

ORIGINAL

IN THE SUPREME COURT OF OHIO

12-1216

STATE OF OHIO	(	CASE NO. _____
	(
Plaintiff-Appellee,	(	On Appeal from the Summit
	(	County Court of Appeals,
v.	(	Ninth Judicial District
	(
MONTOYA L. BOYKIN	(
	(
Defendant-Appellant,	(	Court of Appeals
	(	Case No. 25752
	(
CITY OF AKRON	(
	(
Plaintiff-Appellee,	(	On Appeal from the Summit
	(	County Court of Appeals,
v.	(	Ninth Judicial District
	(
MONTOYA L. BOYKIN	(
	(
Defendant-Appellant,	(	Court of Appeals
	(	Case No. 25845

NOTICE OF CERTIFIED CONFLICT

Appellant, MONTOYA L. BOYKIN, hereby gives notice that the Court of Appeals, Ninth Judicial District, Summit County, Ohio, has certified its decision in this case to be in conflict with the First District Court of Appeals' decision in *State v. Cope*,

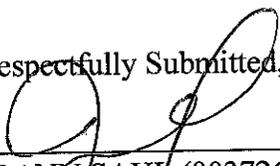
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111 Ohio App.3d 309, 676 N.E.2d 141 (1st Dist. 1996). The Ninth District Court of Appeals has certified the following issue to this Court:

Whether a pardon conclusively entitles the recipient to have her pardoned convictions sealed?

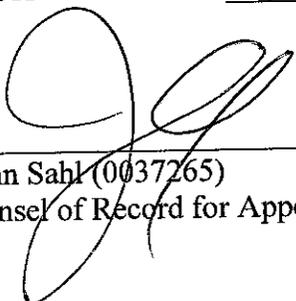
Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Certified Conflict was hand delivered to Michael J. Defibaugh, Assistant Prosecuting Attorney, 161 S. High Street, Suite 202, Akron, OH 44308 and Heaven DiMartino, Assistant Prosecuting Attorney, 53 University Avenue, Akron, OH 44308 on this 18th day of July, 2012.



Joann Sahl (0037265)
Counsel of Record for Appellant Boykin

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

2012 JUL 5 PM 12:03 CA. No. 25752
25845

Appellee

CLERK OF COURTS

v.

MONTOYA BOYKIN

Appellant

CITY OF AKRON

Appellee

v.

MONTOYA BOYKIN

Appellant

JOURNAL ENTRY

Montoya Boykin has moved this Court to certify a conflict under App. R. 25 between this Court's March 30, 2012, judgment and the judgment of the First District Court of Appeals in *State v. Cope*, 111 Ohio App.3d 309 (1st Dist.1996). The City of Akron, appellee in C.A. No. 25845, has responded in opposition to the motion. The State of Ohio, appellee in C.A. No. 25752, has not.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the "judgment * * * is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]" "[T]he alleged conflict must be on a rule of law – not facts." *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596 (1993).

Ms. Boykin has proposed that a conflict exists on the following issue: "Whether a pardon conclusively entitles the recipient to have her pardoned convictions sealed."

Upon review, we find that a conflict of law exists. In *Cope*, the First District Court of Appeals concluded that a trial court has the authority to seal the record of conviction of a pardoned offender even if the offender is not eligible for statutory expungement. The Court noted that in that situation, "what [the offender] needed was for the trial court to help him obtain the sealing to which he was entitled because of the pardon." *Cope*, 111 Ohio App.3d at 312. The First District also quoted with approval another jurisdiction's conclusion that "[a] pardon without expungement is not a pardon." *Id.* at 312, quoting *Commonwealth v. C.S.*, 517 Pa. 89 (Pa.1987). In *State v. Boykin*, 9th Dist. No. 25752, 25845, 2012-Ohio-1381, however, this Court agreed that a trial court may exercise the discretion to seal the conviction of a pardoned offender, but concluded that the nature of executive pardon does not require sealing in every case. *Id.* at ¶ 13.

To the extent that this Court reached a different conclusion from the First District Court of Appeals regarding the exercise of a trial court's authority to seal the record of a pardoned offender, those decisions are in conflict. Accordingly, Ms. Boykin's motion is granted, and this Court certifies the following issue to the Supreme Court of Ohio pursuant to App.R. 25:

Whether a pardon conclusively entitles the recipient to have her pardoned convictions sealed?



Judge

Concurs:
Dickinson, J.

Dissents:
Belfance, P.J.



5 of 24 DOCUMENTS

STATE OF OHIO, Appellee v. MONTOYA L. BOYKIN, Appellant; CITY OF
AKRON, Appellee v. MONTOYA L. BOYKIN, Appellant

C.A. No. 25752, C.A. No. 25845

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT
COUNTY

2012 Ohio 1381; 2012 Ohio App. LEXIS 1191

March 30, 2012, Decided

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO. CASE No. CR 92 03 0635. APPEAL FROM JUDGMENT ENTERED IN THE AKRON MUNICIPAL COURT COUNTY OF SUMMIT, OHIO. CASE Nos. 87 CRB 05482, 91 CRB 07522, 96 CRB 14102.

