

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-002492-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE  
ACTION NO. 90-CR-01993

KEVIN F. BLACK

APPELLEE

OPINION  
REVERSING AND REMANDING  
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BEFORE: BUCKINGHAM, GUIDUGLI AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. The Commonwealth of Kentucky (the State) appeals from an order of the Jefferson Circuit Court entered September 22, 1998, which ordered that the criminal record of Kevin F. Black (Black) be expunged. We reverse and remand.

In November 1990, Black was indicted on one count of theft by failure to make required disposition of property over \$100 under KRS 514.040. Although the current version of KRS 514.070 provides that theft by failure to make required disposition of property over \$100 is a Class A misdemeanor, (to be a felony the amount now must be in excess of \$300) at the time of Black's indictment it was a Class D felony. Black entered a

guilty plea to the charge against him and was sentenced to five years' imprisonment. His sentence was ultimately probated for five years along with the requirement that he make restitution (in the amount of \$6,510.00) to the victim of his crime by order of the Jefferson Circuit Court entered July 1, 1991.

During the first two years of his probation, Black only made six of the required restitution payments and was ultimately brought back before the Jefferson Circuit Court for a hearing on a motion to revoke probation. Following a hearing, the Court increased the amount of Black's monthly restitution payments, and the issue of whether to revoke probation was held open pending Black's compliance with his duty to pay restitution.

On July 21, 1998, Black filed a pro se motion to expunge his record with the trial court. In his motion and affidavit, Black alleged that he had made full restitution in compliance with the judgment entered against him. Although the State has never challenged Black's allegation that he had made payment in full, aside from Black's affidavit, there was no evidence that full restitution had in fact been made. The Commonwealth responded to Black's motion by arguing that pursuant to KRS 431.076 and KRS 431.078, expungement is proper only where the movant has been convicted of a misdemeanor, or where the movant has either been acquitted of the criminal charges against him or had pending criminal charges dismissed with prejudice. On September 22, 1998, the trial court entered an order expunging Black's record upon his payment of a \$25.00 fee. The order was entered without the benefit of a hearing. This appeal followed.

Pursuant to KRS 431.076, a person who has been acquitted of a criminal offense or a person who has had criminal charges against him dismissed with prejudice may petition for expungement of criminal record. Obviously, Black is not entitled to expungement under this section.

Under KRS 431.078, a person who has been convicted of a misdemeanor may petition the court for expungement of his misdemeanor record. KRS 431.078(1). It is obvious that Black is not entitled to expungement under this section either as he was convicted of a felony as opposed to a misdemeanor. Although KRS 514.070 was amended subsequent to Black's sentencing to make failure to make required disposition of property over \$100 a misdemeanor, that amendment does not automatically change Black's conviction to a misdemeanor as opposed to a felony.

Besides being a felony and thus not covered by KRS 431.078, other grounds exist for reversing the trial court's order of expungement. KRS 431.079(3) requires that upon receipt of a motion to expunge, the trial court:

shall set a date for a hearing and shall notify the county attorney; the victim of the crime, if there was an identified victim; and any other person whom the person filing the petition has reason to believe may have relevant information related to the expungement of the record.

KRS 431.078(3). The trial court may not order expungement unless:

if at the hearing, the court finds that:

(a) The offense was not a sex offense or an offense committed against a child;

(b) The person had no previous felony conviction;

(c) The person had not been convicted of any other misdemeanor or violation offense in the five (5) years prior to the conviction sought to be expunged;

(d) The person had not since the time of the conviction sought to be expunged been convicted of a felony, a misdemeanor, or a violation;

(e) No proceeding concerning a felony, misdemeanor, or violation is pending or being instituted against him; and

(f) The offense was an offense against the Commonwealth of Kentucky.

KRS 431.078(4). Here, there was no hearing prior to entry of the order granting expungement, and no findings entered as required by KRS 431.078(4). Therefore, the trial court erred in ordering Black's record expunged.

Having considered the parties' arguments on appeal, the order of the Jefferson Circuit Court is reversed and remanded with instructions to enter an order consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Kevin F. Black  
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