STATE OF KANSAS

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April 1, 1976

ATTORNEY GENERAL OPINION NO. 76-116

Honorable John Mike Elwell
County Judge
Douglas County Courthouse
Lawrence, Kansas 66044

Re: Crimes and Punishments -- Sentencing -- Expungement of Record.

Crimes and Punishments -- Authority of County Court to Order Expungement of an Arrest Record Not Resulting in a Conviction.

Synopsis: K.S.A. 21-4617 does not authorize a court to consider a request for expungement of an arrest record not resulting in a conviction.

Although a court of general jurisdiction has the authority to consider an expungement request under the appropriate circumstances even in the absence of statute, the County Court of Douglas County, a court of limited jurisdiction, is without power to grant such relief.

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Dear Judge Elwell:

You inquire whether K.S.A. 21-4617 confers authority upon a court to grant expungement of an arrest record not resulting in conviction and whether, if not, authority elsewhere exists for such an order.

From an analysis of the provisions of K.S.A. 21-4617, it is apparent that the statute delimits a district court's power to the expungement of criminal records from a proceeding resulting in conviction, including records of arrests and other matters accumulated prior to conviction. This conclusion concurs with that reached in a prior opinion of our office, No. 75-107, wherein it was noted that the recently enacted expungement statutes[1] do not provide for the eradication of arrest records not resulting in conviction.

Thus, the determinative issue for the purpose of your inquiry is whether a court has jurisdiction in the absence of statute to order expungement of an arrest record in a particular case.

Expungement has traditionally been considered a subject exclusively within the province of the legislature, but there now exist a number of cases of relatively recent vintage which indicate that a court is possessed of equitable power to grant an expungement request under the proper factual circumstances. After conducting an extensive analysis of recent judicial decisions on the subject and noting the differing legal contexts in which such requests have been presented, the Tenth Circuit thus expressed their teachings in *United States v. Linn*, 513 F.2d 925, 927-928 (10th Cir. 1975):

> "Under the authorities above cited it is fairly well established, then, that courts do possess the power to expunge an arrest record where the arrestee has been acquitted. However, there appears to be no definitive, all-purpose rule to govern requests of this nature, and to a considerable degree each case must stand on its own two feet. The cases above cited do indicate that the power to expunge an arrest record is a narrow one, and should not be routinely used whenever a criminal prosecution ends in an acquittal, but should be reserved for the unusual or extreme case. Certain of the cases call for a "balancing" of the equities between the Government's need to maintain extensive records in order to aid in general law enforcement and the individual's right of privacy.

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[1] K.S.A. §§12-4514 and 21-4616 also provide for the expungement of records of criminal convictions under varying circumstances.

> "Under the cases above cited, where the arrest itself was an unlawful one, or where the arrest represented harassing action by the police, or where the statute under which the arrestee was prosecuted was itself unconstitutional, courts have ordered expunction. However, it would appear that an acquittal, standing alone, is not in itself sufficient to warrant an expunction of an arrest record."

Applying these general principles to the situation before it, the Court declined to order expunction observing that notwithstanding the applicant's acquittal by a jury, the record failed to reveal any infirmity in his arrest or indictment or any harassing action by police authorities. The Court also thought it significant that the quantum of evidence adduced at trial was substantial enough to warrant the submission of the case to a jury.

Another significant case addressing the question here presented is *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974). Once again, exhaustive scrutiny of existing law was conducted by the Court, and it concluded that "[t]he judicial remedy of expungement is inherent and is not dependent on express statutory provision, and it exists to vindicate substantial rights provided by statute as well as by organic law." 498 F.2d at 1023.

We believe that these two decisions fairly represent the status of prevailing legal doctrine on the question of judicial authority to grant expungement. They instruct that the equitable remedy of expunction should be utilized in only the most compelling circumstances where the relief is necessary to protect and vindicate substantial rights of the applicant. However, the conclusion that such power inheres in a court of general jurisdiction does not end the inquiry, for it must additionally be determined whether the courts of lesser jurisdiction in this state may exercise such injunctive power.

It is familiar doctrine that courts of limited jurisdiction, such as the county courts, may only exercise such judicial powers as have been conferred upon them by legislative enactment. K.S.A. 20-808 provides that in civil cases county courts shall have the jurisdiction prescribed in Chapter 61 and in criminal matters, the

power to try misdemeanors and conduct preliminary examinations of felony charges. Although the expungement request presently pending in your court has been styled as a continuation of the previous criminal proceedings, the complaint seeks extensive injunctive relief by requesting the court to order the return of all arrest data concerning the defendant held by any law enforcement agency in this state. The essential nature of the proceedings is most significant, for if the action be deemed civil, it would be barred by K.S.A. 1975 Supp. 61-1603 which precludes the county courts from exercising civil injunctive power.

After analysis of the question, we do not believe that the pending proceeding falls within the court's limited criminal jurisdiction. Since the requested relief is clearly outside the express statutory jurisdiction conferred upon the court in criminal matters, the question arises whether it may be considered within the ancillary, or incidental, criminal jurisdiction of the court.

Having examined the question, we do not believe that the pending proceeding may properly be characterized as within the court's ancillary criminal jurisdiction. Although the court possesses the power to dismiss a complaint at the behest of the prosecution, as in this case, the broad injunctive relief requested of the court cannot be said to be a necessary concomitant to the effectuation of the express powers conferred upon the court. The relief sought is not necessary to effectuate the discharge of the defendant from custody. Thus, the power of expungement does not lie within the criminal jurisdiction of the court. *Cf. People of California, by the District Attorney Of County Of San Mateo v. Municipal Court*, 124 Cal. Rptr. 484 (Cal. App. 1975).

Nor do we believe that the equitable relief requested may be granted under the civil jurisdiction of the court. K.S.A. 1975 Supp. 61-1603(b)(11) expressly precludes the courts of lesser jurisdiction from entertaining actions for injunctive relief. While in our view, a similar civil action could be properly maintained in the district court, a court of general jurisdiction, the unequivocal mandate of the statute prevents its consideration by the county court. In view of this disposition of the matter, we intimate no view on the merits of the expungement request presented herein.

Therefore, it is our opinion that the County Court of Douglas County does not have jurisdiction to grant equitable relief expunging an arrest record.

Very truly yours,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

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