ORIGINAL

IN THE SUPREME COURT OF OHIO
2013

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

SHARLENE AGUIRRE,

Defendant-Appellee.

Case Nos. 2013-870
2013-876

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

Court of Appeals Case No. 12AP-415

BRIEF OF PLAINTIFF-APPELLANT STATE OF OHIO

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STATEMENT OF FACTS

On May 22, 2002, the defendant entered a guilty plea to a single count of theft, a fourth degree felony. The parties jointly recommended a term of community control and $2,000.00 restitution to Economy Enterprises and further restitution owed to Westfield Insurance Company and Harleyville Insurance. The trial court imposed a five-year period of community control, with a condition that the defendant pay $2,000.00 restitution to Economy Enterprises and the balance of $32,562.47 in restitution to the probation department and pay court costs. (*See* Trial Rec. 6)

On January 12, 2012, defendant filed an application to seal the record of this conviction. (Trial Rec. 2, 5) On February 17, 2012, the State filed an objection. (Trial Rec. 6) The basis for the State's objection was that the defendant/applicant had not satisfied her obligation to pay restitution and court costs, and her application was therefore premature. The matter was originally scheduled for a hearing on April 5, 2012. The defendant/applicant acknowledged that she had not completed payment of the court-ordered restitution. (Tr. 3, 4) The trial court nonetheless granted the application to seal the record of conviction, because the restitution had been ordered to an insurance company and because the defendant had paid a substantial portion of the restitution. (Tr. 6; Trial Rec. 10; Appeals Rec. 5)

The State filed a timely appeal to the Tenth District Court of Appeals. The State asserted that the trial court erred when it granted the defendant's prematurely filed application to seal her conviction, because the defendant had not been finally discharged from her conviction, under R.C. 2953.32. (Appeals Rec. 10) Specifically, her admitted failure to pay all of the court-ordered restitution precluded finding that she had been finally discharged from her conviction, rendering her ineligible to seal this conviction. The State also submitted that the trial court erred when it modified the restitution order at the hearing on the application to seal the conviction.

On March 5, 2013, the court of appeals issued a decision affirming the trial court's decision to grant the application. In overruling the State's assigned error, the appellate court incorrectly applied an abuse of discretion standard of review. *State v. Aguirre*, 10th Dist. Franklin No. 12AP-415, 2013-Ohio-768, ¶12. The appellate court stated that the issue it was deciding was whether a defendant who had completed community control but still owed restitution could expunge her conviction. *Id.* at ¶¶11, 19. The court stated that "the trial court interpreted the community control provision as it now exists to place victims and private parties into a state judgment collection agency if they need or choose this remedy" and that denying the defendant's request to seal her conviction was "a continued punishment". *Id.* at ¶¶16, 17. Because insurance companies are entitled to "use the mandated collection procedures" and in light of the liberal construction afforded remedial statutes, the appellate court affirmed the trial court's decision. *Id.* at ¶¶18, 19.

On March 8, 2013, the State filed an application for en banc consideration and review by the en banc court along with a motion to certify a conflict. (Appeals Rec. 23) By opinion rendered on May 2, 2013, and journalized on May 7, 2013, the court of appeals certified a conflict to this Court based on a conflict between its decision and the Eighth District Court of Appeals' decision in *State v. McKenney*, 8th Dist. Cuyahoga No. 79033, 2001 WL 587493 (May 31, 2001). By decision rendered on May 16, 2013, two judges of the court of appeals dismissed the State's en banc application as moot. (Appeals Rec. 30)

The State then filed a discretionary appeal (No. 13-877) and certified-conflict appeal (No. 13-870). On September 4, 2013, this Court accepted jurisdiction over the first proposition of law raised in the discretionary appeal regarding a defendant's eligibility to seal a criminal conviction when she had not completed all of the conditions of the sentence and received a final discharge.

This Court also recognized that a conflict existed and allowed the certified-conflict appeal to proceed.

ARGUMENT

Proposition of Law No. One: A defendant/applicant who still owes restitution has not been finally discharged and is not eligible to seal her conviction, under R.C. 2953.32(A)(1).

Certified Conflict Question: Whether an offender's record of conviction may be sealed when the offender still owes court-ordered restitution to a third-party insurance company.

An offender may not seal a record of conviction when she still owes court-ordered restitution, because she has not been finally discharged and complied with the statutory waiting period, as required under R.C. 2953.32(A)(1). Accordingly, the lower courts erred when it permitted the defendant/applicant to seal her conviction for theft in light of her admission that she had failed to pay all of the court-ordered restitution which she had agreed to pay.

A.

At the outset, the appellate court applied an incorrect standard of review in the instant case, when it affirmed the trial court's decision. The appellate court reviewed the lower court's decision under an abuse-of-discretion standard. *Aguirre*, 2013-Ohio-768, ¶12. This was incorrect, because the issue in this case was whether the defendant was eligible to apply to seal her conviction, which is a question of law and reviewed de novo. *State v. Ushery*, 1st Dist. Hamilton No. C-120515, 2013-Ohio-2509, ¶6. "'When a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate." *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, ¶7 (citations omitted). "'Expungment should be granted only when all requirements for eligibility are met.'" *State v. Williams*, 10th Dist. Franklin No. 10AP-166, 2010-Ohio-4520, ¶6, quoting *State v. Simon*, 87 Ohio St.3d 531, 721 N.E.2d 1041 (2000).

Whether an offender meets the requirements for eligibility under R.C. 2953.32 is an issue of law for a reviewing court to decide de novo. *See Williams*, at ¶¶6-7; *see also State v. Lovelace*, 2012-Ohio-3797, 975 N.E.2d 567 (1st Dist. 2012) (court lacks authority to grant application to seal conviction of unqualified applicant); *Ushery*, 2013-Ohio-2509, ¶6.

> To be eligible, an applicant must be a 'first offender' as defined in R.C. 2953.31(A). Moreover the offense must be subject to expungement and not excluded by R.C. 2953.36. Additionally, the application must not be filed until the time set by R.C. 2953.32(A)(1) has expired. Unless the application meets all of these requirements, the trial court lacks jurisdiction to grant an expungement. *State v. Reed*, 10th Dist. Franklin No. 05AP-335, 2005-Ohio-6251, ¶8.

In the court of appeals, the defendant erroneously claimed that an abuse-of-discretion standard of review applied, relying on *State v. Wilson*, 10th Dist. Franklin No. 06AP-1060, 2007-Ohio-1811, ¶6. (Appeals Rec. 17, p. 2) In *Wilson*, the appellate court stated:

> Generally, this court reviews a trial court's disposition of an application for sealing of record for an abuse of discretion. *State v. Hilbert* (2001), 145 Ohio App.3d 824, 827. An abuse of discretion is more than an error of law or judgment; it implies that the attitude of the trial court was "unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. *However, where questions of law are in dispute, an appellate court reviews the trial court's determination de novo. State v. Derugen* (1996), 110 Ohio App.3d 408, 410, discretionary appeal not allowed, 77 Ohio St.3d 1419. *Wilson*, 2007-Ohio-1811, ¶6 (emphasis added).

