

ORIGINAL

CASE NO. 2014-0990

IN THE SUPREME COURT OF OHIO

On Appeal from the
Eighth District Court of Appeals
Cuyahoga County, Ohio
Case No. 100522

STATE OF OHIO

Plaintiff-Appellant

vs.

V.M.D.

Defendant-Appellee

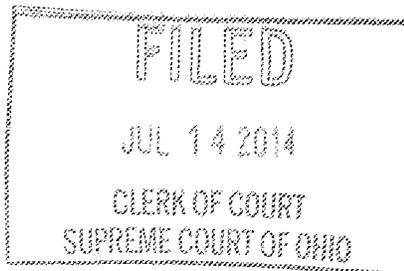
DEFENDANT-APPELLEE'S MEMORANDUM IN RESPONSE

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TABLE OF CONTENTS

INTRODUCTION 1

EXPLANATION OF WHY THIS CASE DOES NOT PRESENT AS A CASE
OF PUBLIC OR GREAT GENERAL INTEREST 1

STATEMENT OF CASE AND FACTS 1

LAW AND ARGUMENT 3

RESPONSE TO STATE’S PROPOSITION OF LAW NO. 1:

A COURT DOES NOT ERR IN CONSTRUING OHIO’S REMEDIAL
EXPUNGEMENT STATUTES IN ORDER TO PROMOTE THEIR PURPOSE.

CONCLUSION 7

CERTIFICATE OF SERVICE 7

TABLE OF AUTHORITIES

CASES

<i>Barker v. State</i> , 62 Ohio St.2d 35, 42, 16 O.O.3d 22, 26, 402 N.E.2d 550, 555 (1980)	4
<i>Estelle v. Gamble</i> (1978), 429 U.S. 97	6
<i>Ross v. Moffitt</i> , (1974), 417 U.S. 600, 616-617	6
<i>State ex rel. Gains v. Rossi</i> , 86 Ohio St.3d 620, 622, 1999-Ohio-213	4
<i>State v. Hamilton</i> , 75 Ohio St.3d 636, 665 N.E.2d 669, 1996-Ohio-440	4
<i>State v. J.K.</i> , 8 th Dist. Cuyahoga No. 96574, 2011-Ohio5675, <i>appeal not accepted</i> , 131 Ohio St.3d 1513, 2012-Ohio-1710	4
<i>State v. McGlothan</i> , 138 Ohio St.3d 146, 2014-Ohio-85	6
<i>State v. Petrou</i> , 13 Ohio App.3d 456, 469 N.E.2d 974 (1984)	4
<i>State v. Simon</i> , 87 Ohio St.3d 531, 721 N.E.2d 1041, 2000-Ohio474	4

INTRODUCTION

This matter involves the expungement of a record and includes a straightforward analysis of Ohio law. It is well settled that the expungement statute at hand, R.C. 2953.36, is remedial in nature. The Court of Appeal's application of the law in this case was correct and, as such, the instant appeal does not warrant review by this Court.

EXPLANATION OF WHY THIS CASE DOES NOT PRESENT AS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

In a unanimous decision, the Eighth District Court of Appeals has justly allowed the sealing of a record. *State of Ohio v. V.M.D.*, 8th Dist. No. 100522, 2014-Ohio-1844. An application to expunge was made in the Cuyahoga County Court of Common Pleas more than a decade after a guilty plea was entered and after all imposed penalties and sanctions had been fulfilled by the applicant. Upon appeal, the appellate court applied the appropriate standard of review and the correct law and concluded that expungement of the record is appropriate. This case does not involve a substantial constitutional question nor is this a case of great public or general interest. Accordingly, this Supreme Court need not extend jurisdiction.

STATEMENT OF FACTS AND FACTS

On or about March 27, 2000 Defendant-Appellee V.D. was indicted with charges of aggravated robbery with firearm specifications in violation of R.C. 2911.02(A)(1) and complicity in the commission of intimidation in violation of R.C. 2921.04.

A plea agreement was reached and on July 26, 2000, the State moved to amend the first count to robbery in violation of R.C. 2911.02(A)(3) and also moved to delete the firearm specifications and to add the "attempt" statute, R.C. 2923.02—rendering the charge to a felony of the fourth degree. Furthermore the State moved to amend the

complicity in intimidation charge by adding the “attempt”—also rendering that charge a felony of the fourth degree. In seeking these changes, the State noted “It is the State’s understanding that it was not a real gun, your Honor” and “this defendant was not in possession of that weapon.” (7/26/2000 Tr. 7.)

