

RENDERED: OCTOBER 11, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000172-MR

FREDERICK JONES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 98-CR-000443

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GOODWINE, JONES, AND KRAMER, JUDGES.

KRAMER, JUDGE: The operative facts in this matter are uncontested. In 1998, Frederick Jones pled guilty in Jefferson Circuit Court to one felony count of theft by failure to make the required disposition of property. As a result, he spent several months incarcerated and five years on supervised probation. In August 2018, over twenty years after his guilty plea, Jones filed an application with the

circuit court to have his record expunged, pursuant to Kentucky Revised Statute (KRS) 431.073. However, he did not tender any filing fee with this petition but instead requested an adjudication of “poor person” status in an effort to be excused from paying the requisite expungement fees. *See* KRS 453.190. Ultimately, the circuit court denied Jones’s request, explaining in relevant part: “The Court views the cost of this elective service as one that the legislature did not intend to be waived, and as one that is not necessarily incurred in the prosecution or defense of a legal claim, as contemplated by KRS 453.190.” This appeal followed. *See* Kentucky Rule of Civil Procedure (CR) 5.05(4). Upon review, we affirm.

Before addressing the substance of Jones’s arguments, we note KRS 431.073 was amended on June 27, 2019, while this appeal was pending. Because the amended version was designated by the General Assembly as retroactive,¹ it is the focus of our analysis. With that said, Jones offers two overarching reasons why, in his view, the circuit court’s disallowance of his request for cost-free filing was improper: (1) it ran afoul of the Equal Protection and Due Process Clauses of the United States and Kentucky Constitutions; and (2) it misinterpreted the relevant statutes.²

¹ KRS 431.073(12).

² We do not have the benefit of the Commonwealth’s views on these issues because although the Attorney General’s office filed a “brief,” in a one-paragraph “argument” the Attorney General stated in essence that he did not have a dog in this fight.

As to his first argument, Jones labors under a misapprehension. Putting aside that indigence is not a suspect class for equal protection purposes,³ there exists no due process right to an expungement of state records under the United States or Kentucky Constitutions. *See, e.g., Duke v. White*, 616 F.2d 955, 956 (6th Cir. 1980) (“The right to expungement of state records is not a federal constitutional right.”). Like parole, expungement is not a *right* but a statutory *privilege*⁴ – a privilege the General Assembly has no obligation to provide at all, and which it may therefore provide subject to conditions that our Courts are not at liberty to ignore. *See Alexander v. Commonwealth*, 556 S.W.3d 6, 9 (Ky. App. 2018) (“Expungement is a privilege granted by statute, the express limits of which cannot be extended by judicial *fiat*.”); *see also Land v. Commonwealth*, 986 S.W.2d 440, 442 (Ky. 1999) (“Kentucky courts have repeatedly held that there is no constitutional right to parole, but rather parole is a matter of legislative grace or executive clemency. . . . Parole is simply a privilege and the denial of such has no constitutional implications.” (internal citations and footnote omitted.))

³ *See Harris v. McRae*, 448 U.S. 297, 323, 100 S.Ct. 2671, 2691, 65 L.Ed.2d 784 (1980) (indigents not a suspect class). On page 15 of his brief, Jones also insinuates that assessing any filing fee for an expungement would discriminate against African Americans. We will not address Jones’s assertion because he makes no attempt to support it.

⁴ In narrowly-defined circumstances not at issue in this matter, our Courts have inherent authority to grant mandatory expungements. *See Commonwealth v. Holloway*, 225 S.W.3d 404 (Ky. App. 2007) (noting trial courts may grant mandatory expungements for purposes of correcting constitutional infractions).

To explain our decision by analogy, the availability of expungement under Kentucky law is akin to the availability of a discharge in bankruptcy under federal law. Like an expungement, obtaining a discharge in bankruptcy is also a matter of legislative grace. *See United States v. Kras*, 409 U.S. 434, 446-47, 93 S.Ct. 631, 638-39, 34 L.Ed.2d 626 (1973). Like the denial of an expungement, a denial of discharge as to certain debts does not result in imprisonment or a monetary penalty, but merely withholds the statutory benefit otherwise available regarding those debts. *See Transamerica Premier Ins. Co. v. Chaplin (In re Chaplin)*, 179 B.R. 123, 128 (Bankr. E.D. Wis. 1995). In both contexts, a court supervising the proceedings has the authority to do so only by a delegation of authority from the legislature. *Kras*, 409 U.S. at 447, 93 S.Ct. at 639. And in neither instance is there a constitutional right of access to the courts. *See id.* (“The mere fact that Congress has delegated to the District Court supervision over the proceedings by which a petition for discharge is processed does not convert a statutory benefit into a constitutional right of access to a court.”).

