

ORIGINAL

IN THE  
SUPREME COURT OF OHIO

<b>STATE OF OHIO</b>	:	NO. 2013-1010
Plaintiff-Appellee	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
<b>TERRELL VANZANDT (FKA TERRELL ASBERRY)</b>	:	Court of Appeals Case Number C-130079
Defendant-Appellant	:	

MERIT BRIEF OF PLAINTIFF-APPELLEE

Joseph T. Deters (0012084P)  
Prosecuting Attorney

Scott M. Heenan (0075734P)  
Assistant Prosecuting Attorney

230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
(513) 946-3227  
Fax No. (513) 946-3021

COUNSEL FOR PLAINTIFF-APPELLEE, STATE OF OHIO

CHRISTINE Y. JONES  
JOSH TOMPSON  
Attorneys at Law  
Hamilton County Public Defender's Office  
230 E. 9th St., Third Floor  
Cincinnati, Ohio 45202  
(513) 946-3712

FILED  
FEB 03 2014  
CLERK OF COURT  
SUPREME COURT OF OHIO

COUNSEL FOR DEFENDANT-APPELLANT, TERRELL VANZANDT (FKA TERRELL ASBERRY)

RECEIVED  
FEB 03 2014  
CLERK OF COURT  
SUPREME COURT OF OHIO

**Table of Contents**

	<b><u>Page</u></b>
Introduction.....	1
Statement of the Case and Facts .....	1
<u>State’s Proposition of Law</u> : Trial courts have discretion to unseal the records of a case that has been sealed under R.C. 2953.51, et seq. when there is a compelling reason to do so. The state’s need to use expunged records in a criminal prosecution is a compelling reason to unseal records. ....	3
Conclusion .....	7
Proof of Service .....	7
Appendix.....	A-1

**Table of Authorities**

**Page**

**Ohio Revised Code**

R.C. 2921.05 .....	6
R.C. 2953.32(E) .....	4
R.C. 2953.51, et seq. ....	3-5
R.C. 2953.54(A) .....	3

**Ohio Case Law**

<i>Bound v. Biscotti</i> , 76 Ohio Misc. 2d 6, 663 N.E.2d 1376 (M.C. 1995) .....	5
<i>In re Application to Seal Record of No Bill</i> , 131 Ohio App. 3d 399, 722 N.E.2d 602 (3rd Dist. 1999) .....	5
<i>Pepper Pike v. Doe</i> , 66 Ohio St. 2d 374, 421 N.E.2d 1301 (1981) .....	5
<i>State v. Boykin</i> , 9th Dist. Nos. 25752 & 25845, 2012-Ohio-1381 .....	5
<i>State v. Chiaverini</i> , 6th Dist. No. L-000-1305, 2001 Ohio App. LEXIS 1190 (Mar. 16, 2001) .....	5

## **Introduction**

Should a defendant be allowed to use the expungement statute to prevent a criminal prosecution? The trial and appellate courts have ruled it would be unjust to allow that to happen. Both have, therefore, allowed an expunged case to be unsealed for the sole purpose of the criminal prosecution.

This case began when Terrell Vanzandt was charged with a criminal offense. After he was acquitted of that crime, the records of his case were expunged. Mere days after the expungement, Vanzandt allegedly retaliated against the primary witness that testified against him, which led to him being charged with retaliation in Hamilton County. Amongst the things the state will need to prove in his new case is that the underlying case existed.

Because this case involves the expunged records of an acquittal, there is no statute that either allows or forbids a trial court from unsealing the records for use in a separate criminal proceeding. Without such a statute, since there was a compelling reason to do so, the trial court possessed judicial power to unseal the records.

This court should, therefore, affirm the lower courts and make two rulings: First, that trial courts have judicial power to unseal expunged records when there is a compelling reason to do so; and, second, that the state's need to use expunged records in a criminal prosecution is a compelling reason to unseal records.

## **Statement of the Case and Facts**

In the underlying case, Vanzandt was acquitted of a criminal offense. Shortly after that, he filed for and was granted an expungement. Within days of receiving that

expungement, Vanzandt retaliated against the primary witness in the underlying case. He has since been charged with retaliation.