DISPOSITION: Judgments affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant offender moved the Summit County Court of Common Pleas (Ohio) and the Akron Municipal Court (Ohio) to seal records of her convictions for receiving stolen property and theft, after she was pardoned. The trial courts denied her motions, and she appealed.

OVERVIEW: The offender said her pardon required the trial courts to exercise their inherent judicial powers to grant her motion, despite her ineligibility for expungement under *R.C. 2953.32* or *2953.52*. The appellate court held the trial courts had authority to expunge the offender's records, despite her statutory ineligibility, because judicial expungement was a constitutional remedy, but such authority was to be exercised only in unusual and exceptional circumstances. The nature of an executive pardon, under Ohio Const. art. III, § 11 and *R.C. 2967.01(B)*, did not require the trial courts to grant the offender's motion because, (1) while a pardon restored a recipient's competency and barred further imposition of

punishment, it did not wipe away all traces of a criminal case, (2) consistent with its definition in *R.C. 2967.01(C)* as "remission of penalty," it did not eradicate the fact of the underlying conduct, and (3) the legislature had not so provided.

OUTCOME: The trial courts' judgments were affirmed.

CORE TERMS: pardon, expungement, sealed, pardoned, disability, seal, recipient, sealing, unconditional pardon, offender, common pleas, acquitted, governor, guilt, assignment of error, executive pardon, full pardon, obliterate, restore, record of conviction, judicial powers, authority to grant, criminal records, exceptional circumstances, public records, citations omitted, contemplation, automatically, competency, eligible

LexisNexis(R) Headnotes

Criminal Law & Procedure > Postconviction Proceedings > Expungement

[HN1] A first offender may move to have a record of conviction of eligible offenses sealed under *R.C. 2953.32*. *R.C. 2953.52* also permits the official record of a criminal case to be sealed if a defendant was acquitted, the case was dismissed, or a grand jury returned a no bill. Apart from these statutes, a record of conviction may be sealed only where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter.

Criminal Law & Procedure > Postconviction Proceedings > Expungement

[HN2] Trial courts have the inherent authority to expunge records apart from statutes when justified by "unusual and exceptional circumstances" founded on constitutional guarantees of the right to privacy. However, this judicial power should not be exercised as a matter of course.

Criminal Law & Procedure > Postconviction Proceedings > Expungement

[HN3] Typically, the public interest in retaining records of criminal proceedings, and making them available for legitimate purposes, outweighs any privacy interest a defendant may assert.

Criminal Law & Procedure > Postconviction Proceedings > Expungement

[HN4] Exercise of a court's discretionary power to expunge criminal records should, for purposes of consistency, not obliterate the fact of the criminal record, but a record so expunged will remain an historical event, available for inspection and use as provided in the expungement statute then in place.

Criminal Law & Procedure > Postconviction Proceedings > Clemency

Criminal Law & Procedure > Postconviction Proceedings > Expungement

[HN5] The judicial power to grant an expungement request exists, but it is limited to cases where an accused has been acquitted or exonerated in some way and protection of the accused's privacy interest is paramount to prevent injustice. Despite the enactment of *R.C. 2953.32* and *2953.52*, exercise of judicial authority to expunge records is warranted in exceptional cases. While it may be argued that it is inappropriate for courts to supersede legislative judgment by granting judicial expungement where the legislature has specifically removed statutory expungement as a remedy, it is in such situations where the judicial expungement remedy may well be most appropriate. Judicial expungement is a constitutional remedy, and it is elementary that although the legislature has freedom to provide greater protections, it has no authority to place limits on rights guaranteed under the Constitution. It therefore stands to reason that, the limitations of *R.C. 2953.32* notwithstanding, a trial court has the authority to grant judicial expungement in situations in which an executive pardon is at issue.

Criminal Law & Procedure > Postconviction Proceedings > Clemency

[HN6] The Ohio Constitution gives the governor power, after conviction, to grant reprieves, commutations, and pardons upon such conditions as the governor may think proper. Ohio Const. art. III, § 11. A "pardon" is defined as the remission of penalty by the governor in accordance with the power vested in the governor by the Constitution. *R.C. 2967.01(B)*. It relieves the person to whom it is granted of all disabilities arising out of the conviction or convictions from which it is granted. *R.C. 2967.04(B)*. The recipient of a pardon is, therefore, relieved of the disabilities imposed by *R.C. 2961.01(A)(1)* and is no longer incompetent to be an elector or juror or to hold an office of honor, trust, or profit. *R.C. 2961.01(A)(2)*.

Criminal Law & Procedure > Postconviction Proceedings > Clemency

[HN7] In contemplation of law, a pardon so far blots out an offense that afterwards it cannot be imputed to its recipient to prevent the assertion of his or her legal rights. It gives him or her a new credit and capacity, and rehabilitates him or her to that extent in his or her former position, and hence its effect is to make an offender a new man or woman. It is, in effect, a reversal of a judgment, a verdict of acquittal, and a judgment of discharge thereon, to this extent, that there is a complete estoppel of record against further punishment pursuant to such conviction.

Criminal Law & Procedure > Postconviction Proceedings > Clemency

[HN8] A pardoned individual is "a new man or woman" insofar as a restoration of competency and a further imposition of punishment are concerned. A pardon, so understood, does not wipe away all traces of the criminal case.

