

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000825-MR

BRIAN MOFFITT

APPELLANT

v. APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 01-CR-00024

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

VANMETER, JUDGE: Under KRS 431.076, a person who has been found not guilty of a crime may petition the court for expungement of the record. The statute permits expungement at the discretion of the court. Under the circumstances presented in this appeal, we hold that the Livingston Circuit Court did not abuse its discretion and therefore affirm.

¹ Senior Status John D. Miller Sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

In 2001, Brian Moffitt was charged with kidnapping, rape first degree, and sodomy first degree arising out of one criminal transaction. The record on appeal is not detailed, but the parties agree that a jury found Moffitt not guilty of rape and sodomy, but guilty of kidnapping. Moffitt was duly sentenced and is currently incarcerated with the Department of Corrections.

On February 24, 2004, Moffitt filed a pro se motion under KRS 431.076, seeking to expunge his record of the rape and sodomy charges. By an order entered on March 19, 2004, the Livingston Circuit Court denied Moffitt's motion. The trial court's order stated its rationale as follows:

[W]hile the charges for rape and sodomy were not dismissed in exchange for a guilty plea to the kidnaping [sic], that was in effect what the jury did by its verdict. Having considered the nature of the offense and having heard the evidence; and the jury having found the defendant guilty of kidnaping [sic], which was one of the three counts charged, the Court **HEREBY ORDERS AND DIRECTS** that said motion to expunge is **DENIED.**²

This appeal followed.

We agree with the parties that a trial court's decision of whether to grant a motion for expungement is discretionary, assuming the defendant otherwise meets the

² Emphasis original.

requirements of KRS 431.076. This statute provides in part as follows:

(1) 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.

(4) 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 and 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. The court shall order the sealing on a form provided by the Administrative Office of the Courts. Every agency, with records relating to the arrest, charge, or other matters arising out of the arrest or charge, that is ordered to seal records, shall certify to the court within sixty (60) days of the entry of the expungement order, that the required sealing action has been completed. All orders enforcing the expungement procedure shall also be sealed.

(5) After the expungement, the proceedings in the matter shall be deemed never to have occurred. 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 other type of application.

Since the trial court's decision to expunge the charges is discretionary, on appeal our standard of review is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."³ Here, the limited record available to us shows that Moffitt was convicted of one of the three charges arising out of a single occurrence. All three of the charges were factually interrelated. Our view is that it would be very difficult, if not impossible, for all information concerning the rape charge, for example, to be expunged without impinging upon or compromising information concerning the kidnapping charge, which obviously the Commonwealth has an interest in maintaining.

The Livingston Circuit Court did not abuse its discretion in denying Moffitt's motion to expunge. The trial court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brian Moffitt, *Pro Se*
Fredonia, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Janine Coy Bowden
Assistant Attorney General
Frankfort, Kentucky

³ Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).