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COMMONWEALTH OF KENTUCKY
SUPREME COURT
No. 19-SC-0651-DG
COURT OF APPEALS
No. 2019-CA-000172-MR

FILED

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CLERK
SUPREME COURT

FREDERICK JONES

APPELLANT

v.

Appeal from Jefferson Circuit Court
Hon. Audra J. Eckerle, Judge
Indictment No. 98-CR-000443

COMMONWEALTH OF KENTUCKY

APPELLEE

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been served April 9, 2021 as follows: by mailing to the trial judge, Hon. Audra Eckerle, Jefferson County Judicial Center, 700 W. Jefferson St., Louisville, KY 40202 and to S. Stewart Pope, John Young, and Cassandra F. Kennedy, Legal Aid Society, 416 W. Muhammad Ali Blvd., Suite 300, Louisville, KY 40202; Michael P. Abate and Cassie Chambers Armstrong, Kaplan Johnson Abate & Bird LLP, 710 W. Main St., 4th Floor, Louisville, KY 40202 and by email to Tom Wine, Commonwealth Attorney.

/s/ Robert Baldrige

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INTRODUCTION

This is a case where the appellant seeks review of an opinion by the Court of Appeals, which held that Kentucky's *in forma pauperis* statute did not apply to motions filed under KRS 431.073.

STATEMENT REGARDING ORAL ARGUMENT

In granting discretionary review, this Court stated that this case would be placed on the Court's oral argument calendar. After reviewing and addressing appellant's arguments against the Court of Appeals' decision, the Commonwealth does not believe oral argument is necessary. This appeal involves only a single issue of law, and the underlying facts are simple and undisputed. The Commonwealth does not request oral argument.

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COUNTERSTATEMENT OF THE CASE

The Commonwealth does not accept the appellant's statement of the case. CR 76.12(4)(d)(iii).

Jones pleaded guilty to theft by failure to make required disposition of property in 1998. *Jones v. Commonwealth*, 2019-CA-000172-MR, 2019 WL 5089922, at *1 (Ky. App. Oct. 11, 2019). Twenty year later, he filed an application under KRS 431.073 to vacate the conviction and have the records expunged. *Jones*, 2019 WL 508922 at *1. However, Jones did not tender the filing fee with his application, which at the time was \$500. *Id.* Instead, he sought an order from the trial court permitting him to proceed under KRS 453.190, Kentucky's *in forma pauperis* (IFP) statute. *Id.* Jones contended that such an order would permit the trial court to consider his motion under KRS 431.073 without payment of the filing fee. *Id.* The trial court denied the motion, concluding that KRS 431.073 involved an elective service, the costs of which was not covered by the IFP statute. *Id.* Jones appealed, and KRS 431.073 was amended while his appeal was pending.

The Court of Appeals affirmed, holding that the filing fee could not be waived under the IFP statute. *Id.* at *2-*4. The Court of Appeals also rejected Jones's argument that the Equal Protection and Due Process clauses of the Fourteenth Amendment require that indigent litigants be granted cost-free expungements. *Id.* at *2. This Court granted discretionary review.

ARGUMENT

Jones contends that the General Assembly intended to provide cost-free felony expungements to anyone who meets the statutory definition of a “poor person.” In his brief, Jones conflates two separate fees, a filing fee and an expungement fee, as one. Because Jones challenged only the filing fee before the Court of Appeals, the Court should not review whether the separate expungement fee can be waived for poor persons. Should the Court disagree, then the two fees should be addressed individually; therefore, a review of KRS 431.073 and its recent amendments is necessary before addressing the substance of Jones’s arguments.

I. Statutory Background

Under KRS 431.073, a person convicted of certain Class D felonies may apply to have the felony vacated and the records expunged. The application is filed as a motion in the original criminal case. KRS 431.073(1). If the court grants the application, the felony conviction is vacated and the court shall order expunged records in the possession of the court or any agency, including law enforcement. KRS 431.073(7). Once the records are expunged, the former felon cannot be required to disclose the prior conviction on any job application. *Id.* His or her voting rights will also be restored, so long as they are not prohibited from voting for any other reason. *Id.* The statute originally required

that the application be accompanied by a \$500 "filing fee." However, the General Assembly enacted retroactive amendments to KRS 431.073 in 2019.