Criminal Law & Procedure > Sentencing > Costs

Criminal Law & Procedure > Postconviction Proceedings > Clemency

[HN9] See *R.C. 2961.01(A)(2)*.

Criminal Law & Procedure > Postconviction Proceedings > Clemency

Governments > State & Territorial Governments > Elections

[HN10] *R.C. 2961.01* does not provide that a pardon restores the recipient's competency under *R.C. 2961.01(B)* to circulate or serve as a witness for the

signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition, although such a person may be restored by operation of *R.C. 2967.16(C)*.

Criminal Law & Procedure > Criminal Offenses > Weapons > Licenses > Holders > Carrying & Concealed Permits

Criminal Law & Procedure > Postconviction Proceedings > Clemency

[HN11] A pardon does not automatically remove a recipient's disability with respect to carrying a concealed weapon. *R.C. 2923.14(C)*.

Criminal Law & Procedure > Postconviction Proceedings > Clemency

Evidence > Testimony > Credibility > Impeachment > Convictions > Admissibility

Legal Ethics > Sanctions > General Overview

[HN12] Consistent with the definition of a pardon as "remission of penalty," as set forth in *R.C. 2967.01(C)*, it is apparent that an executive pardon does not eradicate the fact of the underlying conduct. Despite a pardon, for example, the character of an offense may be relevant for purposes of employment. An attorney who has been indefinitely suspended from practicing law is not automatically entitled to reinstatement when the underlying offense has been pardoned. A pardoned offense may be considered in subsequent prosecutions. Although evidence of a conviction is not generally admissible in Ohio to impeach a witness, it may be admitted if the witness subsequently committed certain crimes. *Evid.R. 609(C)*.

Criminal Law & Procedure > Postconviction Proceedings > Clemency

Criminal Law & Procedure > Postconviction Proceedings > Expungement

[HN13] A pardon does not conclusively entitle the recipient to have the record of the recipient's conviction sealed.

Criminal Law & Procedure > Postconviction Proceedings > Clemency

Criminal Law & Procedure > Postconviction Proceedings > Expungement

[HN14] In Ohio, the legislature has not provided for sealing records of a pardoned individual by statute.

Criminal Law & Procedure > Postconviction Proceedings > Clemency

Criminal Law & Procedure > Postconviction Proceedings > Expungement

[HN15] A pardon under Ohio Const. art. III, § 11 does not automatically entitle the recipient of the pardon to have the record of conviction sealed. A trial court may exercise its authority to order judicial expungement but this authority should not be exercised as a matter of course, but where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter.

COUNSEL: JOANN SAHL, Appellate Review Office, School of Law, The University of Akron, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.

CHERI B. CUNNINGHAM, Director of Law, and DOUGLAS J. POWLEY, Chief City Prosecutor, for Appellee.

JUDGES: DONNA J. CARR, Judge. DICKINSON, J., CONCURS. BELFANCE, P. J., DISSENTING.

OPINION BY: DONNA J. CARR

OPINION

DECISION AND JOURNAL ENTRY

CARR, Judge.

[*P1] Appellant, Montoya Boykin, appeals orders of the Summit County Court of Common Pleas and Akron Municipal Court that denied her motions to seal the record of her convictions. We affirm.

I.

[*P2] In 1992, Boykin pled guilty to one count of receiving stolen property in a case originating in the Summit County Court of Common Pleas. She moved to seal her record in 1996 and 2000, and the trial court denied both motions. In 1996, she pled no contest to and was convicted of two counts of theft by the Akron Municipal Court. In 2009, [**2] Governor Ted Strickland pardoned Boykin for these three offenses. Boykin moved both courts to seal her record, arguing that the trial courts were required to exercise their inherent judicial authority to do so by virtue of the pardon. Both motions were denied, and Boykin appealed. This Court consolidated the appeals for oral argument and decision.

II.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY
DENYING APPELLANT BOYKIN'S
MOTION TO SEAL HER PARDONED
CONVICTIONS.

[*P3] Boykin's assignment of error is that the trial courts erred by denying her motions to seal her records. Specifically, she has argued that the existence of the executive pardon required the trial court to do so as an exercise of its inherent judicial powers.

JUDICIAL EXPUNGEMENT

[*P4] Underlying Ms. Boykin's argument is the assumption that a trial court has the inherent authority to seal criminal records when the defendant has been pardoned, even when the defendant is not eligible under the relevant statute. This is not, however, a foregone conclusion, nor is it an insignificant issue in this case. Boykin concedes that she is not eligible to have her records sealed under the relevant statutes. If the trial courts did not have the authority [**3] to seal her records from some other source, then our inquiry need go no further.