The requested amendments were permitted by the trial court and V.D.’s guilty pleas were accepted. With respect to the robbery count, V.D. admitted guilt to: “under 2911.02(A)(3) and 2923.02, did, in attempting or committing a theft offense, or in fleeing immediately after, attempted to use or threatened the immediate use of force against another person.” Id. at 12-15.

On August 29, 2000 V.D. was sentenced to 18 months of community control sanctions with conditions, court costs and a supervision fee. All requirements were successfully fulfilled by V.D. and the supervision was terminated several months early.

Twelve and half years later V.D. sought to expunge the record of convictions. The State opposed the motion and a hearing was held in the trial court. V.D. asserted that the robbery plea was a legal fiction: “attempt to attempt to commit a robbery.” (9/19/2013 Tr. 3.) In reply the State argued that the V.D. pleaded guilty to robbery and that the statute could not be amended to an attempted attempt. Id. at 5-6.

The trial court agreed with V.D.’s plea strategy and agreed that the attempt statute was properly added to the robbery charge. The court stated:

It clearly can be. There is nothing prohibited. It is done all the time. And the reason why I don’t even think it is a legal fiction is—remember, this is in the alternative. There’s three ways to commit a robbery: you can attempt the theft offense, you can actually commit it; or you can flee immediately thereafter.

Id. V.D. indicated that the attempt statute was added at the time of the plea in order to change the character of the crime and make the conviction eligible for expungement. Nevertheless, the trial court denied the application. Although the trial court felt V.D. “met all the other requirements” (Id. at 11), under the expungement mechanism the court found that it could not grant relief because the crime of robbery includes the concept of attempt without having to add the attempt statute at a plea hearing. Id. at 10.

V.D. sought appellate review of the decision and won reversal. The court of appeals properly determined:

The expungement statute is ‘designed to recognize individuals with a single criminal infraction may be rehabilitated.’ Here, V.D. committed the offense as a young age, when he has just graduated from high school. He fully complied with the terms of his community control sanctions and was discharged early. He has been gainfully employed as a full-time employee for a subcontractor at a chemical company, and apparently has been law-abiding for the last 12 years. V.D. certainly appears to be the sort of person the expungement process was designed to benefit. The trial court itself acknowledged that there was no other reason to deny V.D.’s expungement request other than its strict interpretation of the robbery statute. Construing the expungement statute liberally, as precedent guides us, we will continue to advance the legislative purpose of allowing expungements. We conclude a sealing of V.D.’s record should be allowed and, therefore reverse the trial court’s judgment.

State v. V.M.D., 8th Dist. No. 100522, 2014-Ohio-1844, ¶ 16, (internal citations omitted).

LAW AND ARGUMENT

ARGUMENT AGAINST THE STATE’S PROPOSITION OF LAW NO. 1:

A COURT DOES NOT ERR IN CONSTRUING OHIO’S REMEDIAL
EXPUNGEMENT STATUTES IN ORDER TO PROMOTE THEIR PURPOSE.

No error occurred in the sealing of the conviction.

Ohio's expungement statutes were enacted for the purpose of allowing certain rehabilitated individuals to have their records of conviction sealed such that all of their rights are fully restored. *State v. Petrou*, 13 Ohio App.3d 456, 469 N.E.2d 974 (1984). This Supreme Court has long held that Ohio's expungement statutes are remedial in nature and that courts should liberally construe their provisions in order to promote the purposes of the expungement laws. "[T]he remedial expungement provisions of R.C. 2953.32 and 2953.33 must be liberally construed to promote their purposes." *State ex rel. Gains v. Rossi*, 86 Ohio St.3d 620, 622, 1999-Ohio-213 (1999), citing R.C. 1.11; *Barker v. State*, 62 Ohio St.2d 35, 42, 16 O.O.3d 22, 26, 402 N.E.2d 550, 555 (1980). This Supreme Court has also held that "[w]hen considering whether an applicant is ineligible to have a conviction sealed under R.C. 2953.36 *** a trial judge must examine the entire record ***." *State v. Simon*, 87 Ohio St.3d 531, 721 N.E.2d 1041, 2000-Ohio474, quoting *State v. Hamilton*, 75 Ohio St.3d 636, 665 N.E.2d 669, 1996-Ohio-440.

