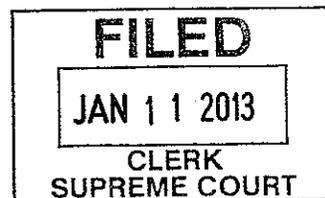


COMMONWEALTH OF KENTUCKY
SUPREME COURT
2012-SC-000144-DG



COMMONWEALTH OF KENTUCKY

APPELLANT

On Discretionary Review From
The Kentucky Court of Appeals 2010-CA-002324

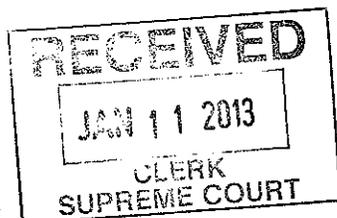
v.

Appeal from the Jefferson Circuit Court, Fifth Division
Indictment No. 92-CR-001447

CHARLOTTE M. JONES

APPELLEE

BRIEF FOR APPELLEE, CHARLOTTE M. JONES



Submitted by:

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by mail or delivery on January 10, 2013: Hon. Mary M. Shaw, Judge, Jefferson Circuit Court, Div. 5, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Kentucky, 40202; Hon. Dorislee Gilbert, Counsel for Appellant, Special Assistant Attorney General, 514 West Liberty Street, Louisville, Kentucky 40202; Hon. Jack Conway, Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, Kentucky, 40601; Hon. Larry Simon, Counsel for KACDL, 510 West Broadway, Suite 805, Louisville, Kentucky, 40202; Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky, 40601. The undersigned does also certify that the Record on Appeal was not withdrawn by the Appellee.

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STATEMENT CONCERNING ORAL ARGUMENT

The Appellee believes the statutes in question are clear and persuasive as was the decision by the Court of Appeals. Thus, the Appellee does not request oral argument. However, should the Court believe it will benefit from oral argument, the Appellee will gladly participate.

COUNTERSTATEMENT OF THE CASE

Appellee accepts the Appellant's statement of the case.

ARGUMENT

The Appellant (hereinafter "the Commonwealth") appeals from the Court of Appeals' Opinion affirming the Circuit Court's decision authorizing expungement of a voided possessory drug conviction. As will be detailed below, the Court of Appeals is correct in holding that a voided conviction under KRS 218A.275 is a dismissal with prejudice, thereby permitting expungement pursuant to KRS 431.076.

I.

**A POSSESSORY DRUG CONVICTION
VOIDED BY KRS 218A.275 IS A
DISMISSAL WITH PREJUDICE AND
THEREFORE EXPUNGEMENT IS
AUTHORIZED PURSUANT TO KRS
431.076.**

The Commonwealth advances four arguments in section three of its brief in support of their proposition that a KRS 218A.275 voided conviction is not a dismissal with prejudice and not subject to expungement.

The Commonwealth's first argument is that the Court of Appeals wrongfully added the phrase "with prejudice" to KRS 218A.275(9) and therefore, the resulting

Appellate Opinion authorizing expungement is contrary to legislative intent. Appellant's Brief, p. 9.

The Court of Appeals' decision is correct. The legislature intends for voided convictions to be dismissals with prejudice.

KRS 218A.275(9) states as follows:

In the case of any person who has been convicted for the first time of possession of controlled substances, the court may set aside and void the conviction upon satisfactory completion of treatment, probation, or other sentence, and issue to the person a certificate to that effect. A conviction voided under this subsection shall not be deemed a first offense for purposes of this chapter or deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Voiding of a conviction under the subsection *and dismissal* may occur only once with respect to any person.

(Emphasis added.)

Interpreting the term "dismissal" as found in KRS 218A.275(9) as meaning dismissal without prejudice, as argued by the Commonwealth, is nonsensical in a statute which addresses the voiding and dismissal of convictions for possessory drug offenses. The Court should effectuate the legislature's intention and must presume that the legislature did not intend an absurd result. *Commonwealth, Central State Hospital v. Gray*, 880 S.W.2d 557, 559 (Ky. 1994).

Black's Law Dictionary defines a void judgment as follows:

A judgment that has no legal force or effect, the invalidity of which may be asserted by any party whose rights are affected at any time and any place, whether directly or collaterally . . . It is incapable of being confirmed, ratified, or enforced in any manner or to any degree.