[*P5] [HN1] A first offender may move to have the record of conviction of eligible offenses sealed under R.C. 2953.32. See also R.C. 2953.36 (describing the convictions that preclude sealing). R.C. 2953.52 also permits the official record of a criminal case to be sealed if the defendant was acquitted, the case was dismissed, or a grand jury returned a no bill. Apart from these statutes, a record of conviction may be sealed only "where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter[.]" *Pepper Pike v. Doe*, 66 Ohio St.2d 374, 421 N.E.2d 1303 (1981), paragraph two of the syllabus. In *Pepper Pike*, the Ohio Supreme Court considered whether the case record of a defendant could be sealed when the charges against her were dismissed with prejudice before trial. *Id.* at paragraph one of the syllabus. Because the predecessor of the current statutes only provided for expungement of a conviction, the Court considered whether trial courts had authority to grant expungement without statutory authorization. *Id.* at 377. The Court concluded that [HN2] trial courts have the inherent authority to expunge [**4] records apart from the statutes when justified by "unusual and exceptional circumstances" founded on constitutional guarantees of the right to privacy. *Id.* The Court emphasized, however, that this judicial power should not be exercised as a matter of course:

Again, this is the exceptional case, and should not be construed to be a *carte blanche* for every defendant acquitted of

criminal charges in Ohio courts. [HN3] Typically, the public interest in retaining records of criminal proceedings, and making them available for legitimate purposes, outweighs any privacy interest the defendant may assert.

Id., citing *Chase v. King*, 267 Pa.Super. 498, 406 A.2d 1388 (1979). The Court also concluded that [HN4] exercise of this discretionary power should, for purposes of consistency, not obliterate the fact of the criminal record, but that a record so expunged "will remain a historical event," available for inspection and use as provided in the expungement statute then in place. *Id.* at 378.

[*P6] *Pepper Pike* has not been broadly applied. Before the enactment of R.C. 2953.52(A), for example, this Court held that trial courts did not have the authority to expunge the records of individuals who had been acquitted of the charges against [**5] them. See *State v. Stadler*, 14 Ohio App.3d 10, 11, 14 Ohio B. 13, 469 N.E.2d 911 (9th Dist.1983). Other courts concluded that judicial expungement was not available to defendants who had been convicted of a crime but were ineligible for statutory expungement. See *State v. Netter*, 64 Ohio App.3d 322, 325-326, 581 N.E.2d 597 (4th Dist.1989); *State v. Weber*, 19 Ohio App.3d 214, 217-218, 19 Ohio B. 359, 484 N.E.2d 207 (1st Dist.1984); *State v. Moore*, 31 Ohio App.3d 225, 227, 31 Ohio B. 508, 510 N.E.2d 825 (8th Dist.1986). See also *State v. Spicer*, 1st Dist. No. C-040637, 040638, 2005 Ohio 4302, ¶ 12 ("Prior to the passage of R.C. 2953.52, expungement was an equitable remedy reserved for extraordinary cases in which the defendant was not only acquitted, but also factually exonerated."). In other words, courts concluded that "[w]here there has been a conviction, only statutory expungement is available." *State v. Davidson*, 10th Dist. No. 02AP-665, 2003 Ohio 1448, ¶ 15.

[*P7] Nonetheless, [HN5] "the judicial power to grant an expungement request still exists, * * * [but] it is limited to cases where the accused has been acquitted or exonerated in some way and protection of the accused's privacy interest is paramount to prevent injustice." *State v. Chiaverini*, 6th Dist. No. L-00-1306, 2001 Ohio App. LEXIS 1190, 2001 WL 256104, *2 (Mar. 16, 2001). [**6] Despite the enactment of R.C. 2953.32 and 2953.52, exercise of judicial authority to expunge records is warranted in exceptional cases:

[w]hile it may be argued that it is inappropriate for courts to supersede legislative judgment by granting judicial expungement where the legislature has specifically removed statutory expungement

as a remedy, it is in such situations where the judicial expungement remedy may well be most appropriate. Judicial expungement is a *constitutional* remedy, and it is elementary that although the legislature has freedom to provide greater protections, it has no authority to place limits on rights guaranteed under the Constitution.

(Emphasis in original.) *In re Application to Seal Record of No Bill*, 131 Ohio App.3d 399, 403, 722 N.E.2d 602 (3d Dist.1999). It therefore stands to reason that, the limitations of R.C. 2953.32 notwithstanding, a trial court has the authority to grant judicial expungement in situations in which an executive pardon is at issue.

EFFECT OF PARDON

[*P8] Given that trial courts have the authority to grant judicial expungement when a pardon is at issue, the question remains whether the nature of the executive pardon itself requires them to do so in every case. [**7] We conclude that it does not.

[*P9] [HN6] The Ohio Constitution gives the governor "power, after conviction, to grant reprieves, commutations, and pardons * * * upon such conditions as the governor may think proper[.]" Ohio Constitution, Article III, Section 11. A "pardon" is defined as "the remission of penalty by the governor in accordance with the power vested in the governor by the constitution." R.C. 2967.01(B). It "relieves the person to whom it is granted of all disabilities arising out of the conviction or convictions from which it is granted." R.C. 2967.04(B). The recipient of a pardon is, therefore, relieved of the disabilities imposed by R.C. 2961.01(A)(1) and is no longer "incompetent to be an elector or juror or to hold an office of honor, trust, or profit." R.C. 2961.01(A)(2).

