

RENDERED: JANUARY 9, 2015; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-000539-ME

RANDELL WAUGH

APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT  
HONORABLE DAVID D. FLATT, JUDGE  
ACTION NO. 94-D-00038 AND 94-D-00038-001

DIANE KAYE WAUGH

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON,<sup>1</sup> LAMBERT AND TAYLOR, JUDGES.

CAPERTON, JUDGE: Randell Waugh appeals from the Carter Circuit Court’s denial of his motion to expunge a domestic violence emergency protective order (“EPO”) that was entered over twenty years ago. Randell argues that he was never

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<sup>1</sup> Judge Caperton authored this opinion prior to Judge Debra Lambert being sworn in on January 5, 2015, as Judge of Division 1, Third Appellate District. Release of this opinion was delayed by administrative handling.

served with the EPO<sup>2</sup> and thus the EPO should be expunged for numerous reasons, as discussed *infra*. Diane Kaye Waugh has not filed a brief in this matter. After a thorough review of Randell's arguments, we must conclude that the court below did not err. Accordingly, we affirm.

On appeal, Randell argues: (1) the court committed reversible error in overruling his motion because an EPO is an offense that is a misdemeanor or violation under Kentucky Revised Statutes (KRS) 431.060 and, thus, subject to expungement under KRS 431.078; (2) the court should be reversed because the case was unconstitutional as applied because Randell was not served with the summons and/or the summons was fatally defective; (3) the court should be reversed because Diane did not file suit against Randell within any applicable statute of limitations; (4) the court should be reversed because the court failed to utilize its inherent power to expunge judicial or executive records; and (5) the court erred as the record is unclear as to whether proper service was made and, thus, an evidentiary hearing should be held.

Randell first argues that an EPO is an offense that is a misdemeanor or violation under KRS 431.060 and, thus, subject to expungement under KRS 431.078; we disagree. An EPO is simply not a criminal matter subject to KRS 431.078 and Randell has not provided this Court with law to the contrary. We agree with the court below that we are unaware of any statutory authority for the

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<sup>2</sup> Throughout Appellant's brief the order entered twenty years ago is styled as a domestic violence order ("DVO"). We have reviewed the record. The order entered was an EPO and our opinion accurately reflects this.

expungement of an EPO. We are sympathetic to Randell's plight; however, it is ultimately the legislature who could solve this dilemma by providing statutory grounds for expungement of an EPO/DVO. Similarly, Randell's argument that Diane did not file suit against Randell within any applicable statute of limitations is without merit. The filing of an EPO is not a lawsuit. Thus, we decline to reverse on these grounds.

Next, Randell argues the court below should be reversed because the court failed to utilize its inherent power to expunge judicial or executive records. This Court addressed the inherent equitable power of a court to order expungement of a record:

[C]ase law says that a court can expunge judicial and executive records in instances that do not have statutory authority. In *U.S. v. Doe*, 556 F.2d 391, 393 (6th Cir. Ohio 1977), the court states that "[i]t is within the inherent equitable powers of a [court] to order the expungement of a record in an appropriate case." Kentucky case law is scarce when dealing with inherent powers to expunge records. The issue, however, has been heavily litigated in federal courts. Most federal courts hold that a court can use its inherent powers to expunge a record in instances of extraordinary circumstances, such as illegal prosecutions, arrests under unconstitutional statutes, or where necessary to vindicate constitutional or statutory rights. *U.S. v. Gillock*, 771 F.Supp. 904, 908 (W.D. Tenn. 1991).

The courts' power to expunge matters from records is one of 'exceedingly narrow scope' to be reserved for extreme cases and is not to be used routinely. The mere fact that an individual is not convicted on the charges on which he was arrested does not entitle him to expungement of the arrest record. Rather, expungement is ordinarily reserved for remedying the denial of an individual's constitutional rights.