Under *Wilson*, the correct standard of review in this case was de novo review, because the issue in this case was whether the defendant was eligible, under R.C. 2953.32(A)(1), not whether the application should have been granted to an eligible offender, under R.C. 2953.32(C). *See State v. Blank*, 10th Dist. Franklin No. 04AP-341, 2005-Ohio-2642, ¶¶9-10, 21-22 (after determining eligibility, trial court has discretion to determine rehabilitation and public interest). Because a defendant's eligibility to seal a conviction is a legal question, it is reviewed de novo. *See id.*

Here, the question was whether the defendant had received a final discharge and complied with the statutory waiting period, rendering her eligible to apply to seal this criminal

conviction under R.C. 2953.32(A)(1). Because resolution of this issue presents a legal question, it is reviewed de novo, and the court of appeals' conclusion to the contrary is incorrect.

B.

"Expungement is an act of grace created by the state, and so is a privilege, not a right." *State v. Simon*, 87 Ohio St.3d 531, 533, 721 N.E.2d 1041 (2000) (internal quotation marks omitted). "[T]he government possesses a substantial interest in ensuring that expungement is granted only to those who are eligible." *State v. Hamilton*, 75 Ohio St.3d 636, 640, 665 N.E.2d 669 (1996). Consequently, "[e]xpungement should be granted only when all requirements for eligibility are met." *Simon*, 87 Ohio St.3d at 533, citing *Hamilton*, 75 Ohio St.3d at 640. The expungement procedure set forth in R.C. 2953.31 et seq. creates a post-conviction remedy that is civil in nature. *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, ¶19.

The procedure set forth in R.C. 2953.32(B) requires that, "[u]pon the filing of an application, the court shall set a date for a hearing and shall notify the prosecutor for the case of the hearing on the application." The court's probation department must make inquires and written reports concerning the application. The prosecutor *may*, but is not required to, file an objection prior to the hearing date. R.C. 2953.32(B) (emphasis added). "Ultimately, it is the responsibility of the trial court to determine whether an applicant is eligible to file for expungement of the record of a conviction." *State v. Reed*, 2005-Ohio-6251, ¶14.

An applicant's eligibility to seal the record of a criminal conviction is governed by R.C. 2953.31, 2953.32 and 2953.36. The applicant must be an eligible offender, as defined in R.C. 2953.31(A), must have no pending criminal proceedings, and must have complied with the statutory waiting period. R.C. 2953.32(A) and (C). Additionally, the conviction to be sealed must not fall within any category in R.C. 2953.36.

Even when an applicant is eligible to seal the record of a conviction, R.C. 2953.32(B) requires a hearing to determine whether the applicant has been rehabilitated to the satisfaction of the court and whether the applicant's interest in sealing the record is outweighed by the State's interest in maintaining the record. *See Simon*, 87 Ohio St.3d 531. The hearing is not adversarial. Rather, the hearing "provides the court with the opportunity to review matters of record and to make largely subjective determinations regarding whether the applicant is rehabilitated and whether the government's interest in maintaining the record outweighs the applicant's interest in having the record sealed." *State v. Hamilton*, 75 Ohio St.3d at 640. During the hearing, the court should review the record and gather relevant information from the applicant, the prosecutor, as well as through independent court investigation through probation officials. *Id.*

The burden is on the applicant, as movant, to show all statutory requirements have been met and to establish a particularized need to have the records sealed, *see State v. Brown*, 10th Dist. Franklin No. 07AP-255, 2007-Ohio-5016, ¶4, and the defendant's application is insufficient to meet this burden. *State v. Evans*, 10th Dist. Franklin No. 13AP-158, 2013-Ohio-3891, ¶11 (citations omitted).

C.

Under R.C. 2953.32(A)(1), an applicant may apply to have a conviction sealed only *after* "the expiration of three years after the offender's final discharge if convicted of a felony." A final discharge includes showing that restitution has been paid-in-full. *State v. Wainwright*, 75 Ohio App.3d 793, 600 N.E.2d 834 (8th Dist. 1991); *State v. McKenney*, 2001 WL 587493, *2 (no final discharge under R.C. 2953.32 until defendant served sentence imposed, including payment of restitution); *State v. Wallace,* 8th Dist. Cuyahoga No. 79669, 2001 WL 1557523, *1 (Dec. 6, 2001) (no final discharge for purposes of R.C. 2953.32(A)(1) until all fines or restitution

have been paid); *State v. Wainwright*, 8th Dist. Cuyahoga No. 60491, 1991 WL 64303 (April 25, 1991) (no final discharge until restitution paid, notwithstanding expiration of period of probation); *State v. Braun*, 8th Dist. Cuyahoga No. 46082, 1983 WL 5542, *1 (July 7, 1983) (no final discharge from misdemeanor conviction under R.C. 2953.32 until sentence, including payment of fine, completed for one year); *In re White,* 165 Ohio App.3d 288, 2006-Ohio-233, ¶7, 846 N.E.2d 93 (10th Dist.) (offender not finally discharged under R.C. 2953.32(A)(1) if still owes restitution); *State v. Jordan*, 10th Dist. Franklin No. 07AP-584, 2007-Ohio-6383 (same); *In re Hopson*, 10th Dist. Franklin No. 12AP-67, 2012-Ohio-4509, ¶5 (same). Indeed, the Tenth District Court of Appeals recently stated that a "[f]inal discharge under the statute does not occur until restitution has been satisfied." *State v. Black*, 10th Dist. Franklin No. 12AP-375, 2012-Ohio-6029, ¶6. *See also State v. Hoover,* 10th Dist. Franklin Nos. 12AP-818, 12AP-826, 2013-Ohio-3337, ¶7 (same). When an applicant has not made full restitution before filing an application to seal the record of a conviction, she has not received a final discharge under the statute and is not eligible to have the criminal record sealed. *Black,* 2012-Ohio-6029, ¶7; *Hoover*, 2013-Ohio-3337, ¶7.

The failure to pursue collection of restitution does not forgive payment of the restitution order with regard to sealing. "Whether the state chooses to collect the debt or not, until such time as the restitution order is paid in full, applicant cannot be considered to have completed the terms of her sentence, and hence cannot be considered 'finally discharged' for the purposes of having the record of her conviction sealed." *State v. Pettis*, 133 Ohio App.3d 618, 622, 729 N.E.2d 449 (8th Dist. 1999). "R.C. 2953.32(A) precludes a final discharge from conviction until defendant's [misdemeanor] sentence, including the payment of any fine imposed has been completed for one year. The intent of the statute is clear; a final discharge from conviction

means a release from all obligations imposed and not just a release from confinement." *Braun*, 1983 WL 5542, *1. *See also State v. Wagner*, 12th Dist. Clermont No. CA93-01-003, 1993 WL 192915 (June 7, 1993) (when sentence reversed on appeal, final discharge under R.C. 2953.32 occurs upon resentencing). Accordingly, a defendant/applicant is not finally discharged until all of the sentencing conditions imposed by the court are fulfilled and the waiting period met. *Braun*, 1983 WL 5542, *1.

