

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE, *ex rel.* THE CINCINNATI
ENQUIRER, a Division of Gannett
Satellite Information Network, Inc.
312 Elm Street
Cincinnati, OH 45202

Petitioner,

v.

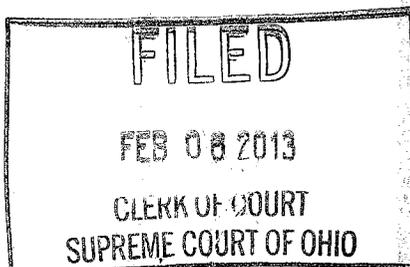
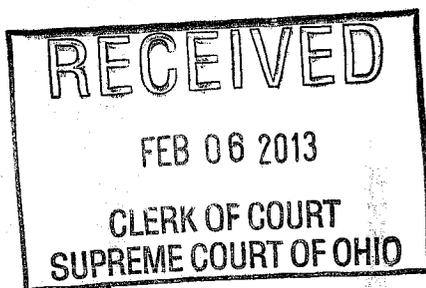
HONORABLE ROBERT H. LYONS
Butler County
Area I Court
118 High St.
Oxford, OH 45056

Respondent,

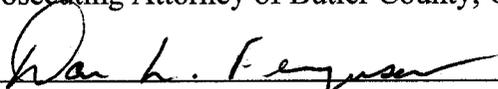
Case No. 12-1924

RESPONDENT'S RESPONSE TO
PETITIONER'S
REPLY TO SUGGESTION OF
MOOTNESS

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Attorney for Respondent,
Honorable Robert H. Lyons

FACTS: This case involves an unnamed defendant who was charged with minor misdemeanor, disorderly conduct. Respondent testified in his deposition that it was his understanding that the defense counsel and prosecutor had a plea agreement in which the defendant would plead to the minor misdemeanor and the parties would agree to seal the record. (Respondent's deposition pages 11, 12 and 21). Respondent also testified that he routinely sealed the records of minor misdemeanor cases immediately after conviction and that he had been doing so with what had been the incorrect form.

The form that the Respondent previously used to seal minor misdemeanor cases, made reference to O.R.C. 2953.52. Certainly the Respondent now concedes, O.R.C. 2953.52 is not applicable to cases in which the defendant has been convicted, applying instead to the sealing of records in which a person "is found not guilty of an offense by a jury or a court or who is the defendant named in a dismissed complaint, indictment, or information..." The error was discovered as a result of an examination of the Petitioner's Original Complaint in Mandamus. (Respondent's deposition pages 12 and 13).

In response to the incorrect sealing of the record, and acting upon the belief that sealing the record was part of the original plea agreement, the Respondent called a hearing at which the Defendant was allowed withdraw his plea. (Respondent's deposition pages 15 and 16). At that hearing, or at a subsequent hearing the same afternoon, the prosecutor's office, announced its intentions not to further pursue the prosecution of the case.¹ (Respondent's deposition pages 17

¹ Of course, the record contains no indication of the evidence or the relative merits of the State's case, nor any discussion of the legal or constitutional issues that may have surrounded the case in the first place. Thus, no inferences can be drawn as to the decision by the Prosecutor's office not to further pursue the matter.

and 24). After the prosecutor's office declined to prosecute the case, effectively a nolle of the charges, the unnamed defendant again moved to have his record sealed. (Respondent's deposition pages 19 and 20). In the absence of a conviction, the Respondent again sealed the record pursuant to O.R.C. 2953.52.

ISSUES: Petitioner asserts two arguments in opposition to Respondent's suggestion that this matter is moot. Petitioner's first assertion is that the minor misdemeanor criminal file belonging to this specific unnamed defendant should be unsealed. Petitioner asserts that it should be unsealed because, they argue, Respondent allowed the unnamed defendant to withdraw his plea in contravention of Ohio Rule of Crim. Procedure 32.1. Petitioner's second assertion is that the matter is not moot because it is capable of repetition. Respondent disputes Petitioner's assertions and continues to suggest that this case is moot.