[*P10] Noting that a pardon restores the civil rights of the recipient, the Ohio Supreme Court has described the effect of pardons:

[HN7] "In contemplation of law it so far blots out the offense, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives him a new credit and capacity, and rehabilitates him to that extent in his former position", and hence its effect "is to make the [**8] offender a new man." It is, in effect, a reversal of the judgment, a verdict of acquittal, and a judgment of discharge thereon, to this extent, that there is a com-

plete estoppel of record against further punishment pursuant to such conviction.

(Internal citations omitted.) *Knapp v. Thomas*, 39 Ohio St. 377, 381 (1883). Context is key to understanding the Court's explanation in *Knapp*, which Boykin cites in support of her assignment of error. A careful reading of the Court's language, however, leads to the conclusion that [HN8] a pardoned individual is "a new man" insofar as the restoration of competency and the further imposition of punishment are concerned. *See id.* A pardon, so understood, does not wipe away all traces of the criminal case.

[*P11] Current laws support this conclusion. For example, R.C. 2961.01(A)(2) provides:

[HN9] [t]he full pardon of a person who under division (A)(1) of this section is incompetent to be an elector or juror or to hold an office of honor, trust, or profit restores the rights and privileges so forfeited under division (A)(1) of this section, *but a pardon shall not release the person from the costs of a conviction in this state, unless so specified.*

(Emphasis added.) [HN10] R.C. 2961.01 [**9] does not provide that a pardon restores the recipient's competency under R.C. 2961.01(B) to "circulate or serve as a witness for the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition," although such a person may be restored by operation of R.C. 2967.16(C). 2010 Ohio Atty.Gen.Ops. No. 2010-002, 2010 Ohio AG LEXIS 2, 2010 WL 292684, *2. [HN11] A pardon does not automatically remove the recipient's disability with respect to carrying a concealed weapon. *See* R.C. 2923.14(C) (requiring an individual to petition the court of common pleas for the removal of the disability, reciting "any partial or conditional pardon granted" as well as "facts showing the applicant to be a fit subject for relief[.]").

[*P12] [HN12] Consistent with the definition of a pardon as "remission of penalty," as set forth in R.C. 2967.01(C), it is also apparent that an executive pardon does not eradicate the fact of the underlying conduct. Despite a pardon, for example, the character of an offense may be relevant for purposes of employment. *See State ex rel. Atty. Gen. v. Hawkins*, 44 Ohio St. 98, 117, 5 N.E. 228 (1886) ("Whatever the theory of the law may be as to the effect of [**10] a pardon, it cannot work such moral changes as to warrant the assertion that a pardoned

convict is just as reliable as one who has constantly maintained the character of a good citizen.""). An attorney who has been indefinitely suspended from practicing law is not automatically entitled to reinstatement when the underlying offense has been pardoned. *See In re Bustamante*, 100 Ohio St.3d 39, 2003 Ohio 4828, ¶ 3-5, 796 N.E.2d 494 (requiring an attorney to complete the prerequisites for reinstatement that had been set by the Supreme Court of Ohio notwithstanding a presidential pardon.). A pardoned offense may be considered in subsequent prosecutions. *Carlesi v. New York*, 233 U.S. 51, 59, 34 S. Ct. 576, 58 L. Ed. 843, 31 N.Y. Cr. 153 (1914). Although evidence of a conviction is not generally admissible in Ohio to impeach a witness, it may be admitted if the witness subsequently committed certain crimes. *Evid.R. 609(C)*.

[*P13] If it is to be maintained that "in the eye of the law, [a pardoned] offender is as innocent as if he had never committed the offense," these examples of collateral consequences that remain after a pardon lead us to agree with one commentator, who has observed that in that case, "the eyesight of the law is very bad." Williston, *Does a [**11] Pardon Blot Out Guilt?*, 28 Harv.L.Rev. 647, 648 (1918), quoting *Ex Parte Garland*, 71 U.S. 333, 18 L. Ed. 366 (1866). We conclude, therefore, that [HN13] a pardon does not conclusively entitle the recipient to have the record sealed. This conclusion is in accord with the majority of courts that have considered the question. *See U.S. v. Noonan*, 906 F.2d 952, 960 (3d Cir.1990); *R.J.L. v. State*, 887 So.2d 1268 (Fla.2004); *State v. Blanchard*, 100 S.W.3d 226, 228 (Tenn.App.2002); *State v. Aguirre*, 73 Wash.App. 682, 690, 871 P.2d 616 (Wash.App.1994); *State v. Skinner*, 632 A.2d 82 (Del.1993); *State v. Bachman*, 675 S.W.2d 41, 52 (Mo.App.1984); *Commonwealth v. Vickey*, 381 Mass. 762, 771, 412 N.E.2d 877 (Mass.1980); *People v. Glisson*, 69 Ill.2d 502, 506, 372 N.E.2d 669, 14 Ill. Dec. 473 (Ill.1978).

[*P14] We recognize that a minority of courts that have addressed the issue disagree. *See State v. Cope*, 111 Ohio App.3d 309, 676 N.E.2d 141 (1st Dist.1996); *State v. Bergman*, 558 N.E.2d 1111, 1114 (Ind.App.1990); *Commonwealth v. C.S.*, 517 Pa. 89, 92, 534 A.2d 1053 (Pa.1987). Nonetheless, we conclude that this result is correct. [HN14] In Ohio, the legislature has not provided for sealing records of a pardoned individual by statute. Some other jurisdictions have done so. *See R.J.L.*, 887 So.2d at 1279 fn4. In this respect, we must [**12] defer to the legislative process.

