

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : **08-2391**
Appellee, : On Appeal from the Lorain
County Court of Appeals,
v. : Ninth Appellate District
DOUGLAS FUTRALL : Court of Appeals
Appellant. : Case No. 08CA009388

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT,
DOUGLAS FUTRALL

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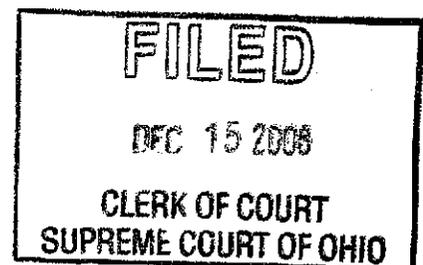


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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case presents for review a significant and important matter of first impression. The case seeks review of the Ninth District Appellate Court's inapposite interpretation of Ohio's sealing statutes, formally referred to as expungement.

The Ohio Revised Code codifies the statutory framework in which a defendant convicted of a crime (or crimes) may move the court to seal his record of convictions.¹ It is axiomatic that not all criminal convictions may be sealed and, in fact, the statutes are quite clear as to which convictions are eligible to be sealed and which are not.²

The question that is not clear, however, and that has never been addressed prior to the Ninth District's decision herein, is what happens in a situation when a defendant moves the court to seal his eligible convictions where he has multiple convictions, some of which *may* be sealed per the statute, and some which *may not*? May the court seal those eligible convictions while leaving the ineligible ones in place? That is the question and issue at bar.

The sealing statutes do not address this scenario nor provide any guidance. Equally, but for the recent decision of the Ninth District, there is no other case law on point. Accordingly, as this issue is both one of first impression for this court and of great interest to the citizens of the State of Ohio, it is ripe for review.

The implication of the decision by the appellate court potentially affects every court, judge, and litigant who moves a court to seal his record of convictions where he has multiple convictions, some of which are eligible to be sealed, others which are not. The fundamental,

¹ R.C. 2953.31, *et seq.*

² *Id.*

statutory right of a citizen to get a “fresh start” by having his record of convictions sealed has been severely compromised by this decision.

Further, the appellate court interpreted the statutes in a manner *contrary* to their remedial intention and “read in” to the statutes a limitation that does not exist. This court must accept jurisdiction to clarify this issue for all Ohioans who seek the benefits of the sealing statutes in order to cleanse their record of statutorily eligible convictions.

In addition to the above, the court of appeals misapplied the proper standard of review. The issue below raised a purely legal question. No facts were in dispute and the parties agreed as to the sole issue before the court. Instead of reviewing the trial court’s decision *de novo*, the court of appeals reviewed it under an abuse of discretion standard. There was, interestingly, a dissent on this issue.

Finally, over Defendant’s objection, the appellate court allowed the State to file a brief and argue contra Defendant’s position, despite the fact that the State *did not* object in the trial court to Defendant’s application to seal his eligible convictions!

Accordingly, this court must grant jurisdiction to hear this case and review the erroneous and inapposite decision of the appellate court.

STATEMENT OF THE CASE

On March 12, 2007, Defendant-Appellant, Douglas Futrall (hereinafter, "Futrall"), filed an Application to Seal Record in the Lorain County Court of Common Pleas.

Pursuant to normal protocol, Futrall met with the State Adult Parole Authority to review his application. A report was made from that body and forwarded to the court.

On September 12, 2007, the court held a hearing on Futrall's application. Futrall and counsel undersigned appeared; the State was represented by Assistant Prosecutor, Steve List. A transcript of those proceedings was made.³

On April 10, 2008, the court filed its Journal Entry denying Futrall's application.⁴ Futrall timely appealed to the Ninth District Court of Appeals. The issue was briefed and argued before that court. On November 3, 2008, the appellate court filed its decision overruling the appeal and affirmed the judgment of the trial court denying Futrall's application to seal his eligible convictions.⁵ This Motion for Jurisdiction timely follows.

³ Exhibit "A," "Transcript of Proceedings in the Trial Court," attached and incorporated herein.

⁴ Exhibit "B," Judgment Entry, Lorain County Court of Common Pleas, Case No. 01CR057973, April 10, 2008, attached and incorporated herein.

⁵ Exhibit "C," Decision and Journal Entry of the Ninth District Court of Appeals, Case No. 08CA009388, November 3, 2008, attached and incorporated herein. (The decision from which this appeal is brought)

STATEMENT OF PERTINENT FACTS

On May 30, 2001, Futrall was indicted by the Lorain County Grand Jury for five criminal offenses, to wit:

- 1) Improper Handling of Firearms, R.C. 2923.16(B), M1;
- 2) Carrying a Concealed Weapon, R.C. 2923.12(A), F4;
- 3) Telephone Harassment, R.C. 2917.21(A)(4), M1;
- 4) Domestic Violence, R.C. 2919.25, M4; and
- 5) Aggravated Menacing, R.C. 2903.21, M1.

These charges arose out of a verbal altercation Futrall had with his estranged wife. No physical confrontation occurred and nobody was harmed. As a result of a negotiated plea agreement, on November 5, 2001, Futrall withdrew his plea of Not Guilty and entered a plea of Guilty to the indictment. However, the Carrying a Concealed Weapon charge was amended to a Misdemeanor in the First Degree. As such, Futrall was only convicted of misdemeanors. These five offenses occurred at the same time and out of the same incident.

On March 1, 2002, Futrall appeared before the court with counsel for sentencing. He was sentenced to a two year community control sanction. *Only four months later*, on July 29, 2002, Futrall's community control sanction was terminated and he was fulfilled to his full civil rights.

