

RENDERED: MARCH 1, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000377-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 05-CR-00707

DEBRA FOUTS

APPELLEE

OPINION
REVERSING AND
REMANDING

** ** * * * * *

BEFORE: DIXON, JONES, AND K. THOMPSON, JUDGES.

DIXON, JUDGE: The Commonwealth of Kentucky appeals an order of expungement entered by the Fayette Circuit Court. Because we conclude the court erred as a matter of law, we reverse and remand for further proceedings.

Debra Fouts was indicted by a Fayette County grand jury on charges of cultivating marijuana, over five plants; second-degree unlawful transaction with

a minor; third-degree unlawful transaction with a minor; and possession of drug paraphernalia. Fouts subsequently pled guilty to amended charges of cultivating marijuana, less than five plants, first offense (KRS 218A.1423), and unlawful transaction with a minor, third degree (KRS 530.070).¹ The court sentenced Fouts to twelve months in jail, probated for two years. In November 2017, Fouts moved to expunge her convictions pursuant to KRS 431.078. The court held a hearing on Fouts's petition and, over the Commonwealth's objection, entered an order of expungement. The Commonwealth now appeals.

Cultivating marijuana, less than five plants, first offense, and third-degree unlawful transaction with a minor are both misdemeanors, and expungement is controlled by KRS 431.078. The statute provides for expungement if, following a hearing, the trial court makes the following findings:

- (a) The offense was not a sex offense or an offense committed against a child;
- (b) The person had not in the five (5) years prior to the filing of the petition for expungement been convicted of a felony or a misdemeanor;
- (c) No proceeding concerning a felony or misdemeanor is pending or being instituted against the person; and
- (d) The offense is not one subject to enhancement for a second or subsequent offense or the time for such an enhancement has expired.

¹ The remaining charges of third-degree unlawful transaction with a minor and possession of drug paraphernalia were dismissed.

KRS 431.078(4).

On appeal, the Commonwealth contends Fouts's convictions were not eligible for expungement pursuant to KRS 431.078(4)(a) and 4(d).

The Commonwealth's argument presents a question of statutory interpretation, and appellate review is *de novo*. *Whitcomb v. Commonwealth*, 424 S.W.3d 417, 419 (Ky. 2014). "As with any case involving statutory interpretation, our duty is to ascertain and give effect to the intent of the General Assembly. We are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used." *Beckham v. Bd. of Educ. of Jefferson County*, 873 S.W.2d 575, 577 (Ky. 1994).

Fouts was convicted of first-offense cultivating marijuana, less than five plants, pursuant to KRS 218A.1423, which states:

(3) Marijuana cultivation of fewer than five (5) plants is:

(a) For a first offense a Class A misdemeanor.

(b) For a second or subsequent offense a Class D felony.

The Commonwealth contends first-offense cultivating marijuana, less than five plants, is subject to enhancement and ineligible for expungement. Fouts, however, argues the legislature intended for KRS 431.078(4)(d) to apply only to DUI offenses.

KRS 218A.1423(3)(b) clearly provides for enhancement to a Class D felony on a second offense of cultivating marijuana, less than five plants, and there is no time limit for such enhancement. Applying the plain language of KRS 431.078(4)(d), a conviction for first offense cultivating marijuana, less than five plants, cannot be expunged because it is subject to enhancement for a second offense. “[S]tatutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required.” *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002). The language of KRS 431.078(4)(d) is unambiguous and precludes expungement of any offense that is subject to enhancement, where the time limit for enhancement has not expired. We conclude Fouts’s conviction pursuant to KRS 218A.1423(3) was not eligible for expungement under KRS 431.078(4)(d). The trial court’s order granting expungement was erroneous as a matter of law.

Fouts was also convicted of third-degree unlawful transaction with a minor pursuant to KRS 530.070, which states:

(1) A person is guilty of unlawful transaction with a minor in the third degree when:

(a) Acting other than as a retail licensee, he knowingly sells, gives, purchases or procures any alcoholic or malt beverage in any form to or for a minor. . . .

(b) He knowingly induces, assists, or causes a minor to engage in any other criminal activity;

(c) He knowingly induces, assists or causes a minor to become a habitual truant; or

(d) He persistently and knowingly induces, assists or causes a minor to disobey his parent or guardian.

The Commonwealth contends the offense of third-degree unlawful transaction with a minor is ineligible for expungement under KRS 431.078(4)(a) because it is an offense committed against a child.

“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” *Hall v. Hosp. Resources, Inc.*, 276 S.W.3d 775, 784 (Ky. 2008) (citation omitted). We agree with the Commonwealth that “child” and “minor” both commonly refer to a person who is less than eighteen years old.² Because we conclude third-degree unlawful transaction with a minor is an offense committed against a child, a conviction for that offense also is not eligible for expungement pursuant to KRS 431.078(4)(a). Therefore, the trial court’s order granting expungement was erroneous as a matter of law.

For the reasons stated herein, we reverse the order of the Fayette Circuit Court and remand this matter for further proceedings consistent with this opinion.

² Black’s Law Dictionary defines “child” as “[a]n unemancipated person under the age of majority,” while “minor” is defined as “[s]omeone who has not reached full legal age; a child or juvenile.” Black’s Law Dictionary (10th ed. 2014).

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