

IN THE SUPREME COURT OF OHIO

STATE OF OHIO
CITY OF AKRON

Appellees

v.

MONTOYA BOYKIN

Appellant

On Appeal from the Summit
County Court of Appeals, Ninth
Appellate District

Case Nos. 2012-0808
2012-1216

APPELLANT MONTOYA L. BOYKIN'S REPLY BRIEF

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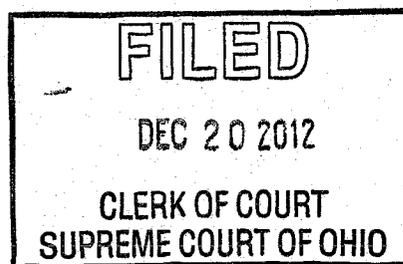


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I. APPELLANT'S REPLY TO APPELLEE CITY OF AKRON

Appellee, City of Akron, argues that the “meaning and effect of a pardon in Ohio follows that of the executive pardon as established in the United States Constitution as the concept and practice is derived from the same common law precedent from England.” (Appellee’s brief, p. 4). This Court could credit this argument if there was not presently existing in Ohio a century of case law where this Court has given “meaning and effect” to the term pardon. This Court consistently and unequivocally has recognized that in Ohio a “full and absolute pardon releases the offender from the entire punishment the law prescribed for his offense, and from all of the disabilities consequent on his conviction... In other words, a full pardon not only results in a remission of the punishment and guilt, but also a remission of the crime itself.” *State v. Morris*, 55 Ohio St. 2d 101, 105, 378 N.E.2d 708 (1978). This Court’s interpretation of the meaning and effect of a pardon under the Ohio constitution should be dispositive of the question. *See Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163, 1993 Ohio LEXIS 1608 (1993) (“[S]tate courts’ interpretations of state constitutions are to be accepted as final); *Bush v. Gore*, 531 U.S. 98, 112, 148 L.Ed. 2d 388, 121 S.Ct. 525 (2000) (Rehnquist, Scalia, Thomas, concurring). (The “decisions of state courts are definitive pronouncements of the will of the States as sovereigns.”)

Appellee also argues that the Ohio legislature has “clearly and succinctly limit[ed] the effect of a pardon to ‘remission of penalty.’” (Appellee’s brief, p. 4). Appellee cites R.C. 2967.01 to support its argument. Appellee’s argument ignores the very statute in Ohio that does define the effect of a pardon: R.C. 2967.04 (B). This statute provides that “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.” This statutory definition is the same definition recognized

by this Court in *Morris* at 105, and *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 520-521, 644 N.E.2d 369 (1994). Contrary to Appellee's argument, the Ohio general assembly has not limited the effect of a pardon to just a "remission of penalty."

Appellee also discusses that the Ohio legislature recently had the opportunity to address the effects of a pardon in Ohio. Appellee mentions language contained in the introduced House Bill 524 and Senate Bill 337. (Appellee's brief, p. 15-16). As Appellee notes, the discussed language was not part of the enacted legislation. Appellee would like this Court to infer some legal relevance to the legislature's inaction on this section. But as the United States Supreme Court has cautioned, "[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Lockhart v. United States*, 546 U.S. 142, 147, 126 S.Ct. 699, 163 L.Ed.2d 557 (2005), quoting *United States v. Craft*, 535 U.S. 274, 287, 122 S. Ct. 1414, 152 L.Ed.2d 437 (2002).

This case is no exception to that warning. Appellee has cited this Court to no authority that reveals the specific reason why the legislature rejected the introduced language. What little legislative history that does exist undermines Appellee's argument that the general assembly's inaction on the amendment rested on the definitional impact of a pardon. Rather, the legislative history shows that opposition to this amendment centered on the provision requiring the case records for any pardoned conviction be destroyed. ("Finally, a major area of concern is the proposal to destroy records unilaterally in the case of unconditional pardons and in the cases of conditional pardons once those conditions are met. We strongly oppose the destruction of these records." Testimony of Dennis Hetzel, Executive Director, Ohio Newspaper Association, House Bill 524, House Criminal Justice Committee, May 9, 2012, available at

<http://www.ohionews.org/wp-content/uploads/2012/05/HB-524-collateral-sanctions-testimony-050912.pdf>) (accessed December 12, 2012).

