

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001888-MR

RANDAL K. KIPER

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT  
HONORABLE BILL CUNNINGHAM, JUDGE  
ACTION NO. 93-CR-00028 & NO. 93-CR-00048

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING  
\*\* \*\*

BEFORE: McANULTY, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: Randall K. Kiper brings this appeal from a July 30, 1999, order of the Lyon Circuit Court. We reverse and remand.

While serving a 25-year sentence in the Eddyville State Penitentiary, appellant was found guilty by the prison adjustment committee of assaulting a fellow inmate with a knife. He was penalized 180 days' disciplinary segregation and two years' loss of good time. The committee's finding was based upon "confidential information." An appeal to the warden was subsequently denied.

Thereafter, appellant was indicted (Indictment No. 93-CR-00028) upon the charges of second-degree assault (Kentucky Revised Statutes (KRS) 508.020) and for being a second-degree persistent felony offender (KRS 532.080). On July 7, 1994, the circuit court entered an order of dismissal which stated, in relevant part, as follows:

**UPON MOTION OF THE COMMONWEALTH** to dismiss, due to the cooperation of the complaining witness, **IT IS HEREBY ORDERED** that this matter be and is hereby **DISMISSED** with leave to reinstate.

On November 25, 1997, appellant moved the circuit court to expunge all records pertaining to the indictment. KRS 431.076. The circuit court granted the motion and entered an expungement order on January 7, 1998. It ordered all documents expunged relating to Indictment No. 93-CR-0028, and specifically directed the Department of Corrections and the Kentucky State Penitentiary to comply therewith. On February 12, 1999, appellant filed a motion to compel enforcement of the expungement order. Appellant alleged that the Kentucky Department of Corrections and the Kentucky State Penitentiary failed to comply with said order. The Kentucky Department of Corrections filed a "Report to the Court" which stated, in relevant part, as follows:

The . . . [appellant] has filed a pleading with the Court regarding his argument that all references to the incident which concerns the basis for his indictment be taken out of his records. However, those items are records maintained by the Department of Corrections, not references to his indictment in this matter. For example, he would request the Court to order that the Extraordinary Occurrence Report which details that a fellow inmate named Randall Osborne had been stabbed at the Penitentiary be

expunged from his institutional record. The . . . [appellant] wants this Court to order that his Detention Order be removed from his file when this order is a necessary part of the . . . [appellant's] institutional record giving the reasons for placing him in segregation. He also wants his Disciplinary Report removed where an adjustment committee did find him guilty of assaulting inmate Osborne. All of these documents are generated by the Department and are not part of his indictment. These records are necessary to memorialize the . . . [appellant's] behavior as an inmate, not as to whether he committed a criminal offense. As such, the Court should overrule the . . . [appellant's] request.

On July 30, 1999, the circuit court entered the following order:

The . . . [appellant] has filed a motion to compel the Department of Corrections to comply with the Order of Expungement entered by the Court on January 7, 1998. The Court has reviewed the Order of Expungement as well as the Order dismissing the action in the Lyon Circuit Court. The Order entered in the Lyon Circuit Court stated that the matter was to be dismissed with leave to reinstate. The expungement Order and certification form is as indicated "for acquittals and dismissals with prejudice."

The Order of Expungement was erroneously entered. Therefore, the court records filed in the Lyon Circuit Court will remain expunged, but the Kentucky Department of Corrections as well as the Kentucky State Penitentiary are hereby relieved from the dictates of that Order insofar as they relate to any records which have not heretofore been expunged.

This appeal follows.

Appellant contends the circuit court committed reversible error by refusing to enforce the expungement order. The expungement order was entered on January 7, 1998, and no

appeal was taken therefrom. As such, the order is considered final. By the July 30, 1999, order, the circuit court effectively amended the expungement order because of judicial error. We do not believe the circuit court had jurisdiction to reopen or amend the final expungement order on the basis of judicial error.<sup>1</sup> See Cardwell v. Commonwealth, Ky., 12 S.W.3d 672 (2000); James v. Hillerich & Bradsby Company, Ky., 299 S.W.2d 92 (1956); Prichard v. Bank Josephine, Ky. App., 723 S.W.2d 883 (1987). Under Ky. R. Crim. P. (RCr) 10.10, a circuit court may correct clerical mistakes at any time; however, such is not the case at hand. Upon the whole, we are of the opinion the circuit court committed reversible error.

For the foregoing reasons, the order of the Lyon Circuit Court is reversed and this cause is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Randal K. Kiper  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky  
Frankfort, Kentucky

Courtney J. Hightower  
Assistant Attorney General  
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<sup>1</sup>We note that a final order or judgment may be possibly subject to judicial review under Ky. R. Civ. P. 60.02. See Fanelli v. Commonwealth, Ky., 423 S.W.2d 255 (1968), *rev'd* on other grounds, 445 S.W.2d 126.