In its Entry denying Futrall's Application to Seal, the trial court found "[W]ith regard to Futrall's rehabilitation, the record and evidence adduced at the hearing established the following: the convictions at issue involved a family disturbance between Futrall and his ex-spouse. No threats of violence or injuries occurred to the victim; all of the convictions were

misdemeanors; Futrall did an outstanding job on probation being successfully terminated in less than four months; completed a domestic violence program; began his own company, Fast Appraisals, and has been continuously, gainfully employed since his convictions; has no prior or subsequent criminal convictions; is actively involved in shared parenting for his son and daughter; attends North Ridgeville Harvest Ridge Church; is a member of the Lorain County Chamber of Commerce and the Lorain Board of Realtors; and is a homeowner in Lorain County.”⁶

The trial court further noted that Futrall was “a first offender;” and that he did “an outstanding job on probation; found that he was sufficiently rehabilitated and is an otherwise outstanding candidate to have his record of conviction sealed.” The trial court also found that Futrall’s interests in having his record sealed “outweigh any legitimate governmental needs to maintain those records.”⁷

Finally, while the trial court stated that it was “inclined to seal” Futrall’s eligible convictions, it ruled, as a matter of law, that given the fact that one of his convictions, the Aggravated Menacing charge, could not be sealed, none of the convictions could be. The court of appeals agreed.⁸

⁶ Exhibit “B,” pg. 4.

⁷ *Id.*

⁸ Exhibit “C.”

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

A TRIAL COURT IS NOT PRECLUDED AS A MATTER OF LAW FROM SEALING A DEFENDANT'S CONVICTIONS THAT ARE STATUTORILY ELIGIBLE TO BE SEALED WHERE ONE OF THE CONVICTIONS IS STATUTORILY EXEMPT FROM BEING SEALED

A. STANDARD OF REVIEW: *DE NOVO*

Futrell concedes that in most cases, an appellate court reviews an order granting or denying an application to seal a record of conviction for an abuse of discretion standard.⁹ Under this standard, the appellate court must determine whether the trial court's decision was arbitrary, unreasonable, or unconscionable – not merely an error of law or judgment.¹⁰

However, as noted in the concurrence in the decision below, the issue herein presents a legal question and, as such, should be reviewed *de novo*. “The single issue in this appeal is whether Defendant's convictions may be treated separately for purposes of R.C. 2953.32. Whether the convictions may be treated separately under R.C. 2953.32 is a question of law . . . and our review should be de novo rather than abuse of discretion.”¹¹

Accepting the trial court's determination of the factual issues “the court of appeals must conduct a de novo review of the trial court's application of the law to those facts.”¹²

B. STANDARD OF REVIEW: R.C. 2953.31, *ET SEQ.*

R.C. 2953.32, “Sealing of Conviction Record or Bail Forfeiture Record,” mandates

⁹ *State v. Jett*, 9th Dist. No 22299, 2005 -Ohio- 1277, at ¶ 5.

¹⁰ *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

¹¹ Exhibit “C,” Carr, concurs in judgment only. (Emphasis added)

¹² *State v. Kay*, 11th Dist., No. 2008 - WL 2332530, citing, *State v. Hines*, 11th Dist., No. 2004-L-066, 2005 -Ohio- 4208 at ¶14, citing, *State v. Searls* (1997), 118 Ohio App.3d 739, 741.

situations in which an applicant may have his conviction(s) sealed. The statute requires, among other things, that the applicant:

- 1) Be a first offender;
- 2) Wait for one year until after the offender's final discharge for misdemeanor convictions;
- 3) Submit to an examination by the court's probation department;

And that the court:

- 1) Review a written report from the court's probation department;
- 2) Determine whether or not it is in the public interest for an applicant with multiple convictions to be treated as a first offender;
- 3) Determine whether the applicant has been rehabilitated to the satisfaction of the court;
- 4) Consider the prosecutor's position if he or she objects; and
- 5) Weigh the interests of the applicant in having the records pertaining to the applicant's conviction(s) sealed against the legitimate needs, if any, of the government to maintain those records.

The statute goes on to require that if the court determines that the applicant is a "first offender . . . that no criminal proceedings are pending against the applicant, and that the interests of the applicant in having the records pertaining to the applicant's conviction . . . sealed are not outweighed by any legitimate governmental needs to maintain those records, and the rehabilitation of an applicant who is a first offender applying (pursuant to Division (A)(1)) [under] this section has been obtained to the satisfaction of the court, the court . . . **shall order all official records pertaining to the case sealed . . .**"¹³

¹³ R.C. 2953.32. (Emphasis added.)

C. DOES THE APPLICANT MEET THE THRESHOLD REQUIREMENTS FOR THE COURT TO CONSIDER SEALING HIS RECORD OF CONVICTIONS

Here, the trial court analyzed Futrall's application; considered the arguments of counsel at the hearing; and considered that the State *did not object* to his application to seal. The court found, regarding this threshold issue, the following:

At the outset, the court must determine whether or not Futrall is a first offender. In the case at bar, he was indicted on May 30, 2001. The dates of the offenses alleged in the five-count indictment are all the same, to wit, April 8, 2001. As such, Futrall is applying as a first offender pursuant to Division (A)(1) of R.C. 2953.32 but has multiple convictions. The convictions, however, all resulted from a related criminal act or related criminal acts that were committed at the same time and date. Accordingly, the court hereby finds that Futrall's convictions may be counted as one conviction and that he is, therefore, as a matter of law, considered a first offender.¹⁴

With regard to Futrall's rehabilitation, the trial court found,

[t]he record and evidence adduced at the hearing established the following: the convictions at issue involved a family disturbance between Futrall and his ex-spouse. No threats of violence or injuries occurred to the victim; all of the convictions were misdemeanors; Futrall did an outstanding job on probation being successfully terminated in less than four months; completed a domestic violence program; began his own company, Fast Appraisals, and has been continuously, gainfully employed since his convictions; has no prior or subsequent criminal convictions; is actively involved in shared parenting for his son and daughter; attends North Ridgeville Harvest Ridge Church; is a member of the Lorain County Chamber of Commerce and the Lorain Board of Realtors; and is a homeowner in Lorain County.¹⁵

The trial court then held,

Accordingly, the court finds that Futrall has been sufficiently rehabilitated and is an otherwise outstanding candidate to have his

¹⁴ Exhibit "B," at pg. 3.