Black's Law Dictionary, 681 (Bryan A. Garner, ed., abridged 7th ed., West 2000). The Court of Appeals correctly noted "no one can seriously contend but under the circumstances the dismissal of Jones' offense is with prejudice." App. Op., p. 5. Otherwise, a defendant, having complied with all conditions of her sentence, would be subject to the prosecutorial whims of the Commonwealth allowing reinstatement of the charges against her after her conviction was voided.

This Court, in *Gibson v. Commonwealth*, 291 S.W.3d 686 (Ky. 2009), addresses the difference between dismissals with and without prejudice.

To avoid a misconception about the meaning of the terms, we refer to *Black's Law Dictionary*, which defines "dismissed with prejudice" as "removed from the court's docket in such a way that the plaintiff is foreclosed from filing a suit again on the same claim or claims." *Black's Law Dictionary*, 503 (8th ed. 2004). It defines "dismissed without prejudice" as "removed from the court's docket in such a way that the plaintiff may refile the same suit on the same claim or claims." *Id.* at 503.

Gibson, 291 S.W.3d at 688. Given that the Appellee had her conviction voided, the Commonwealth is foreclosed from reinstating the charges against her unless the Commonwealth prevails and this Court finds that a dismissal under KRS 218A.275(9) is without prejudice.

Once a possessory drug conviction has been voided and therefore, dismissed with prejudice, then KRS 431.076 allows the voided conviction to be expunged. KRS 431.076(1) states:

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.

There are no decisions in the Commonwealth addressing the issue of whether a voided conviction is a dismissal with prejudice, thereby permitting expungement.

However, a 2009 unpublished opinion by the Court of Appeals held that the KRS 431.076 expungement statute extends to a conviction which had been reversed on appeal as a reversal was “tantamount to a dismissal with prejudice or a directed verdict.” *Hermansen v Com.*, unpublished opinion, 2009 WL 723056, *1 (Ky. App.) (attached as Appendix 1). This analysis by the Court of Appeals expanding the meaning of dismissal with prejudice under KRS 431.076 to include a reversal of a conviction on appeal should assist this Court in determining whether a voided conviction is a dismissal with prejudice and consequently subject to KRS 431.076 expungement. Ultimately, a voided conviction is “tantamount to a dismissal with prejudice.” *Id.*

In the case at bar, the Court of Appeals correctly held that a conviction voided by operation of KRS 218A.275 is a dismissal with prejudice and, thus, is entitled to KRS 431.076 expungement.

The Commonwealth’s second argument in section three of its brief maintains that because other statutes authorizing expungement contain the phrase “dismissed with prejudice”, its absence in KRS 218A.275 indicates a legislative intent disallowing expungement of a voided conviction. Appellant’s Brief, p. 9.

As noted by the Commonwealth: KRS 510.300 provides for the expungement of Chapter 510 offenses by an accused spouse if the charge is dismissed with prejudice; KRS 440.450, Articles III, IV and V, permit dismissal with prejudice of pending charges if time constraints of the Interstate Agreement on detainees are not followed. Neither of the statutes cited by the Commonwealth shed light on the issue of whether the legislature intends expungement of voided convictions, because the statutes pertain to pre-conviction resolutions rather than to post-conviction situations.

KRS 510.300 authorizes expungement if “a charge was either dismissed with prejudice or a verdict of not guilty on said charge was entered.” KRS 510.300(1). Here, expungement is permissible only if there is no conviction unlike the Appellee’s situation where she was convicted, served her sentence, and had her conviction voided. Similarly, KRS 440.450 authorizes expungement of offenses which were dismissed because of time deadlines in contrast with the Appellee’s situation where she was convicted and served her sentence. To merit a voided conviction under KRS 218A.275, a convicted person must meet the statutory requirements of KRS 218A.275(9), which are “satisfactory completion of treatment, probation, or other sentence.”

If the Commonwealth is correct that a KRS 218A.275 dismissal is without prejudice, then criminal charges could be reinstated after they were voided even though an individual had been convicted and had successfully completed treatment or successfully complied with the terms of probation or even after an individual was incarcerated and successfully served her sentence. Under the Commonwealth’s theory the drug charges against the Appellee could be reinstated many years after the completion of her sentence. This cannot be what the legislature intended.

The Commonwealth's third argument in section three of its brief is that KRS 431.076 expungement of a KRS 218A.275 voided conviction will allow repeated voiding of possessory drug convictions which is contrary to the "first time" and "only once" provisions of KRS 218A.275(9). Appellant's Brief, p. 10.

However, the expungement statute at KRS 431.076(6) allows for access to the sealed record. KRS 431.076(6) states:

Inspection of the expunged records may therefore be permitted by the court only upon motion by the person who is the subject of the records and only to those persons named in the motion.

