

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-000208-MR

MICHAEL DALE HENNING

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE KEN G. COREY, JUDGE  
ACTION NO. 94-CR-508

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

\* \* \* \* \*

BEFORE: GUDGEL, Chief Judge; GUIDUGLI and MILLER, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from an order entered by the Jefferson Circuit Court which denied appellant Michael Dale Henning's motion to expunge his criminal record relating to a murder prosecution. On appeal, appellant contends that the trial court abused its discretion by denying his motion. For the reasons stated hereafter, we disagree. Hence, we affirm.

On March 2, 1994, appellant was indicted for murder and Warren Baker was indicted for criminal facilitation to murder in connection with the February 26, 1994, death of Kevin S. Walker. Separate trials were conducted and Baker agreed to testify against appellant. The Commonwealth adduced evidence by which it

attempted to prove that during an argument outside a bar, appellant acquired a gun from Baker and immediately thereafter shot Mr. Walker in the head at close range. Appellant, however, claimed that he observed Baker pointing a gun at Walker's head, that he grabbed for the gun, and that the gun discharged. The jury returned a not guilty verdict as to the murder charge and as to all lesser included homicide charges. On October 25, 1994, the circuit court entered an order dismissing the murder charge against appellant. Baker subsequently pled guilty to first-degree wanton endangerment and was sentenced to five years' imprisonment.

In April 1997, appellant filed a motion requesting the court to "expunge all records in state government control," maintaining that a recently enacted statute, KRS 431.076, and his acquittal entitled him to such relief. The circuit court denied the motion by an order entered on April 17, 1997. The court stated in its order that appellant "was found not guilty in October, 1994. The motion [to expunge] was filed April 14, 1997. Based upon the evidence presented at the trial of the defendant's past criminal history, coupled with the fact that he is now in the penitentiary, and the expungement being discretionary with the Court, the motion is denied." Appellant did not appeal the April 17, 1997, order. Instead, he filed a subsequent motion in January 1998 "to expunge all records in governmental control in regards to Indictment number 94-CR-0508." Appellant reiterated in his second motion that he was acquitted of the charges

relating to the murder indictment, that the records regarding the charge were in the custody of the correctional system, and that the records will have "an adverse effect on [his] possibility of Parole, Community Custody, Furlough and even more so on his possibility of obtaining gainful employment upon his eventual release from incarceration . . . ." Once again, the court denied appellant's motion, stating as follows:

The defendant was in fact acquitted; however, the evidence was clear that his culpability herein was significantly more than minimal. It would in fact be apparent that Henning was not the "trigger man," but his actions both before, during and after the murder are not those of the type of individual envisioned by the legislature under the above cited statute. The fact that the motion comes from the penitentiary in regard to other sentences now being served is further evidence in favor of denial.

This appeal followed.

Based upon our review of the record, we are of the opinion that the court's order must be affirmed, but for reasons different from those set forth in the order. See Jarvis v. Commonwealth, Ky., 960 S.W.2d 466 (1998).

It is settled that "a fact or matter distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties." Barnett v. Commonwealth, Ky., 348 S.W.2d 834, 835 (1961). This rule of res judicata is applicable to criminal cases and serves two purposes: "the one, public policy and necessity, which makes it to the interest of the state that there

should be an end to litigation; the other, the hardship on the individual that he should be vexed twice for the same cause.”

Id. Further, the doctrine of res judicata applies to final judgments rendered on the merits. Davis v. Powell's Valley Water Dist., Ky. App., 920 S.W.2d 75 (1995).

CR 54.01, which is applicable to criminal proceedings pursuant to RCr 13.04, defines a final order as a “final order adjudicating all the rights of all parties in an action or proceeding.” In Commonwealth v. Taylor, Ky., 945 S.W.2d 420, 422 (1997), our supreme court stated that “the fundamental rule is that for an order to be final and appealable, it must adjudicate all claims of the parties at the time the order was entered.”

Here, at the time appellant filed his first motion to expunge in April 1997, there was no pending claim in the proceeding because the court had entered an order dismissing the murder charge. Thus, the court's order of April 17, 1997, denying appellant's first motion to expunge his record, clearly served to finally dispose of all claims pending before the court at that time. It follows, therefore, that the April 17, 1997, order was a final and appealable order. Indeed, our conclusion is consistent with the supreme court's decision in Gilliam v. Commonwealth, Ky., 652 S.W.2d 856 (1983), in which it held that an order denying a criminal defendant's motion for a trial transcript was a final order because the order disposed of all the claims pending before the trial court at the time of its entry.

Appellant was entitled to appeal from the April 17, 1997, order, but failed to do so. Instead, appellant attempted to get a second bite of the apple by filing a second motion to expunge by which he sought to have the court determine the identical claim previously adjudicated by the April 17, 1997, order. Moreover, appellant set forth no grounds in his second motion which were not, or could not have been, asserted in his first motion. Further, the court's reasons for denying both of appellant's motions were essentially identical. The April 17, 1997, order was a final adjudication on the merits of appellant's statutory claim for expungement of his records. Appellant failed to appeal from that order and he was precluded from again litigating the identical issue by filing a second motion to expunge. See Commonwealth v. Hicks, Ky., 869 S.W.2d 35 (1994). In light of our conclusion to this point we need not address appellant's remaining arguments.

The court's order is affirmed.

GUIDUGLI, J., CONCURS.

MILLER, J., CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Michael Dale Henning  
Beattyville, KY

BRIEF FOR APPELLEE:

A.B. Chandler III  
Attorney General

Janet M. Graham  
Assistant Attorney General  
Frankfort, KY