

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-000352-MR

TIMOTHY HUBER

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE JOHN L. ATKINS, JUDGE  
ACTION NO. 07-CR-00712

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: TAYLOR, CHIEF JUDGE; STUMBO, JUDGE; LAMBERT,<sup>1</sup>  
SENIOR JUDGE.

STUMBO, JUDGE: Timothy Huber appeals from an Order of the Christian  
Circuit Court denying his Motion to Expunge a criminal record. An Order to  
Dismiss-Divert was rendered after Huber completed a one-year supervised

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<sup>1</sup> Senior Judge Joseph E. Lambert 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.

diversion program arising from charges related to reckless driving and evading the police. In denying the Motion to Expunge, the Christian Circuit Court determined that the Order to Dismiss-Divert was the only available relief. Huber argues that this conclusion is erroneous. We must conclude that expungement was an available statutory remedy, and accordingly reverse and remand the order on appeal.

On September 3, 2007, a Kentucky State Police Trooper observed Huber traveling 94 miles per hour on his motorcycle in a 70 mph zone on the Pennyrile Parkway. As the Trooper attempted to stop the motorcycle using his emergency lights, Huber increased his speed to 130 mph. Huber was observed weaving in and out of traffic and committing additional traffic violations. The Trooper was able to stop Huber approximately 12 miles from where Huber was first observed speeding.

On December 17, 2007, an information was filed in Christian Circuit Court setting forth charges against Huber for fleeing or evading the police, first-degree, reckless driving, and additional traffic violations. On April 22, 2008, Huber pled guilty to fleeing and evading the police and reckless driving in exchange for the dismissal of the additional traffic violations and the Commonwealth's recommendation that Huber receive supervised diversion. An Order Granting Pretrial Diversion was rendered on July 2, 2008, which stated that

“[I]f the Defendant successfully completes Pretrial Diversion, the charge will be designated as Dismissed-Diverted.”

Huber subsequently completed the diversion, and on November 23, 2009, the Christian Circuit Court rendered an Order to Dismiss-Divert finding that Huber had completed the diversion and ordering that the felony charge be “dismissed-diverted.”

On January 27, 2010, Huber filed a Motion for Expungement in which he argued that he was eligible to have the felony charge expunged pursuant to KRS 431.076. The motion was denied by way of a handwritten notation rendered on February 3, 2010. As a basis for the denial, the trial court determined that dismissed-diverted was the only available relief. This appeal followed.

Huber now contends that the Christian Circuit Court erred in denying his motion to expunge the record when the court determined that the only available relief was an Order to Dismiss-Divert. Huber directs our attention to KRS 431.076, which he maintains allows for the expungement of a criminal record upon completion of diversion. He maintains that this statute grants the trial court discretion to expunge the records of persons who have been found not guilty of crimes, or for whom the charges have been dismissed with prejudice. He goes on to argue that the court’s November 23, 2009 Order to Dismiss-Divert based on Huber’s completion constitutes a dismissal with prejudice. As such, Huber contends that the trial court committed reversible error by holding that it had no statutory authority to expunge his record. He seeks an order expunging his

criminal record, or in the alternative an order reversing and remanding for further adjudication by the trial court.

In response, the Commonwealth acknowledges that a dismissal upon completion of diversion constitutes a dismissal with prejudice for purposes of KRS 431.076. It concedes that the trial court had the discretion to expunge Huber's record, and that it erred in concluding that expungement was not an available remedy. The Commonwealth's sole contention is that the matter must be remanded to the trial court for the exercise of its discretion on Huber's motion, rather than this Court rendered an order expunging the record.

KRS 431.076 provides that,

(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 . . .

(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 . . . .

We agree with Huber's claim - and the Commonwealth acknowledgement - that KRS 431.076 grants discretion to the trial court to expunge the record in a criminal action which has been dismissed based on diversion. This conclusion is based on the language of KRS 431.076, and is bolstered by *Commonwealth v. Shouse*, 183 S.W.3d 204 (Ky. App. 2006). In

*Shouse*, to which the Commonwealth cites, a panel of this Court applied RCr 8.04(5) to conclude that “dismissed-diverted” under KRS 533.258(1) means “dismissed with prejudice” for purposes of KRS 431.076. The facts of *Shouse* are similar to those of the matter before us, and as such the Christian Circuit Court’s Order to Dismiss-Divert is properly characterized as a dismissal with prejudice for purposes of KRS 431.076. Accordingly, we must conclude that the trial court erred in determining that it lacked the authority to consider Huber’s motion to expunge.

The statutory grant of discretion to adjudicate a motion to expunge extends solely to the trial court. KRS 431.076. Accordingly, we reverse the order of the Christian Circuit Court denying Huber’s motion to expunge, and remand the matter for further consideration of Huber’s motion.

ALL CONCUR.

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