CONCLUSION

[*P15] [HN15] A pardon under Article III, Section 11, of the Ohio Constitution does not automatically entitle the recipient of the pardon to have the record of

conviction sealed. A trial court may exercise its authority to order judicial expungement but, as the Ohio Supreme Court concluded in *Pepper Pike*, this authority should not be exercised as a matter of course, but "where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter[.]" *Pepper Pike*, 66 Ohio St.2d 374, 421 N.E.2d 1303 at paragraph two of the syllabus. In this case, Boykin's motions to seal her record relied exclusively on her position that she was entitled to relief by virtue of the pardon, and the record on appeal does not contain evidence beyond that argument. Consequently, consideration of whether her motions should have been granted under the analysis set forth above is premature, and this Court takes no position in that respect.

III.

[*P16] Boykin's assignment of error is overruled, and the judgments of the Summit County Court of Common Pleas and the Akron Municipal Court are affirmed.

Judgments affirmed.

There were reasonable grounds for this appeal.

We order that [**13] a special mandate issue out of this Court, directing the Court of Common Pleas and Akron Municipal Court, County of Summit, 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(C)*. 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.

DONNA J. CARR

FOR THE COURT

DICKINSON, J.
CONCURS.

DISSENT BY: BELFANCE

DISSENT

BELFANCE, P. J.
DISSENTING.

[*P17] I respectfully dissent. The question presented to this Court is whether a person who has received a full and unconditional pardon for certain offenses is entitled to have the public records of those convictions sealed.

[*P18] As an initial matter, and as discussed by majority, I agree that the trial court has inherent authority to order the sealing. See *Pepper Pike v. Doe*, 66 Ohio St.2d 374, 377-378, 421 N.E.2d 1303 (1981).

[*P19] Even [**14] prior to the existence of statutory sealing provisions, the Supreme Court of Ohio discussed the effect and breadth of an unconditional pardon. It has stated that:

a pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It obliterates, in legal contemplation, the offense itself. In contemplation of law it so far blots out the offense, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives him a new credit and capacity, and rehabilitates him to that extent in his former position and hence its effect is to make the offender a new man. It is, in effect, a reversal of the judgment, a verdict of acquittal, and a judgment of discharge thereon, to this extent, that there is a complete estoppel of record against further punishment pursuant to such conviction.

(Internal quotations and citations omitted.) *Knapp v. Thomas*, 39 Ohio St. 377, 381 (1883). The legal effect of a pardon is grounded upon the Supreme Court's recognition of the executive's constitutional authority to make a pardon. See Ohio Constitution, Article III, Section 11. The Ohio Supreme Court has more recently reiterated the principle that a full pardon [**15] has the effect of removing both the punishment and guilt of the offender. In *State ex rel. Gordon v. Zangerle*, 136 Ohio St. 371, 26 N.E.2d 190 (1940), it stated "[a] full pardon purges away all guilt and leaves the recipient from a legal standpoint, in the same condition as if the crime had never been committed." *Id.* at 376. If a full pardon leaves a person

from a legal standpoint as if the crime had never been committed, and obliterates the offense itself, it is difficult to envision how a public document that contains the imposition of guilt could appropriately remain in the public domain.

[*P20] In examining whether sealing is appropriate subsequent to a full and unconditional pardon, I find the reasoning and analysis of the First District's *State v. Cope*, 111 Ohio App.3d 309, 676 N.E.2d 141 (1st Dist.1996), to be very logical and persuasive. As noted in *Cope*, R.C. 2967.04(B) provides that "[a]n unconditional pardon relieves the person to whom it is granted of all disabilities arising out of the conviction or convictions from which it is granted." (Emphasis added.) See *Cope* at 311. While the majority concludes that a pardon relieves a person of only those disabilities imposed by R.C. 2961.01(A)(1), R.C. 2967.04(B) does [**16] not reference R.C. 2961.01(A)(1), nor does it include limiting language. I would interpret the word "all" to mean just that, all disabilities. I think any reasonable person would agree that having a conviction be part of public record for all to see is a disability. Moreover, I do not find the majority's recitation of actions that persons granted pardons must take to restore themselves to full competency to be a compelling argument in support of its position. The fact that someone has to take action to receive the full benefits of the pardon does not necessitate the conclusion that the person is not entitled to those benefits. Thus, in my view, it is logical that sealing the public records of a conviction would go hand in hand with a full and unconditional pardon. As the Court in *Cope* stated, "[a] pardon without expungement is not a pardon." (Internal quotations and citation omitted.) *Cope* at 312. Furthermore, even though a public court record might be sealed, it does not mean that is destroyed. See, e.g., *Pepper Pike*, 66 Ohio St.2d at 378. ("[E]xpungement does not literally obliterate the criminal record * * * [as] [t]he sealed record of the case may be inspected by any law enforcement [**17] authority or prosecutor to aid in the decision to file charges on any subsequent offenses involving the defendant.").