¹⁵ *Id.* at pg. 4.

record of conviction sealed . . . [and] that the interests of Futrall in having his record of conviction sealed outweigh any legitimate governmental needs to maintain those records.”¹⁶

On this issue, the appellate court boldly stated “the trial court’s analysis under R.C. 2953.32 is surplusage.”¹⁷ This conclusion is in error. As the appellate court properly noted, a trial court must undergo a “two-step process” in consideration of the application to seal. As such, *it was* necessary for the court to determine if Futrall was a “first-offender” before going any further, for if he was not, the inquiry as to his eligibility ends.

The appellate court then applied an incorrect standard of review, to wit: abuse of discretion, when, as noted by Judge Carr, the review should have been *de novo*.¹⁸ The court then dismissed out-of-hand Futrall’s argument that the State should not have been permitted to brief or argue the issue as it did not object below.

Regardless, it is important that Futrall is recognized as an “excellent” candidate to have his eligible convictions sealed, particularly as the State did not object in the trial court. Perhaps if the appellate court would have applied the proper standard of review, it would have reversed the trial court and ordered the four eligible convictions sealed.

D. MAY A TRIAL COURT OTHERWISE SEAL THOSE CONVICTIONS THAT ARE STATUTORILY ELIGIBLE TO BE SEALED WHERE ONE OF THE CONVICTIONS IS STATUTORILY EXEMPT FROM BEING SEALED

The issue before the court may also be framed as follows: Does one conviction that is statutorily exempt from being sealed prevent the court from sealing the remaining convictions that may otherwise be eligible to be sealed?

¹⁶ *Id.* (Emphasis added)

¹⁷ Exhibit “C,” ¶8.

¹⁸ *Id.* at. ¶6.

In the case at bar, the trial court ruled, and the court of appeals affirmed, that it *could not* seal those convictions for a first-time (multi-count) offender that normally could be sealed because one of the charges (Aggravated Menacing) was exempt from the statutory framework for the sealing of convictions. The trial court held that “because the Aggravated Menacing charge is statutorily exempt from being sealed, *as a matter of law, all of his convictions* are precluded from being sealed . . .”¹⁹

As for the court of appeals, its reasoning was equally devoid of any statutory or case law citations. The court of appeals opined that “It would be impossible for multiple charges “to be considered not to have occurred” for purposes of R.C. 2953.32(C) while retaining the records of another conviction that arose from the same arrest, complaint, indictment, guilty plea, and conviction.” The appellate court further stated that to seal the eligible convictions and not the one ineligible conviction would “impede the recordkeeping function of the clerks of court and render the process of sealing convictions essentially meaningless in cases such as these.”²⁰

This tortured analysis by the court of appeals is incorrect for two reasons: First, it would hardly be “impossible” to imagine that multiple charges did not occur while retaining the records of one conviction that arose from the same incident. As a practical matter, all that would have to be done is to seal the current record of convictions and file an amended journal entry of conviction and sentence *nunc pro tunc* with the sole remaining, unsealed conviction.

Secondly, there is nothing whatsoever that would impede the recordkeeping function of the clerk. To argue otherwise is to put form over substance and allow the ministerial,

¹⁹ *Id.* at pg. 6. (Emphasis added.)

²⁰ Exhibit “C,” ¶9.

recordkeeping function of the clerk to supersede the important statutory, rehabilitative, right of a citizen to have his convictions sealed. As noted, the clerk would simply seal the current conviction entry and sentence and replace it with a *nunc pro tunc* entry with only one conviction. For all practical purposes, the sentence could remain the same.

Finally, this process would hardly render the sealing of the eligible convictions “meaningless,” but would, instead, be extremely important to Futrall as he would only be henceforth convicted of one count of Aggravated Menacing as opposed to five misdemeanor convictions.

The trial court reviewed Futrall’s convictions and was inclined to, and normally would have, granted the Application to Seal, but for the Aggravated Menacing conviction. The court stated the following on this issue: “In the case at bar, Futrall has five misdemeanor convictions, wit:

- 1) Improper Handling of Firearms, R.C. 2923.16(B), M1;
- 2) Carrying a Concealed Weapon, R.C. 2923.12(A), M1;
- 3) Telephone Harassment, R.C. 2917.21(A)(4), M1;
- 4) Domestic Violence, R.C. 2919.25, M4; and
- 5) Aggravated Menacing, R.C. 2903.21, M1.

The first four convictions are all statutorily eligible to be sealed. The issue presented for the court’s review is one of first impression. The applicant comes to this court with five convictions, four of which this court has the statutory authority to seal, and, based upon the facts and evidence in the record, **is inclined to seal** based upon Futrall’s demonstration of good character and demonstrated rehabilitation. The fifth charge, the Aggravated Menacing charge, is an offense of violence and, therefore, may not be sealed. In fact, Futrall acknowledged this both in his Brief and at the hearing. He seeks to have the four misdemeanor convictions for Improper Handling of Firearms, Carrying a Concealed Weapon,

Telephone Harassment, and Domestic Violence (M4) sealed, recognizing that the Aggravated Menacing charge is not eligible.”²¹

Both the trial court and court of appeals framed the issue thus: “[T]herefore, the question before the court is, may it seal those four otherwise eligible convictions where one conviction “in the bunch” is not statutorily eligible to be sealed? Put another way, does the presence of one ineligible conviction wholly disqualify all convictions from being sealed?”²²

While neither the State nor Futrall has posited any case law to give the court guidance, it was the trial court’s position that the answer is affirmative and that because the applicant has one conviction out of the five that is not statutorily eligible to be sealed, the court may not seal *any* of the convictions, even those which otherwise are eligible.”²³ Notably, the trial court shed no light on how and/or why it reached this conclusion and the court of appeals relied upon the unconvincing explanation that to seal some convictions but not others as a matter of practicality cannot be done.

