

ON COMPUTER - TAI ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO)
)
 Appellee,)
)
 vs.)
)
 DOUGLAS FUTRALL)
)
 Appellant.)
)
)
)
)
)
)

SUPREME COURT CASE
NO. 2008-2391

ON APPEAL FROM THE
COURT OF APPEALS,
NINTH APPELLATE
DISTRICT 08CA009388

LORAIN COUNTY
COMMON PLEAS
COURT CASE NO.
01CR057973

MEMORANDUM OF APPELLEE IN
OPPOSITION TO JURISDICTION

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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

This case, while a question of first impression, does not present a case of public or great general interest and does not involve a substantial constitutional question. Appellant's arguments to the contrary are without merit.

A defendant has no right to expungement. The process of expungement is a statutorily created act of grace. *State v. Simon*, 87 Ohio St.3d 531, 2000 Ohio 474. Expungement is a privilege which should be granted only in cases where a defendant meets all statutory requirements. *State v. Pierce*, 10th Dist. No. 06AP-931, 2007 Ohio 1708. The expungement statutes clearly define which offenses are eligible for expungement. Plainly, where no constitutional right is involved there is no substantial constitutional question.

Appellant argues that the question of whether a portion of his conviction can be expunged while the rest is maintained presents a question of public or great general interest. The State of Ohio disagrees with this contention.

Appellant contends that the trial court could enter a nunc pro tunc order excluding plea and sentencing information for the offenses eligible for expungement while maintaining a record of the Aggravated Menacing conviction which cannot be expunged. The question of whether some convictions can be expunged where one offense arising out of the same facts is not eligible for expungement goes beyond the court's duties to seal records and extends to any public agency with a record pertaining to the case. *State v. S.R.*, (1992), 63 Ohio St.3d 590. It is simply impossible for part of a conviction based on the same events to be expunged without expunging the ineligible offense as well. Law enforcement agencies are required to seal all records pertaining to a case which has been expunged. R.C. 2953.32(C)(2).

It would be impossible for a law enforcement agency to delete all index references to a conviction where the conviction involved multiple offenses arising out of the same incident. The result would be a choppy, partial version of events which would make no sense whatsoever.

It is important to note that R.C. 2953.32(C) refers to deleting all index references to the “case”, and not to individual counts within a case. A common sense reading of the statute indicates that the legislature did not intend for multi count convictions arising out of one incident to be partially expunged.

This case simply does not present a question of public or great general interest given that the question can be resolved by application of common sense.

Finally, Appellant argues that the court of appeals applied an incorrect standard of review in this case. The State disagrees with this contention. In a long line of cases throughout Ohio, courts of appeal have applied the abuse of discretion standard to expungement decisions. See *State v. Silver*, 8th Dist. No. 87022, 2006 Ohio 3151; *State v. Rittner*, 6th Dist. No. L-04-1368, 2006 Ohio 1114; *State v. Haas*, 6th Dist. No. L-04-1315, 2005 Ohio 4350; *State v. Krutowsky*, 8th Dist. No. 81545, 2003 Ohio 1731; *State v. Tyler*, 10th Dist. No. 01AP-1055, 2002 Ohio 4300; *State v. Hilbert*, (2001) 145 Ohio App.3d 824; *State v. Abdullah*, (April 26, 1999), 12th Dist. No. CA98-08-065; *State v. McGinnis*, (1993), 90 Ohio app.3d 479, 481; *State v. Orth*, (December 27, 1993), 12th Dist. No. CA93-03-020; and *State v. Lesinski*, (1992), 82 Ohio App.3d 829, 830-831.

In fact, in the case, *State v. Tyler*, 10th Dist. No. 01AO-1055, 2002 Ohio 4300, the court of appeals applied the abuse of discretion standard even though the court of appeals indicated it would have ruled differently than the trial court had the standard of review been de novo. The

reviewing court stated that it was not free to substitute its judgment for that of the trial court because the standard of review is abuse of discretion. *Tyler*, supra.

This case does not present a question of public or great general interest and does not involve a substantial constitutional question. The State of Ohio respectfully requests that this Honorable Court decline to accept jurisdiction.

STATEMENT OF THE CASE AND FACTS

On May 30, 2001, the Lorain County Grand Jury indicted Douglas Futrall, hereinafter Appellant, on one (1) count of Aggravated Menacing, a violation of R.C. 2903.21(A), a misdemeanor of the first degree; one (1) count of Improper Handling of a Firearm in a Motor Vehicle, a violation of R.C. 2923.16(B), a misdemeanor of the first degree; one (1) count of Carrying a Concealed Weapon, a violation of R.C. 2923.12(A), a felony of the fourth degree; one (1) count of Domestic Violence, a violation of R.C. 2919.25(A), a misdemeanor of the fourth degree; and one (1) count of Telephone Harassment, a violation of R.C. 2917.21(A), a misdemeanor of the first degree.