In this case, when the defendant/applicant filed her application, she had not been finally discharged from her conviction, because she still owed court-ordered restitution. *See, e.g., White,* 165 Ohio App.3d 288, 290, ¶7; *Wainwright*, 75 Ohio App.3d at 795; *Hoover,* 2013-Ohio-3337, ¶7. Because she had not completed all of the conditions of her sentence and complied with the applicable waiting period, she had not obtained a final discharge from her conviction under R.C. 2953.32, *Wainwright*, 75 Ohio App.3d at 795, citing *Braun*, 1983 WL 5542, and she was therefore not eligible to seal the record of her conviction. The trial court therefore erred when it modified her sentence and granted her application to seal this conviction.

Also, the defendant could not properly challenge the propriety of the restitution order in the proceedings on her application to seal her conviction, because expungement is a collateral civil proceeding. *State v. Bissantz*, 30 Ohio St.3d 120, 507 N.E.2d 1117 (1987). As a result, the trial court could not modify the restitution order at the hearing on the defendant's application to seal. *State v. Sheridan*, 8th Dist. Cuyahoga Nos. 74220, 74241, 1998 WL 741917, *1-2 (Oct. 22, 1998) (trial court erred in vacating restitution order *nunc pro tunc*, modifying sentence at hearing on expungement application). "[A]n application to seal a record of conviction is a separate remedy, completely apart from the criminal action, and is sought after the criminal proceedings have concluded." *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172.

"[T]here is a serious question regarding whether the trial court has the authority to modify the restitution order" at a hearing conducted on a defendant's application to seal a conviction. *Black*, 2012-Ohio-6029, ¶7, n.1. Any challenge to the propriety of the court-ordered restitution was not properly raised in this collateral proceeding. This is particularly true here because the defendant had agreed to the restitution order imposed by the trial court, she never filed an appeal from the sentencing decision and the restitution was validly imposed. Modifying the judgment of conviction in this collateral proceeding was erroneous.

In the appellate court, the defendant claimed that her discharge from probation constituted a final discharge under R.C. 2953.32(A)(1) (Appeals Rec. 17, p. 6), but this claim lacked merit both as a matter of fact and as a matter of law. Here the defendant admitted that she had not paid all of the court-ordered restitution (Tr. 3, 4), which she had agreed to pay as part of her plea bargain. At the hearing on her application to seal, she stated that after she was "off probation" and sent paperwork that her probation was discharged, she continued to make payments to the probation office. (Tr. 3) The trial court also stated that she had a responsibility to take care of the obligation. (Tr. 6)

It is well established that a defendant's discharge from probation does not constitute a final discharge under R.C. 2953.32(A)(1), because a final discharge under R.C. 2953.32(A)(1) requires that the defendant complete all of the conditions of the sentence imposed. In *Wainwright*, 1991 WL 64303, the court of appeals found that the defendant had not received a final discharge under R.C. 2953.32(A)(1) when her probation period had expired but she had not paid all of the court-ordered restitution. "'[T]he intent of the statute is clear; a final discharge from conviction means a release from all obligations imposed and not just a release from confinement.'" *Id.* at *2, quoting *Braun*, 1983 WL 5542. *See also City of Willowick v.*

Langford, 15 Ohio App.3d 33, 472 N.E.2d 387 (11th Dist. 1984) (no final discharge under R.C. 2953.32 where defendant successfully completed probation and paid fine but failed to serve 12-day jail sentence); *Wallace*, 2001 WL 1557523, *1 (reversing trial court's decision to grant application to seal conviction where defendant was discharged without paying restitution as contrary to precedent stating no final discharge until all fines and restitution paid); *McKenney*, 2001 WL 587493 (no final discharge under R.C. 2953.32 where probation period ended without payment of restitution). "Probation is a sentencing condition, similar to a fine or restitution. An applicant is not entitled to seal his conviction records until all of the sentencing conditions imposed by the court are fulfilled. * * * In the case *sub judice* the sentencing conditions were probation and restitution; the restitution had not been fulfilled." *Wainwright*, 75 Ohio App.3d at 795 (citation omitted). Thus, Wainwright's conviction could not be sealed. *Id.* at 794-795. Accordingly, the defendant's unsupported claim that her discharge from probation constituted a final discharge under R.C. 2953.32(A)(1) lacked merit. Because the trial court erred when it modified the defendant's sentence and granted her application to seal, the appellate court should have reversed the trial court's decision.

D.

The Tenth District compounded the trial court's error by engaging in an analysis regarding the availability of other possible civil remedies and the restitution recipient's status as an insurance company. The court of appeals relied upon the fact that the trial court originally ordered the defendant to pay restitution to insurers as somehow dispositive of the issue before the court regarding whether the defendant had obtained a final discharge for purposes of R.C. 2953.32(A). As a result, the appellate court determined that the certified conflict was limited to the issue of final discharge when the defendant is ordered to pay restitution to a third-party

insurance company. The appellate court's reliance upon the identity of the recipients of the outstanding restitution as dispositive of the issue regarding a defendant's eligibility to seal a conviction was misplaced for several reasons.

First, the identity of the recipients of the court-ordered restitution is irrelevant to resolving the question before the court, which was whether the defendant/applicant has obtained a final discharge from her conviction under R.C. 2953.32(A)(1). The trial court imposed the jointly recommended sentence and the defendant did not appeal. Nearly ten years after her conviction, she filed the instant application to seal her conviction. At the hearing on her application, she admitted that she did not complete *all* of the sentencing conditions imposed. (T. 3, 4) The appellate court's reliance upon the fact that the trial court originally ordered the defendant to pay restitution to insurance companies is a non sequitur to the issue of whether the defendant had failed to complete all of the conditions of her sentence. Whether the defendant had failed to fulfill all of the conditions of the sentence imposed and received a final discharge from her conviction under R.C. 2953.32 was definitively established by her admission that she had not paid all of the court-ordered restitution. (T. 3, 4) *See Wainwright*, 75 Ohio App.3d at 795, citing *Braun*, 1983 WL 5542; *Hoover*, 2013-Ohio-3337, ¶7. The appellate court's reliance upon the identity of the recipients of the properly imposed court-ordered restitution as dispositive of the issue in this case cannot withstand scrutiny.

Additionally, the appellate court's analysis that an insurer can utilize other potential civil remedies to recover from an injury resulting from the defendant's unlawful conduct is flawed. An insurer (or other injured entity) will be unable to access any official records sealed pursuant to R.C. 2953.32 et seq., to pursue possible civil remedies, making proof of a valid claim likely impossible. And here the trial court modified a validly imposed restitution order nearly ten years

after it had been journalized. The appellate court's reliance upon an insurer's ability to pursue other possible remedies against a criminal defendant after a conviction has been sealed almost ten years after she committed the offense lacks merit.