Realizing that it would need to offer proof of the underlying case to prosecute him, the state moved to have the case unsealed. Vanzandt objected. The trial court, however, found that the state's motion was well taken. It unsealed Vanzandt's acquittal for the limited purpose of allowing its use in the retaliation prosecution. For all other purposes, the case remained sealed. Also, once the criminal prosecution ends, the matter will return to being fully sealed.

Vanzandt appealed that decision to the First District Court of Appeals, which affirmed. This court has since accepted jurisdiction over the matter.

**State's Proposition of Law: Trial courts have discretion to unseal the records of a case that has been sealed under R.C. 2953.51, et seq. when there is a compelling reason to do so. The state's need to use expunged records in a criminal prosecution is a compelling reason to unseal records.**

Vanzandt wants this court to turn the expungement statute into a shield not to protect his privacy, but to protect him from criminal prosecution. He wants this court to say that once an acquitted matter has been sealed that it is sealed forever. He wants too much.

The issue before this court is whether a trial court possesses the power to unseal records of an acquittal that have been sealed via R.C. 2953.51, et seq. Vanzandt wishes to have this court rule that, as a matter of law, a trial court may never unseal the records of an acquittal that have been sealed under R.C. 2953.51, et seq. The state, on the other hand, urges this court to make two rulings: first, that trial courts have discretion to unseal such records if there is a compelling reason to do so; and, second, that the state's need to use expunged records in a criminal prosecution is a compelling reason to unseal them.

### **How expungement of acquittals works**

Under R.C. 2953-51, et seq., a person who has been acquitted of a crime, like Vanzandt was, may immediately apply to have the records of the case sealed. Per R.C. 2953.54(A)(2), with very little exception, once the records have been sealed, they must be treated "as if they did not exist and had never existed."

Revised Code 2953.54(A)(3) provides an exception to that rule. It allows the sealed records to be used for the investigation of another crime. While R.C. 2953.54(A)(3) does allow disclosure of "the name of the person who is the subject of the records or reports for . . . the prosecution of the person for committing the offense," it does not allow disclosure of anything else.

**There is no statute that allows the use of the records of sealed criminal case that ended in an acquittal in a subsequent criminal prosecution**

There is no statute that allows or prohibits what was done in this case. If this had been a case where a conviction had been sealed, then this situation would have been addressed by R.C. 2953.32(E). Under that section, “[i]n 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.”

But the sealed records in this case involve an acquittal, which falls under R.C. 2953.51 to 2953.56. Nothing in those sections mirrors R.C. 2953.32(E). The closest statute is R.C. 2953.54(A)(3), which permits a law enforcement agency that possesses records or reports that have been sealed after an acquittal “to use the records or reports in the investigation of another offense.” That statute only allows the disclosure of “the name of the person who is subject of the records or reports for . . . the prosecution of the person committing the offense.”

The problem here is that the state needs more than just a name to prove retaliation. It needs to present proof that the person retaliated against was a witness in the sealed case. The state does not just need Vanzandt’s name, it needs Vanzandt’s case to prove that there was a criminal case, there was a witness, and that the witness was the victim of the retaliation.

**Trial courts possess judicial power to unseal records of cases that have been sealed under R.C. 2953.51 et seq. when there is a compelling reason to do so**

Because there is no statute that directly addresses this issue, this court should follow the First District and rule that trial courts have discretion to unseal records of cases sealed under R.C. 2953.51, et seq., when there is a compelling reason to do so.

Such a ruling would not be unprecedented. Before R.C. 2953.51, et seq., were enacted, this court ruled that trial courts had the judicial power to seal records even if there is no statute that specifically authorizes such an act: “[E]ven absent statutory authorization,” trial courts retain the authority “to order expungement where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter.” *Pepper Pike v. Doe*, 66 Ohio St. 2d 374, 376, 421 N.E.2d 1301 (1981) and paragraph two of the syllabus.

