the two orders which requires application of Kentucky Rules of Civil Procedure (CR) 59.05. CR 59.05 states as follows: “A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment.” Thus, we must conclude that the trial court was without jurisdiction to amend an order that had been final for more than ten years.

The second order being appealed is the order granting Castillo's motion to expunge. Since the case should not have been dismissed with prejudice, the motion to expunge should have been denied. Castillo argues that a court has the inherent equitable powers to expunge a record. He cites to the case of *Commonwealth v. Holloway*, 225 S.W.3d 404 (Ky. App. 2007), for support.

In *Holloway*, Darwin Holloway petitioned the Fayette Circuit Court to expunge all records concerning a 1996 case. In 1996, Holloway was charged with various felony and misdemeanor crimes. The case was given to the Grand Jury, but a "No True Bill" was returned and the charges were dismissed. In 2005, Holloway sought to expunge his record. The Commonwealth objected, claiming that the case was not dismissed with prejudice and could not be expunged. The trial court granted the motion and the Commonwealth appealed.

A previous panel of this Court reversed the trial court. It found that a "No True Bill" was not a dismissal with prejudice. It further stated that a court does have inherent equitable powers to expunge records.

In *U.S. v. Doe*, 556 F.2d 391, 393 (6th Cir. Ohio 1977), the court states that "[i]t is within the inherent equitable powers of a [court] to order the expungement of a record in an appropriate case." Kentucky case law is scarce when dealing with inherent powers to expunge records. The issue, however, has been heavily litigated in federal courts. Most federal courts hold that a court can use its inherent powers to expunge a record in instances of extraordinary circumstances, such as illegal prosecutions, arrests under unconstitutional statutes, or where necessary to vindicate constitutional or statutory rights. *U.S. v. Gillock*, 771 F.Supp. 904, 908 (W.D. Tenn. 1991).

Holloway at 406. This “extraordinary circumstances” method of expungement was cited with approval by the concurring opinion in *Gibson, supra*.

Castillo also brings our attention to *Diamond v. U.S.*, 649 F.2d 496 (7th Cir. 1981), which was also cited in the concurring opinion in *Gibson, supra*. In *Diamond*, the court adopted a case-by-case approach where the court would weigh the reasons for and against expungement and if the “adverse consequences to the individual outweigh the public interest in maintenance of the records, then expunction is appropriate.” *Id.* at 499.

In the case at hand, however, no facts in the record support a “case-by-case” examination pursuant to *Diamond* or justify an “extraordinary circumstances” expungement pursuant to *Holloway*. Castillo only generally claims that the assault charge is causing difficulty in employment and immigration matters. As in *Holloway*, there have been no factual findings that Castillo’s reasons for receiving an expungement outweigh the need of the Commonwealth to retain those records.

Even though the Commonwealth has made no attempt to prosecute Castillo for ten years, the dismissal of the indictment with prejudice, and the later expungement of Castillo’s records, were in error.

Based on the above we find that the two orders entered by the trial court were in error. For the reasons stated herein we reverse and remand for action consistent with this opinion.

ALL CONCUR.

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