Supreme Court of Ohio Clerk of Court - Filed February 04, 2015 - Case No. 2014-0990

IN THE SUPREME COURT OF OHIO
2014

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

V.M.D.,

Defendant-Appellee.

Case No. 2014-990

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth Appellate District,

Court of Appeals
Case No. 100522

REPLY BRIEF OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTOR RON O'BRIEN IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO

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ARGUMENT

PROPOSITION OF LAW

OHIO COURTS ARE PROHIBITED FROM GRANTING MOTIONS TO EXPUNGE AND SEAL RECORDS OF CRIMINAL CONVICTIONS THAT ARE OFFENSES OF VIOLENCE.

Defendant-Appellee and amicus in support of defendant-appellee ask this Court to uphold the appellate court's decision based on a court's "inherent power" to grant a defendant's application to seal a conviction. Notably, defendant's amicus does not claim that the defendant was statutorily eligible to seal his conviction for attempted robbery. The defendant's claim, that a court has "inherent power" to grant an application to seal a conviction of an "offense of violence," is untenable, because the statutory scheme enacted by the General Assembly affirmatively bars sealing the record of a conviction of an "offense of violence," under R.C. 2953.32 and 2953.36(C). Accordingly, the defendant's claim, that this Court should disregard the legislature's clear statutory prohibition, contained in R.C. 2953.36(C), and find inherent power to seal a conviction record when to do so is clearly, unambiguously and expressly prohibited by statute, is meritless.

Defendant and defendant's amicus rely on this Court's decisions in *Pepper Pike v. Doe*, 66 Ohio St.2d 374, 421 N.E.2d 1303 (1981), and *Schussheim v. Schussheim*, 137 Ohio St.3d 133, 2013-Ohio-4529, as authority for their position that a court has inherent power to seal a record of a conviction of an "offense of violence." But those cases are inapposite, as there was no statutory authority governing sealing in *Pepper Pike* (sealing record of dismissal before enactment of R.C. 2953.52) and in *Schussheim* (sealing record of CPO). Here, there is statutory authority governing sealing the record of a conviction of an "offense of violence," and the statute expressly prohibits sealing the record of a conviction of an "offense of violence." R.C.

2953.36(C). Relying on *Pepper Pike* and *Schussheim* to permit sealing a conviction record when sealing has been expressly prohibited by statute is a direct affront to the General Assembly and a violation of separation of powers.

This Court recognized this critical distinction in *State v. Boykin*, 138 Ohio St.3d 97, 2013-Ohio-4582, where this Court rejected the defendant's claim that she was entitled to seal her multiple convictions following receipt of a gubernatorial pardon. The Court stated:

> [W]hile a pardon releases the offender from further punishment prescribed for the offense and removes certain disabilities consequent on the conviction, there is nothing in the Constitution, the Revised Code or our case law that requires sealing of a criminal record based on a pardon. It is within the purview of the General Assembly to provide that automatic entitlement to sealing of a criminal record is a consequence of a pardon. But in the absence of such a provision, we hold that a gubernatorial pardon does not automatically entitle the recipient to have the record of the pardoned conviction sealed.

Id. at ¶36. Where there exists a clear statutory prohibition against sealing the record of a criminal conviction, as in R.C. 2953.36(C), *Pepper Pike* and *Schussheim* do not apply.

Indeed, this Court recently rejected the same argument defendant's amicus presents, in *State v. Radcliff*, __ Ohio St.3d __, 2015-Ohio-235, ¶18 ("Instead of the statutory authority to seal his record, Radcliff relies on what he asserts is the judiciary's inherent authority to seal records.") In *Radcliff*, the defendant sought to seal convictions that had been pardoned by the governor, when there was no statutory authority to seal the defendant's multiple pardoned convictions. In rejecting the defendant's claim that the court had inherent authority to seal his convictions, this Court held "a court lacks the authority to seal a criminal record of a pardoned offender who does not meet applicable statutory requirements for sealing the record." *Id*. at ¶37. This Court began its analysis by noting that "[i]n the usual course, the legislature determines the eligibility for sealing a record." *Id*. at ¶16. And in refusing to extend the analysis contained in *Pepper Pike* to conviction records, this Court stated:

> [N]either the rule of *Pepper Pike* nor its rationale has vitality when the offender has been convicted and is not a first-time offender. 'While it is true that a trial court has inherent power to order an expungement absent statutory authority, it is a limited power.' * * * Although the judicial power to seal criminal records still exists, 'it is limited to cases where the accused has been acquitted or exonerated in some way and protection of the accused's privacy interest is paramount to prevent injustice.'

Id. at ¶27 (citations omitted). "*Pepper Pike* is 'simply inapposite' to cases involving convicted offenders, even if they have been pardoned." *Id*. at ¶28 (citation omitted). "[I]t is the role of the legislature to address the statutory scheme on sealing records * * *." *Id*. at ¶36. "Thus, 'where a defendant has been convicted of an offense, expungement may be granted only as allowed by statute, and the court may not use the judicial (i.e., extra-statutory) expungement remedy used in *Pepper Pike*.'" *State v. Radcliff*, 10th Dist. No. 11AP-652, 2012-Ohio-4732, ¶15, aff'd 2015-Ohio-235 (citation omitted) (collecting cases).