Also requiring an injured entity to pursue possible civil remedies against a criminal defendant contravenes the purposes underlying community control. When a trial court orders a defendant to serve a period of community control instead of a prison term, the court may impose any conditions upon the defendant that it deems appropriate, provided those conditions are not overbroad and they "reasonably relate to the goals of community control: rehabilitation, administering justice, and ensuring good behavior." *State v. Stewart*, 10th Dist. Franklin No. 04AP-761, 2005-Ohio-987, ¶7; *State v. Conway*, 10th Dist. Franklin No. 03AP-585, 2004-Ohio-1222, ¶¶34-35. "'Clearly, a trial court in pursuit of justice could seek restitution for the victim of criminal activity.'" *State v. Donnelly*, 109 Ohio App.3d 604, 607, 672 N.E.2d 1034 (9th Dist. 1996). And the defendant has the option of complying with the terms of her community control or serving a term of incarceration. *Id.* at 608. "Restitution is an integral part of an offender's sentence, not only as punishment, but for rehabilitation as well." *McKenney*, 2001 WL 587493, at *2.

> The criminal justice system is not operated primarily for the benefit of the victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment for the benefit of the victim, the context in which it is imposed undermines that conclusion. * * * Unlike an obligation which arises out of contractual or statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose. *Id.*, quoting *Kelly v. Robinson*, 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986) (ellipse in original).

A valid restitution order therefore serves both punitive and rehabilitative interests. Here the trial court's decision to modify the validly imposed restitution order, then order the conviction sealed

years after the offense, and the appellate court's affirmance of that decision based on non-existent civil remedies, must be rejected.

Furthermore, permitting a court to vacate a valid final judgment years later in a collateral proceeding disserves the orderly administration of justice, which contemplates litigants who properly and timely present claims and defenses. Instead of requiring that a litigant object to and appeal from a trial court's valid final judgment, the lower court's decision authorizes a litigant to file a collateral action years later and obtain a modification of a court's valid prior judgment. The appellate court's decision also creates law that takes away any incentive for a criminal defendant to pay full restitution to those harmed by her criminal conduct. *Pettis*, 133 Ohio App.3d at 621. Instead, a defendant can enter a plea bargain, with no intention of ever fulfilling the terms of that agreement, *id.*, and then years later in a collateral proceeding seal all of the official records related to the conviction. The lower court's decision disserves these important interests.

In sum, the appellate court's analysis relying on the identity of the recipients of the court-ordered restitution as somehow dispositive to determining whether the defendant had received a final discharge under R.C. 2953.32(A)(1) is flawed and cannot withstand scrutiny. In this case, because the defendant admittedly failed to complete all of the conditions of her sentence, including payment of all of the court-ordered restitution, she was ineligible to seal her conviction, regardless of the identity of the recipients of the restitution.

E.

The defendant agreed to pay restitution to insurers as part of her plea bargain, and she admitted that she still owed restitution at the hearing on her application to seal her conviction. When, as here, the applicant admits that she has not paid all of the court-ordered restitution, that

failure to fulfill all of the conditions of the sentence imposed by the court renders her ineligible to seal her criminal conviction, under R.C. 2953.32(A)(1). *See Wainwright*, 75 Ohio App.3d at 795, citing *Braun*, 1983 WL 5542; *Hoover*, 2013-Ohio-3337, ¶7.

The appellate court's decision contravened its own precedent, and conflicted with a long line of cases from the Eighth Appellate District, holding that a defendant cannot be considered to have been finally discharged from a criminal conviction until she completes all of the conditions of the sentence imposed. *See Wainwright*, 75 Ohio App.3d 793; *Wallace,* 2001 WL 1557523, *1; *Wainwright*, 1991 WL 64303; *Braun*, 1983 WL 5542, *1; *Pettis*, 133 Ohio App.3d at 622; *see also White,* 165 Ohio App.3d 288, ¶7; *Jordan*, 2007-Ohio-6383; *Hopson*, 2012-Ohio-4509, ¶5; *Black*, 2012-Ohio-6029, ¶6; *Hoover,* 2013-Ohio-3337, ¶7. These cases, which interpret "final discharge" in R.C. 2953.32(A)(1), to require that the defendant complete all of the conditions of the sentence imposed, not just a jail or prison term, and specifically require payment of all of the court-ordered fines and restitution, and compliance with the statutory waiting period before seeking to seal a criminal conviction, are persuasive.

Finally, subsequent to the decision in this case, the Tenth District Court of Appeals reiterated its rule that an applicant under R.C. 2953.32(A) must pay all of the court-ordered restitution before sealing a conviction. *Hoover*, 2013-Ohio-3337, at ¶7. In *Hoover*, the Tenth District stated: "this court and others have repeatedly held that final discharge under * * * [R.C. 2953.32] does not occur until court-ordered restitution has been satisfied." *Hoover*, at ¶7. The panel decision in this case constituted a significant break with the court's own precedent, conflicted with the established analyses in the Eighth Appellate District, was unpersuasive, and must be rejected.

F.

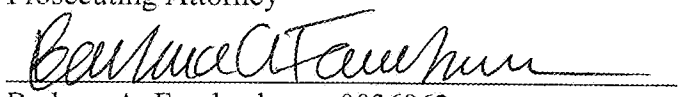
In the case at bar, the defendant/applicant filed an application to seal her conviction before she had fulfilled all of the conditions of the sentence imposed, as she admitted at the hearing held on her application to seal. (Tr. 3, 4) As a result, she has not received a final discharge under R.C. 2953.32(A)(1), and she was ineligible to seal this criminal conviction. The trial court erred when it granted her application, as did the appellate court when it affirmed the trial court's decision, and that decision must be reversed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the judgment of the Tenth District Court of Appeals affirming the trial court's decision to grant the defendant's application to seal her criminal conviction, when she had not been finally discharged from her conviction and was therefore ineligible to seal the record of this case.[1]

Respectfully submitted,

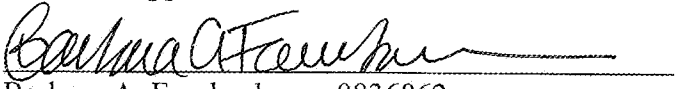
RON O'BRIEN 0017245
Prosecuting Attorney



Barbara A. Farnbacher 0036862
Assistant Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
614-525-3555
bafarnba@franklincountyohio.gov

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed via regular U.S. Mail, postage pre-paid, this day, October ___, 2013, to E. KELLY MIHOCIK, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215; Counsel for Defendant-Appellant.



Barbara A. Farnbacher 0036862
Assistant Prosecuting Attorney

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[1] If this Court *sua sponte* contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills*, 38 Ohio St.2d 298, 301 & n. 3, 313 N.E.2d 400 (1974); *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170, 522 N.E.2d 524 (1988).