In other words, the operative “*right*” Jones attempted to exercise before the circuit court is best characterized as the right to invoke the circuit court’s discretion to expunge his record; and the circuit court’s discretion to expunge his record, in turn, was solely governed by the plain terms of the expungement statute, KRS 431.073.

This leads to Jones’s second argument. He believes the circuit court erred in failing to apply the cost-waiving provision of KRS 453.190 to his expungement request. In that vein, he asserts there is no dispute that he qualifies as a “poor person” within the meaning of KRS 453.190(2); and that the language of KRS 453.190(1), as it appears below, is broad enough to provide him with a waiver of all costs for every kind of proceeding:

A court shall allow a poor person residing in this state to file or defend any action or appeal therein without paying costs, whereupon he shall have any counsel that the court assigns him and shall have from all officers all needful services and process, including the preparation of necessary transcripts for appeal, without any fees, except such as are included in the costs recovered from the adverse party, and shall not be required to post any bond except in an amount and manner reasonable under the circumstances of his poverty.

In making this argument, however, Jones ignores at least three principles of statutory construction. First, “[w]here a conflict exists between two statutes, the later statute enacted is generally controlling.” *Williams v. Commonwealth*, 829 S.W.2d 942, 944 (Ky. App. 1992) (citation omitted). Second, “where two statutes concern the same or similar subject matter, the specific shall prevail over the general.” *Withers v. University of Kentucky*, 939 S.W.2d 340, 345 (Ky. 1997) (citations omitted). And third, legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the

exclusion of others not so mentioned. *See Whitlock v. Rowland*, 453 S.W.3d 740, 744 (Ky. App. 2015).

Here, KRS 431.073 is the later-enacted of the two statutes. While KRS 453.190 describes a generally applicable waiver of costs for a “poor person,” KRS 431.073 provides that payment of the fees associated with expungement is mandatory: It specifically and repeatedly conditions the circuit court’s authority to grant or even consider expungement upon the payment of the statutory fees.⁵

⁵ Generally, the term “mandatory” embraces statutory provisions which are conditions precedent to the validity of a proceeding, and a proceeding not following a mandatory provision of a statute is rendered illegal and void. *See Skaggs v. Fyffe*, 266 Ky. 337, 98 S.W.2d 884, 886 (1936). With that in mind, KRS 431.073 repeatedly provides that payment of the fees associated with the expungement process is a mandatory precondition to invoking the circuit court’s authority to consider or grant an expungement. In relevant part, it provides:

(2) (a) A verified application to have the judgment vacated under this section shall be filed no sooner than five (5) years after the completion of the person’s sentence, or five (5) years after the successful completion of the person’s probation or parole, whichever occurs later.

(b) *Upon the payment of the filing fee* and the filing of the application, the Circuit Court clerk shall serve a notice of filing upon the office of the Commonwealth’s attorney or county attorney that prosecuted the case and the county attorney of the county where the judgment was entered. . . .

...

(5) The court may order the judgment vacated, and if the judgment is vacated the court shall dismiss with prejudice any charges which are eligible for expungement under subsection (1) of this section or KRS 431.076 or 431.078, and, *upon full payment of the fee in subsection (11) of this section*, order expunged 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 the court finds that:

(a) The person had not, after June 27, 2019, had a felony conviction vacated and the record expunged pursuant to this section;

(b) The person had not in the five (5) years prior to the filing of the application to have the judgment vacated been convicted of a felony or a misdemeanor;

(c) No proceeding concerning a felony or misdemeanor is pending or being instituted against the person; and

Moreover, by expressly providing that the fees are mandatory, the implication is not (as Jones claims) that the fees are mandatory *except for a “poor person.”* The implication is that they are *mandatory*. See, e.g., *Spees v. Kentucky Legal Aid*, 274 S.W.3d 447, 450 (Ky. 2009), explaining that despite a plaintiff’s status as a “poor person” within the meaning of KRS 453.190(2):

The direct mandate of KRS 453.060 with respect to payments of warning order attorney fees is more specific than the general reference of KRS 453.190(1) to “all needful services and process” and “all officers.” We conclude therefore that the more specific KRS 453.060 takes precedence over the more general language of KRS

(d) For an application pursuant to subsection (1)(d) of this section, the person has been rehabilitated and poses no significant threat of recidivism.