[*P21] Accordingly, the only way to give full effect to the broad language of Supreme Court precedent and the statute, and thus the pardon itself, is to order the sealing of the records of a person who has received a full and unconditional pardon. Thus, I respectfully dissent.



STATE OF OHIO, Plaintiff-Appellant, v. KIM COPE, Defendant-Appellee.

APPEAL No. C-950671

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

111 Ohio App. 3d 309; 676 N.E.2d 141; 1996 Ohio App. LEXIS 1513

April 17, 1996, Date of Judgment Entry on Appeal
April 17, 1996, Filed

NOTICE: [***1] THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

PRIOR HISTORY: Criminal Appeal From: Hamilton County Court of Common Pleas. TRIAL NO. B-730801.

DISPOSITION: Judgment Appealed From is: Affirmed

CASE SUMMARY:

PROCEDURAL POSTURE: The State sought review of an order by the Hamilton County Court of Common Pleas (Ohio), which sealed the record of defendant's prior drug conviction.

OVERVIEW: Defendant was granted his request to have the record of his prior drug conviction sealed because he had received an unconditional pardon for that crime from the governor. On appeal, the court affirmed. Although the State argued that *res judicata* barred defendant's request because he had previously applied for an expungement that was denied, the court noted that defendant had received the pardon since then, creating a change of circumstances. Although defendant was not a "first offender" as defined in *Ohio Rev. Code § 2953.31(A)* and arguably not entitled to statutory expungement under *Ohio Rev. Code § 2953.32*, the court found that statutory expungement was not defendant's exclusive remedy because the offense in question was

erased by pardon. The court also determined that defendant did not need his record sealed at the trial court's discretion but that he was entitled to have his record sealed because of the pardon, which placed him in the same condition as if the crime had never been committed.

OUTCOME: The court affirmed the trial court's order.

CORE TERMS: pardon, expungement, offender, sealed, sealing, eligible, assignments of error, unconditional pardon, erased, seal, full pardon, exceptional circumstances, disabilities, standpoint, convicted, recipient, governor, pardoned, relieves, guilt, felony, entity

LexisNexis(R) Headnotes

Criminal Law & Procedure > Postconviction Proceedings > Clemency

[HN1] Under *Ohio Rev. Code § 2967.04(B)*, an unconditional pardon relieves the person to whom it is granted of all disabilities arising out of the conviction or convictions from which it is granted. A full pardon purges away all guilt and leaves the recipient from a legal standpoint, in the same condition as if the crime had never been committed.

Criminal Law & Procedure > Preliminary Proceedings > Withdrawal of Charges > Expungement of Records
Criminal Law & Procedure > Postconviction Proceedings > Expungement

[HN2] The inherent powers of the trial court could be invoked to order the sealing of its own records when charges against a person were dismissed with prejudice. The trial courts have authority to order expungement where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter.

Criminal Law & Procedure > Postconviction Proceedings > Expungement

[HN3] There are several methods of expungement, all of which fall into two categories--statutory and judicial.

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview

Criminal Law & Procedure > Postconviction Proceedings > Clemency

Criminal Law & Procedure > Postconviction Proceedings > Expungement

[HN4] A trial court may exercise its jurisdiction to seal the record of a conviction which has been erased by a pardon, regardless of whether the petitioner has other offenses on his record. A pardon without expungement is not a pardon.

HEADNOTES

EXPUNGEMENT

SYLLABUS

In appropriate circumstances, a trial court has jurisdiction to order the sealing of a criminal record even though the applicant does not qualify for statutory expungement under *R.C. Chapter 2953*.

The trial court properly ordered the sealing of the record of a drug conviction, when the applicant had received an unconditional pardon for that conviction.

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Kim Cope, pro se, 641 1/2 Millikin Street, Hamilton, Ohio 45013.

JUDGES: PAINTER, J. GORMAN, P.J., and M.B. BETTMAN, J., CONCUR.

OPINION BY: PAINTER

OPINION

[*310] [**141] OPINION.

PAINTER, J.

The state appeals the trial court's order sealing¹ the record of appellee Kim Cope's 1973 drug conviction, for which Cope had received a pardon. This seems to be an issue of first impression, [***2] as neither party has cited, and we are unable to discover, any Ohio cases directly on point. We affirm.²

1 In this context, an "expunged" record and a "sealed" record are identical. See *R.C. 2953.32* and *R.C. 2953.52 et seq.*

2 We *sua sponte* remove this case from the accelerated calendar.

The state raises two assignments of error, the first of which is that the doctrine of *res judicata* barred the 1995 action, because in 1983 Cope had applied for an expungement which was denied. In August 1995, however, Cope was granted an unconditional pardon by Governor George Voinovich. Because of this change of circumstances, the first assignment is without merit. *Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals (1987)*, 31 Ohio St. 3d 260, 510 N.E.2d 373.