Under the current version of KRS 431.073, only a \$50 filing fee must accompany the application to vacate a felony conviction. KRS 431.073(10). Upon receiving the application and the \$50 filing fee, the court shall hold a hearing on the matter. KRS 431.073(2)-(3). No additional fees are required if the court denies the motion. If the circuit court grants the motion, the current version of KRS 431.073 provides that the records shall be expunged upon full payment of a \$250 "expungement fee." KRS 431.073(7), (11)(a). However, the General Assembly recognized that some applicants would not be able to pay the expungement fee up front. It protected these individuals by providing that the \$250 expungement fee may be paid through an installment plan. KRS 431.073(11)(a). Thus, no one can be denied this statutory benefit simply because they cannot afford to pay \$250 at once.

Of course, the whole purpose of KRS 431.073 will be frustrated if the agencies tasked with expunging felony records are impeded by a lack of funding; therefore, the current version of KRS 431.073 provides that expungement fees are to be paid into a newly created "expungement fund." KRS 431.073(11)(c). The money paid into the expungement fund must be divided between the Department of Libraries and Archives, Department of State Police, the offices of Commonwealth's attorneys, and the Administrative Office of

the Courts. KRS 431.0795(4). Further, the money deposited into the expungement fund “shall not be appropriated or transferred by the General Assembly for any other purposes.” KRS 431.0795(7). Thus, the amendments to KRS 431.073 demonstrate the General Assembly’s intent to lower the financial barriers for felony expungements while ensuring that funding would be available to carry out the directives of the statute. Jones’s argument that the fees imposed under KRS 431.073 can be waived frustrates this intent. It is also inconsistent with the principles of statutory construction.

II. The IFP statute does not apply to motions filed under KRS 431.073.

Jones does not dispute that the fees imposed under KRS 431.073 are mandatory. (Appellant’s Br. 14.) However, he contends the filing fee can be waived under Kentucky’s IFP statute, which provides that:

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.

KRS 453.190(1). The Court of Appeals correctly recognized that making motions under KRS 431.073 subject to the IFP statute would violate the principles of statutory construction.

The “fundamental rule” of statutory construction is to determine the intent of the legislature. *Commonwealth v. Allen*, 980 S.W.2d 278, 280 (Ky. 1998). “To determine legislative intent, a court must refer to the words used in enacting the statute rather than surmising what may have been intended but was not expressed.” *Id.* (citations omitted). If possible, effect must be given to “every word, clause, and sentence of a statute.” *Kentucky Unemployment Insurance Commission v. Wilson*, 528 S.W.3d 336, 340 (Ky. 2017) (citations omitted). However, “when the statute is unambiguous, courts are not free to insert words or add a provision even if it may be just or desirable to do so.” *Lee v. Kentucky Department of Corrections*, 610 S.W.3d 254, 262 (Ky. 2020).

KRS 431.073 does not reference either the Kentucky Rules of Civil Procedure or the IFP statute. The General Assembly’s past practice demonstrates that this omission is notable. For example, the legislature left no doubt that the filing fees for divorces are covered by the IFP statute by explicitly stating that petitions to dissolve a marriage shall be commenced in the same matter as a civil action. KRS 403.150(1). Other statutes that impose costs or fees include provisions explicitly stating that they shall not be imposed on anyone qualifying as a poor person under the IFP statute. *See, e.g.*, KRS 23A.205, KRS 24A.175, KRS 64.080, KRS 387.760. Although Jones surmises the General Assembly intended for the IFP statute to apply to motions under KRS 431.073, he cannot explain why a legislature with such an intent would have departed

from its past practice and omitted a provision explicitly referencing the IFP statute.

Further, Kentucky courts have repeatedly held that statutes imposing mandatory costs or fees applied to all litigants, even those proceeding *in forma pauperis*. *Spees v. Kentucky Legal Aid*, 274 S.W.3d 447, 449-50 (Ky. 2009) (litigant prosecuting divorce *in forma pauperis* required to pay the warning order fee imposed under 453.060); *Cummins v. Cox*, 763 S.W.2d 135, 136 (Ky. App. 1988) (poor person required under KRS 453.040 to pay costs to prevailing party); *Stafford v. Bailey*, 282 Ky. 525, 138 S.W.2d 998, 998-99 (1940) (litigant prosecuting election contest proceeding *in forma pauperis* required to post bond). There is no reason to hold differently in this case. Jones's argument that the IFP statute applies to KRS 431.073 does not rely on the language contained in the statute. Instead, he requests that the Court add words the General Assembly omitted from KRS 431.073. The Court of Appeals correctly held that doing so was contrary to prior precedent and the fundamental rules of statutory construction. *Lee*, 610 S.W.3d at 262 (Ky. 2020); *Allen*, 980 S.W.2d at 280

