

ORIGINAL

IN THE SUPREME COURT OF OHIO
2012

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

JAMES RADCLIFF,

Defendant-Appellant.

Case No. 2012-1985

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 11AP-652

MEMORANDUM OF PLAINTIFF-APPELLEE REGARDING JURISDICTION

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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

In *State v. Cope*, 111 Ohio App.3d 309, 676 N.E.2d 141 (1st Dist.1996), the First District held that a pardon “entitle[s]” the recipient to a judicial expungement under *Pepper Pike v. Doe*, 66 Ohio St.2d 374, 421 N.E.2d 1303 (1981), even if the pardon recipient is ineligible for a statutory sealing of records. *Cope* at 311-312. In *State v. Boykin*, 9th Dist. Nos. 25752, 25845, 2012-Ohio-1381, ¶ 13, the Ninth District held that a pardon does not conclusively entitle the recipient to a judicial expungement under *Pepper Pike*. Rather, according to the Ninth District, where a pardon recipient is ineligible for a statutory sealing of records, the pardon authorizes the trial court to exercise its discretion to grant a judicial expungement. *Id.* at ¶ 15.

The Tenth District in the present case held that because “a pardon neither erases the conviction nor renders the pardon recipient innocent as if the crime were never committed,” and because judicial expungement under *Pepper Pike* is available only where the applicant “has not been convicted,” Radcliff “cannot invoke the court’s inherent jurisdiction to seal his records.” Opinion at ¶ 51. In other words, where a pardon recipient is ineligible for a statutory sealing of records, the pardon neither requires nor authorizes a trial court to grant a judicial expungement.

Thus, there is currently a three-way split among the districts on the effect of a pardon on a trial court’s authority to order a judicial expungement under *Pepper Pike*: (1) automatic judicial expungement (*Cope*); (2) discretionary judicial expungement (*Boykin*); and (3) no judicial expungement (*Radcliff*). The Ninth District certified a conflict between *Boykin* and *Cope* on the following question: “Whether a pardon conclusively entitles the recipient to have her pardoned convictions sealed?” This Court accepted the certified conflict in case number 2012-1216, and consolidated the certified-conflict case with Boykin’s discretionary appeal in case number 2012-808, in which she is presenting the following proposition of law: “A pardon conclusively entitles the recipient to have her pardoned convictions sealed.” 09/05/2012 Case

Announcements, 2012-Ohio-4021. Franklin County Prosecutor Ron O'Brien has filed an amicus brief in *Boykin*, asking this Court to follow *Radcliff*'s "no judicial expungement" holding.

The Tenth District in this case has certified a conflict between *Radcliff* and *Cope* on the following question: "May a trial court exercise jurisdiction to seal the record of a pardoned conviction where the petitioner has other offenses on his record?" Although the Tenth District's decision granting the application to certify a conflict does not mention *Boykin*, the phrasing of the certified question encompasses *Boykin*'s "discretionary judicial expungement" holding.

The State agrees that this case should be held for this Court's decision in *Boykin*. Although this Court in *Boykin* is reviewing the certified conflict between the First and Ninth Districts, this Court is not limited to the "automatic judicial expungement" and "discretionary judicial expungement" options adopted by those courts. *State v. Footlick*, 2 Ohio St.2d 206, 207, 207 N.E.2d 759 (1965) (acceptance of certified conflict brings "entire case" to this Court), citing *Couk v. Ocean Accident & Guarantee Corp., Ltd.*, 138 Ohio St.3d 110, 33 N.E.2d 9 (1941). This is especially so, considering that this Court in *Boykin* has consolidated the certified-conflict appeal with *Boykin*'s discretionary appeal. Depending on this Court's decision in *Boykin*, the State may ask that the present case proceed to full briefing and oral argument.