Regardless, in the case at bar, Futrall was convicted of five misdemeanor charges that all occurred out of one incident, that he sought to seal four of those convictions, and that he was “sufficiently rehabilitated and is an otherwise **outstanding candidate** to have his record of conviction sealed.” The trial court further found that sealing Futrall’s record of conviction “outweighed any legitimate governmental needs to maintain those records.”

Nevertheless, without any authority to support its decision, without any articulated explanation for its reasoning, and in direct contravention of the remedial nature of the Sealing

²¹ *Id.* at pgs. 4-5. (Emphasis added)

²² Exhibit “B,” p. 5; Exhibit “C,” ¶8.

²³ *Id.* at pg. 5.

of Records statutes, the trial court refused to seal those convictions that are otherwise subject to being sealed because one of them (that he never requested be sealed) was exempt or otherwise not eligible to be sealed.

Amazingly, putting form over substance, and elevating the ministerial, recordkeeping function and data-entry complexities of sealing some convictions, but not others, the appellate court affirmed the trial court's decision.

In so doing, the Ninth District Court of Appeals, *ipso facto*, created an inapposite legal maxim that thoroughly eviscerates the remedial intent of R.C. 2953.31, *et seq.*, the Sealing of Records statutes. This court has held that **“the remedial expungement provisions of R.C. 2953.32 and 2953.33 must be liberally construed to promote their purposes.”**²⁴ See also: R.C. 1.11, “Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice.” (Emphasis added.)

For the foregoing reasons, this matter is of great public importance and/or interest as well as a matter of first impression and the court should accept it for review.

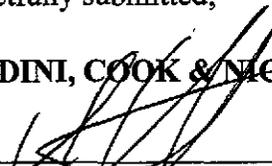
CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. Appellant, Douglas Futrall, respectfully requests this Honorable Court accept jurisdiction in this case so that the important issues presented herein will be reviewed on the merits.

²⁴ *State ex rel. Gains v. Rossi* (1999), 86 Ohio St.3d 620, citing, *Baker v. State* (1980), 62 Ohio St.2d 35. (Emphasis added.)

Respectfully submitted,

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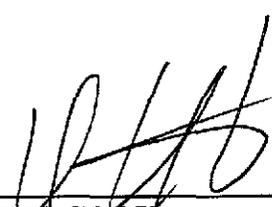
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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent via hand-delivery to the following on the 12th day of December, 2008:

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Attorney for Appellant

1 State of Ohio,)
2 County of Lorain.) SS:

3 IN THE COURT OF COMMON PLEAS

4
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6 Plaintiff,) Case No. 01CR057973
7 vs.)
8 DOUGLAS FUTRALL,)
9 Defendant.)

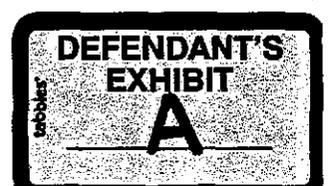
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11 COMPLETE TRANSCRIPT OF THE MOTION TO SEAL
12 RECORDS IN THE ABOVE-ENTITLED MATTER ON THE 12TH DAY
13 OF SEPTEMBER, 2007, BEFORE THE HONORABLE RAYMOND J.
14 EWERS, PRESIDING JUDGE OF SAID COURT.

15
16 APPEARANCES:

17 On behalf of the State of Ohio:
18 Lorain County Prosecutor's Office,
19 Dennis P. Will, Lorain County Prosecutor, by
20 Steven List, Assistant Prosecuting Attorney.

21 On behalf of Defendant Douglas Futrall:
22 D. Chris Cook, Esq.

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P R O C E E D I N G S

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THE BAILIFF: Next case

State of Ohio versus Douglas Futrall, case number
01CR057973.

THE COURT: Good morning.

MR. COOK: Good morning,

Your Honor.

THE COURT: What do we

have, Counsel?

MR. COOK: Your Honor,

if it please the Court, we are here for you to
consider sealing my client's conviction record under
previous case 01CR057973.

This matter is before you on a motion
we filed to seal those, what I believe are five
misdemeanor convictions.

Judge, I want to tell you that this
case raises a somewhat interesting legal issue. I am
going to -- I don't believe that this would be a
factual issue of any dispute if it weren't for one of
his convictions.

By way of quick background, this
matter involved a domestic argument that occurred in
about 2000 between my client, his ex-spouse, and
their teenage daughters. He came over to their home

1 to pick them up to take them to lunch. His ex-spouse
2 wouldn't let them go and an argument occurred. There
3 was no physical violence. There was no threats of
4 violence. There was simply an argument between him
5 and his neighbor. My client was loud. He used
6 profanity.

7 He later, upon being stopped by the
8 police, was found to have a loaded weapon in his
9 vehicle, but he had a job at the time that we were
10 able to demonstrate to the prosecutor that an
11 affirmative defense was appropriate. The charge was
12 reduced as a result of that.

13 Since that time, my client has been
14 what could be described as an outstanding citizen.
15 He has no prior criminal convictions of any nature
16 before that day and none since that day.

17 He was placed on a two-year community
18 control sanction and did so well on that sanction he
19 was released after four months. He paid his fines,
20 his costs. He went through a program, and the
21 probation department successfully terminated him
22 after four months.

23 He started his own company called Fast
24 Appraisals. He's run that business successfully now
25 for a number of years. He's employed people, paid

1 taxes. He just recently sold that business and is
2 now remaining on as a consultant.

3 He has -- his daughter and son have
4 grown up and are now, I believe, 21 and --

5 THE DEFENDANT: Fifteen.

6 MR. COOK: Fifteen.

7 He has since remarried and he is
8 raising, or helping to raise, two or three
9 stepchildren.

10 He is a member of the Lorain County
11 Greater Chamber of Commerce, Board of Realtors. He
12 is a commercial and a residential appraiser, a home
13 owner in the community. And if it wasn't for one
14 misdemeanor charge in his -- of these five
15 convictions, I don't think this Court would have any
16 pause but to grant the sealing of his records. He
17 fits the perfect model for why this statute is in
18 place.