Lacking any support in the language of the statute, and faced with adverse precedent, Jones raises a novel argument. He insists that other statutes, read in conjunction with one another, reveal that motions under KRS 431.073 are "actions" under the IFP statute. First, he cites KRS 446.010(1), which states that the word "Action" includes all proceedings in any court of this

state[.]” Jones contends that this definition means that “anything that qualifies as a ‘proceeding’ is also an ‘action.’” (Appellant Br. 8.) Jones next turns his attention to KRS 431.078, which applies only to expungements for *misdemeanor convictions*, and its provision that the “[i]nability to locate the victim shall not delay the proceedings in the case or preclude the holding of a hearing or the issuance of an order of expungement.” KRS 431.078(3). Based on this language, Jones contends that any filing related to an expungement, felony or misdemeanor, is a “proceeding” and therefore an “action” under the IFP statute. (Appellant Br. 10.) Thus, he argues that a litigant meeting the statutory definition of a poor person cannot be required to pay the filing fee under KRS 431.078. (*Id.*)

Jones’s argument is flawed. An application under KRS 431.073(1) is described as a “motion,” not an “action” or a “proceeding.” Regardless, the use of the word “proceedings” in a statute has never been found to preclude poor persons from paying the fees imposed under that statute. For example, statutes relating to petitions to dissolve a marriage also use the word “proceedings.” *See, e.g.*, KRS 403.150. This Court still held in *Spees* that a litigant prosecuting her divorce *in forma pauperis* was not excused from paying the mandatory warning order fee. 274 S.W.3d at 451. In *Stafford*, the old Court of Appeals held, in a case it described as an “election contest proceeding,” that the IFP statute did not apply to a statute requiring the appellant to post a bond to

prosecute an appeal.¹ 138 S.W.2d at 998. Jones's novel argument that use of the wording "proceedings" triggers application of the IFP statute is not only unsupported by any existing precedent, but contradicted by it.

To the extent that this case involves an "action," it is the original criminal case, which is filed by the Commonwealth. KRS 15.725; *Commonwealth v. Spiller*, 165 Ky. 758, 178 S.W. 1089, 1090 (1915) ("[A] proceeding by way of indictment is an action at law."). Applications to vacate and expunge felony convictions are made by filing a motion in that action. KRS 431.073(1). Jones does not cite any law suggesting that every filing in a case is an "action" under the IFP statute. The IFP statute is not intended to excuse a poor person from paying all fees incident to any type of court filing. "The interest which KRS 453.190(2) is designed to protect is the right of access to the courts, with the assurance that indigent persons are not, on account of their indigency, deprived of access to the courts that would otherwise be available." *Spees*, 274 S.W.3d at 450. Neither the \$50 filing fee nor the \$250 expungement fee can be considered a barrier to Jones's access to the courts because his criminal case has already been adjudicated and he has the right to appeal any adverse ruling on a post-conviction motion without paying costs.

¹ The IFP statute previously did not prevent a poor person from having to post a bond. *Wilson v. Melcroft Coal Co.*, 226 Ky. 744, 11 S.W.2d 932, 933 (1928) (quoting prior version of IFP statute).

Instead, the fees imposed under KRS 431.073 are simply prerequisites to obtaining a statutory benefit. As the Court of Appeals noted, this makes them akin to petitions to discharge bankruptcy because both seek an order granting a benefit that is provided exclusively as a matter of legislative grace. *Jones*, WL 5089922, at *2. Notably, the United States Supreme Court has held that the federal IFP statute, 28 U.S.C. § 1915, does not apply to the filing fee required for a discharge in bankruptcy. *United States v. Kras*, 409 U.S. 434, 439-40 (1973). The federal IFP statute, similar to its Kentucky counterpart, states that it applies to “any suit, action or proceeding[.]” 28 U.S.C. § 1915(a)(1). Thus, a motion under KRS 431.073 is not an “action,” and the IFP statute is not implicated. Such a holding is consistent with prior precedent regarding the IFP statute and the principle that legislative intent must be determined by examining the words actually contained in the statute.

