

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000905-MR

TERESA A. GAHMAN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 02-CR-00643

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** ** *

BEFORE: ABRAMSON AND STUMBO, JUDGES; KNOPF,¹ SENIOR JUDGE.

ABRAMSON, JUDGE: Teresa Gahman appeals from the March 29, 2006 order of the Kenton Circuit Court denying her motion to expunge her criminal record following successful completion of pre-trial diversion requirements. While we believe that the motion was prematurely filed, we find that the trial court's basis for denying the motion—*i.e.*, that the trial court lacked jurisdiction to order expungement of Gahman's record—

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) of the Kentucky Constitution and KRS 21.580.

was incorrect. Accordingly, we reverse the trial court's order and remand for reconsideration.

On September 27, 2002, the Kenton County grand jury indicted Gahman, charging her with one count of first-degree trafficking in a controlled substance, a class C felony. During negotiations, the Commonwealth agreed that in exchange for Gahman's agreement to enter a guilty plea, it would amend the charge to first-degree possession of a controlled substance. The Commonwealth further offered Gahman three years of supervised felony pretrial diversion as long as she completed an approved drug treatment program. In conformance with this agreement, on January 28, 2003, Gahman filed a Motion to Enter a Guilty Plea and a Motion for Pretrial Diversion of a Class D Felony. Both motions were completed using preprinted forms prepared by the Administrative Office of the Courts (AOC). The form used for the pretrial diversion motion, AOC-Form 347, contained the following terms:

5. I understand that if I successfully complete the conditions of diversion, the charge against me will be designated as **dismissed-diverted** and I will not be required to acknowledge the occurrence of the charge.

.....

10. I understand that upon successful completion of the terms and conditions of the Pretrial Diversion I may petition the Court for expungement of the dismissed-diverted charge.

On March 10, 2003, the trial court entered an Order Granting Pretrial Diversion of a Class D Felony, stating in it:

If Defendant successfully completes Pretrial Diversion, the charge(s) will be designated as Dismissed-Diverted. The Defendant has been advised that upon successful completion of the Diversion, the Court may be petitioned for expungement of the record.

Gahman successfully completed her three-year diversion period on March 10, 2006. Less than a week later, on March 15, 2006, she filed a motion seeking dismissal of the charge and expungement of her record.² The trial court rendered an order on March 29, 2006, in which Gahman's charge was “dismissed/diverted.”³ However, the trial court also denied the expungement request, stating that “[t]his Court has no jurisdiction to expunge diversion cases.” This appeal followed.

The statute controlling the expungement of criminal records for an individual who has had a felony charge dismissed is Kentucky Revised Statute (KRS) 431.076. This statute states in pertinent part:

(1) A person who has been charged with a criminal offense and who has been found not guilty of the offense, or against whom charges have been dismissed with prejudice, and not in exchange for a guilty plea to another offense, may make a motion, in the District or Circuit Court in which the charges were filed, to expunge all records

. . . .

² Gahman had made two prior motions for expungement, each of which was premature and was denied.

³ Pursuant to Kentucky Rule of Criminal Procedure 8.04(5), “[u]pon the expiration of the period of suspension of prosecution and upon the completion of the agreement and where there is no motion by the Attorney for the Commonwealth to terminate the agreement upon any grounds permitted under this Rule, the indictment, complaint or charges which are the subject matter of the agreement shall be dismissed with prejudice.”

(2) The expungement motion shall be filed no sooner than sixty (60) days following the order of acquittal or dismissal by the court.

....

(4) If the court finds that there are no current charges or proceedings pending relating to the matter for which the expungement is sought, the court may grant the motion and order the sealing of all the records in the custody of the court and any records in the custody of any other agency or official, including law enforcement records. . . .

From these provisions, it is clear, as the Commonwealth admits, that a circuit court does have jurisdiction to expunge a defendant's criminal record if the conditions set forth in KRS 431.076 are met.

Turning to this matter, denial of Gahman's motion may have otherwise been appropriate because the Commonwealth is correct in its assertion that her motion was filed prematurely. As indicated above, KRS 431.076(2) provides that any "expungement motion shall be filed no sooner than sixty (60) days following the order of acquittal or dismissal by the court." Gahman's motion for expungement was filed on March 15, 2006, approximately two weeks *before* the trial court's entry of an order dismissing the charge against her. Thus it is clear that not only was it filed before expiration of the statutorily mandated sixty-day waiting period, its filing occurred before the waiting period had even begun to run. The motion, therefore, was not in conformance with KRS 431.076 and could not properly be granted.

However, because the trial court's order was not based on the untimeliness of Gahman's motion, but rather on the court's conclusion that it generally lacked

jurisdiction to even entertain it, it is appropriate to address this issue. Due to the trial judge's decision to include no other reasoning in her order, we are unable to discern her rationale for concluding that she lacked the jurisdiction to grant Gahman's request for expungement even though, assuming timeliness were not at issue, Gahman otherwise appears to have qualified under the statute.⁴ Regardless, the trial court's conclusion was in error; KRS 431.076 plainly confers the requisite jurisdiction on the circuit court. *See also Commonwealth v. Shouse*, 183 S.W.3d 204 (Ky.App. 2006) (defendant who pled guilty to class D felony and later successfully completed diversion program entitled to have record expunged pursuant to KRS 431.076). Therefore, because the denial of Gahman's motion appears to have been based on an incorrect legal premise, we must reverse the trial court's March 29, 2006 order to the extent that it denied the motion for expungement on jurisdictional grounds.

In sum, Gahman's motion for expungement was not filed in conformance with the time period prescribed in KRS 431.076. Nonetheless, we believe the trial court's decision to deny the motion based on jurisdictional grounds to be in error. We therefore reverse the Kenton Circuit Court's March 29, 2006 judgment and remand this matter for reconsideration in light of this Opinion.

ALL CONCUR.

⁴ Gahman argues on appeal that the trial court erroneously relied on KRS 431.078 as authority for denying the expungement motion. This statute specifically addresses expungement of misdemeanor records and does not apply to a record, such as Gahman's, involving a class D felony. However, our review of the record reveals nothing supporting Gahman's assertion. As a result, we find no reason to address this clearly inapplicable statute.

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