19 The problem that I think this Court is
20 going to be confronted with is that he has a
21 conviction for aggravated menacing, a misdemeanor of
22 the first degree. And under 2953.36 -- or 2901(A)(9)
23 that is a crime of violence and that charge would not
24 be subject to being sealed, and we recognize that.

25 The other charges he has, however, the

1 CCW misdemeanor, the improper handling, telephone
2 harassment, and M4 DV are all subject to being
3 sealed. The M4 domestic violence is excluded because
4 it's not a crime of violence. It is a misdemeanor of
5 the first degree, so even the DV could be sealed. So
6 but for one charge of misdemeanor, again it wouldn't
7 be an issue.

8 What we are asking the Court to
9 consider, and I have not found any case law in the
10 State that says that this can't be done.
11 Unfortunately, I haven't found any case law that says
12 it can. It may very well be a matter of first
13 impression. I am asking this Court to seal those
14 four charges that he is convicted of, misdemeanors
15 that are subject to being sealed and expunged,
16 recognizing the aggravated menacing cannot be.
17 That's what we are asking for. That's why we are
18 here. Thank you.

19 THE COURT: Mr.
20 Prosecutor.

21 MR. LIST: Your Honor,
22 the main issue I take -- the main point I take issue
23 with Attorney Cook on is concerning the fourth degree
24 misdemeanor domestic violence. As the Court is well
25 aware, domestic violence in Ohio is an enhanceable

1 crime. By that I mean should the defendant have
2 prior convictions for domestic violence, in the
3 future charges are automatically enhanced to a
4 different level because of that prior conviction.

5 I have not had a chance to research
6 this, Your Honor. I would ask that the Court at the
7 very least take this matter under advisement and
8 allow me to check into that. I do not believe the
9 fourth degree misdemeanor domestic violence can be
10 sealed. I believe it has to remain on the
11 defendant's record.

12 Hopefully the defendant will never
13 again re-offend. Apparently he has led a law-abiding
14 life in the last five years, and that's fine.
15 However, he looks like a young man. He has many
16 years of ahead of himself. I don't want, for lack of
17 a better phrase, for him to have a chance to
18 re-offend and to come back as a misdemeanor when it
19 should be a felony.

20 I would like to have this defendant,
21 before he would lose control of his temper, stop and
22 think, hopefully, that "I can't do this again. I
23 have done it once before, and I am going to be in a
24 lot more trouble this time."

25 So at the very least, Your Honor, I

1 would ask that the Court to allow me to look into the
2 issue of whether a fourth degree misdemeanor domestic
3 violence, which is also a crime of violence, that can
4 be sealed, because I do not believe it can be.

5 The CCWs, the improper handling of a
6 firearm and the telephone harassment, those are
7 probably okay to be sealed, Your Honor. I don't see
8 a problem with those. But the two crimes that
9 indicate some sort of assaultive behavior, I don't
10 think could be.

11 MR. COOK: Judge, if it
12 would please the Court, I would refer the prosecutor
13 to 2953.36(C), 2953.36(C). That section is the
14 exclusionary section for the offenses. And it does,
15 as the prosecutor notes, exclude offenses of
16 violence, but if they are misdemeanors of the first
17 degree.

18 MR. LIST: Your Honor,
19 that is what the section says. I will admit to that.
20 My particular issue is I want to research whether a
21 crime that is necessary for an enhancement for a
22 future offense, if that can be sealed. That's my
23 question, not whether this is a really a misdemeanor
24 of the first degree. I am arguing whether this crime
25 because of its very nature could be sealed, thereby

1 denying the State the potential of being able to
2 enhance any future domestic violence charges. That's
3 the issue I am concerned about, and I would like the
4 chance to look at it.

5 THE COURT: I understand.
6 The only thing I'm not sure of is whether I can seal
7 part of the record and not all of it. So we will
8 take it under advisement. We will take a look at it.
9 And before we issue any opinion, we will get in touch
10 with you obviously.

11 MR. COOK: All right.

12 THE COURT: Thank you.

13 MR. COOK: Judge, I
14 would ask the Court if the matter after consideration
15 is denied we would ask that an entry be put on so we
16 can review the Court's findings.

17 THE COURT: That will be
18 fine.

19 MR. COOK: Thank you.

20 THE COURT: Very good.

21 - - -

22 (HEARING CONCLUDED.)

23 - - -

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C E R T I F I C A T E

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STATE OF OHIO,)
) SS:
COUNTY OF LORAIN.)

I, Janis E. Albert, Notary Public and
Official Court Reporter of the Court of Common Pleas,
Lorain County, Ohio, do hereby certify that this is a
correct transcript of the proceedings in this case on
September 12, 2007.

I further certify that this is a complete
transcript of the proceedings on that date.

IN WITNESS WHEREOF, I have subscribed my name
this 1st day of October, 2007.



Janis E. Albert, RPR
Official Court Reporter
Lorain County Justice Center
225 Court Street, 6th Floor
Elyria, Ohio 44035
(440) 329-5520
My commission expires 08-30-12

FILED
LORAIN COUNTY

2009 APR 10 P 2:09

CLERK OF COMMON PLEAS
RON NABAKOWSKI

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

STATE OF OHIO	:	CASE NO. 01CR057973
Plaintiff,	:	JUDGE RAYMOND EWERS
v.	:	<u>JUDGMENT ENTRY</u>
DOUGLAS FUTRALL	:	<input checked="" type="checkbox"/> To the Clerk: THIS IS A FINAL
Defendant/Applicant.	:	APPEALABLE ORDER. Please
	:	serve upon all parties not in default for
	:	failure to appear; Notice of the
	:	Judgment and its date of entry
	:	upon the Journal

.....