Here, the defendant did not meet the applicable statutory requirements for sealing the record of his conviction, because sealing the record of a conviction of an "offense of violence" has been expressly prohibited by the General Assembly, under R.C. 2953.36(C). The mandatory prohibition against sealing a record of conviction of an "offense of violence" is "unambiguous and need only be applied as written." *State v. Vanzandt*, __ Ohio St.3d __, 2015-Ohio-236, ¶10 (applying R.C. 2953.53(D)'s prohibition against use of sealed record of acquittal). The lower court had no authority to seal the record of the defendant's conviction of an "offense of violence," and the defendant's reliance on a court's "inherent power" to support the lower court's decision is misplaced.

Additionally, separation of powers principles weigh against giving trial courts extra-statutory inherent power to seal records of convictions. Sealing records implicates multiple private and public interests, and "it is the proper role of the General Assembly to balance

competing private and public rights." *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, ¶9, citing *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 65 Ohio St.3d 258, 266, 602 N.E.2d 1159 (1992). Sealing records affects not only the courts own records, but the ability of the public and other government officials to access records. *Schussheim*, 2013-Ohio-4529, ¶77 (sealing of records is a "legislatively defined remedy that encroaches on other branches of government and conceals historical fact from public view") (French, J., dissenting).

The General Assembly has carefully balanced these interests in providing a comprehensive statutory scheme for sealing records in criminal cases. Allowing a trial court to seal the record of a conviction of an "offense of violence," in contravention of the clear and unambiguous statute prohibiting sealing, would constitute an obvious encroachment on the General Assembly's authority. As one court has stated in asking whether a trial court has inherent power to seal records contrary to statutory authorization:

> The obvious answer, if one subscribes to the doctrine of separation of powers, is no. To hold otherwise would permit an unfettered judiciary to absorb the policy making function of the legislative branch and would violate Article IV, section 18 of the Ohio Constitution, which states that judges shall 'have and exercise such power and jurisdiction * * * as may be directed by law.'

Youngstown v. Garcia, 7th Dist. No. 05 MA 47, 2005-Ohio-7079, ¶21; *see also Schussheim*, 2013-Ohio-4529, ¶29 ("A judicial remedy may not contravene the public policy expressed in duly enacted, constitutional legislation.") (O'Connor, C.J., dissenting).

The defendant also claims that he was not convicted of an "offense of violence," because he pled guilty to an attempt of an attempt, a purported legal fiction, but this claim fails. First, an attempted offense is a lesser included offense of a charged offense. *State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988), paragraph one of the syllabus. Thus, the defendant's guilty plea to

attempted robbery was not a "legal fiction." And the defendant's argument in this regard is more in the nature of a possible defense to the charge. But there was no dispute that the defendant pled guilty to and was convicted of attempted robbery, in violation of R.C. 2911.02 and 2923.02, which is statutorily defined as an "offense of violence," under R.C. 2901.01(A)(9)(a) and (d).

The defendant also posits that a court deciding an application to seal a conviction record should review the facts supporting the conviction to determine whether the defendant actually engaged in violent behavior when deciding whether the defendant committed an "offense of violence." While it is true that a court deciding an application to seal should review the facts to determine if the defendant is *ineligible* to seal a conviction, under *State v. Simon*, 87 Ohio St.3d 531, 721 N.E.2d 1041 (2000), here, the defendant's guilty plea to attempted robbery, in violation of R.C. 2911.02 and 2923.02, is dispositive of his ineligibility. The defendant is ineligible to seal this conviction because he pled guilty to a statutorily defined "offense of violence." Accordingly, further factual inquiry to determine ineligibility is unnecessary and unwarranted.

The Tenth District Court of Appeals has recognized that it is incorrect for a court to interpret a statute (R.C. 2901.01(A)(9)) in a manner that contradicts the plain meaning of the language employed by the General Assembly by adding words that the General Assembly did not choose to employ. *State v. Miller*, 10th Dist. No. 06AP-192, 2006-Ohio-5954, ¶10; *see also State v. Lawson*, 10th Dist. No. 12AP-771, 2013-Ohio-2111, ¶¶9-10, 14. R.C. 2901.01(A)(9) is clear and unambiguous, *Miller*, ¶9, and it contains a list of offenses that the General Assembly has determined are "offense[s] of violence." It is therefore incorrect for a court to examine the underlying facts when the defendant has been convicted of an offense that is contained in the list of "offense[s] of violence," as defined by the legislature in R.C. 2901.01(A)(9). *See Miller*, 2006-Ohio-5954, ¶¶8-10; *State v. Glass*, 10th Dist. No. 10AP-155, 2010-Ohio-4954, ¶¶3, 5-6;

see also Lawson, 2013-Ohio-2111. Rather, a court simply examines the list of offenses enumerated in R.C. 2901.01(A)(9), and if the offense of conviction is included in the list, the record of conviction may not be sealed, under R.C. 2953.36(C). Here, because the defendant pled guilty to committing an offense statutorily defined as an "offense of violence," he is ineligible as a matter of law to seal his conviction regardless of the underlying facts.

Accordingly, when an offender is convicted of an "offense of violence," as defined in R.C. 2901.01(A)(9), that conviction may not be sealed, under R.C. 2953.32 and 2953.36(C). Because the lower court sealed the defendant's conviction for attempted robbery, a felony "offense of violence," in contravention of R.C. 2953.32 and 2953.36(C), that decision must be reversed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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, February 4, 2015, to A. Steven Dever, 13363 Madison Ave., Lakewood, Ohio 44107; Counsel for Defendant-Appellee, and to Diane Smilanick, Assistant Prosecuting Attorney, at The Justice Center, 1200 Ontario St., Cleveland, Ohio 44113, counsel for Plaintiff-Appellant.

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