On November 2, 2001, Appellant entered a plea of guilty to an amended indictment; the charge of Carrying a Concealed Weapon was amended to a misdemeanor of the first degree before Judge Thomas W. Janas of the Lorain County Court of Common Pleas. On March 1, 2002, Appellant was sentenced to two (2) years probation with a suspended jail sentence. On July 29, 2002, Appellant was successfully terminated from probation.

On March 12, 2007, Appellant filed an application to seal his record. On April 10, 2008, the trial court, through Judge Raymond J. Ewers, filed its judgment denying Appellant's application to seal his record.

On April 18, 2008, Appellant filed notice of appeal with the Ninth District Court of Appeals. On November 3, 2008, the court of appeals issued its decision, affirming the decision of the trial court wherein Appellant's application to seal his record was denied. *State v. Futrall*, 9th Dist. No. 08CA009388, 2008 Ohio 5654. On December 15, 2008, Appellant filed a notice of discretionary appeal with this Honorable Court as well as a memorandum in support of jurisdiction. The State of Ohio hereby responds.

LAW AND ARGUMENT

RESPONSE TO SOLE PROPOSITION OF LAW

I. **THE NINTH DISTRICT COURT OF APPEALS ACTED PROPERLY WHEN IT AFFIRMED THE DECISION OF THE TRIAL COURT, DENYING APPELLANT'S APPLICATION TO SEAL HIS RECORD.**

Appellant first argues that the court of appeals improperly reviewed this case under the abuse of discretion standard of review. The State disagrees with this contention. In a long line of cases throughout Ohio, courts of appeal have applied the abuse of discretion standard to expungement decisions. See *State v. Silver*, 8th Dist. No. 87022, 2006 Ohio 3151; *State v. Rittner*, 6th Dist. No. L-04-1368, 2006 Ohio 1114; *State v. Haas*, 6th Dist. No. L-04-1315, 2005 Ohio 4350; *State v. Krutowosky*, 8th Dist. No. 81545, 2003 Ohio 1731; *State v. Tyler*, 10th Dist. No. 01AP-1055, 2002 Ohio 4300; *State v. Hilbert*, (2001) 145 Ohio App.3d 824; *State v. Abdullah*, (April 26, 1999), 12th Dist. No. CA98-08-065; *State v. McGinnis*, (1993), 90 Ohio app.3d 479, 481; *State v. Orth* (December 27, 1993), 12th Dist. No. CA93-03-020; and *State v. Lesinski*, (1992), 82 Ohio App.3d 829, 830-831.

In the case, *State v. Tyler*, 10th Dist. No. 01AO-1055, 2002 Ohio 4300, the court of appeals applied the abuse of discretion standard even though the court of appeals indicated it would have ruled differently than the trial court. The reviewing court stated that it was not free

to substitute its judgment for that of the trial court because the standard of review is abuse of discretion. *Tyler* supra.

It is interesting to note that on appeal Appellant framed his assigned error as abuse of discretion by the trial court. However, at oral argument he argued that the trial court erred as a matter of law and that the standard of review should be de novo. In rendering its decision, the Ninth District Court of Appeals properly reviewed this case under the abuse of discretion standard. The court noted that since expungement is an act of grace and is a privilege and not a right, denial of an application to seal a conviction is to be reviewed for an abuse of discretion. *State v. Futrall*, 9th Dist. No. 08CA009388, 2008 Ohio 5654 at ¶ 6.

In his sole proposition of law, Appellant contends that the trial court erred in denying his application for expungement where all but one offense was eligible for expungement. This assertion lacks merit.

Sealing of a record of conviction pursuant to R.C. 2953.32 is a postconviction remedy that is civil in nature. *State v. Lasalle*, 96 Ohio St. 3d 178, 2002 Ohio 4009, citing *State v. Bissantz* (1987), 30 Ohio St.3d 120, 121. "Expungement is an act of grace created by the state," and so is a privilege and not a right. *State v. Hamilton*, 75 Ohio St.3d 636, 639, 1996 Ohio 440. Expungement should be granted only when all requirements for eligibility are met. *Id.*

Specific statutory provisions govern the sealing of a record of conviction. See R.C. 2953.31 through 2953.36. In particular, R.C. 2953.36 provides that the conviction records of some offenders cannot be sealed. As relevant in this case, R.C. 2953.36 provides, *inter alia*, that "[s]ections 2953.31 to 2953.35 of the Revised Code do not apply" to "[c]onvictions of an offense of violence when the offense is a misdemeanor of the first degree..." A conviction for

Aggravated Menacing, a violation of R.C. 2903.21 is defined in R.C. 2901.01(A)(9)(a) as an “offense of violence.”

In the present case, Appellant was convicted of one (1) count of Aggravated Menacing, a violation of R.C. 2903.21(A), a misdemeanor of the first degree; one (1) count of Improper Handling of a Firearm in a Motor Vehicle, a violation of R.C. 2923.16(B), a misdemeanor of the first degree; one (1) count of Carrying a Concealed Weapon, a violation of R.C. 2923.12(A), a misdemeanor of the first degree; one (1) count of Domestic Violence, a violation of R.C. 2919.25(A), a misdemeanor of the fourth degree; and one (1) count of Telephone Harassment, a violation of R.C. 2917.21 (A), a misdemeanor of the first degree. Because Appellant was convicted of Aggravated Menacing under R.C. 2903.21, he was ineligible for the relief that he sought: namely, a sealing of the record.