There is no bar to a prosecutor requiring the defendant to request production of any expunged records before determining eligibility for future diversions, expungements, or voidings. The Court of Appeals addressed the concern of repeated expungements in pre-trial diversion cases in *Commonwealth v. Shouse*, 183 S.W.3d 204 (Ky. App. 2006):

As to the contention that the granting of expungement will preclude the Commonwealth from assessing a defendant's eligibility for pre-trial diversion, the expungement statute specifically provides that the person affected may move the court to allow others to inspect his expunged record.

Id. at 206.

The final argument advanced by the Commonwealth in section three of its brief is whether the issuance of a certificate of a voided conviction to an individual pursuant to KRS 218.275(9), indicates legislative intent against expungement. Appellant's Brief, p. 11. It does not.

The legislature requires the issuance of a certificate of a void conviction to assist a defendant during the time between the voiding of the conviction and its expungement.

An expungement motion cannot be made until after sixty (60) days following a dismissal with prejudice or as in this case, the entry of an Order voiding the possessory drug conviction. KRS 431.076(2), states as follows:

The expungement motion shall be filed no sooner than sixty (60) days following the order of acquittal or dismissal by the court.

A defendant may use this certificate to her advantage with employers showing that her conviction has been voided while an expungement is forthcoming.

Additionally, if an employer has a criminal history reflecting a conviction and then obtains a second criminal history post-expungement, the employer may want an explanation as to the absence of the conviction. The certificate answers that question.

II.

AN EXPUNGEMENT DOES NOT AUTOMATICALLY RESULT FROM THE VOIDING OF A POSSESSORY DRUG CONVICTION, THUS THE LEGISLATURE DEFINES WHAT CONSTITUTES A SECOND OFFENSE BY EXCLUDING VOIDED CONVICTIONS.

The Commonwealth argues in section four of its brief that if voided convictions were eligible for expungement, there would be no need to specify that they should not be considered for determining whether a second or subsequent offense has occurred under Chapter 218. Appellant's Brief at pp. 11-12. KRS 218A.275(9) states, in part:

...A conviction voided under this subsection shall not be deemed a first offense for purposes of this chapter or deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. ...

The Commonwealth assumes that every voided conviction will result in an expungement. The voiding of a possessory drug conviction under KRS 218A.275 and expungement under KRS 431.076 are not simultaneous events. Rather, expungement is a three-step process requiring a Defendant to take affirmative steps:

Step one: Have a possessory drug conviction voided and dismissed under KRS 218A.275.

Step two: Wait the statutory minimum of sixty (60) days. KRS 431.076(2).

Step three: Following the voiding and dismissal of a possessory drug conviction and having waited 60 days, an individual can then seek expungement pursuant to KRS 431.076(1) by filing a motion in the Court where the charges were filed:

A person who has been charged with a criminal offense 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 . . .

Unsophisticated or *pro se* defendants, indigents, or those with uninformed counsel might not take the extra step to expunge a voided conviction. If an individual has a conviction voided but does not move for expungement, then an arrest record continues to exist with police and correction agencies, and court records will reflect the charge and the disposition. Therefore, if an individual is subsequently arrested for a drug offense, KRS 218A.275(9) merely addresses the question whether a voided conviction can be used to form the basis of a second offense. Thankfully, the legislature has clearly stated its intention that a voided possessory drug conviction cannot be used to make a subsequent drug charge a second offense.

III.

**RECORDS SUBJECT TO EXPUNGEMENT
ARE ALSO SUBJECT TO SEGREGATION.
THE MERE EXISTENCE OF THE
SEGREGATION REMEDY DOES NOT
BAR THE AVAILABILITY OF THE MORE
MEANINGFUL REMEDY OF EXPUNGE-
MENT.**

The Commonwealth argues in section five of its brief that while voided convictions are not eligible for expungement, a voided conviction may be segregated pursuant to KRS 17.142. Appellant's Brief at p. 14.

KRS 17.142(1) provides:

- (1) Each law enforcement or other public agency in possession of arrest records, fingerprints, photographs, or other data whether in documentary or electronic form shall upon written request of the arrestee as provided herein segregate all records relating to the arrestee in its files in a file separate and apart from those of convicted persons, if the person who is the subject of the records:
 - (a) Is found innocent of the offense for which the records were made; or
 - (b) Has had all charges relating to the offense dismissed; or
 - (c) Has had all charges relating to the offense withdrawn.

