

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-001044-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE A.C. MCCAY CHAUVIN, JUDGE  
ACTION NO. 00-CR-002474

TERESA SATTERLY GARRISON

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: COMBS, DIXON, AND VANMETER, JUDGES.

COMBS, JUDGE:           The Commonwealth of Kentucky appeals an order of the Jefferson Circuit Court granting the motion of Teresa Satterly Garrison to dismiss with prejudice an indictment charging her with felony theft by unlawful taking. It also granted her petition for the expungement of her case records. After our review, we reverse and remand.

On November 15, 2000, Garrison was indicted on the charge of felony theft by unlawful taking. The Commonwealth, however, chose not to pursue the matter. Upon the Commonwealth's motion, the case was dismissed without prejudice on June 6, 2003. Garrison did not object.

On April 6, 2011, Garrison filed a motion to dismiss the indictment and to expunge the record. The Commonwealth resisted her motion, arguing that it would not consent to a dismissal with prejudice. It also argued that under Kentucky Revised Statute[s] 431.076(1), expungement is authorized *only* where a case is dismissed with prejudice or where a person has been adjudicated not guilty.

On May 23, 2011, the trial court ordered the case to be dismissed with prejudice and granted the motion to expunge the theft charge. This appeal followed.

The Commonwealth argues that by dismissing the case with prejudice without its consent, the trial court ran afoul of the doctrine of separation of powers. We are compelled to agree.

The power to charge and to prosecute charges belongs solely and exclusively to the executive branch of our government. With rare exception, a trial court is not authorized to dismiss with prejudice or to amend a prosecution based on a valid indictment. *Hoskins v. Maricle*, 150 S.W.3d 1, 20 (Ky. 2004). Under the circumstances of this case, the trial court erred by dismissing the case with prejudice.

The trial court also erred by granting the motion to expunge. Although courts have inherent equitable powers to expunge records, they may exercise that power only under extraordinary circumstances. Garrison alleged generally in her motion that the record of her indictment “is injurious to advances in employment.” The trial court did not find that Garrison’s reason for seeking expungement was extraordinary. Nor did she demonstrate that her desire for expungement outweighed the interest of the Commonwealth to maintain the record. *Commonwealth v. Holloway*, 225 S.W.3d 4004 (Ky. 2007). Finally, we reiterate that KRS 431.076(1) requires a dismissal of an indictment with prejudice as a prerequisite for expungement.

Although we are reversing, we note with concern that a number of cases discovered in the course of our research reveal instances in which the Commonwealth has declined to prosecute a case for a prolonged period of time while resisting a motion to dismiss with prejudice. Frequently, individuals are seeking to cleanse their résumés in order to qualify for employment. Often a substantial period of time is involved, keeping them in limbo indefinitely and impeding their ability to obtain employment.

Clearly, this is a matter committed to the discretion of the prosecutor. However, as presently exercised, that discretion has the potential of undermining the spirit of due process and equity. This case represents a conscientious – albeit erroneous – attempt by the Jefferson Circuit Court to rectify what may be an

injustice. It is an issue that needs to be re-visited by the General Assembly for clarification of its legislative intent.

We reverse the order of the Jefferson Circuit Court and remand for entry of an order consistent with this opinion.

VANMETER, JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT.

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