This matter is before the court on Defendant/Applicant, Douglas Futrall's (hereinafter, "Futrall"), Application to Seal Record, filed March 12, 2007. The State of Ohio was represented by Attorney Steve List. Futrall was represented by Attorney D. Chris Cook. Hearing had on September 12, 2007; evidence taken. The court rules as follows:

I. PROCEDURAL HISTORY

On May 30, 2001, Futrall was indicted by the Lorain County Grand Jury for five criminal offenses, to wit:

- 1) Improper Handling of Firearms, R.C. 2923.16(B), M1;
- 2) Carrying a Concealed Weapon, R.C. 2923.12(A), F4;
- 3) Telephone Harassment, R.C. 2917.21(A)(4), M1;
- 4) Domestic Violence, R.C. 2919.25, M4; and
- 5) Aggravated Menacing, R.C. 2903.21, M1.

DEFENDANT'S
EXHIBIT
B

Journal 1027 Page 2404

On November 5, 2001, Futrall withdrew his plea of Not Guilty and entered a plea of Guilty to the indictment. However, the Carrying a Concealed Weapon charge was amended to a Misdemeanor in the first degree. As such, Futrall was only convicted of misdemeanors.

On March 1, 2002, Futrall appeared before the court with counsel for sentencing. He was sentenced to a two year community control sanction. Approximately four months later, on July 29, 2002, Futrall's community control sanction was terminated and he was fulfilled to his full civil rights. As noted, Futrall filed his Application to Seal herein on March 12, 2007, and a hearing was had on the application on September 12, 2007..

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. STANDARD OF REVIEW

R.C. 2953.32, "Sealing of Conviction Record or Bail Forfeiture Record,"

mandates situations in which an applicant may have his conviction(s) sealed. The statute requires, among other things, that the applicant:

- 1) Be a first offender;
- 2) Wait for one year until after the offender's final discharge for misdemeanor convictions;
- 3) Submit to an examination by the court's probation department;
- 4) That the court must review a written report from the court's probation department;
- 5) Determine whether or not it is in the public interest for an applicant with multiple convictions to be treated as a first offender;

- 6) Determine whether the applicant has been rehabilitated to the satisfaction of the court;
- 7) Consider the prosecutor's position if he or she objects; and
- 8) Weigh the interests of the applicant in having the records pertaining to the applicant's conviction(s) sealed against the legitimate needs, if any, of the government to maintain those records.

The statute goes on to require that if the court determines that the applicant is a "first offender . . . that no criminal proceedings are pending against the applicant, and that the interests of the applicant in having the records pertaining to the applicant's conviction . . . sealed are not outweighed by any legitimate governmental needs to maintain those records, and the rehabilitation of an applicant who is a first offender applying (pursuant to Division (A)(1)) of this section has been obtained to the satisfaction of the court, the court . . . shall order all official records pertaining to the case sealed . . ."

B. ISSUE ONE: DOES THE APPLICANT MEET THE THRESHOLD REQUIREMENTS FOR THE COURT TO CONSIDER SEALING HIS RECORD OF CONVICTION

At the outset, the court must determine whether or not Futrall is a first offender. In the case at bar, he was indicted on May 30, 2001. The dates of the offenses alleged in the five-count indictment are all the same, to wit, April 8, 2001. As such, Futrall is applying as a first offender pursuant to Division (A)(1) of R.C. 2953.32 but has multiple convictions. The convictions, however, all resulted from a related criminal act or related criminal acts that were committed at the same time and date. Accordingly, the court hereby finds that Futrall's convictions may be counted as one conviction and that he is, therefore, as a matter of law, considered a first offender.

With regard to Futrall's rehabilitation, the record and evidence adduced at the hearing established the following: the convictions at issue involved a family disturbance between Futrall and his ex-spouse. No threats of violence or injuries occurred to the victim; all of the convictions were misdemeanors; Futrall did an outstanding job on probation being successfully terminated in less than four months; completed a domestic violence program; began his own company, Fast Appraisals, and has been continuously, gainfully employed since his convictions; has no prior or subsequent criminal convictions; is actively involved in shared parenting for his son and daughter; attends North Ridgeville Harvest Ridge Church; is a member of the Lorain County Chamber of Commerce and the Lorain Board of Realtors; and is a homeowner in Lorain County.

Accordingly, the court finds that Futrall has been sufficiently rehabilitated and is an otherwise outstanding candidate to have his record of conviction sealed. Further, the court finds, pursuant to R.C. 2953.32(C)(2), that the interests of Futrall in having his record of conviction sealed outweigh any legitimate governmental needs to maintain those records.

C. ISSUE TWO: WHERE AN APPLICANT WITH MULTIPLE CONVICTIONS MOVES TO SEAL HIS RECORD, AND ONE OF THE CONVICTIONS IS STATUTORILY EXEMPT FROM BEING SEALED, MAY THE COURT OTHERWISE SEAL THE REMAINING CONVICTIONS THAT ARE STATUTORILY ELIGIBLE TO BE SEALED

In the case at bar, Futrall has five misdemeanor convictions, wit:

- 1) Improper Handling of Firearms, R.C. 2923.16(B), M1;
- 2) Carrying a Concealed Weapon, R.C. 2923.12(A), M1;
- 3) Telephone Harassment, R.C. 2917.21(A)(4), M1;
- 4) Domestic Violence, R.C. 2919.25, M4; and
- 5) Aggravated Menacing, R.C. 2903.21, M1.

The first four convictions are all statutorily eligible to be sealed.¹ The issue presented for the court's review is one of first impression. The applicant comes to this court with five convictions, four of which this court has the statutory authority to seal, and, based upon the facts and evidence in the record, is inclined to seal based upon Futrall's demonstration of good character and demonstrated rehabilitation. The fifth charge, the Aggravated Menacing charge, is an offense of violence and, therefore, may not be sealed. In fact, Futrall acknowledged this both in his Brief and at the hearing. Futrall seeks to have the four misdemeanor convictions for Improper Handling of Firearms, Carrying a Concealed Weapon, Telephone Harassment, Domestic Violence (M4) sealed, recognizing that the Aggravated Menacing charge is not eligible.

Therefore, the question before the court is, may it seal those four otherwise eligible convictions where one conviction "in the bunch" is not statutorily eligible to be sealed? Put another way, does the presence of one ineligible conviction wholly disqualify all convictions from being sealed?