Appellant contends that the trial court erred in ruling that because Appellant has one (1) conviction out of five (5) that is not eligible to be sealed, the court may not seal any of the convictions. Applying the correct standard of review, abuse of discretion, the trial court did not err in its ruling.

An abuse of discretion connotes more than a mere error in judgment, it signifies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *State v. Girard*, 9th Dist. No 02CA0057-M, 2003 Ohio 7178, citing, *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Girard*, supra, citing, *Berk v. Matthews* (1990), 53 Ohio St. 3d 161. In the case at hand, a simple review of R.C. 2953.32, which provides for the sealing of records, reveals that the trial court did not act unreasonably or arbitrarily but properly

denied Appellant's application to seal due to his ineligible conviction for Aggravated Menacing under R.C. 2903.21.

R.C. 2953.32(A) provides that under specific circumstances, a first offender may apply to the sentencing court "for the sealing of the conviction record." A review of what "sealing a record" actually entails affirms that the trial court properly denied Appellant's request to "seal" *some* of the charges in his case but not the ineligible charge. Upon sealing, the court "...shall order all official records pertaining to the case sealed and...all index references to the case deleted..." See R.C. 2953.32(C)(2). [Emphasis added] It would be impossible for the trial court to order that "all official records pertaining to the case" be sealed, while at the same time, requiring that a record of the case be retained because of Appellant's Aggravated Menacing conviction. It would be impossible for the trial court to order that "all index references to the case" be "deleted," while at the same time, ordering that index references to the case be maintained because of Appellant's Aggravated Menacing conviction.

A plain reading of R.C. 2953.32(A) indicates that the legislature did not intend for multi count convictions to be partially sealed. The legislature clearly stated all index references and all official records pertaining to the case are to be deleted and sealed. This is clear in light of the sheer impossibility of deleting portions of official records such as police reports where a multi count conviction results from one single incident.

In addition, R.C. 2953.32(C)(2) states that upon sealing "[t]he 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.... *Id.* [Emphasis added] Again, Appellant seeks a legal impossibility in asking that the proceedings in the case "be considered not to have occurred," while, at the same time, asking that the proceedings in the case be considered to have occurred

for a portion of the case. Here again the legislative intent is clear. The expungement statutes contemplate sealing an entire case, not just portions of the case.

In the case of *State v. Vale*, the Eighth District Court of Appeals offered some guidance in this matter. *State v. Vale*, 8th Dist. No. 85425, 2005 Ohio 3725. In *Vale*, the State appealed the trial court's decision granting Vale's application under R.C. 2953.32 to seal the record of his convictions for Aggravated Trespassing and Aggravated Menacing. The Eighth District Court of Appeals stated that the trial court lacked jurisdiction to consider Vale's application due to his conviction for Aggravated Menacing and found that Vale was ineligible for the relief he sought. *State v. Vale*, 8th Dist. No. 85425, 2005 Ohio 3725, citing *State v. Simon*, 87 Ohio St.3d 531, 2000 Ohio 474; *State v. Salim*, 8th Dist. No. 82204, 2003 Ohio 2024. Although Vale also sought to seal his conviction for Aggravated Trespassing, (which, if alone, could have been eligible for sealing) the Eight District Court of Appeals did not even address that charge and stated that, because of Vale's conviction for Aggravated Menacing, the trial court lacked jurisdiction to consider Vale's application to seal and had no authority to order the record of Vale's convictions sealed. *Salim* at 11, 12.

In similar fashion, because Appellant was convicted of Aggravated Menacing under R.C. 2903.21, the trial court properly denied Appellant's motion to seal his record as the trial court lacked jurisdiction to consider Appellant's application to seal and had no authority to order that Appellant's convictions be sealed. Thus, the Ninth District Court of Appeals correctly ruled that Appellant was ineligible to have his multi count conviction sealed. Appellant's sole proposition of law is without merit and this Court should decline to accept jurisdiction of this case.

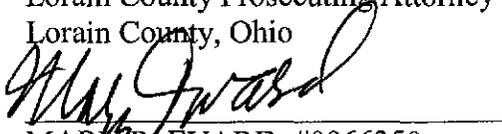
CONCLUSION

For the foregoing reasons the State of Ohio respectfully requests that this Honorable Court decline to accept jurisdiction of this case.

Respectfully Submitted,

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PROOF OF SERVICE

A copy of the Memorandum in Opposition to Jurisdiction was mailed via regular U.S. Mail to D. Chris Cook, esq., Counsel for Appellant, 520 Broadway Avenue, Second Floor, Lorain, Ohio 44052 this 13th day of January, 2009.



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