STATEMENT OF THE CASE AND FACTS

In the early 1980s, defendant James A. Radcliff, was convicted of breaking and entering, a fourth-degree felony, in criminal case number 81CR-4506. On January 7, 2011, Governor Strickland granted a full pardon for the conviction in 81CR-4506 and for several out-of-county convictions, which included convictions for another breaking and entering conviction, felonious assault, aiding in escape, and passing bad checks. Radcliff then applied to have his conviction in case number 81CR-4506 sealed pursuant to R.C. 2953.52. The State objected to the application.

An expungement hearing was held on July 7, 2011. At the hearing, the State noted its objection to the expungement, because Radcliff was not a first offender and then rested on the contents of the written motion. Radcliff told the trial court that he had tried to get the other pardoned cases expunged in other counties, but was told he could not do it.

The trial court stated that “I would think that because you got pardoned, I would have the authority to grant your application. I’m going to grant it.” The court continued by saying “I am going to go ahead and seal your record because you got a governor’s pardon. * * * I think I have the authority based on the governor’s pardon.”

The trial court granted Radcliff’s application for expungement in a judgment entry filed July 20, 2011. The judgment entry states “In accordance with Section 2953.32, Ohio Revised Code, the Court finds that there are no criminal proceedings pending against the applicant, James A. Radcliff, and that the sealing of the record of the applicant’s CONVICTION, in Criminal Case number 81CR-4506 is consistent with the public interest.”

The State appealed, and the Tenth District reversed. On appeal, it was undisputed that Radcliff was ineligible for a statutory sealing of records. Opinion at ¶ 9. Radcliff therefore argued that the trial court nonetheless had inherent authority to expunge the records of Radcliff’s conviction under *Pepper Pike*. After thoroughly surveying the relevant authorities, the Tenth District held that, because “a pardon neither erases the conviction nor renders the pardon recipient innocent as if the crime were never committed,” and because judicial expungement under *Pepper Pike* is available only where the applicant “has not been convicted,” Radcliff “cannot invoke the court’s inherent jurisdiction to seal his records.” *Id.* at ¶ 51. The Tenth District thereafter certified that its decision conflicted with the First District’s decision in *Cope*.

ARGUMENT

Proposition of Law: Judicial expungement under *Pike v. Doe*, 66 Ohio St.2d 374, 421 N.E.2d 1303 (1981), is limited to cases in which there was no conviction. A pardon is not an acquittal or dismissal and does not erase the fact of conviction. The receipt of a pardon therefore does not require or even authorize a trial court to grant a judicial expungement under *Pepper Pike*.

Certified-Conflict Question: May a trial court exercise jurisdiction to seal the record of a pardoned conviction where the petitioner has other offenses on his record?

Radcliff does not rely on any statutory authority to seal records. Rather, he relies exclusively on the trial court's so-called "inherent authority" to expunge records under *Pepper Pike*. But a trial court's authority to expunge records under *Pepper Pike* is limited to cases in which there was no conviction. And a pardon does not erase the fact of conviction and thus does not authorize—let alone require—a trial court to order an expungement under *Pepper Pike*.

I. A TRIAL COURT'S AUTHORITY TO ORDER A JUDICIAL EXPUNGEMENT UNDER *PEPPER PIKE* IS LIMITED TO CASES IN WHICH THERE WAS NO CONVICTION.

In *Pepper Pike*, Doe was arrested on a misdemeanor assault charge, with the complaining witness being Doe's ex-husband's wife. *Pepper Pike* at 374. But the charge was ultimately dismissed with prejudice in exchange for Doe's agreement to dismiss a defamation suit filed against her ex-husband and his wife. *Id.* at 374-375. Doe later sought to expunge her arrest record *Id.* at 375. The municipal court denied the motion, and the court of appeals affirmed. *Id.*