Petitioner's First Assertion: The unnamed defendant's file can not be correctly sealed pursuant to O.R.C. 2953.52 because, Petitioner asserts, the plea could not properly be withdrawn pursuant to Ohio Rule of Crim. Procedure 32.1, which states:

A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.

Petitioner's first assertion is based on the fact that the unnamed defendant had already paid his fines in this minor misdemeanor case thus rendering this a post sentence plea withdrawal. The Petitioner asserts that this can not properly occur unless there was a showing of "manifest injustice". In support of Petitioner's assertion that there was no manifest injustice,

Petitioner can point only to the fact that Respondent was unable to articulate his legal basis for allowing the unnamed defendant to withdraw his plea at the moment he was first asked in his deposition. (*Respondent's deposition page 17*). In making this assertion, the Petitioner newspaper, seeks to insert itself into the judicial conduct of a criminal case. To allow this would be exceedingly dangerous and unprecedented. This is an obvious meddling in judicial and prosecutorial functions. Their insertion into the case would be without standing. Federal Home Loan Mtge. Corp. v. Schwartzwald, 134 Ohio St.3d 13, 2012-Ohio-5017. (Ohio 2012).

We recognized that standing is a "jurisdictional requirement" in *State ex rel Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973), and we stated: "It is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action." (Emphasis added.)

Petitioner obviously has no interest in the subject matter of the original criminal case.

That case was between the defendant and the State of Ohio.

Petitioner's assertion also overlooks the fact that Respondent elsewhere articulated an exceedingly appropriate basis for allowing the plea withdrawal. At least according to Respondent's belief at the time, the unsealing of the record would have violated the terms of the original plea agreement, (*Respondent's deposition pages 15 and 16*) which would have certainly been a "manifest injustice". "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427, 1971 U.S. LEXIS 1 (U.S. 1971)

To unseal the record in response to the error which had been exposed by petitioner, without allowing the defendant to be present for a hearing would have been a further manifest injustice and a violation of due process. Therefore, as stated by the Respondent in his deposition, he allowed the defendant to move the court to withdraw his plea. After Respondent withdrew his plea and the prosecutor declined to further pursue the case, a decision which rested entirely with the State and was not up to the Respondent, the record was properly sealed pursuant to O.R.C. 2953.52.

To allow the withdrawal of a plea under the circumstances is a matter of judicial discretion for the trial court and shall be reversed only upon a showing of abuse of discretion.

State v. Scarnati, 2002-Ohio-711 (11th Eleventh District).

A Crim.R. 32.1 motion is addressed to the sound discretion of a trial court. State v. Xie (1992), 62 Ohio St.3d 521, paragraph two of the syllabus. Thus, the good faith, credibility, and weight of a defendant's assertions in support of his motion are to be resolved by a trial court. State v. Gibbs (June 9, 2000), Trumbull App. No. 98-T-0190, unreported, 2000 Ohio App. LEXIS 2526, at 6, citing State v. Stumpf (1987), 32 Ohio St.3d 95, 104. Our review is limited to a determination of whether the trial court abused its discretion. State v. Barnett (1991), 73 Ohio App.3d 244, 250. Abuse of discretion connotes more than an error of law or judgment; rather, it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. State v. Adams (1980), 62 Ohio St.2d 151, 157.

Plea withdrawals before sentencing should be freely granted. After sentencing, the withdrawal should be granted when failure to do so would constitute a manifest injustice. Only an abuse of discretion could overturn such a decision. "Absent an abuse of discretion on the part of the trial court in making the ruling, its decision must be affirmed. For [a court] to find an abuse of discretion ... [it] must find more than an error of judgment. [The court] must find that

the trial court's ruling was "unreasonable, arbitrary or unconscionable". *State v. Xie*, 62 Ohio St. 3d 521, 584 N.E.2d 715, 1992 Ohio LEXIS 204 (Ohio 1992).²

Petitioner asserts that the process used by Respondent was "unseemly". Respondent knows of no case law that would allow a newspaper to overturn the outcome of a criminal case that it thought "unseemly. What is extremely unseemly, is that a newspaper would seek to influence the outcome of a criminal proceeding, instead of simply reporting the news."³

Notwithstanding the assertions of unseemly conduct, the newspaper is simply without standing to challenge the outcome of the criminal case. They were not a party. They have no knowledge of the evidence, or lack thereof in the underlying criminal case. They also have no knowledge of the legal or constitutional issues that may have been involved in a successful prosecution of the underlying case and even if they did, they are seeking to interfere in something that is simply not within their province. Consequently, Respondent strongly urges this court to hold the Petitioner's first assertion to be without merit.

