IN THE SUPREME COURT OF OHIO
2008

STATE OF OHIO,	Case No. 2008-921
Plaintiff-Appellant,	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
-vs-	
GUY METTLE,	
Defendant-Appellee.	Court of Appeals Case No. 07AP-892

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

Through R.C. 2953.31 and R.C. 2953.32, the General Assembly set forth provisions allowing individuals who qualify as first offenders the opportunity to have their record sealed. However, under R.C. 2953.36, the General Assembly excluded specific offenses, thereby removing the trial court's authority to seal such records. Defendant's conviction for non-support of dependents fell within the excluded offenses under former R.C. 2953.36(D), renumbered as R.C. 2953.36(F), which prohibited the court from sealing a record when a minor was victimized by the crime. The decision of the Tenth District Court of Appeals followed the plain language of this statute.

The instant case does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is a fundamental principle of law that legislative intent is first and foremost guided by the plain language of the statute. *Heck v. State* (1886), 44 Ohio St. 536; *State v. Williams* (1922), 104 Ohio St. 232; *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606. The plain language of the statute was given effect in this case. It is respectfully submitted that jurisdiction should be declined.

STATEMENT OF THE CASE AND THE FACTS

Guy Mettle, Defendant-Appellee, was convicted for non-support of dependents, a fourth-degree felony under Franklin County criminal case number 96CR-2848. On May 7, 2007, Defendant filed an application to seal the record of this conviction. The State filed an objection to his application asserting that Defendant was not eligible under former R.C. 2953.36(D) because the victim of his offense was a minor. The State attached a copy of the indictment in 96CR-2848 to its objection showing the victim of the offense was Defendant's minor son. Defendant filed a response on August 16, 2007.

At the hearing on Defendant's application, the court was unsure whether the legislature intended to preclude non-support convictions from expungement and took the matter under advisement. The court later granted Defendant's application, concluding that the legislature did not intend to prohibit expungement of non-support convictions.

The State appealed. The Tenth District Court of appeals found the expungement was improper given the exclusion in R.C. 2953.36 precluding the expungement of offenses when the victim was a minor. *State v. Mettle*, 10th Dist. No. 07AP-892, 2008-Ohio-1425.

ARGUMENT

RESPONSE TO DEFENDANT'S FIRST, SECOND, FIFTH, EIGHTH AND NINTH PROPOSITIONS OF LAW

FORMER R.C. 2953.36(D) CLEARLY AND UNAMBIGUOUSLY PROHIBITS A TRIAL COURT FROM SEALING THE RECORD OF A CONVICTION IN CIRCUMSTANCES WHERE THE VICTIM WAS A MINOR.

Defendant's application to seal his conviction was filed before the amendments to R.C. 2953.36 effective in October, 2007. This Court has previously held that the expungement statute in effect at the time an expungement application is filed governs the applicant's eligibility for expungement. *State v. LaSalle*, 96 Ohio St. 3d 178, 2002-Ohio-4009. Thus, the analysis below refers to the former version of R.C. 2953.36(D). Former R.C. 2953.36(D) prohibited sealing records of convictions in circumstances involving a victim under eighteen years old. This same exclusion is now set forth in R.C. 2953.36(F).

Defendant contends that the plain language of former R.C. 2953.36(D) should be ignored to allow his record to be sealed. Defendant's argument is contrary to long established rules of statutory construction. Legislative intent is first and foremost determined by the plain language of a statute. This Court has stated: "[W]here the language is plain, and leads to no absurd or improbable results, there is no room for construction, and it is the duty of the courts to give it the effect required by the plain and ordinary signification of the words used . . . ." *State v. Williams* (1922), 104 Ohio St. 232, 241, quoting *Heck v. State* (1886), 44 Ohio St. 536, 537. Recently, this Court reiterated this principle of statutory construction:

> The court must first look to the plain language of the statute itself to determine the legislative intent. *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81, 1997 Ohio 310, 676 N.E.2d 519. We apply a statute as it is written when its meaning is unambiguous and definite. *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006 Ohio 954, 846 N.E.2d 478, ¶52, citing *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*

> (1996), 74 Ohio St.3d 543, 545, 1996 Ohio 291, 660 N.E.2d 463. An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language. *State ex rel. Burrows*, 78 Ohio St.3d at 81, 676 N.E.2d 519.

State v. Lowe, 112 Ohio St.3d 507, 2007-Ohio-606, ¶ 9.

The statute at issue here is former R.C. 2953.36(D). This statute, now R.C. 2953.36(F), precludes a trial court from sealing the record of a conviction in circumstances where the victim was under eighteen years of age. Contrary to defendant's argument, the language is not limited to offenses of violence. Notably, another statutory provision prohibits trial courts from sealing convictions for offenses of violence, as defined under R.C. 2901.01(A)(9)(a). R.C. 2953.36(C). Similarly, convictions for specific sex offenses cannot be sealed. See former R.C. 2953.36(F).

Former R.C. 2953.36(D) prohibits sealing records of convictions for non-support of dependents when those dependants are minors: *State v. Westendorf*, 1st Dist. No. C-020114, 2003-Ohio-1019; *In re Schiavo*, 10th Dist. No. 07AP-699, 2008-Ohio-298. In *Westendorf*, the applicant was convicted for failing to support his three-year-old daughter. Id. at ¶ 4. The First District Court of Appeals found that "R.C. 2953.36(D) *clearly and unambiguously* precludes sealing the record of conviction where the victim was under eighteen years of age." Id. (emphasis added). As the applicant was ineligible under R.C. 2953.36(D), the expungement order was reversed. Id. at ¶ 8.

