ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	**SUPREME COURT CASE NO.** 08-2391
Appellee,	:	
v.	:	**NINTH DISTRICT CASE NO.** 08CA09388
DOUGLAS FUTRALL	:	**LORAIN COUNTY COMMON PLEAS CASE NO.** 01CR057973
Appellant.	:	

MERIT BRIEF OF APPELLANT, DOUGLAS FUTRALL

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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.[1]

On April 10, 2008, the court filed its Journal Entry denying Futrall's application.[2] 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 over-ruling the appeal and affirmed the judgment of the trial court denying Futrall's application to seal his eligible convictions.[3]

On December 15, 2008, Futrall timely filed his notice of appeal in the Supreme Court.[4] On March 25, 2009, the Supreme Court granted discretionary jurisdiction and on April 9, 2009, the record was filed with this clerk's office. On May 4, 2009, the record was properly supplemented with the Transcript of Proceedings from the trial court.[5]

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1 Exhibit "A."

2 Exhibit "B."

3 Exhibit "C."

4 Exhibit "D."

5 Exhibit "A."

STATEMENT OF 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 Ninth District Court of Appeals agreed.[8]

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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*

Futrall 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]

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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," Judge 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.

In the case at bar, the Ninth District Court of Appeals applied an incorrect standard of review, to wit: abuse of discretion, when, as noted by Judge Carr in her dissent, the review should have been *de novo*.[13] Perhaps that court would have reached a different decision had it reviewed the matter *de novo*.

B. THE COURT OF APPEALS IMPROPERLY ALLOWED THE STATE TO BE HEARD ON THE ISSUE

It is axiomatic that "an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court."[14] Likewise, "[c]onstitutional rights may be lost as finally as any others by a failure to assert them at the proper time."[15]

"Errors that arise during a trial that are not brought to the attention of the trial court are ordinarily waived and may not be raised on appeal unless there is plain error."[16]

At the hearing in the trial court below, the State *did not object* to Futrall's argument that the convictions for CCW, Improper Handling of a Firearm, and Telephone Harassment, <u>could be sealed</u>! (The State was unsure about the M4 Domestic Violence charge.) The Assistant Prosecutor who handled the case stated "[t]he CCW's, the

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13 Exhibit "C," at ¶11.

14 *State v. Childs* (1968), 14 Ohio St.2d 56, paragraph three of the syllabus: *State v. Glaros* (1960), 170 Ohio St. 471, paragraph one of the syllabus: *State v. Lancaster* (1971), 25 Ohio St.2d 83, paragraph one of the syllabus.

15 *Childs, supra,* at 62, citing, *State v. Davis* (1964), 1 Ohio St.2d 28.

16 *State v. Carter* (2000), 89 Ohio St. 3d 593; see also; *Wilburn v. Wilburn* (2006), 169 Ohio App.3d 415, Ninth Appellate District.

improper handling of a firearm and the telephone harassment, those are probably okay to be sealed, Your Honor."[17]

Nevertheless, on appeal to the Ninth District, the State *did* object, briefed the issue, and presented an oral argument, all over the objection of Futrall. On this issue, the Ninth District stated ". . . the doctrine of forfeiture does not prevent an appellee from advancing legal arguments in support of a trial court's judgment on appeal."[18] The court, however, does not cite any authority for this maxim. Further, the court appears to have confused "forfeiture" with a complete reversal of position.

In the trial court, the State did not just fail to object but *affirmatively agreed* with Futrall's position! Futrall argued below, and maintains herein, that it was improper to allow the State to "flip" positions on this issue and argue contra Futrall in the Court of Appeals when it did not object (and in fact, agreed) below.

C. STANDARD OF REVIEW: R.C. 2953.31,[19] *ET SEQ.*

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;

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17 Exhibit "A," pg. 7.

18 Exhibit "C," at ¶7.

19 Exhibit "E."

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 . . .**"[20]

D. 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:

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[20] R.C. 2953.32. (Emphasis added.)

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.[21]

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.[22]

The trial court then held,

Accordingly, the court finds that Futrall has been sufficiently rehabilitated and is an otherwise outstanding candidate to have his 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."[23]

On this issue, the appellate court boldly stated "the trial court's analysis under R.C. 2953.32 is surplusage."[24] This conclusion is in error. As the appellate court properly

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21 Exhibit "B," at pg. 3.

22 *Id.* at pg. 4.

23 *Id.* (Emphasis added)

24 Exhibit "C," ¶8.

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.

In *State v. Rojas*[25], the Second District Court of Appeals noted "[a] court must make in granting or denying in R.C. 2953.32 . . . the requirement imposed by paragraph (C)(3) of that section to: 'Weigh the interests of the applicant in having the records pertaining to the applicant's conviction sealed against the legitimate needs, if any, of the government to maintain those records.'"[26]

Regardless, it is important that Futrall is recognized as an "excellent" candidate to have his eligible convictions sealed and that the State did not object below.

E. 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?

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

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25 (2008), 180 Ohio App.3d 52.

26 *Id.*

Aggravated Menacing charge is statutorily exempt from being sealed, *as a matter of law*, all of his convictions are precluded from being sealed . . ."[27]

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."[28] 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."[29]

This 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 that would impede the recordkeeping function of the clerk. To argue otherwise is to put form over substance and allow the ministerial, 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

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27 Exhibit "B," at pg. 6. (Emphasis added.)

28 Exhibit "C," ¶9

29 *Id.* at ¶9.

current conviction entry and sentence and replace it with a *nunc pro tunc* entry with only one conviction.

Finally, this process would hardly render the sealing of the eligible convictions "meaningless," but would, instead, be extremely important to all citizens in the State of Ohio and, in particular, to Futrall as he would only be henceforth convicted of one count of Aggravated Menacing as opposed to five misdemeanor convictions.

The trial court stated that 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."[30]

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."[31] Notably, the trial court shed no light on how and/or why it reached this conclusion and the

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30 Exhibit "B," at pgs. 4-5. (Emphasis added)

31 *Id.* at pg. 5.

court of appeals relied upon the unconvincing explanation that to seal some convictions but not others as a matter of practicality cannot be done.

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."**[32] 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 some additional guidance, the court may consider R.C. 2953.61, Multiple charges-sealing of records. This statute contemplates the very real scenario of citizens who apply to seal multiple convictions. The statute specifically *provides* for the sealing of multiple convictions under certain situations, but limits the applicant from applying to have the conviction sealed until such time as he could apply to the court to have all of the records in all of the cases sealed. Notably, this statute gives no guidance when one of the multiple convictions is ineligible to be sealed.

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

It appears that the only time that this court dealt with a similar issue was in the matter of *State v. Sandlin*.[33] In that case, the defendant was convicted of Aggravated Vehicular Assault (an offense that may be sealed) and DUI (an offense that may not be sealed). After the appropriate passage of time, the defendant moved to seal only the Aggravated Vehicular Assault charge. The trial court denied the motion to seal the Aggravated Vehicular Assault charge finding that because of the DUI, the defendant was not a "first offender." This court agreed.

The *Sandlin* decision, however, can be distinguished as it posited a more-narrow question than the one presented for review herein. In *Sandlin,* the issue certified was "whether a conviction for violation of R.C. 4511.19 which 'shall be considered a previous or subsequent conviction' pursuant to R.C. 2953.31(A) . . ."[34]

This court referred to the definition of "first offender" found in R.C. 2953.31(A) which states that a conviction for R.C. 4511.19 (DUI) "shall be considered a previous or subsequent conviction." As *Sandlin's* conviction for DUI was a "previous or subsequent" conviction, he was explicitly prevented from sealing *any* conviction(s) as he was not a first offender. Such is not the case herein.

In the case at bar, Futrall's unsealable conviction (Aggravated Menacing), unlike *Sandlin's* DUI, is not explicitly listed in R.C. 2953.31(A) as a conviction that is to be considered a "previous or subsequent conviction." R.C. 2953.31(A) lists various offenses beginning with R.C. 4511.19 through R.C. 4549.46, the conviction of which is a "previous

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33 (1999), 86 Ohio St.3d 165.

34 *Id.*

or subsequent conviction." The offense of Aggravated Menacing, R.C. 2903.21, however, *is not listed* as an offense that is deemed a "previous or subsequent conviction."[35]

Accordingly, while *Sandlin's* DUI conviction prevented him from ever sealing any conviction(s), Futrall's Aggravated Menacing conviction does not. To that end, while a conviction for Aggravated Menacing cannot itself be sealed, it does not act as a bar (like a DUI conviction does) to the sealing of any other, otherwise eligible, conviction(s).

Here, the doctrine of *expressio unius est exclusio alterius* is applicable thus, *Sandlin,* cited above, actually supports Futrall's position. That is to say, the legislature took great effort to include over a dozen offenses in R.C. 2953.31(A) that constitute "previous or subsequent convictions" for purposes of disqualifying an applicant from sealing his record. Conspicuously absent is the offense of Aggravated Menacing; accordingly, had the legislature desired to include the offense of Aggravated Menacing (R.C. 2903.21) in the list of disqualifying offenses, it certainly could have done so.

This court has repeatedly stated in cases involving statutory interpretation that the overriding concern is "the determination of legislative intent."[36] This court has also stated that it is the court's duty "to give effect to the words used in the statute **and not to insert words not used.**"[37]

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35 Exhibit "E."

36 *State ex rel. Herman v. Klopfleish* (1995), 72 Ohio St.3d 581, 584.

37 *State ex rel. Carter v. Wilkinson* (1994), 70 Ohio St.3d 65, 66, citing, *State ex rel. Cassels v. Dayton City School Dist. Bd. Of Edn.* (1994), 69 Ohio St.3d 217, 220. (Emphasis added.)

To that end, it is clear that the legislature's intentional exclusion of the offense of Aggravated Menacing from the offenses enumerated in R.C. 2953.31(A) is evidence that it did not intend that this offense be a bar for the sealing of *other* offenses. To interpret the sealing of convictions statutes any other way would require this court to "read-in" language that is conspicuously absent and would be violative of *Wilkinson* and its progeny.

CONCLUSION

For the foregoing reasons, Appellant, Douglas Futrall, respectfully requests this Honorable Court sustain his proposition of law; overrule and reverse the decision of the Ninth District Court of Appeals; and, remand this case to the Lorain County Court of Common Pleas with an order that that court grant Appellant's application to seal his eligible convictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellant, Douglas Futrall, was sent via regular U.S. Mail and/or hand-delivery to the following on the 15th day of May, 2009:

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APPENDIX

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

IN THE COURT OF COMMON PLEAS

STATE OF OHIO,)
Plaintiff,) Case No. 01CR057973
vs.)
DOUGLAS FUTRALL,)
Defendant.)

- - -

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

- - -

APPEARANCES:

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

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

- - -

DEFENDANT'S EXHIBIT A

1 P R O C E E D I N G S

2 THE BAILIFF: Next case

3 State of Ohio versus Douglas Futrall, case number

4 01CR057973.

5 THE COURT: Good morning.

6 MR. COOK: Good morning,

7 Your Honor.

8 THE COURT: What do we

9 have, Counsel?

10 MR. COOK: Your Honor,

11 if it please the Court, we are here for you to

12 consider sealing my client's conviction record under

13 previous case 01CR057973.

14 This matter is before you on a motion

15 we filed to seal those, what I believe are five

16 misdemeanor convictions.

17 Judge, I want to tell you that this

18 case raises a somewhat interesting legal issue. I am

19 going to -- I don't believe that this would be a

20 factual issue of any dispute if it weren't for one of

21 his convictions.

22 By way of quick background, this

23 matter involved a domestic argument that occurred in

24 about 2000 between my client, his ex-spouse, and

25 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 - - -
24
25

1 C E R T I F I C A T E

2

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

5

6 I, Janis E. Albert, Notary Public and
7 Official Court Reporter of the Court of Common Pleas,
8 Lorain County, Ohio, do hereby certify that this is a
9 correct transcript of the proceedings in this case on
10 September 12, 2007.
11 I further certify that this is a complete
12 transcript of the proceedings on that date.
13 IN WITNESS WHEREOF, I have subscribed my name
14 this 1st day of October, 2007.

15

16

17 Janis E. Albert, RPR
18 Official Court Reporter
Lorain County Justice Center
19 225 Court Street, 6th Floor
Elyria, Ohio 44035
20 (440) 329-5520
My commission expires 08-30-12

21

22

23

24

25

FILED
LORAIN COUNTY

2008 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.	:	**JUDGMENT ENTRY**
DOUGLAS FUTRALL	:	**☒To the Clerk: THIS IS A FINAL 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**
Defendant/Applicant.	:	
	:	

::::::::::::::::

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;

Journal 127 Page 2404

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 Handing 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.

4-3-08
Date

JUDGE

Respectfully submitted,

D. CHRIS COOK, #0061073
520 Broadway, Second Floor
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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
FILED
LORAIN COUNTY
2008 NOV -3 A 11:47
CLERK OF COMMON PLEAS
RON NABAKOWSKI
9th APPELLATE DISTRICT

STATE OF OHIO)) ss: COUNTY OF LORAIN)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
STATE OF OHIO Appellee	C. A. No. 08CA009388
v. DOUGLAS FUTRALL Appellant	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 01CR057973

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]

DEFENDANT'S EXHIBIT C

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.

