

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001825-MR

LESTER CLIFTON LOWE

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 76-CR-00026

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

BARBER, JUDGE: Appellant, Lester Clifton Lowe (Lowe), appeals the Taylor Circuit Court's denial of his motion for expungement of record pursuant to KRS 431.076. We affirm the trial court's ruling.

Lowe was indicted for murder in 1976. On September 22, 1976, Lowe was found not guilty after jury trial. In 1986 Lowe was tried and convicted of murder in an unrelated case. The conviction in the 1986 case was affirmed on appeal. Lowe

made a motion for expungement of the record in the 1976 case pursuant to KRS 431.076. Lowe also asked that the court seal the entire record in the 1976 case, and the pre-sentence investigation (PSI) in the 1986 case, which made reference to the earlier charges. Lowe requested that the criminal record in the 1986 case for which he is presently incarcerated be sealed, as transcripts of statements made by him in the 1976 proceeding were made part of the record in the 1986 action. Records from the 1976 case were also used as exhibits at trial in the 1986 case.

Lowe claims that he is entitled to expungement of the records in question. KRS 431.076 provides, in pertinent part, that "if the court finds that there are no current charges or proceedings pending relating to the matter for which the expungement is sought, the court may grant the motion" Id., at subsection (4). The circuit court is given discretion as to whether to grant a motion for expungement of record. The Taylor circuit court denied the motion to expunge the 1976 case, and to seal the record in the 1986 action. The court stated that it took into consideration the history of the case and the full record therein when making its determination. The court held that the decision whether to expunge the records is discretionary, and ruled that it was in the court's discretion to deny the request.

Expungement of records is governed by the statutes of the jurisdiction in which expungement is sought. Duke v. White, 616 F.2d 955, 956 (6th Cir. 1980). The statute provides that the court "may" take such action upon request. The Commonwealth asserts that the use of the word "may" is permissive, and gives the court discretion as to whether to take the requested action. See: Dannheiser v. City of Henderson, 4 S.W.3d 542, 549 (1999). KRS 446.010(20) holds that the word "may", used in a statute, is permissive, and does not mandate action.

A trial court's discretionary ruling may not be disturbed on appeal unless there is evidence of an abuse of discretion. "The test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575 (2001), citing Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999). The court reviewed the complete records, and determined that the records should not be expunged. No abuse of discretion has been shown by Lowe with regard to the ruling of the Taylor circuit court.

The Commonwealth argues that the denial of the motion properly preserves the evidence regarding the earlier indictment for parole proceedings in the current offense. Sister courts have ruled that where the prior offense and the current offense are intertwined, the law properly permits a court to deny a

motion for expungement. United States v. Bagley, 899 F.2d 707 (8th Cir. 1990), *cert denied* 498 US 938, 111 S. Ct. 343, 112 L.Ed.2d 307 (1990). We decline to address this argument, as no abuse of discretion in the denial of the motion was shown, and the trial court's action in denying the motion does not constitute reversible error.

ALL CONCUR.

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