

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002296-MR

FREDDY KENNEDY, JR.

APPELLANT

v. APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE JOANN S. COLEMAN, SPECIAL JUDGE
ACTION NO. 99-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION REVERSING AND REMANDING

** ** *

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; HENRY,¹ SENIOR JUDGE.

COMBS, CHIEF JUDGE: Freddy Kennedy, Jr., appeals from an order of the Knott Circuit Court that denied his motion to expunge his criminal record after he successfully completed a pre-trial diversion program. After our review, we reverse and remand for further proceedings consistent with this opinion.

On February 22, 1999, the Knott County Grand Jury indicted Kennedy on one count of first-degree sexual abuse for subjecting a female to sexual contact through

¹Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the use of forcible compulsion, a Class D felony pursuant to Kentucky Revised Statutes (KRS) 510.110. On February 14, 2000, Kennedy and the Commonwealth reached an agreement in which the Commonwealth recommended that Kennedy be placed in a pre-trial diversion program for a period of five (5) years. The agreement included the following provision:

If the defendant successfully completes Pretrial Diversion, the charge will be designated as Dismissed-Diverted. The defendant has been advised that upon successful completion of the diversion he/she may petition the Court for expungement of the record.

The trial court accepted the agreement and entered an order that granted Kennedy pre-trial diversion on February 16, 2000.

Kennedy successfully completed the diversion program, and the sexual abuse charge against him was dismissed in a notation entered into the record on February 10, 2005. On July 24, 2006, Kennedy filed a motion to expunge the charge from his criminal record. The trial court denied the motion in an order entered on November 29, 2006, on the ground that his case had not been dismissed “with prejudice” as required by KRS 510.300(2). This appeal followed.

On appeal, Kennedy contends that the trial court erred in denying his motion for expungement. The trial court observed that it did not consider Kennedy’s case to have been dismissed with prejudice, and we shall address that ruling first. As the Commonwealth concedes, this conclusion was erroneous. In *Commonwealth v. Shouse*, 183 S.W.3d 204 (Ky.App. 2006), this Court held that when a defendant successfully

completes the provisions of a pre-trial diversion agreement and the charges against him are consequently “dismissed-diverted” pursuant to KRS 533.258(1), such a dismissal is considered to be with prejudice. *Id.* at 205-06. KRS 533.258(1) provides:

If the defendant successfully completes the provisions of the pretrial diversion agreement, the charges against the defendant shall be listed as “dismissed-diverted” and shall not constitute a criminal conviction.

In examining the import of this statute in *Shouse*, we relied upon Kentucky Rule of Criminal Procedure (RCr) 8.04, which addresses “Pretrial Diversion” and provides as follows:

Termination of the agreement; automatic dismissal. Upon the expiration of the period of suspension of prosecution and upon the completion of the agreement and where there is no motion by the Attorney for the Commonwealth to terminate the agreement upon any grounds permitted under this Rule, the indictment, complaint or charges which are the subject matter of the agreement **shall be dismissed with prejudice**. In the event that there may be a pending motion by the Commonwealth to terminate the agreement, if the Court shall rule that the motion be denied, then upon entry of said order the indictment, complaint or charges shall be dismissed with prejudice.

(Emphasis added). The Commonwealth does not dispute that Kennedy successfully satisfied the terms of his pre-trial diversion agreement; at no point did it file a motion to terminate the agreement. Thus, the charge against Kennedy must be considered dismissed with prejudice, and the trial court erred in holding otherwise.

The next issue is whether Kennedy’s record should be expunged and, if so, under the authority of what statutory provision. The Commonwealth argues that

Kennedy is not necessarily entitled to expungement even though the charge against him was dismissed with prejudice. It contends that the decision as to whether his record should be expunged should be left to the discretion of the trial court pursuant to KRS 431.076(1) and (4), which provide:

(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.

Thus, according to the Commonwealth, this matter should be remanded to the Knott Circuit Court for a hearing to determine whether that court should exercise its discretion and grant Kennedy's request for expungement.

Countering the discretionary argument of the Commonwealth, Kennedy contends that his record **must** be expunged pursuant to the mandatory language of KRS 510.300(2), which provides:

(2) If the charges brought against a defendant under this chapter are dismissed with prejudice or the defendant is found not guilty, the court shall order all law enforcement and other public agencies holding records of the offense **to expunge** the records. (Emphasis added.)

