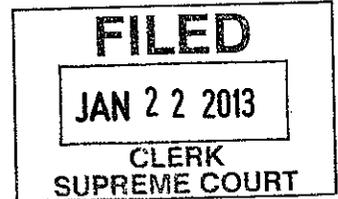


COMMONWEALTH OF KENTUCKY
SUPREME COURT
2012-SC-000144-DG



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

**REPLY BRIEF FOR APPELLANT
COMMONWEALTH OF KENTUCKY**

Submitted by:

JACK CONWAY
Attorney General

A handwritten signature in cursive script, appearing to read "Dorislee Gilbert".

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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 18, 2013: Hon. Mary M. Shaw, Judge, Jefferson Circuit Court, Division 5, 700 West Jefferson Street, Louisville, KY 40202; Hon. Jeffrey B. Skora and Tricia Lister, Counsel for Appellee, 600 West Main Street, Suite 300, Louisville, KY 40202; Hon. Jack Conway, Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, KY 40601; Hon. Larry Simon, Counsel for KACDL, 510 West Broadway, Suite 805, Louisville, KY 40202; and Hon. Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. The undersigned does also certify that the record on appeal was not withdrawn in preparation of this brief.

A handwritten signature in cursive script, appearing to read "Dorislee Gilbert".
Dorislee Gilbert

PURPOSE OF BRIEF

The purpose of this brief is to respond to Appellee's argument that interpreting the voiding of a conviction under KRS 218A.275 as a dismissal without prejudice for purposes of KRS 431.076 will allow the Commonwealth to re-prosecute Appellee and others similarly situated. The Commonwealth will respond to Appellee's citation to *Hermansen v. Commonwealth*, 2008-CA-001038-MR, 2009 WL 723056 (Ky. App. Mar. 20, 2009) (discretionary review denied on Oct. 21, 2009). As well, the Commonwealth will respond to KACDL's request that this Court remand this case to the Jefferson Circuit Court with directions to consider sealing Appellee's criminal records under the current provisions of KRS 218A.275. The Commonwealth maintains the arguments presented in its original brief to this Court, but will not repeat them herein.

ARGUMENT

Contrary to Appellee's claims, construing the voiding of a conviction under KRS 218A.275 as a dismissal without prejudice would not allow the Commonwealth to reinstate the same criminal charges against the same defendant. It is the underlying substantive law, not a designation of with or without prejudice that precludes subsequent prosecution of some charges. *Gibson v. Commonwealth*, 291 S.W.3d 686, 691 (Ky. 2009). The Double Jeopardy Clause prohibits a second prosecution for the same offense after conviction and multiple punishments for the same offense. See *Jordan v. Commonwealth*, 703 S.W.2d 870, 872 (Ky. 1985) quoting *Ohio v. Johnson*, 467 U.S. 493, 104 S.Ct. 2536 (1984). Because a Defendant eligible for voiding under KRS 218A.275 must have been convicted and satisfactorily completed treatment, probation, or other sentence (KRS 218A.275), the Double Jeopardy Clause prevents subsequent

prosecution on those charges, regardless of whether a voided conviction is termed a “dismissal with prejudice,” a “dismissal without prejudice,” or simply a “dismissal.” Appellee’s claim that the failure to classify a voided conviction as a “dismissal with prejudice” would result in repeated prosecution is incorrect. See Appellee’s Brief, Pps. 3, 5, 13. Moreover, contrary to what Appellee would have this Court believe, the Commonwealth is not urging this Court to declare a voided conviction a dismissal without prejudice so as to allow a subsequent prosecution. Rather the Commonwealth urges this Court to follow the plain language of the statute and not term the voided conviction dismissed with prejudice so as to allow the additional, unintended remedy of expungement.

