ORIGINAL

# IN THE SUPREME COURT OF OHIO
# 2014

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| STATE OF OHIO, | Case Nos. 2013-870<br>2013-876 |
| Plaintiff-Appellant, | On Appeal from the Franklin County Court of Appeals, Tenth Appellate District |
| -vs- | |
| SHARLENE AGUIRRE, | |
| Defendant-Appellee. | Court of Appeals<br>Case No. 12AP-415 |

## REPLY BRIEF OF PLAINTIFF-APPELLANT STATE OF OHIO


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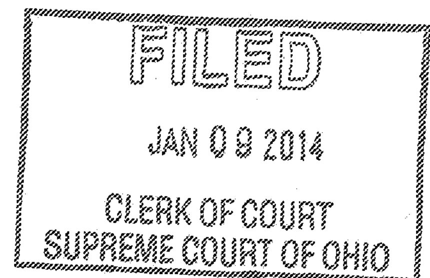

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## STATEMENT OF FACTS

The defendant makes certain assertions which require a brief response. First, the defendant erroneously relies upon and references the trial court's judgment entry terminating her probation in June 2007, but this entry was not part of the appellate record. App.R. 9(A) (the original papers, exhibits, transcript and certified copy of docket and journal entries shall constitute the record on appeal). Because the State appealed from the trial court's decision sealing the defendant's conviction in Franklin County Common Pleas case number 12EP-26, the trial court's judgment entry terminating the defendant's probation in her criminal case was not contained in the record on appeal. (*See* Trial Rec. 1-14; Appeals Rec. 6) Instead, the defendant appended that particular judgment entry to her brief filed in the appellate court. (Appeals Rec. 17) But merely appending an exhibit to a brief does not make it part of the appellate record. *State v. Thomas*, 10th Dist. Franklin No. 12AP-144, 2012-Ohio-4511. Accordingly, the defendant's continued reliance upon and citation to the June 2007 judgment entry terminating her probation is misplaced.

Also, the defendant relies on the trial court's entry sealing her record of conviction to support her claim that sealing the record was consistent with the public interest. At the hearing, however, the trial court granted the defendant's request to seal her conviction because the restitution had been ordered to insurance companies and because the defendant had paid a substantial portion of the restitution. (Tr. 6; Trial Rec. 10; Appeals Rec. 5) The public interest did not serve as an articulated basis for the trial court's decision at the hearing.

Third, the defendant claims that she made a good faith effort to pay the restitution, but there was nothing presented to the trial court establishing that the defendant made a good faith effort to pay the court-ordered restitution (*see* Tr. 2-6), which she had agreed to pay as part of her

plea bargain. (*See* Trial Rec. 6) Indeed her failure to comply with the terms of the jointly recommended sentence demonstrates a lack of good faith.

Similarly, her assertions regarding her indigency were not presented to the trial court, and, in fact, her application to seal her conviction provides that she is not indigent. (*See* Trial Rec. 2, 6) The defendant's arguments regarding indigency are simply a red herring, because the defendant agreed to pay the restitution as part of her plea bargain to avoid having to serve a prison term. (*See* Appeals Rec. 6) Defendant's assertions regarding her alleged good faith effort to pay the court-ordered restitution and her indigency are not supported by the appellate record.

## 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.

Again, the defendant makes several claims requiring a response. For instance, the defendant repeatedly claims that "discharge" in the criminal context "refers to a defendant's release from jail, prison or supervision." But this assertion in this context lacks merit for several reasons. First, it ignores the long line of appellate decisions cited in the State's brief holding that "final discharge" in R.C. 2953.32 means a release from all of the obligations of the sentence imposed on the defendant, not simply a partial completion of one or some of the conditions of the sentence. *See* Brief, at pp. 6-10. Second, while the defendant cites R.C. 2935.31, 2947.16 and 2949.08 as authority for her position, she fails to cite any relevant, persuasive caselaw interpreting R.C. 2953.32 to support her claim. And, in fact, the appellate decisions interpreting R.C. 2953.32 hold to the contrary.

Additionally, there are numerous other contexts in which the legislature employed the term "discharge" in the criminal code which do not support the defendant's proposed construction of "final discharge" contained in R.C. 2953.32, including discharge of a duty, R.C. 2901.23 and 2901.24, discharge of a debt, R.C. 2905.21, discharge of a complainant, R.C. 2903.36, discharge of the defendant, R.C. 2937.05, 2945.15, 2945.38, 2945.40 2953.13, discharge of a surety, R.C. 2937.40, discharge of bail, *id.*, discharge of the jury, R.C. 2945.36, discharge of a firearm, R.C. 2923.16 and 2945.146, and discharge for delay. R.C. 2945.73. Notably, R.C. 2923.14(D) provides for a defendant's relief from disability, after an applicant has been "fully discharged *from* imprisonment, community control, post-release control, and parole, or, if the applicant is under indictment, has been released on bail or recognizance" and the applicant demonstrates, inter alia, that "[t]he applicant has led a law-abiding life *since discharge or release* * * * ." (emphasis added). Certainly, the legislature would not have used both "discharge" and "release" in R.C. 2923.14 if both terms had the same meaning, as the defendant claims here. "'[T]he General Assembly is not presumed to do a vain or useless thing[.] * * * [W]hen language is inserted in a statute it is inserted to accomplish some definite purpose.'" *State v. Wilson*, 77 Ohio St.3d 334, 336, 673 N.E.2d 1437 (1997) (quotation omitted); *see also Ford Motor Co. v. Ohio Bur. of Emp. Serv.*, 59 Ohio St.3d 188, 190, 571 N.E.2d 729 (1991) (presumption that every word in statute designed to have some effect). Accordingly, the defendant's unsupported claim that "final discharge" in R.C. 2953.32 means release from jail, prison or supervision lacks merit and should be rejected.

