RENDERED: March 16, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 1999-CA-002689-MR

PAUL D. YORK — APPELLANT

v.

APPEAL FROM BRACKEN CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, JUDGE
ACTION NO. 88-CR-00003

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; BARBER AND KNOPF, JUDGES.

KNOPF, JUDGE: The appellant, Paul Dwayne York, appeals from an October 28, 1999 order by the Bracken Circuit Court, denying his motion to expunge the criminal records associated with his indictment in Action No. 88-CR-00003. We find that the trial court's denial of the motion without elucidation and in the absence of any evidence in the record constituted an abuse of discretion. Hence, we vacate the trial court's order, and remand for further factual findings.

On March 7, 1988, York and a co-defendant, William Turner, were indicted by the Bracken County Grand Jury on two counts of burglary in the second degree. Following a jury trial,

York was acquitted of the charges. In October 1990, York filed a motion pursuant to KRS 17.142 to order segregation of the records from that arrest and indictment. The trial court denied the motion, but this Court, in a published opinion, reversed and remanded the matter to the trial court for entry of an order segregating the records.[1]

The trial court entered an order directing all law enforcement agencies to segregate the records, but the court concluded that it did not have the authority to order the Corrections Cabinet or the Department of Probation and Parole to do so. In response, York brought an original action in this Court seeking a writ of mandamus. This Court agreed with York that KRS 17.142 applies to all public agencies, and the trial court was ordered to enter the segregation order sought by York.[2] The trial court issued the orders as directed. However, in August 1992, York filed a motion seeking to hold the Corrections Cabinet in contempt for failure to comply with the order. The trial court denied the motion for sanctions after determining that the Department of Corrections had no records relating to the indictment.

On May 22, 1999, York filed a motion, pursuant to KRS 431.076, for expungement of his court records relating to Indictment No. 88-CR-00003. On May 28, 1999, prior to any response by the Commonwealth, the trial court denied the motion

---

[1] York v. Commonwealth, Ky. App., 815 S.W.2d 415 (1991).

[2] York v. Richard L. Hinton, Judge, Ky. App., No. 92-CA-007-OA (Order Granting Petition for Writ of Mandamus entered March 16, 1992).

on a form order. Thereafter, York renewed his motion and requested that the trial court make specific findings of fact pursuant to CR 52.01. On October 28, 1999, the trial court overruled the motion without making any findings. The Commonwealth did not file a response to this motion.

On appeal, York argues that the trial court abused its discretion in denying his motion.[3] We agree. KRS 431.076(4) grants the trial court considerable discretion in determining whether a motion for expungement of records should be granted. However, the trial court's ruling must be accompanied by some articulation on the record of the court's resolution of the factual, legal, and discretionary issues presented.[4] The Commonwealth asserts that there were valid reasons for the trial court to deny York's motion to expunge the records of his indictment. However, given the current state of the record, this Court is not required to guess what those reasons might have been.[5]

---

[3] York also makes much of the fact that on two prior appeals this Court reversed the trial court's rulings denying his motions to segregate his records. However, the prior two appeals arose from orders issued by the Hon. Richard L. Hinton. In 1994, the Hon. Robert I. Gallenstein succeeded Judge Hinton as circuit judge for the 19th Judicial Circuit. Hence, York's inference of recalcitrance on the part of the trial judge is not warranted.

[4] Greathouse v. American National Bank and Trust Co., Ky. App., 796 S.W.2d 868, 870 (1990).

[5] According to the Commonwealth, York and Turner were also indicted in Mason and Fleming Counties on unrelated burglary charges. The Commonwealth states that York was convicted of the burglaries in those cases, but the Kentucky Supreme Court set aside the Mason County convictions. The Commonwealth argues that this Court is entitled to take judicial notice of York's other court records. KRE 201(f); Newberg v. Jent, Ky.App., 867 S.W.2d

(continued...)

Furthermore, we do not find the cases from other jurisdictions which are cited by the Commonwealth to be persuasive. In Earle v. District of Columbia,[6] the trial court was applying a judicially created rule allowing for expungement of arrest records where the charge is dismissed prior to trial. As previously established by the District of Columbia courts, the rule requires the movant to prove, by clear and convincing evidence, that he did not commit the crime charged.[7] Likewise, in United States v. Bagley,[8] the Federal courts follow a common-law rule which allows expungement of criminal records in unusual and extreme cases. The movant's indictment was dismissed after weapons seized during an illegal search were excluded, and thereafter he moved to expunge the records of the charges. A federal district court held that the movant had failed to prove that expungement was warranted under these circumstances. The Eighth Circuit agreed with the district court's finding that "we 'find[] it difficult to imagine that expun[ction], a remedy to be used in extreme circumstances, should be exercised every time a case is dismissed because evidence is suppressed'."[9]

---

[5](...continued)
207 (1993). However, it is inappropriate for this Court to take judicial notice of records which are not included in the record under review. Samples v. Commonwealth, Ky., 983 S.W.2d 151, 153 (1998).

[6] 479 A.2d 877 (D.C. App., 1984).

[7] *See also* District of Columbia v. Hudson, 404 A.2d 175 (D.C. App., 1979).

[8] 899 F.2d 707 (8th Cir., 1990).

[9] Id. at 708.

Earle and Bagley are clearly distinguishable from the present case. First, our expungement proceeding is a statutorily created proceeding. There is nothing in KRS 431.076 which requires the movant to show exceptional circumstances or to prove that he or she did not commit the offense charged. Furthermore, the charges which York seeks to have expunged were not dismissed prior to trial. Rather, he was acquitted on the charges following a jury trial. We see no basis for requiring him to now prove that he did not commit the offense. In addition, unlike Earle or Bagley, in which the trial court explained why expungement would not be allowed, the trial court in this case stated no basis for its decision to deny the motion to expunge the records.

Chesler v. People,[10] involved a statutory expungement proceeding and is more instructive to this case, although not in the manner suggested by the Commonwealth. The Illinois court held that a trial court may consider post-disposition behavior if that conduct is relevant to the charges for which the movant seeks expungement. However, the court also held that a trial court abuses its discretion if its decision to deny a expungement petition is not based upon any evidence of substance.

Illinois's statutory expungement procedure[11] sets out more specific criteria under which a movant may establish eligibility for expungement than does KRS 431.076. Nevertheless,

---

[10] 309 Ill. App. 3d 145, 722 N.E.2d 668, 242 Ill. Dec. 884 (Ill. App. 1st Distr., 1999).

[11] 20 Ill. Comp. Stat. 2630/5

both Illinois and Kentucky grant the trial court considerable discretion in determining whether expungement is appropriate. However, the trial court's exercise of this discretion must be based upon evidence in the record. As the record in this case now stands, there was no evidence to support the trial court's decision.

We recognize that KRS 431.036 does not require the trial court to conduct a hearing on a motion to expunge records. However on remand, the trial court must state its reasons for denying the motion based on the record. In the alternative, the Commonwealth may submit evidence in opposition to York's motion to expunge the records of his indictment in Action No. 88-CR-00003, and the trial court could be within its discretion to deny York's motion based upon that evidence. However, and particularly in light of York's motion under CR 52.01 for specific factual findings, the trial court's failure to set out its reasons for denying the expungement motion renders any meaningful appellate review impossible. Therefore, we must set aside the trial court's order and remand for further factual findings.

Accordingly, the order of the Bracken Circuit Court is vacated and this matter is remanded for further factual findings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kim Brooks
Covington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky