ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	**Case No. 2011-1070**
	)	
Plaintiff-Appellee,	)	
	)	**On Appeal from the Warren**
-vs-	)	**County Court of Appeals,**
	)	**Twelfth Appellate District**
REGINA NIESEN-PENNYCUFF,	)	
	)	**Court of Appeals**
Defendant-Appellant.	)	**Case No. CA2010-11-112**

REPLY BRIEF OF APPELLANT REGINA NIESEN-PENNYCUFF

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ARGUMENT

Proposition of Law No. I

> Must a trial court order the sealing of records in the manner provided in R.C. 2953.32, which requires a one-year waiting period for misdemeanors and a three-year waiting period for felonies, or may the trial court employ R.C. 2953.52(A)(1) and determine that a defendant who has successfully completed the intervention in lieu of conviction program is eligible to have their record sealed immediately upon successful completion of the program?

Whether Appellant is eligible to have her record sealed immediately following the dismissal due of her case due to her successful completion of Treatment in Lieu of Conviction (hereinafter "ILC") or whether she is required to wait a specified time period hinges on the Court's interpretation of the phrase in Ohio Revised Code § 2951.041(E) that the trial court "may order the sealing of records related to the offense in question in the manner provided in sections 2953.31 to 2953.36 of the Revised Code."

As this Court is aware, Ohio Revised Code §§ 2953.31 to 2953.36 address the sealing of one's record following a conviction. Ohio Revised Code § 2953.52, which governs the sealing of one's record after the dismissal of a case, is not referenced in the ILC statute. A major distinction between these two statutes is that an individual must wait a specified time period[1] until the matter can be sealed following a conviction, whereas a defendant in a dismissed complaint, indictment, or information may have his or her record sealed immediately following the dismissal.

The Fourth District noted in *State v. Mills* that "the process for sealing criminal records does not always fit neatly with the treatment-in-lieu-of-conviction statute." *Mills* (Jan. 6, 2011), Ross App. No. 10CA3144, 2011 WL 322637, 2011-Ohio-377, at ¶10. This description

[1] Pursuant to Ohio Revised Code § 2953.32, that time is one year from final discharge for misdemeanors and three years from final discharge for felonies.

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stems from the inherent contradiction that exists within Ohio Revised Code § 2951.041(E). The ILC statute plainly states, in pertinent part, that:

> Successful completion of the intervention plan and period of abstinence under this section shall be ***without adjudication of guilt and is not a criminal conviction*** for purposes of any disqualification or disability imposed by law and upon conviction of a crime
>
> Ohio Revised Code § 2951.041(E).

Thus, it is clear that successful completion of ILC does not result in a conviction. Although no conviction results, the ILC statute references the provisions that address sealing one's record ***following*** a conviction, stating that the trial court "may order the sealing of records related to the offense in question in the manner provided in sections 2953.31 to 2953.36 of the Revised Code." The Tenth District in *Mills* recognized the inherent confusion this causes, noting "R.C. 2953.32(A)(1) expressly provides for the sealing of "conviction record[s]," but there is *no* conviction under R.C. 2951.041(E)." *Mills*, 2011 WL 322637 at ¶10.

The State failed to reconcile this contradiction in its Merit Brief. Further, although the State argued that a plain reading of § 2951.041(E) is unambiguous; it failed to address the undeniable ambiguities, inconsistencies, and absurdity that results when its definition is applied. Therefore, the Court must find that there is no mandatory waiting period for an individual to have his or her record sealed following successful completion of ILC and adopt the approach articulated in either *State v. Fortado* (1996), 108 Ohio App.3d 706, 671 N.E.2d 622 or *State v. Smith* (Dec. 13, 2004), Marion App. No. 9-04-05, 2004 WL 2849057, 2004-Ohio-6668 allowing trial courts immediate discretion whether to seal the record.

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A. *The State's response fails to address the ambiguities that arise in the application of the Twelfth District's interpretation of § 2951.041(E)*

Accepting, for argument's sake, the State's position that § 2951.041(E) is unambiguous, then the State has failed to adequately address how such an approach fits within the framework of the Revised Code.

The Ohio Revised Code is clear in §§ 2953.31 to 2953.36 that a conviction is required before one can proceed with sealing his or her record. Following the conviction, one must wait a specified period of time after his or her final discharge until he or she is eligible to have the record sealed. Ohio Rev. Code § 2953.32(A)(1).

The Court has stated that:

> "A 'conviction' is an 'act or process of judicially finding someone guilty of a crime; the state of having been proved guilty.' Black's Law Dictionary (7th Ed.1999) 335. Thus, the ordinary meaning of 'conviction,' which refers exclusively to a finding of 'guilt,' is not only inconsistent with the notion that a defendant is not guilty (by reason of insanity or otherwise), it is antithetical to that notion. Indeed, the notion that a person is *convicted* by virtue of being found *not guilty* is an oxymoron (a 'not guilty conviction')."