ORIGINAL

IN THE SUPREME COURT OF OHIO
2013

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

SHARLENE AGUIRRE,

Defendant-Appellee

Case No. 13-0876

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

Court of Appeals Case No. 12AP-415

NOTICE OF APPEAL OF PLAINTIFF-APPELLANT STATE OF OHIO

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street, 13th Floor
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Phone: 614-525-3555
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And

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COUNSEL FOR PLAINTIFF-APPELLANT

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And

JASON A. MACKE
(Counsel of Record)
Assistant State Public Defender

COUNSEL FOR DEFENDANT-APPELLEE

FILED
MAY 31 2013
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF PLAINTIFF-APPELLANT STATE OF OHIO

Plaintiff-appellant, the State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in *State v. Aguirre*, 10th Dist. No. 12AP-415, on March 5, 2013, and from the journal entry entered in the same case on May 16, 2013.

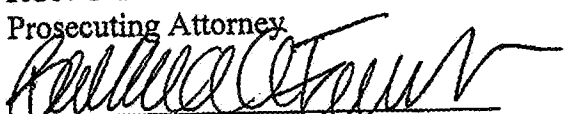
This appeal is being timely filed pursuant to S.Ct.Prac.R. 7.01(A)(6). The State filed a timely application seeking en banc consideration in the Tenth District on March 8, 2013, and the Tenth District dismissed that application by decision and journal entry filed on May 16, 2013.

Because new errors arose in the May 16, 2013 decision and journal entry, the State's appeal here is also timely in relation to that decision and journal entry as well.

The State of Ohio invokes the jurisdiction of the Supreme Court on the grounds that the case presents substantial constitutional questions, presents questions of public or great general interest, and involves a felony and warrants the granting of leave to appeal.

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney

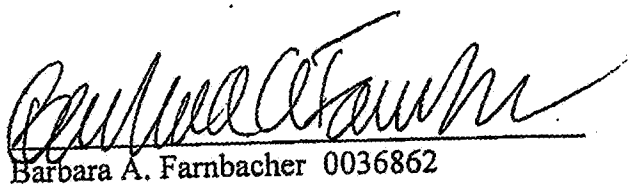


BARBARA A. FARNBACHER 0036862
(Counsel of Record)
Assistant Prosecuting Attorney

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that pursuant to S.Ct.Prac.R. 3.11(A)(1)(a) and (A)(3), a copy of the foregoing was sent by regular U.S. Mail this day, May 31, 2013, to JASON A. MACKE, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215; Counsel for Defendant-Appellee.



Barbara A. Farnbacher 0036862
Assistant Prosecuting Attorney

ORIGINAL

IN THE SUPREME COURT OF OHIO
2013

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

SHARLENE AGUIRRE,

Defendant-Appellee

Case No. 13-0870

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

Court of Appeals Case No. 12AP-415

NOTICE OF CERTIFIED CONFLICT OF PLAINTIFF-APPELLANT STATE OF OHIO

RON O'BRIEN 0017245
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and
JASON MACKE 0069870
Assistant State Public Defender
(Counsel of Record)
Counsel for Defendant-Appellee

FILED
MAY 31 2013
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF CERTIFIED CONFLICT OF PLAINTIFF-APPELLANT STATE OF OHIO

Plaintiff-appellant, the State of Ohio, hereby gives notice that, on March 8, 2012, the Franklin County Court of Appeals, Tenth Appellate District, certified a conflict in *State v. Aguirre*, 12AP-415 on the following question of law pursuant to its authority under Section 3(B)(4), Article IV, of the Ohio Constitution:

> Whether an offender's record of conviction may be sealed when the offender still owes court-ordered restitution to a third-party insurance company.

Attached are the Tenth District journal entry certifying the conflict and the Tenth District decisions. Also attached is the conflicting case in *State v. McKenney*, 8th Dist. Nos. 79033, 2001 WL 581493 (May 31, 2001), in which the Eighth District Court of Appeals, unlike the Tenth District, determined that the defendant's agreement to pay a civil judgment to the victim's insurer was not full payment of the court-ordered restitution to constitute a final discharge under R.C. 2953.32.

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney

BARBARA A. FARNBACHER
0036862
(Counsel of Record)
Assistant Prosecuting Attorney

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that, pursuant to S.Ct.Prac.R. 3.11(A)(1)(a) and (A)(3), a copy of the foregoing was sent by regular U.S. Mail on this 31st day of May, 2013, to JASON MACKE, Assistant State Public Defender, at Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215; Counsel for Defendant-Appellee.

BARBARA A. FARNBACHER
Assistant Prosecuting Attorney

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	No. 12AP-415
v.	:	(C.P.C. No. 12EP-01-26)
Sharlene K. Aguirre,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on March 5, 2013, appellant's assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs assessed against appellant.

McCORMAC, J., BRYANT and TYACK, JJ.

John W. McCormac

Judge John W. McCormac, retired, of the Tenth Appellate District, assigned to active duty under authority of Ohio Constitution, Article IV, Section 6(C).

Franklin County Ohio Clerk of Appeals

[Cite as *State v. Aguirre*, 2013-Ohio-768.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	No. 12AP-415
v.	:	(C.P.C. No. 12EP-01-26)
Sharlene K. Aguirre,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 5, 2013

Ron O'Brien, Prosecuting Attorney, *Barbara A. Farnbacher* and *Branden J. Albaugh*, for appellant.

Timothy Young, Ohio Public Defender, and *Jason A. Macke*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

McCORMAC, J.

{¶ 1} The State of Ohio, plaintiff-appellant, is appealing the judgment of the Franklin County Court of Common Pleas sealing the record of defendant's conviction in criminal case No. 01CR-7203 (commonly known as expungement of her record).

{¶ 2} Appellant's assignment of error and issue presented for review reads as follows:

> THE TRIAL COURT ERRED WHEN IT GRANTED THE DEFENDANT'S PREMATURELY FILED APPLICATION FOR EXPUNGEMENT.

{¶ 3} On May 22, 2002, defendant-appellee entered a guilty plea to a single count of theft, a fourth-degree felony. The parties jointly recommended a term of community control. On July 9, 2002, the trial court imposed a five-year period of community control including, among other conditions, the provision that appellee pay $2,000 in restitution

to Economy Enterprises and the balance of $32,562.47 restitution to two third-party insurance companies through the probation department and to pay court costs.

{¶ 4} On January 12, 2012, appellee filed an application for expungement of the conviction. On February 17, 2012, appellant filed an objection to the application. The basis of the appellant's objection was that appellee had not fully satisfied her obligation to pay restitution and court costs and that her application was therefore premature. Appellee acknowledged that she had not completed payment of the court-ordered restitution to the two third-party insurance companies.