While neither the State nor Futrall have posited any case law to give the court guidance, it is the court's position that the answer is affirmative and that because the applicant has one conviction out of the five that is not statutorily eligible to be sealed, the court may not seal *any* of the convictions, even those which otherwise are eligible.

¹ Domestic Violence, a violation of R.C. 2919.25 is considered an offense of violence (R.C. 2901.01(9)(a)) and, thus, would normally be exempted from being sealed. However, R.C. 2953.36(C) only prohibits the sealing of convictions of offenses of violence "when the offense is a Misdemeanor of the First Degree or a felony . . ." Here, Futrall was convicted of a *Misdemeanor of the Fourth Degree*, Domestic Violence. As such, his conviction for Domestic Violence is not an offense of violence and, thus, eligible to be sealed.

For the record, the court would note that the State did not object to this court sealing Counts One, Two, and Three: the Improper Handling of Firearms, Carrying a Concealed Weapon, and Telephone Harassment charges. The State did object to the court sealing the Aggravated Menacing charge (which is not contested by Futrall) and the Domestic Violence charge as it is the State's position that because the Domestic Violence charge (even an M4) is enhanceable, it is not eligible to be sealed. The court rejects this "enhanceable" argument and holds that an M4 Domestic Violence charge may be sealed where an Applicant (like Futrall) otherwise satisfies the mandates of R.C. 2953.32 *et seq.*

III. CONCLUSION

For the foregoing reasons, the court finds that while Futrall is otherwise an outstanding candidate to have his convictions sealed, because the Aggravated Menacing charge is statutorily exempt from being sealed, as a matter of law, all of his convictions are precluded from being sealed and his Application to Seal Record is accordingly

DENIED.

IT IS SO ORDERED.

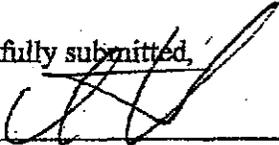
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JUDGE

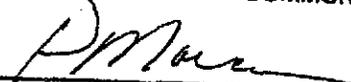
Respectfully submitted,



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FX: (440) 246-2670
email: cooklaw@centurytel.net
Attorney for Defendant/Applicant

I HEREBY CERTIFY THIS TO BE A TRUE COPY
OF THE ORIGINAL ON FILE IN THIS OFFICE.

RON NABAKOWSKI, LORAIN COUNTY
CLERK OF THE COURT OF COMMON PLEAS

BY  DEPUTY

cc: List, APA
Cook, Esq.

COURT OF APPEALS

STATE OF OHIO

FILED
LORAIN COUNTY

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COUNTY OF LORAIN

2008 NOV - 3 A 11:47

STATE OF OHIO

C. A. No. 08CA009388

Appellee

CLERK OF COMMON PLEAS
RON HABAKOWSKI

v.

311 APPELLATE DISTRICT

DOUGLAS FUTRALL

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 01CR057973

Appellant

DECISION AND JOURNAL ENTRY

Dated: November 3, 2008

SLABY, Judge.

{¶1} Defendant-Appellant, Douglas Futrall, appeals an order of the Lorain County Court of Common Pleas that denied his application to seal the record of a criminal case. We affirm.

{¶2} In November 2001, Defendant pled guilty to five charges: (1) aggravated menacing in violation of R.C. 2903.21(A); (2) improper handling of a firearm in violation of R.C. 2923.16(B); (3) carrying a concealed weapon in violation of R.C. 2923.12(A); (4) domestic violence in violation of R.C. 2919.25(A); and (5) telephone harassment in violation of R.C. 2917.21(A). As part of the plea agreement, the charge of carrying a concealed weapon was reduced to a misdemeanor, and the remaining four charges were misdemeanors as well. The trial court sentenced Defendant to concurrent jail sentences of six months on counts one, two, and three and thirty days on counts four and five. The trial court suspended the jail terms, placed Defendant on two years of probation, and ordered him to "successfully complete dom[estic]



violence treatment[.]” On July 29, 2002, upon the recommendation of Defendant’s probation officer, the trial court discharged Defendant from probation.

{¶3} On March 12, 2007, Defendant applied to have the record of his convictions sealed pursuant to R.C. 2953.32. The trial court denied Defendant’s request on April 10, 2008, after conducting a hearing on the application. In doing so, the trial court concluded “that while [Defendant] is otherwise an outstanding candidate to have his convictions sealed, because the Aggravated Menacing charge is statutorily exempt from being sealed, as a matter of law, all of his convictions are precluded from being sealed[.]” Defendant timely appealed.

ASSIGNMENT OF ERROR

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED [DEFENDANT’S] APPLICATION TO SEAL HIS RECORD OF STATUTORILY EXEMPT CONVICTIONS.”

{¶4} Defendant’s assignment of error is that the trial court erred by concluding that his conviction for aggravated menacing precluded sealing the records of his other convictions that resulted from the same incident.

{¶5} R.C. 2953.32(A) provides that a first offender may apply to have the record of misdemeanor convictions sealed by the sentencing court one year following the offender’s final discharge. The trial court must conduct a hearing on the application. R.C. 2953.32(B). Consideration of the application involves a two-step process. See R.C. 2953.32(C). In the first step, the trial court must consider whether the applicant is a first offender or should be treated as having multiple convictions pursuant to R.C. 2953.32(C)(1); determine whether there are criminal proceedings pending against the applicant; determine “whether the applicant has been rehabilitated to the satisfaction of the court”; consider objections, if any, filed by the State; and weigh the applicant’s interest in sealing the records against the legitimate interests of the

government. R.C. 2953.32(C). Then trial court then moves to the second step in considering the application:

If the court determines, after complying with division (C)(1) of this section, that the applicant is a first offender ***, that no criminal proceeding is pending against the applicant, and that the interests of the applicant in having the records pertaining to the applicant's conviction or bail forfeiture sealed are not outweighed by any legitimate governmental needs to maintain those records, and that the rehabilitation of an applicant who is a first offender applying pursuant to division (A)(1) of this section has been attained to the satisfaction of the court, the court, *** shall order all official records pertaining to the case sealed[.]” R.C. 2953.32(C)(2).

