

RENDERED: AUGUST 17, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000526-MR

REGINALD ERIC FRANTZ

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 90-CR-000241-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: Reginald Eric Frantz brings this appeal from February 16, 2017, Orders of the Jefferson Circuit Court denying Frantz's application for expungement of felony convictions pursuant to Kentucky Revised Statutes (KRS) 431.073. We affirm.

In 1992, following a jury trial, Frantz was found guilty of two counts of theft by unlawful taking over \$300. On July 17, 1992, the Jefferson Circuit Court sentenced Frantz to one-year imprisonment.

Subsequently, on July 25, 2016, pursuant to KRS 431.073, effective July 15, 2016, Frantz filed an application to vacate and expunge his felony convictions. Frantz sought to have the July 17, 1992, judgment of conviction vacated and all records expunged relating to the convictions of theft by unlawful taking. By orders entered February 16, 2017, the circuit court denied the application for expungement. The circuit court found:

The Court does not find Defendant has taken responsibility for his actions. Despite the Court's request that Defendant Franz [sic] write an essay on how he is accountable for the theft convictions from years ago and understands how they may have impacted the life of the victim, Defendant's letter only discusses the impact to himself. He pushes blame and responsibility to the victim and his co-defendant.

Accordingly, the Court, having reviewed the application to expunge a felony conviction and being otherwise sufficiently advised, the application for expungement is hereby **DENIED**. The clerk shall refund the fee paid for the application.

This appeal follows.

Appellant contends the circuit court erred by denying his application to expunge his felony convictions under KRS 431.073. Appellant argues that he was entitled to expungement as he satisfied the statutory criteria set forth in KRS 431.073(4). Additionally, appellant maintains the circuit court failed to make findings of fact as required by KRS 431.073(4) and abused its discretion by denying his application for expungement.

The interpretation of a statute presents an issue of law, and our review proceeds *de novo*. See *City of Bowling Green v. Helbig*, 399 S.W.3d 445, 447 (Ky. App. 2012). Generally, our courts have recognized that the legislature’s use of the word “may” signals a permissive statutory requirement while use of the word “shall” signals a mandatory statutory requirement. KRS 446.010(26); KRS 446.010(39); *Storm v. Martin*, 540 S.W.3d 795, 801 (Ky. 2017); *Alexander v. S & M Motors, Inc.*, 28 S.W.3d 303, 305 (Ky. 2000). It also has been observed that “[w]hen a statute distinguishes between ‘may’ and ‘shall,’ it is generally clear that ‘shall’ imposes a mandatory duty.” *Kingdomware Technologies, Inc. v. United States*, ____ U.S. ____, 136 S. Ct. 1969, 1977, 195 L. Ed. 2d 334 (2016).

The expungement statute at issue in this appeal is KRS 431.073, which provides, in relevant part:

- (1) Any person who has been convicted of a Class D felony violation of KRS 17.175, 186.990, 194A.505, 194B.505, 217.181, 217.207, 217.208, 218A.140, 218A.1415, 218A.1416, 218A.1417, 218A.1418, 218A.1423, 218A.1439, 218A.282, 218A.284, 218A.286, 218A.320, 218A.322, 218A.324, 244.165, 286.11-057, 304.47-5, 324.990, 365.241, 434.155, 434.675, 434.850, 434.872, 511.040, 512.020, 514.030, 514.040, 514.050, 514.060, 514.065, 514.070, 514.080, 514.090, 514.100, 514.110, 514.120, 514.140, 514.150, 514.160, 516.030, 516.060, 516.090, 516.108, 517.120, 518.040, 522.040, 524.100, 525.113, 526.020, 526.030, 528.020, 528.040, 528.050, 530.010, or 530.050, or a series of Class D felony violations of one (1) or more statutes enumerated in this section arising from a single incident, or who has been granted a full pardon, may file with the court in which he

or she was convicted an application to have the judgment vacated. The application shall be filed as a motion in the original criminal case. The person shall be informed of the right at the time of adjudication.

....

(4) The court may order the judgment vacated, and if the judgment is vacated the court shall dismiss with prejudice any charges which are eligible for expungement under subsection (1) of this section, or KRS 431.076 or 431.078, and order expunged all records in the custody of the court and any records in the custody of any other agency or official, including law enforcement records, if the court finds that:

(a) The person had not previously had a felony conviction vacated and the record expunged pursuant to this section;

(b) The person had not in the five (5) years prior to the filing of the application to have the judgment vacated been convicted of a felony or a misdemeanor; and

(c) No proceeding concerning a felony or misdemeanor is pending or being instituted against the person.

Under subsection (4), the circuit court “may” vacate the judgment of conviction provided the court finds that the person did not have a previous felony expunged under the statute, had not been convicted of a felony/misdemeanor within five years, and does not have a current felony/misdemeanor proceeding impending. KRS 431.073(4). If the circuit court decides to vacate the judgment of conviction, the circuit court “shall” dismiss all charges and order all records expunged. By use of the term “may” in subsection (4), the circuit court is vested with discretion to

initially decide whether to grant expungement provided the statutory criteria of KRS 431.073(4)(a-c) are satisfied. However, if the circuit court decides to grant expungement, KRS 431.073(4) is clear that the court “shall” dismiss all charges with prejudice and expunge all records related to the felony convictions. As to these statutory mandates, the circuit court possesses no discretion.

In this case, it is undisputed that Frantz satisfied the statutory criteria set forth in KRS 431.073(4)(a-c). As the statutory criteria of KRS 431.073(4)(a-c) was fulfilled, the circuit court possessed discretion to grant or deny Frantz’s application for expungement of his felony convictions. In denying the application, the circuit court found that Frantz had never “taken responsibility for his actions.” The court was particularly troubled by an essay Frantz wrote at the court’s request. The court noted that in the essay Frantz “only discussed the impact to himself. He pushes blame and responsibility to the victim and his co-defendant.” Considering the circuit court’s reasons set forth for denying Frantz’s application for expungement, we simply cannot conclude that the court abused its discretion or failed to make sufficient findings of fact under KRS 431.073. In short, the circuit court complied with KRS 431.073.

We view any remaining contentions of error as moot or without merit.

In sum, we hold that the circuit court did not commit reversible error by denying Frantz's application for expungement of two felony convictions pursuant to KRS 431.073.

For the foregoing reasons, the Orders of the Jefferson Circuit Court are affirmed.

MAZE, JUDGE CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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