State v. Baker (2008), 119 Ohio St.3d 197 at ¶11, 893 N.E.2d 163, 2008 -Ohio- 3330; *quoting State v. Tuomala* (2004), 104 Ohio St.3d 93, 818 N.E.2d 272, 2004-Ohio-6239, ¶ 14.

The ILC statute plainly states, however, that successful completion of ILC "shall be without adjudication of guilt and is not a criminal conviction for purposes of any disqualification or disability imposed by law and upon conviction of a crime." Ohio Rev. Code § 2951.041(E).

Adoption of the State's position would result in every word and phrase in §§ 2953.31 to 2953.36 addressing a "conviction" being rendered inoperable or superfluous. This Court's definition of "conviction" and its use in §§ 2953.31 to 2953.36 would not be in congruence with its use in § 2951.041(E). "Conviction", as used in in § 2951.041(E), would mean

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something completely different than how this Court has defined it and how it has been utilized elsewhere in the Revised Code.

The State never addressed the ambiguities caused when applying its definition. Instead, it narrowly focused on defining the phrase "the court may order the sealing of records related to the offense in question in the manner provided in sections 2953.31 to 2953.36 of the Revised Code." The State failed to consider the broad impact its interpretation has on the other Revised Code provisions addressing the sealing of records. While the State's argument may give meaning to all of the words and phrases in § 2951.041(E), it failed to show how it can be implemented without causing more ambiguity than it resolves. Appellant's interpretation addresses all statutes involved; the State's ignores all but a phrase in § 2951.041(E).

B *The State's example demonstrates the need for this case*

The State's example regarding the two common pleas court divisions demonstrates the importance of this case. As is evident from this case and *Fortado*, defendants in different courts are eligible to have their record of dismissal following successfully completion of ILC sealed at different times. Some are immediately eligible while others have to wait three years. Adopting Appellant's approach and relying on either *Smith* or *Fortado* would make it clear that trial courts have discretion when to seal a case that was dismissed following successful completion of ILC. A trial court could seal it immediately, after three years, or sometime even further in the future depending on the circumstances.

Furthermore, the State's concern that adopting the *Smith* approach may lead to unequal administration of justice is misguided. Assuming, for purposes of argument, that the *Smith* approach was adopted and trial courts were given the discretion whether to apply §§ 2953.31

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to 2953.36 in all cases that were dismissed following ILC. In such a scenario, a trial court's blanket policy requiring a three-year wait to seal the record in all ILC cases would be an abuse of its discretion. *See e.g. State v. Raymond* (June 27, 2006), Franklin App. No. 05AP-1043, 2006 WL 1750953, 2006-Ohio-3259, at ¶ 15 (stating "A trial court . . . abuses its discretion when it rejects a plea agreement by relying on a blanket policy rather than considering the facts and circumstances of the particular case."); *State v. Graves* (Nov. 19, 1998), Franklin App. No. 98AP-272, 1998 WL 808356 (finding an abuse of discretion after trial court refused the defendant's plea based upon its blanket policy of not accepting no contest pleas); *State v. Hunt* (Oct. 22, 1985), Scioto App. No. 1536, 1985 WL 8359 (finding abuse of discretion when the trial court refused to accept a plea agreement because it had a policy of rejecting agreements after jury cards were mailed to prospective jurors in a case).

Adopting Appellant's position would firmly place the decision within the immediate discretion of the trial court. Depending on the facts and circumstances of each case, the court could seal the record immediately or wait a period of time. This approach would remove an arbitrary three year-waiting period for an individual who had his or her case dismissed. Thus, those defendants whom the trial court believed to be rehabilitated could have their records sealed immediately.

C. *Adopting the State's approach renders numerous statutory provisions meaningless and superfluous*

The dissent in *Fortado* posed the obvious question—["i]f R.C. 2951.041[(E)] doesn't apply in this case, it never applies in any case. And, if it never applies in any case, what is the purpose of the statute?" *Fortado*, 108 Ohio App.3d 706, 709 (Quillin, dissent). The majority did not engage is a statutory interpretation analysis. As such, it never addressed the question

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raised by the dissent. It is clear, though, that either: (1) that the rules of statutory interpretation render the phrase superfluous because applying it would be even more problematic; or (2) the phrase was the result of a simple legislative error or oversight.

Ohio Revised Code § 2951.041(E) is unquestionably a poorly written statute. Words and phrases either in it or in other statutes are rendered superfluous regardless of how it is interpreted. The interpretations in *Fortado* and *Smith* are the lesser of a necessary evil. Those interpretations potentially render only thirteen words in § 2951.041(E) superfluous, whereas the State's alternative immeasurably impacts other statutes.