When one parent fails to support his or her child, it is the child that suffers the consequences. The Tenth District succinctly stated, "[i]n non-support cases, the princip[al] victim is a child who has little or no ability to help himself or herself." *State v. Hall* (2000), 137 Ohio App.3d 666, 668. Other Ohio District Courts have also commented on the fact that children are the victims of non-support cases because those children suffer the consequences of the offender's non-support crime. *Westendorf*, supra at ¶ 3 (noting that "[t]he victim in a case of

non-support is the child"); see also, *State v. Vanderpoll*, 9th Dist. No. 22803, 2006-Ohio-526, ¶ 19; *State v. Harris*, 4th Dist. No. 02CA22, 2003-Ohio-4555, ¶ 20.

There was no dispute in this case that Defendant's minor child was the victim of his crime. The indictment, attached to the prosecutor's objection, showed that Defendant's conviction arose out of his failure to support his minor son. Because the victim of Defendant's crime was a minor, the plain language of the statute prohibited sealing the record. Accordingly, the Tenth District properly reversed the trial court's order.

Defendant's first, second, fifth, eighth and ninth propositions of law should be overruled.

RESPONSE TO DEFENDANT'S THIRD, FOURTH, SIXTH AND SEVENTH PROPOSITIONS OF LAW

DEFENDANT'S CLAIMS ARE NOT PROPERLY BEFORE THIS COURT.

Defendant's complaints regarding the filing requirements for pro se litigants, the validity of his plea, and his allegations of misconduct cannot be raised or litigated in a direct appeal of the court of appeal's decision in this case. These claims were not raised below and are not properly before this Court. Furthermore, defendant's claims lack merit. Accordingly, Defendant's third, forth, sixth and seventh propositions of law should be overruled.

RESPONSE TO DEFENDANT'S FIFTH AND EIGHTH PROPOSITIONS OF LAW

R.C. 2953.36 DOES NOT IMPLICATE DEFENDANT'S CONSTITUTIONAL RIGHTS.

In his fifth and eighth propositions of law, Defendant claims R.C. 2953.36(D) violates due process and constitutes an equal protection violation. Defendant did not challenge the constitutionality of R.C. 2953.36(D) below. Accordingly, such claims are not properly before

this Court. See *State v. Awan* (1986), 22 Ohio St.3d 120. Even if Defendant had properly raised these claims, Defendant has failed to show R.C. 2953.36(D) is unconstitutional.

The statutory provisions prohibiting expungement for certain types of crimes do not implicate a defendant's right to due process and the provisions do not create a suspect classification that triggers equal protection concerns. *State v. Davenport* (1996), 116 Ohio App. 3d 6, 11. This Court has noted that "[e]xpungement is an act of grace created by the state, and so is a privilege, not a right." *State v. Simon* (2000), 87 Ohio St. 3d 531, 533, quoting *State v. Hamilton* (1996), 75 Ohio St. 3d 636, 639 (internal quotation marks omitted). This Court has also stated "[n]either the United States Constitution nor the Ohio Constitution endows one convicted of a crime with a substantive right to have the record of a conviction expungement." *Hamilton*, 75 Ohio St. 3d at 639, citing *Bird v. Summit Cty.* (C.A. 6, 1984), 730 F.2d 442, 444.

The appropriate standard of review is whether the statute is rationally related to some legitimate governmental interest. The "rational basis" standard of review is the paradigm of judicial restraint. See *FCC v. Beach Communications* (1993), 508 U.S. 307, 314.

> Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them.

Benjamin v. Columbus (1957), 167 Ohio St. 103, at paragraph six of the syllabus; *DeMoise v. Dowell* (1984), 10 Ohio St.3d 92, 96-97.

Criminal records are presumptively public and individuals seeking to seal such a record must meet specific criteria. Sealing records of criminal convictions is a legislatively created exception to the rule of open public records. See *State ex. rel Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, ¶ 6. The General Assemble has imposed rational and

legitimate limits on what type of criminal convictions can be sealed and thereby removed from the public forum.

Through the promulgation of former R.C. 2953.36(D), the General Assemble limited the availability of expungement to crimes that do not victimize children. This is a legitimate restriction on the removal of a criminal record from public inspection. The distinction between crimes that do not involve children and those that do shows how seriously the legislature considered any type of crime that is committed against a child.

There are numerous other legitimate interests in maintaining records of convictions. Such information assists law enforcement with investigations and establishing patterns of criminal conduct. Maintaining records of convictions, such as crimes involving children, also provides valuable information to law makers, enabling them to ascertain recidivism rates and to craft remedies specifically tailored to address such crimes. Additionally, employers, educational institutions, financial institutions and other governmental agencies have a significant interest in accessing the criminal history of their applicants. Indeed, many employers are required to perform background checks on their applicants to determine whether those applicants have had contact with the criminal justice system.

As numerous legitimate governmental interests support the exclusion in former R.C. 2953.36(D), defendant cannot show the statute is unconstitutional. Defendant's fifth and eighth propositions of law should be overruled.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

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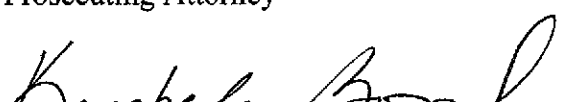

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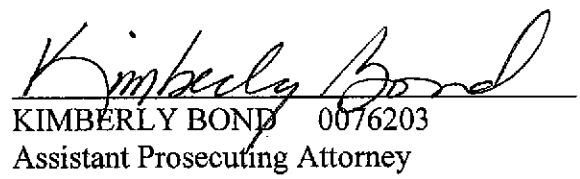
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, June 9, 2008, to GUY METTLE, 2715 Collinford Drive, #K, Dublin, Ohio 43016, 614/432-6000.



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