Further, Appellee's citation to and reliance on any legislative history is unnecessary. As this Court explained in *State ex rel. Brinda v. Lorain County Board of Elections*, 115 Ohio St.3d 299, 2007-Ohio-5228, ¶ 25, quoting *State ex rel. Canales-Flores v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 129, 2005-Ohio-5642, (2005), "our inquiry begins with the statutory text, and ends there as well if the text is unambiguous. No resort to an examination of the legislative history is warranted." Appellee has not argued to this Court that the pardon statute is ambiguous. Rather, Appellee argues the "statutory definition clearly and succinctly limits the effect of a pardon to 'remission of penalty.'" (Appellee's brief, p. 4) Given this argument, Appellee's resort to legislative history is misplaced.

Appellee also finds the lack of any Ohio statutory authority to seal a pardoned conviction dispositive of the question presented in this case. Appellee argues that the "General Assembly is the proper entity to determine whether a pardoned individual is entitled to automatic expungement." (Appellee's brief, p. 16). This argument ignores this Court's decision in *Pepper Pike v. Doe*, 66 Ohio St.2d 374, 421 N.E. 1303 (1981), paragraph two of syllabus, where this Court recognized that trial courts have the authority to seal absent statutory authority. Appellee would have this court limit the judicial sealing remedy to those who have been "exonerated." (Appellee's brief, p. 11)

This Court's holding in *Pepper Pike* is not so restrictive. At the time this Court decided *Pepper Pike*, the syllabus of a decision stated the law. *Williamson Heater Co. v. Radich*, 128 Ohio St.124, 190 N.E. 403 (1934), paragraph one of syllabus. The *Pepper Pike* decision contains two syllabi. The first syllabus is specific to the facts of the *Pepper Pike* case, holding that trial

courts have jurisdiction to seal dismissed charges. *Pepper Pike* at paragraph one of syllabus. The second syllabus contains the holding that is applicable to the present case. In the second syllabus, this Court held that “trial courts have authority to order expungement where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter.” *Id.* at paragraph two of syllabus. This syllabus holding does not restrict judicial sealing to dismissed charges, and this Court should decline Appellee’s invitation to limit *Pepper Pike*’s holding to only cases involving dismissed charges.

Appellee also disputes the necessity of sealing a pardoned conviction because the circumstances of a pardon are not so unusual and extraordinary to require sealing. (Appellee’s brief, p. 12). To support this argument Appellee states that once the governor issues the pardon “[n]o further penalty is exacted for the crime, but the pardon’s effect goes no further.” (Appellee’s brief, p. 12). This argument ignores the fact that pardoned ex-offenders still face the disabling collateral consequences of their convictions. (See Merit Brief of Amici Curiae, Advocates for Basic Legal Equality, et al., in support of Appellant Montoya Boykin). These collateral consequences are a penalty to ex-offenders. The only way to ameliorate the effect of these collateral consequences is to seal a pardoned conviction.

II. APPELLANT'S REPLY TO APPELLEE STATE OF OHIO

Appellee, State of Ohio, argues that a pardoned conviction should not result in automatic sealing because "the pardon does not erase all traces of the conviction." (Appellee's brief, p. 7). Appellee looks to the Ohio Revised Code to provide support for its proposition; however, an analysis of the code sections cited by Appellee undermines its argument.

Appellee firsts cites R.C. 2961.01 arguing that this statute does not release a pardoned ex-offender from the costs of the pardoned conviction. (Appellee's brief, p. 7). The text of the statute is contrary to Appellee's argument. R.C. 2961.01 (A)(2) states, "a pardon shall not release the person from the costs of a conviction in this state, unless so specified." (Emphasis added). This statute clearly gives the governor the power to include in any pardon a directive that the person pardoned is excused from paying any remaining costs of his conviction. Contrary to Appellee's analysis of this section, the statute recognizes that a pardon may "erase" any lingering costs of conviction.