{¶ 5} The trial court held a hearing and found that appellee had completed payment of all of the conditions of the community control order, but that she had not completed payment of the third-party ordered restitution, finding that the balance remaining for that restitution was $14,152 out of the original amount of $32,562.47. The trial court found that appellee's application for expungement should be granted since more than three years had passed since appellee had completed all of the provisions of community control. The trial court found that the third-party payments ordered to the insurance companies should not be a bar to expungement since the court had completely released appellee from any obligations under the community control provisions other than completion of the two third-party restitution orders made to liability insurance companies.

{¶ 6} Appellant argues that all obligations must be taken care of before there is an eligibility to expunge the record, and that, even though appellee had completed all obligations owed to the state, she still owed money to the third-party insurers who obtained their claims by subrogation. Appellant argues that appellee must pay off the balance of the $32,561 although appellee had commendably paid about 60 percent or $18,000 of that amount, despite that probably, at least in part, due to her criminal record and inability to secure employment that would be as remunerative. To summarize, appellant asserts that appellee must pay off the balance, wait at least three more years without having problems before filing her motion for expungement.

{¶ 7} The sentencing court, as part of the community control sanctions, ordered a $2,000 payment to Economy Enterprises (which was quickly paid, for direct expenses). The court ordered the balance of the $32,562.47 to be paid as soon as possible to two third-third party insurance companies.

{¶ 8} The court considered appellant's present and future ability to pay a fine and/or financial sanctions and ordered that appellee pay only court costs.

{¶ 9} Community control sanctions provide that "[f]ulfilling the conditions of a community control sanction does not relieve the offender of a duty to make restitution under section 2929.28 of the Revised Code." R.C. 2929.25(E).

{¶ 10} When we examine R.C. 2929.28, it refers to misdemeanors, but obviously is intended to apply to anyone, including appellee, who has completed community control with restitution obligations still owed. The amounts due have been determined, the entity entitled to restitution obtains a judgment and is entitled to the entire range of options for execution of the judgment. The entity seeking restitution may be, among others, the victim or private provider. Some public assistance is offered at a fee for these who may need it (at the cost of the judgment debtor).

{¶ 11} R.C. 2929.28 is silent about expungement. When the appellee has performed all conditions of community control and is released from all that control but still owes restitution, may expungement apply? That is the issue we must decide.

{¶ 12} The statutory provisions governing conviction expungement are remedial in nature and must be liberally construed to promote those purposes. *State v. Boddie*, 170 Ohio App.3d 590, 2007-Ohio-626 (8th Dist). As stated in *State v. Wilson*, 10th Dist. No. 06AP-1060, 2007-Ohio-811, an appellate court reviews a trial court's decision on an application to seal a record for an abuse of discretion.

{¶ 13} The standard to be applied in an expungement case is: "[t]he court must weigh the interest of the public's need to know as against the individual's interest in having the record sealed, and must liberally construe the statute so as to promote the legislative purpose of allowing expungements." *State v. Hilbert*, 145 Ohio App.3d 824, 827 (8th Dist.2001). It is noted that the original expungement provisions have been amended to provide more liberal relief for expungement: i.e., changing the original position of only one misdemeanor, with certain exceptions, to two misdemeanors, and allowing expungement of certain types of felony convictions, one of which is the fourth-degree felony conviction of appellee.

{¶ 14} The trial court informed appellee at the time he granted the application for expungement that she remained in debt to these companies and that collection by them would be a matter between her and the insurance companies and that it was something

that should be paid. Essentially, the same remedies the creditor now has for collection of unpaid restitution was available under R.C. 2929.28.

{¶ 15} Appellant argues that the trial court, in essence, amended the community control provision concerning restitution by excepting a restitution provision from the requirement that appellee comply with all provisions of the community control doctrine.

{¶ 16} We do not believe that to be the case. We believe that the trial court interpreted the community control provision as it now exists to place victims and private parties into a state judgment collection agency if they need or choose this remedy. They can also use private remedies if they choose.

{¶ 17} We believe that denying expungement is a continued punishment, with no benefit to a victim or private payer who is owed restitution. The entity who is owed has the best of both worlds. The judgment debtor can be more likely to obtain a better job and more likely to have the means to pay the restitution, and the state will provide collection help.

{¶ 18} The Supreme Court of Ohio, in *Barker v. State*, 62 Ohio St.2d 35 (1980), determined R.C. 2953.31 et seq. expungement statutes to be remedial in nature and subject to liberal construction as mandated by R.C. 1.11. The liberal trend has increased since that time, apparently in a manner that best serves the needs of society. We would also note that insurance companies are also entitled to use the mandated collection procedures.

{¶ 19} Appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and TYACK, JJ., concur.

McCORMAC, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Ohio Constitution, Article IV, Section 6(C).

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-415 (12EP01-26)
Sharlene Aguirre,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on May 2, 2013, it is the order of this court that the motion to certify the judgment of this court as being in conflict with the judgments of other Courts of Appeals is sustained, and, pursuant to the Ohio Constitution, Article IV, Section 3(B)(4), the record of this case is certified to the Supreme Court of Ohio for review and final determination upon the following issue in conflict:

> Whether an offender's record of conviction may be sealed when the offender still owes court-ordered restitution to a third-party insurance company.

McCORMAC, BRYANT and TYACK, JJ.

John W. McCormac

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of Ohio Constitution, Article IV, Section 6(C).

Franklin County Ohio Court of Appeals Clerk of Courts- 2013 May 31 ...

Court Disposition

Case Number: 12AP000415

Case Style: STATE OF OHIO -VS- SHARLENE K AGUIRRE

Motion Tie Off Information:

1. Motion CMS Document Id: 12AP0004152013-03-0899980000
   Document Title: 03-08-2013-MOTION
   Disposition: 3201

Franklin County Ohio Court of Appeals Clerk of Court

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-415 (12EP01-26)
Sharlene Aguirre,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

MEMORANDUM DECISION

Rendered on May 2, 2013

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellant.

Timothy Young, Ohio Public Defender, and *Jason A. Macke*, for appellee.

ON MOTION TO CERTIFY A CONFLICT

McCORMAC, J.

{¶ 1} Pursuant to App.R. 25, plaintiff-appellant, State of Ohio, moves this court for an order certifying a conflict between our decision in *State v. Aguirre*, 10th Dist. No. 12AP-415, 2013-Ohio-768, and the decisions rendered by the Eighth District Court of Appeals in *State v. Wainwright*, 8th Dist. No. 60491 (Apr. 25, 1991), *State v. Wainwright*, 75 Ohio App.3d 793 (8th Dist.1991), *State v. Pettis*, 133 Ohio App.3d 618, 622 (8th Dist.1999), and *State v. McKenney*, 8th Dist. No. 79033 (May 31, 2001). Defendant-appellee, Sharlene Aguirre, has filed a response to the state's motion.