Appellee relies on a definition of “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,” and a definition of “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.” Appellee’s Brief, P. 3, quoting *Gibson v. Commonwealth*, 291 S.W.3d 686, 688 (Ky. 2009). These definitions are taken from *Black’s Law Dictionary*, and while they are generally correct, they do not adequately take into account all of the nuances of Kentucky law. In Kentucky, a dismissal with prejudice also carries the distinction of entitling a defendant to expungement of charges under KRS 431.076. Furthermore, KRS 218A.275 does not use either the phrase “dismissed with prejudice” or “dismissed without prejudice,” so the relevance of these definitions to the inquiry before this Court is limited.

Because the substantive law prevents re-prosecution of a charge voided under KRS 218A.275, it is not necessary to term such a voided charge as dismissed with prejudice to prevent re-prosecution. To term such a voided conviction as dismissed with prejudice under Kentucky law would not only prevent re-prosecution but would also entitle a defendant to expungement of the charge. It is indicative of legislative intent not to allow expungement that KRS 218A.275 does not call a voided conviction a dismissal with prejudice. The legislature avoided labeling the dismissal as one without prejudice because it did not intend that charges could be re-prosecuted and because the substantive law would prevent re-prosecution. However, the legislature also did not intend the charges to be eligible for expungement; therefore, it avoided labeling the voided conviction as dismissed with prejudice, trusting that the substantive law prevents re-prosecution.

Appellee cites this Court to the unpublished Court of Appeals' opinion in *Hermansen v. Commonwealth*, 2008-CA-001038-MR, 2009 WL 723056 (Ky. App. Mar. 20, 2009) (discretionary review denied on Oct. 21, 2009) (attached as Appendix 1 to Appellee's brief). That case, of course, is not binding on this Court because it is both unpublished and from an inferior court. Regardless, nothing in that case requires this Court to find that a conviction voided and deemed dismissed under KRS 218A.275 is dismissed with prejudice for purposes of KRS 431.076. In *Hermansen*, the court considered whether a defendant was entitled to have convictions that were reversed on direct appeal because of a failure to prove venue expunged under KRS 431.076. Importantly, the Court considered what a reversal for failure to prove venue meant, and found that while it was not equivalent to an acquittal, the reversal "was essentially a

directed verdict.” *Hermansen*, 2009 WL 723056 at *2. The Court found that because KRS 505.030(2) barred re-prosecution of the charges, they were eligible for expungement. *Id.* KRS 505.030(2), which was relied on in that case, does not contain any language about dismissal. In this case, the Court is called upon to determine the meaning of explicit statutory language in KRS 218A.275 and KRS 431.076, both of which were written and adopted by the General Assembly and which use different terminology to describe dismissal. The General Assembly expressed its intent by the words it chose in each statute, and this Court is bound by the General Assembly’s directive through those statutes.

KACDL urges this Court to remand this case back to the Circuit Court “with directions to utilize the current provisions of KRS 218A.275 so that Ms. Jones’ criminal records can be sealed, as allowed for voided convictions.” KACDL Amicus Brief, P. 4. Appellee recognizes this remedy as an alternative, but does not request this relief. Appellee Brief, P. 12. The Commonwealth objects to this relief. At the time Appellee’s motion for expungement was filed, the current version of KRS 218A.275 was not in effect. Even if it was, the current version of KRS 218A.275 does not authorize expungement. Thus, Appellee would still not be entitled to the relief she sought. KRS 218A.275, in its current form, authorizes sealing of records. If Appellee desires this remedy, she should file a motion for the sealing of her records that can be properly litigated in the Circuit Court.

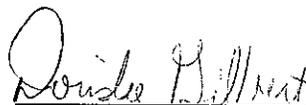
CONCLUSION

For all the reasons stated in the Commonwealth’s initial brief and all the reasons stated above, the Commonwealth respectfully requests that this Court reverse the Court

of Appeals, find that a voided conviction is not eligible for expungement under KRS 431.076, and vacate the Circuit Court's order granting expungement.

Respectfully submitted,

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A handwritten signature in cursive script, appearing to read "Dorislee Gilbert", is written over a horizontal line.

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