

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000964-MR

DEWAYNE ANDY MILLER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 93-CR-001260

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, KNOPF AND McANULTY, JUDGES.

JOHNSON, JUDGE: Dewayne Andy Miller has appealed from an order of the Jefferson Circuit Court entered on April 7, 2003, which denied his motion to expunge the record of his conviction for assault in the fourth degree¹ that had been entered on August 3, 1995. Having concluded that the trial court did not err by denying Miller's motion to expunge his record, we affirm.

¹ Kentucky Revised Statutes (KRS) 508.030.

On June 7, 1993, Miller was indicted by a Jefferson County grand jury on one count of use of a minor in a sexual performance,² and on one count of sexual abuse in the first degree.³ At the time of the alleged offenses, the minor in question was less than ten-years-old.⁴ Miller entered pleas of not guilty to both charges and the case proceeded to trial.

A jury trial was held in late June 1994, in which the jury deadlocked and was unable to reach a unanimous verdict. Thereafter, a second jury trial was scheduled for June 13, 1995. On the morning of Miller's second trial date, the Commonwealth agreed in exchange for Miller's guilty plea to recommend that the charge of sexual abuse in the first degree be amended to the charge of assault in the fourth degree and that the charge of use of a minor in a sexual performance be dismissed. Miller entered a guilty plea pursuant to North Carolina v. Alford,⁵ to the amended charge of assault in the fourth degree. The Commonwealth also agreed to recommend a sentence of up to 12 months' imprisonment and/or a fine of up to \$500.00.

On August 3, 1995, after a pre-sentence investigation had been completed, the trial court sentenced Miller to 12

² KRS 531.310.

³ KRS 510.110.

⁴ According to Miller's indictment, the offenses were committed over a span of six months, during which time the minor turned nine-years-old.

⁵ 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

months' imprisonment, six months of which were to be served under a home incarceration program, with the balance probated for a period of two years. Miller was also ordered to complete a sexual offender treatment program, to have no contact with the victim or the victim's family, and to have no unsupervised contact with any juvenile.

On June 14, 1996, Miller was terminated from the Kentucky Community Sex Offender Treatment Program for refusing to take responsibility for his offense. As a result, the Commonwealth filed a motion seeking to revoke Miller's probation. On November 27, 1996, the trial court granted the Commonwealth's motion to revoke Miller's probation, and ordered Miller to serve the remaining six months of his 12-month sentence under the home incarceration program.

Approximately five years later, on June 14, 2001, Miller filed a motion pursuant to KRS 431.078, seeking to expunge from his record the conviction for assault in the fourth degree. On July 20, 2001, the trial court entered an order denying Miller's motion. The trial court noted that "the underlying facts of the case involve an allegation of a sex offense involving a minor," and that Miller's motion to expunge was "premature since on December 3, 1996, he commenced serving a 12 month sentence."

On February 27, 2003, Miller filed a second motion seeking to expunge from his record the conviction for assault in the fourth degree. On April 7, 2003, the trial court once again denied Miller's motion, stating that since the offense for which Miller was convicted was "clearly against a child," he was not entitled to have his record expunged under KRS 431.078.⁶ This appeal followed.

Miller first argues that the trial court erred by determining that he was not entitled to have expunged from his record the conviction for assault in the fourth degree. We disagree. Words used in a statute are to be given their plain and ordinary meaning.⁷ When interpreting a statute, the court has a duty "to ascertain and give effect to the intent of the General Assembly."⁸ "A fundamental rule of statutory construction is to determine the intent of the legislature, considering the evil the law was intended to remedy."⁹

Under KRS 431.078(4), an individual is entitled to have a misdemeanor or violation conviction expunged from his

⁶ The trial court also stated as a basis for denying Miller's motion that "although [assault in the fourth degree] is not on its face a sex crime, the facts, which formed the basis of the allegations, involved a sex offense." We disagree with the trial court's reasoning on this particular ground; however, since we are affirming on another ground this error is harmless.

⁷ See, e.g., Commonwealth v. Harrelson, Ky., 14 S.W.3d 541, 547 (2000).

⁸ Id. at 546.

⁹ Beach v. Commonwealth, Ky., 927 S.W.2d 826, 828 (1996).

record if, inter alia, the trial court finds that “[t]he offense was not a sex offense or an offense committed against a child [emphasis added].”¹⁰ We conclude that the plain and ordinary meaning of this provision is that our General Assembly specifically chose to exclude sex offenses and offenses committed against children from those offenses which may be expunged from an individual’s record. In using the word “child,” the Legislature has determined that individuals who

¹⁰ KRS 431.078(4) states in full as follows:

The court shall order sealed 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 at the hearing the court finds that:

- (a) The offense was not a sex offense or an offense committed against a child;
- (b) The person had no previous felony conviction;
- (c) The person had not been convicted of any other misdemeanor or violation offense in the five (5) years prior to the conviction sought to be expunged;
- (d) The person had not since the time of the conviction sought to be expunged been convicted of a felony, a misdemeanor, or a violation;
- (e) No proceeding concerning a felony, misdemeanor, or violation is pending or being instituted against him; and
- (f) The offense was an offense against the Commonwealth of Kentucky.

commit offenses against a particularly vulnerable class of our citizenry, should not be entitled to the benefit of having those offenses expunged from their records. Certainly, Miller's victim, who was less than ten-years-old when the offense at issue was committed against him, falls within the definition of a "child" as the term is used in KRS 431.078.¹¹ Accordingly, Miller was not entitled to have expunged from his record the conviction for assault in the fourth degree.

Finally, Miller argues that the word "child" is ambiguous to the point of being unconstitutionally vague, and that specifically excluding sex offenses and offenses against children from those offenses which may be expunged under KRS 431.078, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. However, neither of these arguments were presented to the trial court. Hence, we will not consider them for the first time on appeal.¹²

Furthermore, Miller has not served the Attorney General with a copy of the required documents specifying the nature of the alleged constitutional defects as required by KRS 418.075.¹³ The

¹¹ This interpretation is consistent with other areas within KRS when the word "child" has been specifically defined. See, e.g., KRS 413.249 (defining the word "child" as it relates to an action concerning childhood sexual abuse or childhood sexual assault as "a person less than eighteen (18) years old").

¹² See Abuzant v. Shelter Insurance Co., Ky.App., 977 S.W.2d 259, 262 (1998) (holding that an issue not presented to the trial court would not be considered for the first time on appeal).

¹³ KRS 418.075 states in part as follows:

failure to comply with KRS 418.075 is fatal to the request for appellate review of the constitutionality of a statute.¹⁴

Based on the foregoing, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Henry K. Jarrett, III
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

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(2) In any appeal to the Kentucky Court of Appeals or Supreme Court or the federal appellate courts in any forum which involves the constitutional validity of a statute, the Attorney General shall, before the filing of the appellant's brief, be served with a copy of the pleading, paper, or other documents which initiate the appeal in the appellate forum. This notice shall specify the challenged statute and the nature of the alleged constitutional defect.

¹⁴ See Homestead Nursing Home v. Parker, Ky.App., 86 S.W.3d 424, 425 (1999).