IN THE SUPREME COURT OF OHIO

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

NOTICE OF APPEAL OF APPELLANT, DOUGLAS FUTRALL

DENNIS P. WILL, #0031829
Lorain County Prosecuting Attorney

BY: BILLIE JO BELCHER, #0072337
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FX: (440) 246-2670
email: cooklaw@centurytel.net
Counsel for APPELLANT, DOUGLAS FUTRALL

FILED
DEC 15 2008
CLERK OF COURT
SUPREME COURT OF OHIO

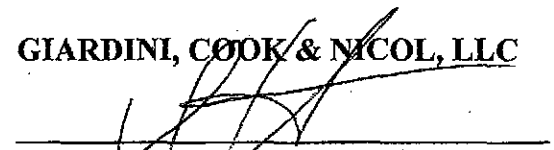
NOTICE OF APPEAL OF APPELLANT, DOUGLAS FUTRALL

Appellant, Douglas Futrall, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lorain County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case No. 08CA009388 on November 3, 2008.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

GIARDINI, COOK & NICOL, LLC

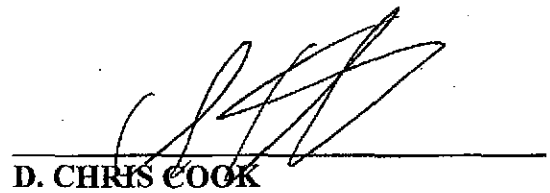


D. CHRIS COOK
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent via hand-delivery to the following on the 11th day of December, 2008:

Dennis P. Will, Esq.
Billie Jo Belcher, Esq
Lorain County Prosecuting Attorneys
Lorain County Justice Center
225 Court Street, 3rd Fl.
Elyria, OH 44035
Attorneys for Appellee



D. CHRIS COOK
Attorney for Appellant

2953.31 Sealing of record of conviction definitions.

As used in sections 2953.31 to 2953.36 of the Revised Code:

(A) "First offender" means anyone who has been convicted of an offense in this state or any other jurisdiction and who previously or subsequently has not been convicted of the same or a different offense in this state or any other jurisdiction. When two or more convictions result from or are connected with the same act or result from offenses committed at the same time, they shall be counted as one conviction. When two or three convictions result from the same indictment, information, or complaint, from the same plea of guilty, or from the same official proceeding, and result from related criminal acts that were committed within a three-month period but do not result from the same act or from offenses committed at the same time, they shall be counted as one conviction, provided that a court may decide as provided in division (C)(1)(a) of section 2953.32 of the Revised Code that it is not in the public interest for the two or three convictions to be counted as one conviction.

For purposes of, and except as otherwise provided in, this division, a conviction for a minor misdemeanor, for a violation of any section in Chapter 4507., 4510., 4511., 4513., or 4549. of the Revised Code, or for a violation of a municipal ordinance that is substantially similar to any section in those chapters is not a previous or subsequent conviction. However, a conviction for a violation of section 4511.19, 4511.251, 4549.02, 4549.021, 4549.03, 4549.042, or 4549.62 or sections 4549.41 to 4549.46 of the Revised Code, for a violation of section 4510.11 or 4510.14 of the Revised Code that is based upon the offender's operation of a vehicle during a suspension imposed under section 4511.191 or 4511.196 of the Revised Code, for a violation of a substantially equivalent municipal ordinance, for a felony violation of Title XLV of the Revised Code, or for a violation of a substantially equivalent former law of this state or former municipal ordinance shall be considered a previous or subsequent conviction.

(B) "Prosecutor" means the county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer, who has the authority to prosecute a criminal case in the court in which the case is filed.

(C) "Bail forfeiture" means the forfeiture of bail by a defendant who is arrested for the commission of a misdemeanor, other than a defendant in a traffic case as defined in Traffic Rule 2, if the forfeiture is pursuant to an agreement with the court and prosecutor in the case.

(D) "Official records" has the same meaning as in division (D) of section 2953.51 of the Revised Code.

(E) "Official proceeding" has the same meaning as in section 2921.01 of the Revised Code.

(F) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(G) "Post-release control" and "post-release control sanction" have the same meanings as in section 2967.01 of the Revised Code.

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