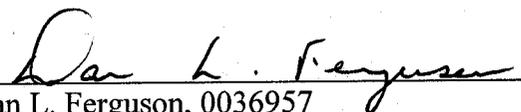
Petitioner's Second Assertion: Petitioner further asserts that this case may not be moot because of repeatability. Petitioner asserts that this case should not be considered moot because the Respondent stated in his deposition that he has continued to seal the records of various cases following his discovery that the wrong form had previously been used. *Respondent's deposition*

² Even if it appeared that the Respondent Judge improperly granted the defendant's motion to withdraw his plea, only the State, acting through the prosecutor's office would have standing to object. *Federal Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017 (Ohio 2012). The prosecutor's office had no objection to the withdrawal of the plea. (Respondent's deposition pages 15 and 16). Again, there is no indication in the record of the relative merits of the underlying criminal case, so no inferences can be drawn as to why the State may have chosen not to proceed with the case.

³ The Petitioner, Cincinnati Enquirer, may be disappointed in the outcome of the case and upset that it didn't get whatever news it sought, but that should not give them any ability to influence the outcome of the prosecution.

at page 25. Petitioner is assuming however, that Respondent has *incorrectly* sealed such records. O.R.C. 2953.32 provides a perfectly proper method to seal various records post conviction. O.R.C. 2953.52 provides a perfectly acceptable method to seal records stemming from cases that result in no conviction. Petitioner is in essence, requesting that this court proceed with this case, based on Petitioner's assumption that Respondent, Judge Lyons, has in fact sealed additional records outside the parameters of those statutes. No such evidence exists. Therefore, Respondent reasserts his Suggestion of Mootness with regard to Petitioner's claim of repeatability.

Respectfully submitted,

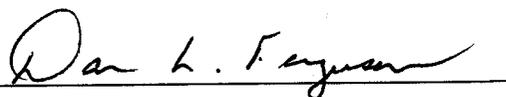

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*Attorney for Respondent,
Honorable Robert H. Lyons*

CERTIFICATE OF SERVICE

This is to certify that on February 4, 2013, a copy of the foregoing was served by Regular U.S. Mail upon the following:

John C. Greiner, Attorney at Law, Graydon, Head & Ritchey LLP, 1900 Fifth Third Center, 511 Walnut St., Cincinnati, OH 45202-3157

Michael T. Gmoser
Prosecuting Attorney of Butler County, Ohio

By 

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*Attorney for Respondent,
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Butler County
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Oxford, OH 45056**

Respondent,

Case No. 12-1924

AFFIDAVIT OF RESPONDENT, JUDGE ROBERT H. LYONS

Affiant, after being duly cautioned and sworn, states as follows:

1. I allowed the defendant in the underlying criminal case to withdraw his plea because of my belief that the original plea agreement included sealing the record. Based upon my subsequent understanding that I would have to unseal the record of his conviction, I determined that it would be a manifest injustice not to grant the defendant's motion to withdraw his plea. Appropriate findings were made on the record.

FURTHER AFFIANT SAYETH NAUGHT



HONORABLE ROBERT H. LYONS

STATE OF OHIO)
) ss.
COUNTY OF BUTLER)

Sworn and subscribed personally before me by Robert H. Lyons this 4th day of ^{February}~~January~~, 2013.

Tammy Walton
Notary Public

7-22-2013
My Commission Expires



Tammy S. Walton
Notary Public
State of Ohio
My Commission Expires
7/22/2013