{¶6} In his brief, Defendant maintains that this Court should review this matter for an abuse of discretion. In his argument before this Court, however, Defendant took a different position – that the trial court erred as a matter of law in applying R.C. 2953.32 and this Court should review his application de novo. We do not agree. “[E]xpungement is an act of grace created by the state, and so is a privilege, not a right. Expungement should be granted only when all requirements for eligibility are met.” *State v. Simon* (2000), 87 Ohio St.3d 531, 533, quoting *State v. Hamilton* (1996), 75 Ohio St.3d 636, 639. This Court reviews an order granting or denying an application to seal a record of conviction for an abuse of discretion. *State v. Jett*, 9th Dist. No. 22299, 2005-Ohio-1277, at ¶5; *State v. Gilchrist* (Dec. 7, 1994), 9th Dist. No. 16800, at *1. Under this standard, we must determine whether the trial court's decision was arbitrary, unreasonable, or unconscionable – not merely an error of law or judgment. See *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶7} Defendant also argues that the State forfeited its objection to sealing the aggravated menacing conviction and cannot argue in support of the trial court's decision for the first time on appeal. The State, however, is not the appellant in this appeal, and the doctrine of forfeiture does not prevent an appellee from advancing legal arguments in

support of a trial court's judgment on appeal. This Court also observes that the transcript of proceedings in the trial court was not transmitted by the court reporter. When a transcript of proceedings is necessary to resolve assignments of error, this court presumes regularity in the trial court's proceedings. See, generally, *State v. Price*, 9th Dist. No. 07CA0003-M, 2008-Ohio-2252, at ¶53, citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶8} Preliminary matters aside, the issue in this case is narrow and the facts are undisputed. R.C. 2953.32 does not apply in the event of “[c]onvictions of an offense of violence when the offense is a misdemeanor of the first degree,” which are not eligible to be sealed. R.C. 2953.36(C). Aggravated menacing, a violation of R.C. 2903.21, is one such offense of violence. R.C. 2901.01(A)(9)(a). Defendant was convicted of four crimes that are eligible for sealing pursuant to R.C. 2953.32, but also of aggravated menacing. The trial court framed the issue as follows:

“Therefore, the question before the court is, may it seal those four otherwise eligible convictions where one conviction ‘in the bunch’ is not statutorily eligible to be sealed? Put another way, does the presence of one ineligible conviction wholly disqualify all convictions from being sealed?

*** It is the court's position that the answer is affirmative and that because the applicant has one conviction out of the five that is not statutorily eligible to be sealed, the court may not seal any of the convictions, even those which are otherwise eligible.” (Emphasis in original.)

The trial court reached this conclusion after having conducted a full analysis of Defendant's eligibility apart from his conviction for aggravated menacing. Because the provisions of R.C. 2953.32 do not apply to a conviction for aggravated menacing, however, the trial court's analysis under R.C. 2953.32 is surplusage. The single issue in this appeal is whether Defendant's

convictions may be treated separately for purposes of R.C. 2953.32. This Court concludes that they cannot.

{¶9} R.C. 2953.32(C)(2) explains the consequences that result when the record of a conviction is sealed:

The proceedings in the case shall be considered not to have occurred and the conviction *** of the person who is the subject of the proceedings shall be sealed, except that upon conviction of a subsequent offense, the sealed record of prior conviction *** may be considered by the court in determining the sentence or other appropriate disposition[.]”

R.C. 2953.35 also makes it a crime for public employees to disseminate information related to sealed convictions:

“Except as authorized by divisions (D), (E), and (F) of section 2953.32 of the Revised Code or by Chapter 2950. of the Revised Code, any officer or employee of the state, or a political subdivision of the state, who releases or otherwise disseminates or makes available for any purpose involving employment, bonding, or licensing in connection with any business, trade, or profession to any person, or to any department, agency, or other instrumentality of the state, or any political subdivision of the state, *any information or other data concerning any arrest, complaint, indictment, trial, hearing, adjudication, conviction, or correctional supervision the records with respect to which the officer or employee had knowledge of were sealed* by an existing order issued pursuant to sections 2953.31 to 2953.36 of the Revised Code, or were expunged by an order issued pursuant to section 2953.42 of the Revised Code as it existed prior to the effective date of this amendment, is guilty of divulging confidential information, a misdemeanor of the fourth degree.” (Emphasis added.)

These statutes contemplate that not only the fact of the conviction itself but all information related to the conviction – the “arrest, complaint, indictment, trial, hearing, adjudication, conviction, or correctional supervision” – must be treated as if it never happened in the first instance. R.C. 2953.35. See, also, R.C. 2953.32(C)(2). It would be impossible for multiple charges “to be considered not to have occurred” for purposes of R.C. 2953.32(C) while retaining the records of another conviction that arose from the same arrest, complaint, indictment, guilty plea, and conviction. See, e.g., R.C. Chapter 2303 (describing the recordkeeping duties

incumbent upon a clerk of the court of common pleas). To do so would impede the recordkeeping function of the clerks of court and render the process of sealing convictions essentially meaningless in cases such as these.

{¶10} Accordingly, this Court concludes that the trial court did not abuse its discretion by denying Defendant's application to seal the record of his convictions. Defendant's assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.


LYNN C. SLABY
FOR THE COURT

WHITMORE, J.
CONCURS

CARR, P. J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶11} Although I agree with the majority's affirmance of the trial court's decision, I would analyze this under a de novo review. As the majority correctly states, "The single issue in this appeal is whether Defendant's convictions may be treated separately for purposes of R.C. 2953.32." Whether the convictions may be treated separately under R.C. 2953.32 is a question of law. The trial court does not have discretion to treat them separately, and our review should be de novo rather than abuse of discretion. Otherwise, I agree with the majority.

APPEARANCES:

D. CHRIS COOK, Attorney at Law, for Appellant.

DENNIS WILL, Prosecuting Attorney, and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for Appellee.