This Court, however, reversed, holding that "[t]he trial courts in Ohio have jurisdiction to order expungement and sealing of records in a criminal case where the charges are dismissed with prejudice prior to trial by the party initiating the proceedings." *Id.* at paragraph one of the syllabus. This authority exists "where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter." *Id.* at paragraph two of the syllabus. Courts

must “use a balancing test which weighs the privacy interest of the defendant against the government’s legitimate need to maintain records of criminal proceedings.” *Id.* In Doe’s case, there was “no compelling state interest or reason to retain the judicial and police records,” given that the charge arose “from a domestic quarrel and constitute[d] vindictive use of our courts.” *Id.* at 377. “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 General Assembly has since codified *Pepper Pike* in R.C. 2953.51 et seq., which governs the sealing of records after a finding of not guilty, dismissal, or no bill. *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, 805 N.E.2d 1094, ¶ 10 (equating analysis under R.C. 2953.52 with balancing test set forth in *Pepper Pike*). To the extent *Pepper Pike* is still relevant at all, it is limited to cases in which there was no conviction. As the Tenth District noted, “where a defendant has been convicted of an offense, expungement may be granted only as allowed by statute, and the court may not use the judicial (i.e. extra-statutory) expungement remedy used in *Pepper Pike*.” Opinion at ¶ 15, quoting *State v. Bailey*, 10th Dist. No. 02AP-406, 2002-Ohio-6740, ¶ 11. Other courts have reached the same conclusion. Opinion at ¶ 15 (citing cases from six appellate districts).

II. A PARDON DOES NOT ERASE THE FACT OF CONVICTION AND THUS DOES NOT AUTHORIZE OR REQUIRE A TRIAL COURT TO GRANT A JUDICIAL EXPUNGEMENT.

Because judicial expungement under *Pepper Pike* is limited to cases in which there was no conviction, the next question is whether a pardon renders the recipient as having never been convicted of the offense. The answer to this question is “no.”

Under Section 11, Article III of the Ohio Constitution, the governor has “the power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except

treason and cases of impeachment, upon such conditions as the governor may think proper; subject, however, to such regulations, as to the manner of applying for commutations and pardons, as may be prescribed by law.” “A full and absolute pardon releases the offender from the entire punishment prescribed for his offense, and from all the disabilities consequent on his conviction.” *State ex rel. Attorney General v. Peters*, 43 Ohio St. 629, 650, 4 N.E. 81 (1885); *see, also*, R.C. 2967.01(B) (pardon is a “remission of penalty by the governor in accordance with the power vested in the governor by constitution”); R.C. 2967.04(B) (pardon “relieves the person to whom it is granted of all disabilities arising out of the conviction or convictions from which it is granted.”). Thus, while a pardon discharges the recipient from any further punishment and removes any legal disabilities arising from the conviction, it “neither erases the conviction nor renders the pardon recipient innocent as if the crime were never committed.” Opinion at ¶ 51.

A. Modern Caselaw Refutes The View That A Pardon Erases The Fact Of Conviction.

Nearly 130 years ago, in *Knapp v. Thomas*, 39 Ohio St. 377, 48 Am.Rep. 462 (1883), this Court stated that ““a pardon reaches both the punishment prescribed for the offense and the guilt of the offender.”” *Id.* at 381, quoting *Ex parte Garland*, 71 U.S. 333, 380, 18 L.Ed 366 (1866). This Court continued that a pardon “obliterates, in legal contemplation, the offense itself.” *Knapp* at 381, quoting *Carlisle v. United States*, 83 U.S. 147, 21 L.Ed. 426 (1872). “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.” *Knapp* at 381, quoting *Knote v. United States*, 95 U.S. 149, 24 L.Ed. 442 (1877).

Later, this Court relied on *Knapp* in *State ex rel. Gordon v. Zangerle*, 136 Ohio St. 371, 26 N.E.2d 190 (1940), which stated that “[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, citing *Knapp* at 381; *see also*, *State v. Morris*, 55 Ohio St.2d 101, 105, 378 N.E.2d 708 (1978) (“a full pardon not only results in a remission of the punishment and the guilt, but also a remission of the crime itself.”), citing *Knapp* at 381.

