

RENDERED: FEBRUARY 10, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002324-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 92-CR-001447

CHARLOTTE M. JONES

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, STUMBO AND VANMETER, JUDGES.

VANMETER, JUDGE: The Commonwealth of Kentucky appeals from the December 1, 2010, order of the Jefferson Circuit Court granting Charlotte Jones's motion to expunge the record of her voided felony conviction of illegal possession of a controlled substance in the first degree, schedule II - cocaine. For the following reasons, we affirm.

In 1992, Jones was indicted by the grand jury with trafficking in a controlled substance, schedule II – cocaine, a class C felony, and complicity thereto. Jones pled guilty to an amended lesser charge of illegal possession of a controlled substance in the first degree, schedule II - cocaine, a class D felony, and the trial court probated her three-year sentence for a period of five years.

Approximately seventeen years later, Jones moved *pro se* for the trial court to expunge the record of her felony conviction. The Commonwealth opposed the motion on the basis that the court lacked statutory authority to expunge the conviction under either of the expungement statutes, KRS¹ 431.076 or KRS 431.078. Jones, by counsel, then moved for the court to void her felony conviction pursuant to KRS 218A.275, which the Commonwealth did not oppose. The court subsequently entered an order voiding Jones’s felony conviction per KRS 218A.275.

Thereafter, Jones moved the trial court to expunge the voided felony conviction. The Commonwealth opposed the motion on grounds that expungement of voided felony convictions was not authorized under KRS 431.076, which permits expungement only for those acquitted of crimes or for whom charges have been dismissed with prejudice. Following a hearing on the matter, the court

¹ Kentucky Revised Statutes.

granted Jones's motion to expunge the voided felony conviction, relying on CR² 60.02(f) to do so.³ This appeal followed.

On appeal, the Commonwealth argues that the trial court abused its discretion by granting Jones's motion to expunge the voided felony conviction because CR 60.02 is not an avenue for expunging voided felony convictions when expungement is not authorized by statute. The Commonwealth emphasizes that KRS 431.076 does not provide for expungement of felony convictions ruled void by operation per KRS 218A.275.

Two Kentucky statutes grant trial courts the power to expunge criminal records: KRS 431.076 and KRS 431.078. *Clements v. Commonwealth*, 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 expressly grants courts the authority to expunge a criminal record after a felony conviction has been voided.

That being said, the issue before this court is the effect of a voided conviction, and whether it amounts to a dismissal of the charges. Jones argues that the statute addressing the voiding of convictions, KRS 218A.275, equates voiding with dismissal and thus, her voided conviction was properly expunged under the

² Kentucky Rules of Civil Procedure.

³ CR 60.02(f) permits a court to relieve a party from its final judgment for any reason of an extraordinary nature that justifies such relief.

provision of KRS 431.076 permitting expungement of charges dismissed with prejudice. We agree. The version of KRS 218A.275 in effect at the time of the trial court's order provides, in relevant part:

(9) In the case of any person who has been convicted for the first time of possession of controlled substances, the court may set aside and void the conviction upon satisfactory completion of treatment, probation, or other sentence, and issue to the person a certificate to that effect. A conviction voided under this subsection shall not be deemed a first offense for purposes of this chapter or deemed a conviction for purposes of disqualification or disabilities imposed by law upon conviction of a crime. **Voiding of a conviction under the subsection and dismissal may occur only once with respect to any person.**

KRS 218A.275(9) (emphasis added).⁴

Neither party challenges the trial court's decision to void Jones's felony conviction under KRS 218A.275. Indeed, a clear reading of KRS 218A.275(9), addressing the voiding of a conviction **and its dismissal**, shows a legislative intent to equate the voiding of a conviction with its concomitant dismissal. Thus, the trial court's voiding and dismissing Jones's conviction under KRS 218A.275(9) brought that offense within the parameters of KRS 431.076, which permits the expungement of a charge dismissed with prejudice. No one can seriously contend but that under the circumstances the dismissal of Jones's offense is "with prejudice." Accordingly, while we disagree with the trial court's decision to

⁴ In 2011, this statute was amended to permit only the voiding of misdemeanor possession convictions. 2011 Ky. Acts ch. 2 § 21. That amendment, while indicating the legislature's intent that felony convictions are not to be voided, does not govern our decision since all pertinent events and proceedings in this matter occurred prior to amendment of the statute.

expunge Jones's voided felony conviction under CR 60.02(f), we believe that expungement was proper in these circumstances.⁵

We agree with the Commonwealth that a court's ability to expunge criminal convictions is largely governed by statute. *See Commonwealth v. Holloway*, 225 S.W.3d 404, 406-07 (Ky. 2007) (holding that a court's statutory authority to expunge records is governed by the clear and unambiguous language of KRS 431.076 and KRS 431.078, and the court's inherent authority to expunge records is exceedingly narrow in scope, *e.g.*, reserved for remedying the denial of one's constitutional rights); *Clements v. Commonwealth*, 203 S.W.3d 710, 711 (Ky.App. 2006) (noting that the power to expunge criminal charges that have been dismissed or misdemeanor convictions is derived from statute). However, in this instance, the trial court's ability to expunge Jones's conviction necessarily followed from the statutory language contained in KRS 218A.275(9).⁶

The Jefferson Circuit Court's order is affirmed.

⁵ The fact that the trial court's decision to grant expungement was based on different reasoning does not alter our result since the rule is well-settled that an appellate court may affirm a lower court for any reason supported by the record. *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n.19 (Ky. 2009).

⁶ Neither *Commonwealth v. Bowles*, 107 S.W.3d 912 (Ky.App. 2003), nor *Harscher v. Commonwealth*, 327 S.W.3d 519 (Ky.App. 2010), compel a different result. In *Bowles*, the trial court voided a conviction under KRS 218A.275, but the record disclosed that the court had not ordered the conviction to be expunged. This court, therefore, declined to address the issue of whether a voided felony conviction under KRS 218A.275 was expunged. 107 S.W.3d at 918. Instead, this court simply affirmed the trial court's voiding of the felony conviction under KRS 218A.275. In *Harscher*, we addressed the effect of a gubernatorial pardon on a criminal conviction and its possible expungement. We noted that the effects of a pardon were not expressly provided for in the Kentucky Constitution, but that under the common law, the issuance of a pardon did not confer upon its grantee the right to an expungement. 327 S.W.3d at 521. In other words, "[b]ecause a pardon does not erase the fact that the individual was convicted, . . . a pardon does not entitle an individual to expungement of his criminal record." *Id.* at 522.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jack Conway
Attorney General of Kentucky

Samuel J. Floyd, Jr.
Special Assistant Attorney General
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jeffrey B. Skora
Louisville, Kentucky