Appellee also relies on R.C. 2961.01(B) as further support for its argument that the legislature has limited the impact of a pardon. R.C. 2961.01(B) states that a convicted felon "is incompetent 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." (Appellee's brief, p. 7). To demonstrate that a pardon does not release this disability, Appellee then cites to a 2010 Ohio Attorney General opinion. This cited opinion undermines Appellee's argument. In footnote one of the opinion, it states "[y]ou have not indicated whether the person has been granted a full pardon by the Governor or had his conviction reversed or annulled or the record of his conviction sealed." 2010 Ohio Atty.Gen. Ops. No. 2010-002 at 3, fn 1. This footnote recognizes that a pardon has an impact on releasing the disability of this statute.

Appellee also cites R.C. 2923.14 (C) stating, “the recipient of a pardon is not entitled to automatic removal of the disability to carrying a concealed weapon.” (Appellee’s brief, p. 7). The text of this statute also undermines Appellee’s argument. The statute provides discretionary relief for those with a “partial or conditional” pardon. R.C. 2923.14 (B)(1). Noticeably absent from this statute is any application requirement for those persons who have received a full pardon from the governor. Accordingly, the general assembly has recognized a full pardon would remove the disability to carry a concealed weapon. *See Thomas v. Freeman*, 79 Ohio St.3d 221, 224-225, 680 N.E.2d 997 (1997), quoting Black’s Law Dictionary (6 Ed.1990) 581 (“[I]f a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded.”)

Appellant Boykin has argued to this Court that a sealing is necessary to give effect to a pardon, particularly to remove the collateral consequences of the pardoned conviction. Appellee cites with approval a case that supports Appellant’s argument, *Bjerkan v. United States*, 529 F.2d 125 (7th Cir. 1975). (Appellee’s brief, p. 7) In *Bjerkan*, the court decided that a full pardon eliminates the collateral consequences of a conviction. *Id.* at 129. Appellant seeks the same result in this case. A pardon must reach the collateral consequences of a conviction; as such, any pardoned conviction must be sealed.

III. APPELLANT'S REPLY TO AMICUS CURIAE FRANKLIN COUNTY PROSECUTING ATTORNEY RON O'BRIEN

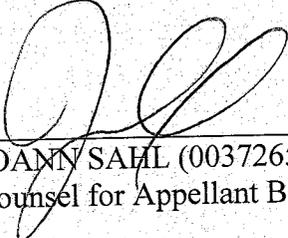
Amicus Curiae Franklin County Prosecuting Attorney seeks to expand the legal issue presented by this case. The certified question (and jurisdictional question) accepted by this Court is whether a pardon conclusively entitles the recipient to have her pardoned convictions sealed. Amicus Curiae has constructed his proposition of law to include an issue of whether the trial court even has the authority to grant a judicial expungement.

This issue has not been raised in this case. The court below recognized that a "trial court may exercise its authority to order judicial expungement." *State v. Boykin*, 9th Dist. No. 25752, 25845, 2012-Ohio-1381, ¶ 15. Further, the Appellees in this case both acknowledge that a trial court has authority to seal. ("The circumstances of a pardon are therefore not so unusual and extraordinary to **require** sealing of a conviction as those of a person who seeks to protect his or her reputation of innocence." Appellee, City of Akron's Brief, p. 12, emphasis in original; "There are no unusual or extraordinary circumstances in the instance of a pardon that **require** the courts to create such a claim of right." Appellee, City of Akron's brief, p. 14, emphasis in original). ("[Courts derive authority to sealing or expunging records from statutory and judicial authority.") (Appellee, State of Ohio's Brief, p. 2).

Appellant raises this issue because he asks this Court to adopt a decision he litigated in the Tenth District Court of Appeals, *State v. Radcliff*, 10th Dist. No. 11AP-652, ___ N.E.2d ___, 2012-Ohio-4732. The *Radcliff* case is not before this Court. This Court should ignore Amici's attempts to shoehorn that case, and its issues, before this Court.

CONCLUSION

This Court should hold that a pardon conclusively entitles the recipient to have her pardoned conviction sealed. Appellant requests that this Court reverse the decision of the Ninth District Court of Appeals.



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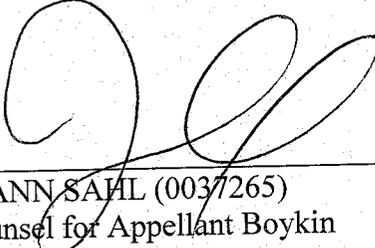
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief was mailed, postage prepaid on this 18th day of December, 2012, to the following:

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