Second, the defendant claims that the State forfeited its claim that the defendant's termination from community control did not relieve her of her responsibility to pay restitution by failing to object to the termination order, but she cites no authority for her position. Also, as

noted, there was very little contained in the appellate record regarding the termination order. The appellate record contained only the defendant's assertion that she was off probation in June but continued to make payments (T. 3), as the entry improperly appended to the defendant's appellate brief (*see* Appeals Rec. 17), was not part of the appellate record. *Thomas*, 2012-Ohio-4511. Thus, the record does not demonstrate whether there was an objection to the termination entry or even any opportunity to object. Nonetheless, there was never any dispute that the defendant had not paid all of the court-ordered restitution. She admitted that she had not paid all of it. (T. 3) And the trial court found that she had not paid all of it. (*See* T. 5-6) Accordingly, the defendant's unsupported claim that there is some procedural bar to this Court's review of the issue of whether there was a "final discharge" under R.C. 2953.32 in this case, notwithstanding the defendant's failure to complete all of the conditions of the sentence, lacks merit.

In the appellate court and in this Court, the defendant claimed that she was finally discharged for purposes of R.C. 2953.32 when her probation was terminated, notwithstanding her admitted failure to pay the court-ordered restitution, but as explained in the State's Brief, this claim lacked merit both as a matter of fact and as a matter of law. Brief, at pp. 9-10. At the expungement hearing, the trial court did not find that the defendant had been finally discharged when her probation was terminated. Rather, the court found that the defendant's payment of a "substantial portion" of the restitution warranted granting her application. Indeed, neither the defendant nor the court thought that the defendant had completed payment of the court-ordered restitution when her probation was terminated. (T. 3, 6) Nonetheless, the trial court modified its prior order, effectively relieving the defendant of the criminal sanction by sealing the criminal record, stating:

> The Court at this time is going – I'm going to grant the expungement. They may appeal it and it may get thrown back at you. But I'm going to do it because it's

restitution being ordered to an insurance company and you paid a substantial portion of that.

> I'll go ahead and grant the expungement and we'll see what they do with it. But it could get kicked back, I'll let you know that. I'm not excusing you for not paying the rest of it because you need to talk –
>
> * * *
>
> -- hold on, let me finish, then you can talk, maybe. Your responsibility is to take care of the obligation. The reason I'm not relying on the insurance company is there in the event that you do something wrong, they're supposed to step in and do what they're supposed to do. Their recourse is to go against you and to try to obtain a judgment or what have you to recover, but that's what they're there for.
>
> And I'm not excusing your conduct by doing this, this is a principle matter here that saying that the insurance – I shouldn't be ordering restitution to the insurance company, that's the only thing I'm saying. (T. 5-6)

The defendant's "substantial" compliance with the conditions of her sentence did not constitute a "final discharge" under R.C. 2953.32, and her claim to the contrary must be rejected.

Finally, the defendant's claim that the trial court did not have authority to order the defendant to pay restitution to insurance companies is incorrect, and her discussion of R.C. 2929.18 is inapposite. Here the defendant agreed to pay restitution as part of her plea bargain, and the trial court imposed the jointly recommended sentence. (*See* Trial Rec. 6) The trial court ordered restitution as part of its broader community control powers. *See State v. Stewart*, 10th Dist. Franklin No. 04AP-761, 2005-Ohio-987, ¶¶7-10. 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*, 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." *State v. McKenney*, 8th Dist. Cuyahoga No. 79033, 2001 WL 587493 (May 31, 2001), at *2. The defendant's discussion of R.C. 2929.18 is inapposite, and her claim challenging the trial court's original restitution order, which she had agreed to, lacks merit.

Further, because expungement is a collateral civil proceeding, *State v. Bissantz*, 30 Ohio St.3d 120, 507 N.E.2d 1117 (1987), the trial court could not properly modify the restitution order at the expungement hearing. *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. And "[o]nce execution of a sentence commences, the trial court may not amend the sentence to [de]crease the punishment." *Sheridan*, 1998 WL 741987 at *2 (citations omitted). "[T]here is a serious question regarding whether the trial court has the authority to modify the restitution order" at an expungement hearing. *State v. Black*, 10th Dist. Franklin No. 12AP-375, 2012-Ohio-6029, ¶5, n.1. Accordingly, the trial court erred when it modified the defendant's sentence and granted her request to seal her conviction.

Here the appellate court erred when it affirmed the trial court's decision granting the defendant's application to seal her conviction despite her admission that she failed to complete all of the conditions of the sentence. The defendant had agreed to pay restitution to insurers as part of her plea bargain, and the trial court imposed the jointly recommended sentence, but the

defendant failed to complete all of the conditions of the sentence by paying all of the court-ordered restitution. The trial court erred when it granted her request to seal her conviction given her failure to pay all of the restitution and receive a final discharge, and the court of appeals erred when it affirmed that decision. The State respectfully requests that this Court reverse the court of appeals' decision.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the trial court below should be reversed.[1]

Respectfully submitted,

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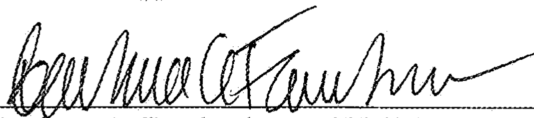
## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed via regular U.S. Mail, postage pre-paid, this day, January 9th, 2014, to Stephen P. Hardwick, 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).