{¶ 2} Ohio Constitution, Article IV, Section 3(B)(4), governs motions seeking an order to certify a conflict and provides as follows:

> Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with the judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

{¶ 3} In *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596 (1993), the Supreme Court of Ohio held that "[p]ursuant to Section 3(B)(4), Article IV of the Ohio Constitution and S.Ct.Prac.R. III, there must be an actual conflict between appellate judicial districts on a rule of law before certification of a case to the Supreme Court for review and final determination is proper." *Id.* at paragraph one of the syllabus. The court articulated the standard to be applied by an appellate court in deciding a motion to certify:

> [A]t least three conditions must be met before and during the certification of a case to this court pursuant to Section 3(B)(4), Article IV of the Ohio Constitution. First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be "upon the same question." Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

(Emphasis sic.) *Id.* at 596.

{¶ 4} The background of this case is fully set forth in this court's decision, and we will not reiterate it here. This court held that the trial court did not abuse its discretion in granting appellee's application to seal the record of her conviction, despite her admitted failure to pay all of the court-ordered restitution to the third-party insurers. In so holding, we specifically noted that insurance companies are entitled to use mandated collection procedures. *Aguirre* at ¶ 18. We thus implicitly distinguished this case from others where court-ordered restitution was owed to entities other than insurance companies.

{¶ 5} Our holding in *Aguirre* thus conflicts with only the *McKenney* case from the Eighth District, as that is the only case that expressly involved court-ordered restitution to

Franklin County Ohio Court of Appeals

an insurance company. As the other cases cited by the state appear to involve court-ordered restitution to entities other than third-party insurance companies, they are factually distinguishable and thus were not decided "upon the same question."

{¶ 6} Because the judgment rendered in *Aguirre* is in conflict with the judgment of the Eighth District Court of Appeals in *McKenney*, we hereby grant the state's motion and certify the record of this case to the Supreme Court of Ohio, pursuant to Ohio Constitution, Article IV, Section 3(B)(4), for review and final determination upon the following issue:

> Whether an offender's record of conviction may be sealed when the offender still owes court-ordered restitution to a third-party insurance company.

Motion to certify a conflict granted.

BRYANT and TYACK, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of Ohio Constitution, Article IV, Section 6(C).

Franklin County Ohio Court of Appeals Clerk of Courts

COMM

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

2012 APR 12 PM 1:58
CLERK OF COURTS

STATE OF OHIO, Plaintiff	:	SEALING CASE NO. **12EP-26**
	:	
		CRIMINAL CASE NO **01CR-7203**
Vs.	:	JUDGE **REECE**
Sharlene Aguirre	:	
Defendant,		

ENTRY SEALING RECORD OF CONVICTION PURSUANT TO R.C. 2953.32

In accordance with Section 2953.32, Ohio Revised Code, the Court finds that there are no criminal proceedings pending against the applicant, **Sharlene Aguirre**, and that the sealing of the record of the applicant's CONVICTION, in Criminal Case number **01CR-7203** is consistent with the public interest.

It is therefore **ORDERED** that all official records pertaining to the applicant's conviction in Case number **01CR-7203**, be sealed and, except as provided in R.C. 2953.32(F), all index references be deleted. This order does not exempt from use records and work product in this case in any civil litigation arising out of, or related to, the facts in this case, and such records and work product will be available for inspection and use for such purposes if necessary.

With the exceptions noted above, it is **FURTHER ORDERED** that no officer or employee of the State, or political subdivision thereof, except as authorized by Division (D), (E) and (G) of Section 2953.32 of the Ohio Revised Code, shall release, disseminate, or make available for any purpose involving employment, bonding, licensing, or education to any person or to any department agency, or other instrumentality of the State, or any political subdivision thereof, any information or other data concerning the: arrest, complaint, indictment, dismissal, nolle, motion hearings, trial, adjudication or correctional supervision associated with Criminal Case **01CR-7203**.

For purposes of identification, the following information is provided for the arresting agency and any custodians of arrest and adjudication data:

APPLICANT'S FULL NAME: **Sharlene Aguirre**
ADDRESS: **451 Darbyhurst Rd.**
CITY: **Columbus** STATE: **OH** ZIP: **43228**
SEX: **Female** RACE: **White** DATE OF BIRTH: **07/01/1956** SSN:
CHARGE: **Theft(F4)**
CONVICTED OF: **Theft(F4)**
DATE OF ARREST: **12/2001**
ARRESTING AGENCY: **CPD**
MUNICIPAL COURT:
OHIO B.C.I. NUMBER:
F.B.I.:

THE STATE OF OHIO, Franklin County, SS } I, MARYELLEN O'SHAUGHNESSY, Clerk OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY,
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL NOW ON FILE IN MY OFFICE
WITNESS MY HAND AND SEAL OF SAID COUNTY THIS 13 DAY OF APR A.D. 2012
MARYELLEN O'SHAUGHNESSY, Clerk
By ..... Deputy

JUDGE

5 Apr 12

RON O'BRIEN, Franklin County Prosecutor

2953.32 Sealing of conviction record or bail forfeiture record.

(A)

(1) Except as provided in section 2953.61 of the Revised Code, an eligible offender may apply to the sentencing court if convicted in this state, or to a court of common pleas if convicted in another state or in a federal court, for the sealing of the conviction record. Application may be made at the expiration of three years after the offender's final discharge if convicted of a felony, or at the expiration of one year after the offender's final discharge if convicted of a misdemeanor.

(2) Any person who has been arrested for any misdemeanor offense and who has effected a bail forfeiture may apply to the court in which the misdemeanor criminal case was pending when bail was forfeited for the sealing of the record of the case. Except as provided in section 2953.61 of the Revised Code, the application may be filed at any time after the expiration of one year from the date on which the bail forfeiture was entered upon the minutes of the court or the journal, whichever entry occurs first.

(B) Upon the filing of an application under this section, the court shall set a date for a hearing and shall notify the prosecutor for the case of the hearing on the application. The prosecutor may object to the granting of the application by filing an objection with the court prior to the date set for the hearing. The prosecutor shall specify in the objection the reasons for believing a denial of the application is justified. The court shall direct its regular probation officer, a state probation officer, or the department of probation of the county in which the applicant resides to make inquiries and written reports as the court requires concerning the applicant. If the applicant was convicted of or pleaded guilty to a violation of division (A)(2) or (B) of section 2919.21 of the Revised Code, the probation officer or county department of probation that the court directed to make inquiries concerning the applicant shall contact the child support enforcement agency enforcing the applicant's obligations under the child support order to inquire about the offender's compliance with the child support order.

(C)

(1) The court shall do each of the following:

(a) Determine whether the applicant is an eligible offender or whether the forfeiture of bail was agreed to by the applicant and the prosecutor in the case. If the applicant applies as an eligible offender pursuant to division (A)(1) of this section and has two or three convictions that result from the same indictment, information, or complaint, from the same plea of guilty, or from the same official proceeding, and result from related criminal acts that were committed within a three-month period but do not result from the same act or from offenses committed at the same time, in making its determination under this division, the court initially shall determine whether it is not in the public interest for the two or three convictions to be counted as one conviction. If the court determines that it is not in the public interest for the two or three convictions to be counted as one conviction, the court shall determine that the applicant is not an eligible offender; if the court does not make that determination, the court shall determine that the offender is an eligible offender.