As the Tenth District noted, *Knapp* is “at the root of the pardon jurisprudence in Ohio.” Opinion at ¶ 23. But, as the Tenth District also noted, this Court has clarified its holding in *Knapp*, stating that “[w]hatever the theory of the law may be as to the effect of 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.” Opinion at ¶ 19, quoting *State ex rel. Attorney General v. Hawkins*, 44 Ohio St. 98, 117, 5 N.E. 228 (1886). This Court in *Hawkins* rejected the idea that a pardon entitled the recipients “to the same confidence as if they had never been convicted.” *Hawkins* at 98. It is a “perversion of language” to give Justice Okey’s opinion in *Knapp* “such a construction. He never meant anything of the kind.” *Id.*

Moreover, the Tenth District recognized that the United States Supreme Court cases cited in *Knapp*—*i.e.*, *Garland*, *Carlisle*, and *Knote*—do not support the conclusion that a pardon erases the fact of the conviction. For example, “[m]odern case law has dismissed the ‘blotting out’ language from *Garland* as dictum and rejected *Garland*’s expansive view of the power to pardon.” Opinion at ¶ 27 (citing cases from the District of Columbia, Delaware, and four federal circuits). Subsequent United States Supreme Court cases have “eroded” *Garland*’s “broad articulation” of the pardon power by “narrowing its scope.” *Id.* at ¶ 28, quoting *In re Sang Man Shin*, 125 Nev. 100, 105, 206 P.3d 91 (Nev.2009). In one such case, the United States Supreme Court observed that a pardon “carries an imputation of guilt; acceptance a confession of it.” Opinion at ¶ 29, quoting *Burdick v. United States*, 236 U.S. 79, 94, 35 S.Ct. 267, 59 L.Ed 476

(1915). As for *Carlisle* and *Knote*, those cases both “acknowledg[e] that a pardon does not erase past conduct.” Opinion at ¶ 30; *see also*, *Nixon v. United States*, 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) (“a pardon is in no sense an overturning of a judgment of conviction by some other tribunal” but “is ‘[an] executive action that mitigates or set aside *punishment* for a crime’”), quoting Black’s Law Dictionary 1113 (6th Ed. 1990) (emphasis in *Nixon*).

Given the foregoing, “*Knapp*’s foundation for holding that a pardon blots out the offense and operates as a verdict of acquittal is problematic. *Carlisle* and *Knote* both indicate that a pardon cannot erase past conduct, and recent case law dismisses *Garland*’s broad articulation of a pardon as dictum.” Opinion at ¶ 33; *see also*, *United States v. Noonon*, 906 F.2d 952 (3rd Cir.1990) (explaining that the United States Supreme Court does not accept *Garland*’s dictum that a pardon “blots out” the existence of guilt); *Bjerkan v. United States*, 529 F.2d 125 (7th Cir.1975), n. 2 (same).

This limited view of a pardon has found support in academia. Opinion at ¶ 34, citing Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 Harv.L.Rev. 647, 647-648 (1915) (“when it is said that in the eye of the law [pardoned convicts] are as innocent as if they had never committed an offence, the nature rejoinder is, then the eyesight of the law is very bad.”). It has also been applied in cases involving reinstatement of disbarred attorneys and other professional-licensing contexts. Opinion at ¶¶ 35-37. Accordingly, “[t]he majority of courts to consider the issue hold that a pardon does not entitle its recipient to records expungement.” *Id.* at ¶¶ 40-43 (collecting state and federal cases); *see, also*, *Boykin* at ¶ 13 (also collecting cases).

B. Ohio Statutes Further Prove That A Pardon Does Not Erase The Fact Of Conviction.

In addition to surveying state and federal caselaw regarding the effect of a pardon, the Tenth District also discussed several Ohio statutes further proving that a pardon does not erase

the fact of conviction. For example, the recipient of a pardon remains incompetent to circulate a petition. Opinion at ¶ 46, citing R.C. 2961.01(A), (B). A pardon recipient also “does not release the person from the costs of a conviction in this state, unless so specified.” Opinion at ¶ 46, citing R.C. 2961.01(A)(2). Plus, unless the pardon was based on a finding of innocence or rehabilitation, a pardoned conviction can still be admitted as a conviction for purposes of impeachment under Evid.R. 609(C). And a pardon does not automatically remove the recipient’s disability with respect to carrying a concealed weapon. Opinion at ¶ 46, citing *Boykin* at ¶ 11, citing R.C. 2923.14(C).