*Coles v. Levine*, 561 F.Supp. 146, 153 (D.Md.1983)  
(citations omitted).

*Commonwealth v. Holloway*, 225 S.W.3d 404, 406-07 (Ky. App. 2007).

*Sub judice*, we cannot say that the court below erred in declining to expunge Randell's record as there were not extraordinary circumstances comparable to those listed in *Holloway*.

Randell then argues that the EPO was unconstitutional as applied because Randell was not served with the summons and/or the summons was fatally defective. Randell further argues that given the uncertainty with the service, the court should have held an evidentiary hearing. We disagree.

KRS 403.740(4)-(6) states that an EPO will be effective prior to being served upon the adverse party<sup>3</sup> and that personal service is required on the adverse party:

(4) An emergency protective order issued in accordance with this section shall be effective until the full hearing provided for in this subsection or in KRS 403.745, or until withdrawn by the court. Upon the issuance of an emergency protective order, the court shall set a date and time for a full hearing, within fourteen (14) days as provided for in KRS 403.745, and shall summon the adverse party to appear. If, at the hearing, the adverse party is not present and has not been served, the emergency protective order shall remain in place, and the court shall direct the issuance of a new summons for a hearing set not more than fourteen (14) days in the future. If service has not been made on the adverse party prior to

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<sup>3</sup> Although we note that Randell could not have been held in contempt of court until he has either been notified of its existence and terms or has been served with it. *Stinson v. Stinson*, 381 S.W.3d 333, 337 (Ky. App. 2012)(relying on KRS 403.735(6)).

seventy-two (72) hours before that hearing or a subsequent hearing, the emergency protective order shall remain in place and the court shall continue the hearing and issue a new summons with a new date and time for the hearing to occur, which shall be within fourteen (14) days of the originally scheduled date for the continued hearing. Before issuing the new summons, the court shall note the length of time that has passed since the issuance of the emergency protective order, during which the adverse party has not been served. The court shall repeat the process of continuing the hearing and reissuing a new summons after noting the lapse of time since the issuance of the emergency protective order until the adverse party is served at least seventy-two (72) hours in advance of the scheduled hearing. In issuing the summons, the court shall simultaneously transmit a copy of the summons or notice of its issuance and provisions to the petitioner.

(5) The adverse party shall be personally served with a copy of the emergency protective order, a copy of the summons setting the full hearing, and a copy of the petition. Service may be made in the manner and by the persons authorized to serve subpoenas under the provisions of Rule 45.03 of the Rules of Civil Procedure. No service fee shall be assessed to the petitioner.

(6) (a) The provisions of this section permitting the continuance of an emergency protective order shall be limited to six (6) months from the issuance of the initial emergency protective order.

(b) If the respondent has not been served within the six (6) month period, the emergency protective order shall be rescinded without prejudice. Prior to the expiration of the emergency protective order, the court shall provide notice to the petitioner stating that if the petitioner does not file a new petition the order shall be rescinded without prejudice.

(c) A new emergency protective order shall not be issued by the court unless the petitioner files a new petition, which shall start the six (6) month process again.

(d) The total length of time that a series of emergency protective orders may remain in effect without the respondent being served shall not exceed two (2) years.

Thus, per statute, the EPO is effective for a finite period of time without service.

We are not persuaded that this violated Randell's constitutional rights. We are also not persuaded that the court below was obligated to hold an evidentiary hearing as Randell's incorrect service argument is premised on an incorrect spelling of his name;<sup>4</sup> Randell does not claim to have been unaware of the EPO or that the remainder of the petition for the EPO in the record is incorrect. Thus, we decline to reverse on these grounds.

Finding no error, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE:

W. Jeffrey Scott  
Brandon Michael Music  
Grayson, Kentucky

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<sup>4</sup> We believe a different situation could merit expungement. If an EPO is wrongly issued against a third party, i.e., where the intended adverse party shares a name with the third party, then the court could use its equitable power to expunge the record