Thus, according to Kennedy, because the sexual abuse charge against him was dismissed with prejudice, he is entitled to have his record expunged by statutory mandate without deference or reference to any discretion to be exercised by the trial court.

We agree with Kennedy's argument. Although both statutes arguably may be invoked as to subject matter, KRS 510.300 applies directly since it deals with expungements of charges brought under KRS Chapter 510. KRS 431.076 addresses expungement of criminal charges in general without reference to a specific chapter. Under established rules of statutory construction, "when two statutes deal with the same subject matter, one in a broad, general way and the other specifically, the specific statute prevails." *Land v. Newsome*, 614 S.W.2d 948, 949 (Ky. 1981); *see also Commonwealth v. Phon*, 17 S.W.3d 106, 107 (Ky. 2000). Kennedy was charged with a violation of KRS 510.110. Therefore, KRS 510.300 governs as to the expungement of his record.

Since KRS 510.300 applies to this case and because the charge against Kennedy must be considered to have been dismissed with prejudice, we conclude that his record **must** be expunged. Our decision is compelled by the clearly mandatory language

of KRS 510.300(2), directing that if charges brought under KRS Chapter 510 “**are dismissed with prejudice** or the defendant is found not guilty, the court **shall order all law enforcement and other public agencies holding records of the offense to expunge the records.**” (Emphasis added). When used in a statute, the word *shall* is indeed considered mandatory. KRS 446.010(30); *Alexander v. S & M Motors, Inc.*, 28 S.W.3d 303, 305 (Ky. 2000).

The Commonwealth acknowledges that expungement under KRS 510.300(2) is mandatory in nature. Nonetheless, it still argues that KRS 510.300 should not be applicable in this case. The Commonwealth cites the chronology of two Chapters of KRS in support of its contention. KRS 510.300 was first enacted in 1986 and was amended in 1990. Kentucky’s pre-trial diversion statutes (KRS 533.250 to 533.262) were not enacted until 1998, and RCr 8.04 did not become effective until 1999. Therefore, the Commonwealth believes that the General Assembly did not anticipate that the “dismissed with prejudice” language in KRS 510.300(2) would later be subject to mandatory expungement of sexual abuse criminal records under the pre-trial diversion statutes and RCr 8.04.

The Commonwealth contends that application of the mandatory expungement provisions of KRS 510.300 as opposed to the discretionary expungement provisions of KRS 431.076 would grant a defendant an advantage that the General Assembly never envisioned. According to the Commonwealth, KRS 510.300 was not intended to give sex offenders the benefit of participating in pre-trial diversion. Instead,

it contends that the General Assembly sought to provide expungement only for those persons who had been wrongfully accused or who had been found not guilty of a KRS Chapter 510 offense as distinguished from those who had been granted “dismissal-diverted” status.

The Commonwealth’s argument is both persuasive and well reasoned. The pre-trial diversion statutes were amended in 2006 to make diversion unavailable to any person who has committed a sex crime. KRS 533.250(1)(d) provides:

No person shall be eligible for pretrial diversion who has committed a sex crime as defined in KRS 17.500. A person who is on pretrial diversion on July 12, 2006, may remain on pretrial diversion if the person continues to meet the requirements of the pretrial diversion and the registration requirements of KRS 17.510.

Included among the “sex crimes” set forth by KRS 17.500 are those felony offenses “defined in KRS Chapter 510[.]” KRS 17.500(8)(a). Clearly, then, the General Assembly has determined that the benefits associated with pre-trial diversion should not be made available to persons who have committed a sex crime. However, this statutory provision was **not in effect** at the time that Kennedy completed his pre-trial diversion program; therefore, it cannot govern his case. KRS 510.300(2) was the pertinent statute at the time of Kennedy's offense, and its clear and unambiguous language requires expungement of his record **under the law as it existed** when he was dismissed-diverted. Accordingly, the Commonwealth’s contentions as to what the General Assembly may have “intended” are simply too speculative in nature to negate the plain language of KRS 510.300(2).

The order of the Knott Circuit Court is reversed, and this case is remanded for entry of an order granting Kennedy's motion to expunge his criminal record pursuant to KRS 510.300(2).

ALL CONCUR.

BRIEF FOR APPELLANT:

Eric E. Ashley
Hazard, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Bryan D. Morrow
Assistant Attorney General
Frankfort, Kentucky