Since then, courts across Ohio have continued to rule that trial courts possess the judicial power to seal records in unusual and exceptional cases. See *State v. Boykin*, 9<sup>th</sup> Dist. Nos. 25752 & 25845, 2012-Ohio-1381 (pardons); *In re Application to Seal Record of No Bill*, 131 Ohio App. 3d 399, 722 N.E.2d 602 (3<sup>rd</sup> Dist. 1999) (children services records); *Bound v. Biscotti*, 76 Ohio Misc. 2d 6, 663 N.E.2d 1376 (M.C. 1995) (arrest records where no charges have been filed). That judicial authority to seal cases has been careful to limited to times where it has been necessary to “prevent injustice.” *State v. Chiaverini*, 6<sup>th</sup> Dist. No. L-000-1305, 2001 Ohio App. LEXIS 1190, \*4 (Mar. 16, 2001).

Other than the First District in the decision below, no court has been confronted with whether records could likewise be unsealed to prevent injustice. Just as there is judicial authority to seal records in unusual and exceptional cases, there should also be a judicial authority to unseal records in unusual and exceptional cases. This is such a case.

**The state's need to use expunged records in a criminal prosecution is a compelling reason to unseal records**

Vanzandt has been charged with retaliation. Under R.C. 2921.05, to successfully prosecute him, the state must show that he retaliated against a witness who was involved in a criminal action because the witness dutifully testified against him. To prove that offense, the state will have to prove there was a case for the witness to testify in. It will have to prove that the person retaliated against testified in that case. It cannot present that proof when the records of the underlying case are sealed.

Recognizing this, the trial court granted the state's motion to unseal and permitted the State to use those records in the retaliation case. It otherwise ordered that the case remained sealed and also ordered that the records would be completely resealed after the retaliation case had concluded. This exercise of discretion fairly balanced the needs of the state against the interests of Vanzandt. It preserved the privacy of the records pertaining to the acquittal while allowing the State to properly prosecute Vanzandt for retaliation.

Unsealing the records of this case allows the state to present the proof necessary to prosecute Vanzandt for retaliation. It allows justice to prevail over a quasi-civil act of grace created by the legislature. It is a compelling reason – if not the most compelling reason – to allow records to be unsealed.

**Conclusion**

The state needs to use the records of an acquittal that has been sealed under R.C. 2953.51, et seq., to prove a charge of retaliation. Vanzandt argues that he should be granted immunity from prosecution because those records have been expunged.

The expungement statutes are designed to be a shield that protects a person's privacy; they should not be turned into a shield that protects a person from prosecution. This court should, therefore, make two rulings: First, that trial courts have discretion to unseal the records of a dismissed case that have been sealed under R.C. 2953.51, et seq. when there is a compelling reason to do so; and, second, that the state's need to use expunged records in a criminal prosecution is a compelling reason to unseal records.

Respectfully,

Joseph T. Deters, 0012084P  
Prosecuting Attorney

---

Scott M. Heenan, 0075734P  
Assistant Prosecuting Attorney  
230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
Phone: 946-3227  
Attorneys for Plaintiff-Appellee,  
State of Ohio

**Proof of Service**

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Christine Y. Jones & Josh Thompson, Hamilton County Public Defender's Office, 230 E. 9th St., Third Floor, Cincinnati, Ohio 45202, counsel of record, this 20th day of January, 2014.

---

Scott M. Heenan, 0075734P  
Assistant Prosecuting Attorney

Appendix

R.C. 2921.05 ..... A-2

All other sections of the Revised Code are included in the Appellant's index.

**R.C. 2921.05 - Retaliation**

(A) No person, purposely and by force or by unlawful threat of harm to any person or property, shall retaliate against a public servant, a party official, or an attorney or witness who was involved in a civil or criminal action or proceeding because the public servant, party official, attorney, or witness discharged the duties of the public servant, party official, attorney, or witness.

(B) No person, purposely and by force or by unlawful threat of harm to any person or property, shall retaliate against the victim of a crime because the victim filed or prosecuted criminal charges.

(C) Whoever violates this section is guilty of retaliation, a felony of the third degree.