The Commonwealth cites *Commonwealth v. Smith*, 354 S.W.3d 595 (Ky. App. 2011) for the proposition that in the case at bar, the Appellee's remedy is record segregation pursuant to KRS 17.142 rather than expungement. In *Smith*, the charges against the defendant were "dismissed without prejudice" following a successful suppression hearing before trial. Nine years later, the defendant moved the trial court to

amend the order of dismissal to “with prejudice” thereby allowing subsequent expungement. The Court of Appeals held that the trial court did not have the authority to amend its dismissal order. Further, the Court of Appeals suggested that the defendant’s remedy was the segregation of his records pursuant to KRS 17.142. *Id.* at 597.

In the case at bar, the Appellee and the Court of Appeals both say that Appellee Jones’s dismissal pursuant to KRS 218A.275 was a dismissal with prejudice. Here, unlike *Smith*, there is no Judgment of Conviction which is being amended. Because the Appellee’s dismissal was with prejudice, the records may properly be expunged.

The existence of the general remedy of segregation does not bar the more specific remedy of expungement. Record segregation is allowed in two situations where expungement is impermissible: a dismissal without prejudice (KRS 17.142(1)(b)), and the withdrawal of charges (KRS 17.142(1)(c)). Record segregation and expungement are both appropriate if the charges are dismissed with prejudice or an individual is found innocent of the charged offenses. KRS 17.142(1)(a) and KRS 431.076(1).

Should this Court reverse the Court of Appeals’ Opinion, the Appellee could seek the segregation of her records, an almost meaningless remedy because a segregation order only pertains to police and public agencies, not Court records. Employers have access to Court records.

IV.

**RECENT AMENDMENTS TO KRS
218A.275 DO NOT INDICATE
LEGISLATIVE INTENT AGAINST
THE DISMISSAL WITH PREJUDICE
OF A VOIDED CONVICTION AND
SUBSEQUENT EXPUNGEMENT.**

In section six of its brief, the Commonwealth analyzes KRS 218A.275(9) which was in effect when the Appellee had her voided drug conviction expunged and KRS 218A.275(8)-(12), as amended and now in effect, and concludes that in light of the language of the amended statute, the legislature never intended expungement of a voided conviction. Appellant's Brief, pp. 15-17. Specifically, the Commonwealth claims that because KRS 218.A.275(10), as amended, now allows the sealing of a voided conviction, the legislature never intended expungement of voided convictions pursuant to the previous version of KRS 218A.275 which did not address record sealing. This is an erroneous conclusion.

KRS 218A.275, as amended, clarifies the legislative intent that voided convictions should be expunged from police and court records. KRS 218A.275(9), as amended, streamlines the process wherein the trial judge shall order an individual's records "sealed" simultaneously with the entry of the court's order voiding a conviction:

If the court voids a conviction under this section, the court shall order the sealing of all records in the custody of the court and any records in the custody of any other agency or official, including law enforcement records, except as provided in KRS 27A.099.

In situations pertaining to voided drug convictions, no longer must a defendant wait sixty (60) days before moving for expungement. No longer will a defendant incur extra legal fees arising from counsel filing a separate expungement motion. There is no practical difference between the sealing of records under KRS 218A.275, as amended, and the expungement under KRS 431.076 other than KRS 218A.275, as amended, expedites the process. Both result in records being "sealed." KRS 218.275(10) (as amended), and KRS 431.076(4).

The critical language of KRS 218A.275(10), as amended (which addresses the sealing of records) and KRS 431.076(5) (the expungement statute) is nearly identical. As a result of a KRS 431.076 expungement and KRS 218A.275(10) record sealing, both statutes state:

. . . The Court and other agencies shall reply to any inquiry that no record exists on the matter. The person whose record is expunged shall not have to disclose the fact of the record or any matter relating thereto on an application for employment, credit or any other type of application.

The expungement statute, KRS 431.076(5), contains the phrase “the proceedings in this matter shall be deemed never to have occurred.” This phrase is absent in KRS 218A.275(10), as amended. The Commonwealth states that the absence of the phrase “the proceedings in this matter shall be deemed never to have occurred” in KRS 218A.275, as amended, is significant but offers no explanation of its significance. This absence is curious, but does not address the question at hand of whether voided convictions are expungeable.

As correctly argued in the KACDL amicus brief filed in this case, KRS 218A.275, as amended, reflects the legislature’s desire to efficiently return to life’s mainstream those individuals who suffered a possessory drug conviction, satisfied their sentence obligation to the court and had their conviction voided. While the remedy suggested by the KACDL (remand to the trial court in order to apply KRS 218A.275 as amended) is an alternative, the Court of Appeals was correct that the dismissal can only have been with prejudice and thus the conviction was subject to expungement, no further action is required.