(b) Determine whether criminal proceedings are pending against the applicant;

(c) If the applicant is an eligible offender who applies pursuant to division (A)(1) of this section, determine whether the applicant has been rehabilitated to the satisfaction of the court;

(d) If the prosecutor has filed an objection in accordance with division (B) of this section, consider the reasons against granting the application specified by the prosecutor in the objection;

(e) Weigh the interests of the applicant in having the records pertaining to the applicant's conviction sealed against the legitimate needs, if any, of the government to maintain those records.

(2) If the court determines, after complying with division (C)(1) of this section, that the applicant is an eligible offender or the subject of a bail forfeiture, that no criminal proceeding is pending against the applicant, and that the interests of the applicant in having the records pertaining to the applicant's conviction or bail forfeiture sealed are not outweighed by any legitimate governmental needs to maintain those records, and that the rehabilitation of an applicant who is an eligible offender applying pursuant to division (A)(1) of this section has been attained to the satisfaction of the court, the court, except as provided in divisions (G) and (H) of this section, shall order all official records pertaining to the case sealed and, except as provided in division (F) of this section, all index references to the case deleted and, in the case of bail forfeitures, shall dismiss the charges in the case. The proceedings in the case shall be considered not to have occurred and the conviction or bail forfeiture of the person who is the subject of the proceedings shall be sealed, except that upon conviction of a subsequent offense, the sealed record of prior conviction or bail forfeiture may be considered by the court in determining the sentence or other appropriate disposition, including the relief provided for in sections 2953.31 to 2953.33 of the Revised Code.

(3) Upon the filing of an application under this section, the applicant, unless indigent, shall pay a fee of fifty dollars. The court shall pay thirty dollars of the fee into the state treasury. It shall pay twenty dollars of the fee into the county general revenue fund if the sealed conviction or bail forfeiture was pursuant to a state statute, or into the general revenue fund of the municipal corporation involved if the sealed conviction or bail forfeiture was pursuant to a municipal ordinance.

(D) Inspection of the sealed records included in the order may be made only by the following persons or for the following purposes:

(1) By a law enforcement officer or prosecutor, or the assistants of either, to determine whether the nature and character of the offense with which a person is to be charged would be affected by virtue of the person's previously having been convicted of a crime;

(2) By the parole or probation officer of the person who is the subject of the records, for the exclusive use of the officer in supervising the person while on parole or under a community control sanction or a post-release control sanction, and in making inquiries and written reports as requested by the court or adult parole authority;

(3) Upon application by the person who is the subject of the records, by the persons named in the application;

(4) By a law enforcement officer who was involved in the case, for use in the officer's defense of a civil action arising out of the officer's involvement in that case;

(5) By a prosecuting attorney or the prosecuting attorney's assistants, to determine a defendant's eligibility to enter a pre-trial diversion program established pursuant to section 2935.36 of the Revised Code;

(6) By any law enforcement agency or any authorized employee of a law enforcement agency or by the department of rehabilitation and correction as part of a background investigation of a person who

applies for employment with the agency as a law enforcement officer or with the department as a corrections officer;

(7) By any law enforcement agency or any authorized employee of a law enforcement agency, for the purposes set forth in, and in the manner provided in, section 2953.321 of the Revised Code;

(8) By the bureau of criminal identification and investigation or any authorized employee of the bureau for the purpose of providing information to a board or person pursuant to division (F) or (G) of section 109.57 of the Revised Code;

(9) By the bureau of criminal identification and investigation or any authorized employee of the bureau for the purpose of performing a criminal history records check on a person to whom a certificate as prescribed in section 109.77 of the Revised Code is to be awarded;

(10) By the bureau of criminal identification and investigation or any authorized employee of the bureau for the purpose of conducting a criminal records check of an individual pursuant to division (B) of section 109.572 of the Revised Code that was requested pursuant to any of the sections identified in division (B)(1) of that section;

(11) By the bureau of criminal identification and investigation, an authorized employee of the bureau, a sheriff, or an authorized employee of a sheriff in connection with a criminal records check described in section 311.41 of the Revised Code;

(12) By the attorney general or an authorized employee of the attorney general or a court for purposes of determining a person's classification pursuant to Chapter 2950. of the Revised Code.

When the nature and character of the offense with which a person is to be charged would be affected by the information, it may be used for the purpose of charging the person with an offense.

(E) In any criminal proceeding, proof of any otherwise admissible prior conviction may be introduced and proved, notwithstanding the fact that for any such prior conviction an order of sealing previously was issued pursuant to sections 2953.31 to 2953.36 of the Revised Code.

(F) The person or governmental agency, office, or department that maintains sealed records pertaining to convictions or bail forfeitures that have been sealed pursuant to this section may maintain a manual or computerized index to the sealed records. The index shall contain only the name of, and alphanumeric identifiers that relate to, the persons who are the subject of the sealed records, the word "sealed," and the name of the person, agency, office, or department that has custody of the sealed records, and shall not contain the name of the crime committed. The index shall be made available by the person who has custody of the sealed records only for the purposes set forth in divisions (C), (D), and (E) of this section.

(G) Notwithstanding any provision of this section or section 2953.33 of the Revised Code that requires otherwise, a board of education of a city, local, exempted village, or joint vocational school district that maintains records of an individual who has been permanently excluded under sections 3301.121 and 3313.662 of the Revised Code is permitted to maintain records regarding a conviction that was used as the basis for the individual's permanent exclusion, regardless of a court order to seal the record. An order issued under this section to seal the record of a conviction does not revoke the adjudication order of the superintendent of public instruction to permanently exclude the individual who is the subject of the sealing order. An order issued under this section to seal the record of a conviction of an individual may be presented to a district superintendent as evidence to support the contention that the

superintendent should recommend that the permanent exclusion of the individual who is the subject of the sealing order be revoked. Except as otherwise authorized by this division and sections 3301.121 and 3313.662 of the Revised Code, any school employee in possession of or having access to the sealed conviction records of an individual that were the basis of a permanent exclusion of the individual is subject to section 2953.35 of the Revised Code.

(H) For purposes of sections 2953.31 to 2953.36 of the Revised Code, DNA records collected in the DNA database and fingerprints filed for record by the superintendent of the bureau of criminal identification and investigation shall not be sealed unless the superintendent receives a certified copy of a final court order establishing that the offender's conviction has been overturned. For purposes of this section, a court order is not "final" if time remains for an appeal or application for discretionary review with respect to the order.

Amended by 129th General AssemblyFile No.131,SB 337, §1, eff. 9/28/2012.

Amended by 128th General AssemblyFile No.30,SB 77, §1, eff. 7/6/2010.

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Related Legislative Provision: *See 129th General AssemblyFile No.127,HB 487, §610.10.*