III. Even if the Court holds that motions under KRS 431.073 are “actions,” then only the \$50 filing fee would be subject to the IFP statute.

Even if the Court were to accept Jones’s argument that motions under KRS 431.073 are “actions,” then only the \$50 “filing fee” would be subject to the IFP statute, not the \$250 “expungement fee.” By its plain language, the IFP statute does not waive all costs incurred litigating an action. It prohibits only the costs necessary to “file or defend” an action. KRS 453.190(1). These are costs “which are necessary to allow indigent persons access to the courts. Traditionally those have been interpreted as costs payable to court officials and

necessary in order to prosecute or defend a claim.” *Spees*, 274 S.W.3d at 450 (quoting *Cummins*, 763 S.W.2d at 136). *Spees* made clear that these costs do not include fees that are paid after an action is filed.

In that case, the appellee was permitted to file her divorce *in forma pauperis* and was appointed a warning order attorney. 274 S.W.3d at 448. After the warning order attorney fulfilled his duty, he sought a warning order fee from the appellee. *Id.* The trial court denied the request because the appellee had been granted *in forma pauperis* status. *Id.* This Court reversed because the warning order fee was required under KRS 453.060 and its payment was not required for the appellee to file her divorce. *Id.* at 450. The Court explained that its holding was consistent with the purpose of the IFP statute:

[W]e conclude that the trial court erred when it declined to allow [the warning order attorney] a fee for his services and that it erred when it failed to direct the payment of same by Appellee. The trial court could have done so with no detriment to the interest served by KRS 453.190 because Appellee had been granted necessary access to the court and the adjudication of her case was virtually complete. Our interpretation of the statute harmonizes all of the interests concerned. In so doing, we note that KRS 453.060(2) does not require payment of the warning order fee in advance, and its application to indigent persons does not limit access to the court or to the legal process.

Id. at 450-51.

Similarly, the expungement fee is not paid in advance. Unlike the \$50 filing fee, the motion to vacate the underlying felony may be filed and considered by the circuit court without payment of the expungement fee. KRS 431.073(2)-(4). Full payment of the expungement fee is necessary only after the Court has granted the motion to vacate the felony and ordered the underlying records expunged. KRS 431.073(7). Further, the expungement fee is not paid to court officials. Instead, expungement fees are paid into an expungement fund. KRS 431.073(11)(c). Even if the Court accepts Jones's argument concerning the meaning of the word "action" which it should not, the \$250 expungement fee must remain mandatory for anyone seeking to expunge records of their felony conviction.

IV. Jones does not have a constitutional right to cost-free expungement.

The Court of Appeals correctly held that its interpretation of KRS 431.073 and the IFP statute was consistent with Jones's constitutional rights. Indigents are not a suspect class. *Harris v. McRae*, 448 U.S. 297, 323 (1980). "The right to expungement of state records is not a federal constitutional right." *Duke v. White*, 616 F.2d 955, 956 (6th Cir. 1980). Rather, expungement is purely a matter of legislative grace. *Alexander v. Commonwealth*, 556 S.W.3d 6, 9 (Ky. App. 2018).

Nonetheless, Jones contends that a line of cases from the United States Supreme Court supports his contention that both the Due Process and Equal

Protection clauses of the Fourteenth Amendment grant him a constitutional right to vacate his felony conviction and expunge the accompanying records without paying the statutory fees. (Appellant Br. 15-20.) He specifically cites *Griffin v. Illinois*, 351 U.S. 12 (1956), *Boddie v. Connecticut*, 401 U.S. 371 (1971), *United States v. Kras*, 409 U.S. 434 (1973), and *Bullock v. Carter*, 405 U.S. 134 (1972). (*Id.*) In *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), the late Justice Ginsburg, writing for the majority, addressed how the holdings in each of these cases affect the constitutionality of statutory fees. A review of *M.L.B.* shows that Jones has misconstrued the opinions he cites and leaves no doubt that the fees imposed under KRS 431.073 are constitutional.