In its second assignment of error, the state contends that Cope was not eligible to have his record sealed, because he is not a "first offender" as defined in *R.C. 2953.31(A)*. The state is correct that Cope is only eligible [***3] to have his record sealed under *R.C. 2953.32* if he is a first offender. The state may be correct in asserting that Cope is not a first offender as defined in *R.C. 2953.31(A)*, because [**142] he was, in addition to his 1973 drug conviction, also convicted of criminal trespass, *R.C. 2911.21*, in 1975. Even though Cope was arguably not eligible for a "statutory expungement" under *R.C. 2953.32*, our inquiry does not end at this point.³

3 Strangely enough, we could say that Cope is a first offender with regard to the misdemeanor, because the felony has been pardoned, and if the felony no longer exists he could not even be a first offender with respect to *it* because it has been erased by the pardon. Instead of chasing this enigma, a pursuit which could rapidly descend into sophistry, we will assume *arguendo* that Cope is not a first offender under the statutory definition.

[*311] [HN1] Under *R.C. 2967.04(B)*, "an unconditional pardon relieves the person to whom it is granted of all disabilities arising out [***4] of the conviction or convictions from which it is granted." See, also, *R.C. 2961.01*. In *State ex rel. Gordon v. Zangerle (1940)*, 136 Ohio St. 371, 26 N.E.2d 190, the Supreme Court of Ohio held that "a full pardon purges away all guilt and leaves the recipient from a legal standpoint, in the same condi-

tion as if the crime had never been committed * * * ." (Emphasis added.) See, also, *Commonwealth v. Sutley* (1977), 474 Pa. 256, 273-74, 378 A.2d 780, 789, which holds that a pardon of an offender "blots out the very existence of his guilt, so that, in the eye of the law, he is thereafter as innocent as if he had never committed the offense [citations omitted]."⁴

4 Though some states have taken a different view of the effect of a full pardon, see, e.g., *State v. Skinner* (Del.1993), 632 A.2d 82, *State ex rel. Gordon* is the definitive pronouncement by the Ohio Supreme Court.

In *Pepper Pike v. Doe* (1981), 66 Ohio St. 2d 374, 421 N.E.2d 1303, [***5] the Ohio Supreme Court held that [HN2] the inherent powers of the trial court could be invoked to order the sealing of its own records when charges against a person were dismissed with prejudice.⁵ The supreme court stated, "The trial courts have authority to order expungement where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter." *Pepper Pike, supra*, paragraph two of the syllabus.⁶ While a factual distinction can be drawn between a person who has charges dismissed with prejudice and a person who is convicted and receives a pardon, that distinction is immaterial, because the pardon places the recipient, from a legal standpoint, in the same condition as if the crime had never been committed. *State ex rel. Gordon, supra*.

5 At the time of the *Pepper Pike* decision, the right to statutory expungement was limited to convictions, and an accused whose charges were dismissed had no remedy. The holding in *Pepper Pike* was later codified in R.C. 2953.52 et seq.

6 After *Pepper Pike*, courts have recognized that [HN3] "there are several methods of expungement, all of which fall into two categories--statutory and judicial." *State v. Netter* (1989), 64 Ohio App. 3d 322, 581 N.E.2d 597.

[***6] The granting of a pardon is an "exceptional and unusual" circumstance, and the trial court was correct in holding that it could seal the record of Cope's conviction. If anything, the order should not have even been necessary--Cope received nothing more than what he was entitled to receive pursuant to his pardon. Under R.C. 2967.04(B), "an unconditional pardon relieves the person to whom it is granted of all disabilities arising out of the conviction or convictions [*312] from which it is granted." See, also, R.C. 2961.01.⁷

7 From the scant record below, we are unable to determine what entity or entities are failing or refusing to erase or seal Cope's conviction. Perhaps a mandamus action would also be proper, but the trial judge wisely accomplished that which needed to be done by a more familiar remedy, rather than tossing the *pro se* petitioner out of court for failing to file the proper form.

We discern no reason that the trial court could not order the sealing of its records pursuant to Cope's [***7] pardon, even though Cope was not eligible to have his record sealed under R.C. 2953.32. Cope did not need his record sealed at the trial court's discretion because his 1973 conviction had been pardoned by the governor--what he needed was for the trial court to help him obtain the sealing to which he was entitled because of the pardon. That the trial judge chose to characterize the entry as a statutory expungement is of no import, especially because the Ohio Supreme Court has indicated [**143] that when sealing a record using judicial powers, courts should generally follow the statutory form. *Pepper Pike, supra*, 66 Ohio St. 2d at 377, 421 N.E.2d at 1306.⁸

8 Though neither case was cited by the state, both *State v. Weber* (1984), 19 Ohio App. 3d 214, 484 N.E.2d 207, and *State v. Netter* (1989), 64 Ohio App. 3d 322, 581 N.E.2d 597, involved persons who were not first offenders to whom the trial court had granted expungement. Both cases correctly held that in such a situation, the statutory expungement was the exclusive remedy. Cope is distinguishable, because while he is not a first offender, the offense he wants sealed has been erased by pardon. This "unusual and exceptional circumstance" did not exist in the above cases.

[***8] We hold that [HN4] a trial court may exercise its jurisdiction to seal the record of a conviction which has been erased by a pardon, regardless of whether the petitioner has other offenses on his record. "A pardon without expungement is not a pardon." *Commonwealth v. C.S.* (1987), 517 Pa. 89, 534 A.2d 1053. Accordingly, we overrule both assignments of error and affirm the judgment of the trial court.

GORMAN, P.J., and M.B. BETTMAN, J., CONCUR.

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