The State's approach completely ignores and renders meaningless Ohio Revised Code § 2953.52, which addresses the sealing of one's record after the dismissal of a case. Thus, under the State's argument, Appellant cannot utilize the statute that specifically addresses sealing the record of a dismissed case for her dismissed case as that would render a portion of a sentence in § 2951.041(E) superfluous. Instead, to give meaning to the pertinent phrase in § 2951.041(E), Appellant must seal the records of her dismissed case pursuant to the statutes addressing sealing a record of conviction. According to the State, that is an infinitely more logical approach.

The State further contends that the legislature could have easily made reference to § 2953.52 in § 2951.041(E) and that its failure to do so evidences an intent to prohibit ILC defendants from utilizing that statute. *Fortado*, though, was decided in 1996 and *Smith* was decided in 2004. These are not new rulings exposing a potential pitfall. Case law shedding light on the ambiguity at issue in this case has existed for fifteen years. If the legislature believed that *Fortado* was decided erroneously it would have already addressed the matter or amended the statute.

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Finally, as was previously addressed, Ohio Revised Code §§ 2953.31 to 2953.36 are predicated on a conviction. Successful completion of ILC, though, results in a dismissal, not a conviction. Utilizing these sections requires the trial court to create multiple legal fictions regarding the "conviction" stemming from the dismissed case.

Thus, while the interpretations argued by both Appellant and the State will render words and phrases in the Revised Code meaningless and inoperable, the State's approach has the most wide-reaching negative impact.

D. *The State's approach does not further the legislative intent behind ILC*

The Court in *State v. Massien* stated that ILC is not designed as punishment, but as an opportunity for first-time offenders to receive help for their dependence without the ramifications of a felony conviction. *Massien* (2010), 125 Ohio St.3d 204, at ¶ 10; *citing State v. Ingram* (April 28, 2005), Cuyahoga App. No. 84925, 2005 WL 977820, 2005-Ohio-1967 at ¶ 13.

One of the ramifications of a conviction for a first-time offender is that they are burdened with a criminal record for a specific period of time. It goes against the spirit and intent of ILC to burden Appellant or any ILC defendant as though they were convicted of a crime when their charges were dismissed pursuant to a program designed to avoid the ramifications of a conviction.

Under *Fortado* or *Smith*, the trial court, pursuant to Revised Code § 2953.52, would still have discretion whether to seal the record of a case that was dismissed following successful completion of ILC. Appellant's approach would allow the trial court to exercise its discretion immediately, whereas the State's interpretation requires trial courts to wait three years. Thus, the trial court would have discretion to immediately seal a record of dismissal if

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it felt that a defendant who had successfully completed ILC was an ideal candidate. Conversely, the trial court could still require the defendant to wait a period of time if it believed it necessary. Adopting Appellant's approach does not deprive the trial court of its discretion to make a defendant wait to seal his or her record. Adopting the State's position, however, deprives the trial court of its discretion to immediately seal of the record of a dismissed case even if it finds that the facts and circumstances warrant it—thus burdening an otherwise deserving applicant.

Appellant, who has a Masters degree and no prior criminal record, became dependant on pain medication following a serious car accident and, unfortunately, made some decisions that led to her being charged with felony drug offenses. The intent behind ILC was to assist individuals like Appellant, not hinder them. In adopting the State's approach, however, Appellant is burdened with this dismissal on her record while she seeks employment. The existence of this charge on her record only serves to punish her. It does not serve any rehabilitative purpose.

The State's approach does nothing to further the legislative aims for ILC. It deprives the trial court of immediate discretion and imposes a mandatory three-year wait, even where a trial court may feel such a wait is unnecessary. The interpretation most in line with the public policy rationale for ILC is to allow the trial court discretion to immediately seal the record of dismissal. This is consistent with the legislature's intent for ILC to be rehabilitative.

CONCLUSION

Interpreting the ILC statute in a manner that allows for the record to be sealed immediately is consistent with the principles of statutory interpretation, renders the least

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number of words and phrases meaningless and inoperable, and does not result in the ILC statute contradicting itself. Adopting the State's position would render multiple other words and phrases in the Revised Code superfluous and would render one entire code section meaningless. Therefore, this Court should interpret Ohio Revised Code § 2951.041(E) so that trial courts have immediate discretion whether to seal the record of dismissal following successful completion of ILC.

Respectfully submitted,

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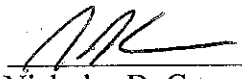
CERTIFICATE OF SERVICE

The undersigned certifies that she has served a copy of the foregoing upon David Fornshell, Warren County Prosecuting Attorney, and Michael Greer, Assistant Prosecuting Attorney, Attorneys for Appellee, 550 Justice Drive, Lebanon, Ohio 45036, by ordinary mail this 18th day of November, 2011.



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