M.L.B. concerned whether the Constitution requires an indigent litigant be permitted to appeal *in forma pauperis* a judgment permanently terminating her parental rights. 519 U.S. at 109. The Court began by examining its holding in *Griffin*, which struck down a statute requiring costs to perfect a criminal appeal. *Id.* at 110. The Court noted that its holding was based on the importance of eliminating unreasonable distinctions between defendants that impede equal access to courts in matters adjudicating guilt or innocence. *Id.* The Court further explained that its decision in *Boddie*, which held that a state could not deny a divorce to a married couple based on their inability to pay court costs, recognized that there was a “narrow” category of civil cases in which mandatory fees may be unconstitutional. *Id.* at 113. The Court made

clear its holding in *Boddie* was based on the character and intensity of the individual rights at stake:

Crucial to our decision in *Boddie* was the fundamental interest at stake. Given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, we said, due process prohibits a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

Id. (quotations omitted).

The Court continued by characterizing its subsequent holding in *Kras*, which rejected a constitutional challenge to a bankruptcy fee, as clarifying “that a constitutional requirement to waive court fees in civil cases is the exception, not the general rule.” *Id.* at 114. Thus, statutory fees “involving state controls or intrusions on family relationships” are set apart from other types of civil cases. *Id.* at 116.

The Court concluded that this line of cases represented where due process and equal protection principles converge. *Id.* at 120. Thus, the constitutionality of fee requirements is determined by “inspect[ing] the character and intensity of the individual interest at stake, on the one hand, and the State’s justification for its exaction, on the other.” *Id.* at 120-21. As a result, the Court concluded that the Constitution requires that indigents be permitted to appeal a judgment terminating their parental rights *in forma pauperis* because the interest at stake for the appellant, state destruction of the “most

fundamental family relationship,” outweighed the state’s interest in offsetting the costs of its court system. *Id.* at 121-22. However, the Court insisted that its holding did not change the ordinary rule that fee requirements are reviewed only for rationality. *Id.* at 123. The only two exceptions to this rule are that: (1) access to the courts in matters that are criminal or quasi criminal in nature cannot turn on the ability to pay, and (2) the right to participate in the political process as a candidate or voter cannot be limited to those who can afford to pay a fee, such as the one Texas imposed on candidates in *Bullock*. *Id.* at 124.

Conversely, the fees imposed under KRS 431.073 do not limit access to the courts, or involve adjudication of guilt or innocence. Jones himself recognizes that motions made under KRS 431.073 are civil, not criminal, in nature. (Appellant Br. 9.) Unlike *Boddie* or *M.L.B.*, this case does not involve the establishment or destruction of family relationships. Nor has any court ever recognized the expungement of criminal records as a fundamental right. The fees imposed under KRS 431.073 are also not a prerequisite to participation in the political system. Although Jones cannot vote, that is because he is a convicted felon. Excluding felons from the franchise does not violated the Fourteenth Amendment. *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974). Thus, the Court of Appeals’ conclusion that Jones’s circumstances do not implicate any recognized constitutional right was consistent with all available precedent from the United States Supreme Court.

Unable to reconcile his argument with *M.L.B.*, Jones choses to ignore it and argues that the fees imposed under KRS 431.073 are akin to those at issue in *Boddie* because the Commonwealth exercises complete control over the process by which a convicted felon may expunge his felony conviction. (Appellant Br. 17-18.) However, *M.L.B.* made clear that the fact that the state monopolized the means to obtain the divorce was relevant in *Boddie* because it affected how the Court weighed the individual's interests versus the state's interests. 519 U.S. at 113. Nothing in *Boddie*, or any other case, holds that fee requirements are unconstitutional when applied to indigents unless an equivalent service is provided by the private sector. Every licensing and occupational fee would raise constitutional problems if this logic were accepted. Simply put, Jones's argument that he is entitled to cost-free expungement cannot be accepted without recognizing a new constitutional right.

CONCLUSION

Although Jones complains he was "denied entry at the Courthouse door," the reality is that he was simply turned away with an answer he did not like. However, it was an answer consistent with the plain language of KRS 431.073, the rules of statutory construction, prior precedent regarding the IFP statute, and the Due Process and Equal Protection clauses of the Fourteenth

Amendment. Jones's grievances about KRS 431.073 are more appropriately directed to the General Assembly. The Court of Appeals' opinion must be affirmed.

Respectfully Submitted,

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