

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001406-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 56-CR-03572

HAROLD DIXON

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: KELLER AND LAMBERT, JUDGES; SHAKE,¹ SENIOR JUDGE.

SHAKE, SENIOR JUDGE: The Commonwealth of Kentucky appeals from a Fayette Circuit Court Order expunging criminal records relating to Harold Dixon's (Dixon) 1956 conviction for armed assault with intent to rob. Under KRS 431.078,

¹ Senior Judge Ann O'Malley Shake 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.

the trial court lacked the authority to order the expungement. Therefore, we reverse the trial court's order.

Following his guilty plea, Dixon was sentenced to twenty-one years' imprisonment. He began serving his prison sentence on February 14, 1956, and was discharged on parole six years later, on February 14, 1962. On June 26, 1973, then Governor Wendell Ford restored Dixon's civil rights.

On April 25, 2010, Dixon moved the Fayette Circuit Court to expunge all records relating to his felony conviction. While the trial court orally contemplated the motion, the prosecutor did not object and appeared disinterested in the court's ruling. The prosecutor's only comment with regard to Dixon's motion was a joke about Dixon's age. The trial court granted Dixon's motion based upon the restoration of rights and the date of the offense.

On appeal, the Commonwealth claims that the trial court lacked authority to expunge Dixon's conviction. Kentucky law vests within trial courts the power to expunge certain felony records. KRS 431.076 (1) provides that:

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 including, but not limited to, arrest records, fingerprints, photographs, index references, or other data, whether in documentary or electronic form, relating to the arrest, charge, or other matters arising out of the arrest or charge.

Trial courts do not have an inherent power to expunge cases. *Clements v. Commonwealth*, 203 S.W.3d 710, 711-712 (Ky. App. 2006).

Although the record is sparse and contains little information about the underlying crime, the record is clear that Dixon was convicted of a felony. The charges were not dismissed with prejudice. He was not acquitted. Based upon the trial court's lack of authority, we reverse the expungement order.

Despite the prosecutor's failure to preserve this issue for appeal, reversal is appropriate given the palpable nature of the error.

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Kentucky Rules of Criminal Procedure (RCr) 10.26. Palpable error is "clear or plain under current law." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Such error "affects the substantial rights of a party" if "it is more likely than ordinary error to have affected the judgment." *Ernst v. Commonwealth*, 160 S.W.3d 744, 762 (Ky. 2005).

The trial court's overreaching exercise of authority was a clear error which substantially affected the rights of the Commonwealth. Under Kentucky law, the prosecution "represents all of the people of the Commonwealth." *Goff v. Commonwealth*, 241 Ky. 428, 44 S.W.2d 306, 308 (Ky. 1931). The people of the

Commonwealth are entitled to judicial proceedings that are conducted within statutory constraints.

The expungement may appear harmless given the amount of time that has passed since Dixon's conviction and his gubernatorial pardon. However, justice cannot be served by abandoning the law and statutory constraints.

"[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Com. of Mass.*, 291 U.S. 97, 122, 54 S. Ct. 330, 338, 78 L. Ed. 674 (1934).

Accordingly, the Fayette Circuit Court Order is reversed.

DIXON, JUDGE, CONCURS.

LAMBERT, JUDGE, DISSENTS WITHOUT FILING A SEPARATE OPINION.

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