Here, the court of appeals resolved this matter in favor of V.D. through its analysis and application of Ohio's expungement laws. Citing its own prior decision in *State v. J.K.*, 8th Dist. Cuyahoga No. 96574, 2011-Ohio5675, *appeal not accepted*, 131 Ohio St.3d 1513, 2012-Ohio-1710, the court of appeals considered whether V.D. committed a "disqualifying offense of violence." The court found:

Although we recognize an 'offense of violence' includes an attempt of the offense under the definition, here, however, V.D. was convicted of an offense that itself embeds the notion of attempt – he was convicted of *either committing or attempting to commit* a theft while either using or threaten to use force, which the State admitted involved possibly a fake gun *not* in his possession. When the underlying offense itself contemplates attempt, and the defendant was charged with an *attempt* of that offense, the element of violence is simply too removed for the defendant to be automatically precluded from expungement. Under the

particular circumstances of this case, we cannot say the record 'clearly revealed' V.D. committed a disqualifying 'offense of violence.'

Id. at ¶ 15. Noting that the expungement laws are remedial in nature and that definitional statutes must be construed strictly against the state and liberally in favor of the accused, the court of appeals held that V.D.'s record must be sealed. Id. at ¶ 14.

V.D. pleaded guilty to a legal fiction that qualified for expungement.

The crime to which V.D. pleaded guilty was a legal fiction and was eligible for expungement. The fiction created here was that V.D. *attempted* to attempt a robbery. At the time of the plea, the assumption was made (and was assented to by the parties and the trial court) that V.D. could, in fact, *attempt* to attempt a robbery. When such an assumption is made in order to enable a court to equitably resolve a matter before it that assumption is referred to as a legal fiction.

At the time of the plea the State agreed that the amendment of the robbery count down to the attempted version was a necessary and equitable fiction because the weapon used to secure the indicted charge was not a real gun and was not even in V.D.'s possession during the crime. (7/26/2000 Tr. 7.)

While certain offenses of violence are not eligible for expungement, the court of appeals correctly determined that that legal fiction to which V.D. admitted guilt was expugnable. The court properly reasoned:

V.D. committed the offense as a young age, when he has just graduated from high school. He fully complied with the terms of his community control sanctions and was discharged early. He has been gainfully employed as a full-time employee for a subcontractor at a chemical company, and apparently has been law-abiding for the last 12 years. V.D. certainly appears to be the sort of person the expungement process was designed to benefit. * * * Construing the expungement statute liberally, as precedent guides us, we will continue to advance the legislative purpose

of allowing expungements. We conclude a sealing of V.D.'s record should be allowed and, therefore reverse the trial court's judgment.

State v. V.M.D., 8th Dist. No. 100522, 2014-Ohio-1844, ¶ 16. Since V.D.s' conviction truly was eligible for expungement, the appellate court's decision in the underlying appeal does not call for this Court's review.

At best, the State's appeal in this case amounts to a request for error correction.

While no error is conceded here, the most that the State's appeal amounts to is a request for this Supreme Court to correct what the State perceives to be an error. The State disagrees with the appellate court's conclusion that, based on the complete record of this case, the offense to which V.D. pleaded guilty may be expunged. However, this Court should not engage in what essentially is "error correction" as sought by the Cuyahoga County prosecutor.

As a general proposition, this Supreme Court will not engage in mere error correction. Courts "seldom take cases merely to reaffirm settled law." *Estelle v. Gamble*, (1978), 429 U.S. 97, 115 (dissent), see also *State v. McGlothan*, 138 Ohio St.3d 146, 2014-Ohio-85 (dissent).

Here, the State argues that this case is of great general interest because it believes there is an interest in retaining access to criminal records. However, the appellate court balanced that argument against the public and individual purposes and benefits in expunging criminal records—a procedure that has been available to rehabilitated criminal defendants for decades in this State.

Like the United States Supreme Court, this Supreme Court of Ohio should not grant jurisdiction over every alleged error made in a court of appeals. *Ross v. Moffitt*, (1974), 417 U.S. 600, 616-617.

CONCLUSION

This case simply does not present a need for this Honorable Supreme Court to interpret or write any new law. No constitutional question is involved and no matter of great public or general interest exists. For these reasons, Defendant-Appellee V.M.D. requests that this Court decline jurisdiction and dismiss this appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing Memorandum in Response was sent by regular United States Mail on this 11 day of July, 2014, to the following counsel for Plaintiff-Appellant, the State of Ohio:

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