...

(7) Upon entry of an order vacating and expunging a conviction, the original conviction shall be vacated and, *upon full payment of the fee in subsection (11) of this section*, the record shall be expunged. . . .

...

(10) The filing fee for an application to have judgment vacated and records expunged *shall* be fifty dollars (\$50), which shall be deposited into a trust and agency account for deputy clerks and *shall not be refundable*.

(11) (a) Upon the issuance of an order vacating and expunging a conviction pursuant to this section, the applicant *shall* be charged an expungement fee of two hundred fifty dollars (\$250), which may be payable by an installment plan in accordance with KRS 534.020.

(b) When the order is issued, the court shall set a date, no sooner than eighteen (18) months after the date of the order, by which *the defendant must comply with the installment payment plan*. The applicant shall be given notice of the total amount due, the payment frequency, and the date by which *all payments must be made*. *The notice shall state that the expungement cannot be completed until full payment is received*, and that if the applicant has not completed the installment payment plan by the scheduled date, he or she shall appear on that date to show good cause as to why he or she is unable to satisfy the obligations. Notwithstanding provisions of KRS 534.020 to the contrary, no applicant shall be ordered to jail for failure to complete an installment plan ordered pursuant to this section.

(Emphasis added).

453.190(1). By clear directive of KRS 453.060(2) the General Assembly has mandated that a warning order attorney shall be granted a reasonable fee, and that the fee shall be paid by the “plaintiff.”

Indeed, our former Court of Appeals explained that in the context of statutory proceedings where the legislature has the authority to prescribe by whom and under what conditions an action may be maintained, the operative statute must be strictly observed to give the court jurisdiction. *See Stafford v. Bailey*, 282 Ky. 525, 138 S.W.2d 998, 999 (1940). The court is not at liberty to apply a statute that generally waives costs for a “poor person” (*i.e.*, Kentucky Statute (KS) 884, the predecessor statute of KRS 453.190) when doing so would conflict with a statutory precondition for maintaining the action. *See id.* Specifically, the Court explained that if the statutory requirement for the execution of a bond in an election contest were considered court costs within the meaning of KS 884,

[T]he contest statute, having been enacted at a much later date, and in which the required bond securing costs and damages of the opposing litigant was made a jurisdictional requirement, would supersede [KS 884], even if [KS 884] was broad enough to cover the point in issue. Neither the trial court nor this court has the right to repeal or set aside a duly enacted mandatory statute[.]

Id.

Lastly, Jones asserts that the Administrative Office of the Courts (AOC) has interpreted KRS 431.073 as allowing for a waiver of costs pursuant to KRS 453.190 based on the form it provides for applying for an expungement. This

argument lacks all merit for a variety of reasons and while we briefly review it, we give no credence to the argument that AOC's role in creating these forms elevates it to agency status to interpret this statute.

Regarding such forms, according to AOC's website a **disclaimer** is given, noting that "These forms are provided as a convenience to individuals with legal business in the Commonwealth of Kentucky to assist them in their official capacities or their pursuit of justice."⁶ More to the point, however, is the fact that even if AOC had some authority to interpret this statute—which we do not hold that it does—, it cannot interpret the statute contrary to its plain language. And, finally we note that after KRS 431.073 was amended earlier this year, AOC revised form AOC-496.3 to be in accord with the statute and now states:

There is a \$50 non-refundable filing fee per application, due at the time of filing. The clerk cannot take your application without proper payment of this fee.

If an expungement order is granted, you will be charged an additional fee of \$250 ("expungement fee"), which you may pay in installments. If you would like to ask the Court to establish an installment payment plan, you will need to fill out the request below. Please note that the expungement cannot be completed until payment in full is received.

Thus, Jones's final argument does not support a reversal.

⁶ <https://kycourts.gov/resources/legalforms/LegalForms/4963.pdf> (last visited Oct. 9, 2019).

For these reasons, we AFFIRM.

ALL CONCUR.

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