Moreover, Ohio statutes specifically contemplate that a record of the pardon and the corresponding conviction be maintained. The governor must “communicate to the general assembly, at every regular session, each case of * * * pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the * * * pardon * * * with the Governor’s reasons therefor.” Opinion at ¶ 47, citing Ohio Constitution, Article III, Section 11; *see also*, R.C. 107.10(E) (requiring governor to keep a “pardon record” containing the date of each application for pardon, the name of the convict, the crime committed, in what county, the term of court where the convict was convicted, the sentence of the court, the action of the governor, the reason for that action, and the date of that action).

Copies of the warrant of pardon must also be filed with the clerk and, if applicable, with the institution if the recipient was confined. Opinion at ¶ 48, citing R.C. 2967.06. The clerk must “record the warrant * * * in the journal of the court, which record, or a duly certified transcript thereof, shall be evidence of such pardon or commutation, the conditions thereof, and the acceptance of condition.” R.C. 2967.04(A).

Through these provisions, the General Assembly intended that all pardons—as well as information regarding the pardon recipients and the convictions that are the subject of the pardons—be available for public inspection. Requiring, or even authorizing, a trial court to expunge the records of a pardoned conviction would be “of questionable value if the record of conviction, accessible through the internet, continues to reveal the underlying conviction.” Opinion at ¶ 52.

Furthermore, while R.C. 2953.52 provides for the sealing of records after a not guilty finding, dismissal, or no bill, the statute does not list a pardon as grounds to seal records. *Id.* at ¶ 49. This omission is significant, because “if a pardon truly rendered the defendant innocent as if the crime were never committed, the General Assembly should have included pardons with the other innocence-based reasons for expungement contained in R.C. 2953.52.” *Id.* at ¶ 52.

C. Pardons And Expungements Are Separate Forms Of Relief—The Former Does Not Require The Latter.

Radcliff argues that expunging a pardoned conviction is necessary because people seeks pardons to remove the “stigma and embarrassment that attaches to having a very public record.” MSJ, 10. But an applicant’s motive in seeking a pardon does not determine the actual legal effect of the pardon. Besides, having a public record of conviction is not a “disability” that is removed by a pardon. Black’s Law Dictionary 494 (8th Ed.2004) (defining “civil disability” as “[t]he condition of a person who has had a legal right or privilege revoked as a result of a criminal conviction”).

Radcliff also argues that judicial expungement of a pardon is necessary to give the pardon decision “effect.” MSJ, 10. But pardons and expungements are separate forms of relief. A sealing of records is an “additional avenue to restore rights and privileges” apart from a pardon. *State ex rel. Gains v. Rossi*, 86 Ohio St.3d 620, 623, 716 N.E.2d 204 (1999). A refusal to grant

an expungement therefore in no way infringes on the governor's authority to issue a pardon. Neither a pardon nor an expungement automatically requires the other. One can obtain a pardon without obtaining an expungement, and vice-versa.

Of course, this is not to say that a pardon recipient will *never* be able to obtain an expungement. Pardon recipients may be eligible for a *statutory* sealing of records under R.C. 2953.31 et seq. And Am. Sub. S.B. No. 337, effective September 28, 2012, vastly expanded the eligibility for receiving a statutory sealing of records.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the present case be held for this Court's decision in *Boykin*. Depending on the decision in *Boykin*, the State may ask this Court to order that this case proceed to full briefing and oral argument.

Respectfully submitted,

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This is to certify that a copy of the foregoing was hand-delivered this day, December 26, 2012, to JOHN W. KEELING, 373 South High Street-12th Fl., Columbus, Ohio 43215; Counsel for Defendant-Appellant.



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