It should be noted that despite all the amendments to KRS 218A.275, the legislature did not remove the phrase “and dismissal” which was formerly found in KRS 218A.275(9) and now is found in KRS 218A.275(8). The Commonwealth argues that “and dismissal” means dismissal without prejudice. If the Commonwealth is correct, then currently when an individual has his conviction voided and sealed under KRS 218A.275(8), as amended, that individual could have those charges re-opened against him based on the discretion of the Commonwealth. Clearly, this cannot be what the legislature intends.

The Commonwealth points out that both KRS 218A.275 and KRS 431.076 were amended by the same act in 2005 Kentucky Laws, Chapter 99 (SB 47), yet neither was amended to incorporate the other. SB 47 was a housekeeping bill, not a bill of substantive changes. The amendments referred to by the Commonwealth merely changed the name of “Cabinet for Families and Children” to “Cabinet for Health and Family Services.” There were no substantive changes.

V.

**VOIDED CONVICTIONS ARE, BY
OPERATION OF LAW, DISMISSED
WITH PREJUDICE AS THEY
INVOLVE A GUILTY PLEA AND
COMPLETION OF SENTENCE.**

In section seven of its brief the Commonwealth correctly recognizes that a conviction under KRS 218A.275 can only be voided after completion of the final sentence. Appellant’s Brief, pp. 17-18. Once the voiding occurs post-sentence completion, double jeopardy principles of the 5th Amendment of the United States Constitution and Section 13 of the Kentucky Constitution bar a second prosecution for

the same offense. A voided conviction by operation of law must be a dismissal with prejudice. The Commonwealth inexplicably arrives at the wrong conclusion, arguing that if the language in KRS 218A.275 is ambiguous regarding dismissal, then dismissal must mean dismissed without prejudice. This interpretation is contrary to the principles of double jeopardy. The United States Supreme Court has identified the three purposes served by the Double Jeopardy Clause of the 5th Amendment, one of which is protection from re prosecution after conviction and completion of a sentence. *Ohio v. Johnson*, 467 U.S. 493, 498, 104 S.Ct. 2536 (1984).

VI.

NO COURT RULE OR STATUTE IS NECESSARY TO PROPERLY DESCRIBE A POST-CONVICTION DISMISSAL AS "WITH PREJUDICE".

In section eight of its brief the Commonwealth argues that unlike the pre-trial diversion statute which specifically authorizes a dismissal with prejudice, there is no corresponding statutory provision or Court rule specifically providing that voided convictions are dismissals with prejudice. Appellant's Brief, pp. 18-19.

As pointed out by the Court of Appeals in their Opinion in the case at bar, common sense dictates that the dismissal of a voided conviction can only be a dismissal with prejudice. "No one can seriously contend but that under the circumstances the dismissal of Jones's offense is 'with prejudice'." App. Op., p. 5. The Commonwealth is missing the essential distinction that the Appellee was convicted of a criminal offense and served her sentence prior to the voiding of her conviction, thus the claim cannot be brought again. In a pre-trial diversion situation, the defendant is not convicted unless he is unsuccessful in completing his diversion program. Diversion delays final adjudication.

Peeler v. Commonwealth, 275 S.W.3d 223, 225 (Ky. App. 2008). It is only upon the defendant's failure to complete his diversion agreement that the diversion agreement can be voided by the trial court and then the defendant is sentenced at a separate sentencing hearing. *Prather v. Commonwealth*, 301 S.W.3d 20 (Ky. 2009).

In the case at bar the Appellee's dismissal is with prejudice. There is a substantial difference between a conviction voided post-sentence completion and a pre-trial diversion agreement that is voided prior to final disposition because of the defendant's misbehavior. The absence of any court rule or statute authorizing the expungement of a voided conviction is not significant.

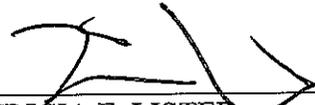
CONCLUSION

For the above reasons, this Court should find that a voided conviction is a conviction that has been dismissed with prejudice and is eligible for expungement under KRS 431.076. The Court of Appeals Opinion should be Affirmed as should the Circuit Court's Order of expungement.

Respectfully submitted,



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APPENDIX

Hermansen v Com., an unpublished opinion, 2009 WL 723056 (Ky. App.)1
Attached Pursuant to CR 76.28(4)