

IN THE SUPREME COURT OF OHIO
2015

ORIGINAL

STATE OF OHIO,

Case No. 15-1221

Plaintiff-Appellant,

-vs-

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

J.M.,

Defendant-Appellee

Court of Appeals
Case No. 15AP-77

**NOTICE OF CERTIFIED CONFLICT
OF PLAINTIFF-APPELLANT STATE OF OHIO**

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and

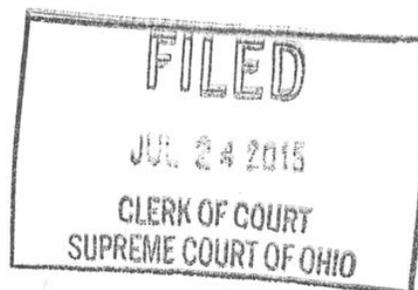
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COUNSEL FOR PLAINTIFF-APPELLANT

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2630 Augustwood Drive
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DEFENDANT-APPELLEE PRO SE



**NOTICE OF CERTIFIED CONFLICT
OF PLAINTIFF-APPELLANT STATE OF OHIO**

Plaintiff-appellant, the State of Ohio, hereby gives notice that, on June 30, 2015, the Franklin County Court of Appeals, Tenth Appellate District, certified a conflict in *State v. J.M.*, 15AP-77 on the following question of law pursuant to its authority under Section 3(B)(4), Article IV, of the Ohio Constitution:

Whether a violation of R.C. 4503.11, concerning a failure to register a motor vehicle, a fourth-degree misdemeanor, must be counted as an offense when determining eligible offender status under R.C. 2953.31?

Attached are the Tenth District journal entry certifying the conflict and the Tenth District decision. Also attached is the conflicting case in *State v. Clark*, 4th Dist. Athens No. 11CA8, 2011-Ohio-6354, in which the Fourth District Court of Appeals, unlike the Tenth District, determined that the defendant's conviction for violating R.C. 4503.11 counted as a conviction for purposes of determining eligibility to seal another conviction pursuant to R.C. 2953.31(A).

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney

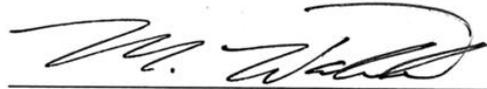


MICHAEL P. WALTON 0087265
(Counsel of Record)
Assistant Prosecuting Attorney

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, July 24, 2015, to John Merrion, at 2630 Augustwood Drive Columbus, Ohio 43207; Defendant-Appellee Pro se, and to Timothy Young, Ohio Public Defender, 250 E. Broad St., Suite 1400, Columbus, Ohio, 43215.



MICHAEL P. WALTON 0087265
Assistant Prosecuting Attorney

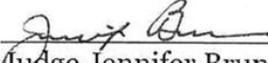
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
Plaintiff-Appellant, :
v. : No. 15AP-77
[J.M.], : (C.P.C. No. 14EP-18)
Defendant-Appellee. : (ACCELERATED CALENDAR)

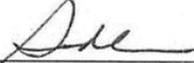
JOURNAL ENTRY

For the reasons stated in the decision of this court rendered herein on June 30, 2015, it is ordered that, being in conflict with the judgment of the Fourth District Court of Appeals in *State v. Clark*, 4th Dist. No. 11CA8, 2011-Ohio-6354, pursuant to S.Ct.Prac.R. 8.01 and Ohio Constitution, Article IV, Section 3(B)(4), , the record of this case is sua sponte certified to the Supreme Court of Ohio for review and final determination upon the following issue in conflict:

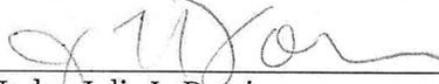
Whether a violation of R.C. 4503.11, concerning failure to register a motor vehicle, a fourth-degree misdemeanor, must be counted as an offense when determining eligible offender status under R.C. 2953.31?



Judge Jennifer Brunner



Judge Lisa L. Sadler



Judge Julia L. Dorrian du

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 15AP-77
 : (C.P.C. No. 14EP-18)
 [J.M.], : (ACCELERATED CALENDAR)
 :
 Defendant-Appellee. :

D E C I S I O N

Rendered on June 30, 2015

Ron O'Brien, Prosecuting Attorney, and *Michael P. Walton*,
for appellant.

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} Plaintiff-appellant, State of Ohio, appeals from a decision of the Franklin County Court of Common Pleas that granted J.M.'s application to seal the record of his 1989 felony conviction for receiving stolen property. The state contends that a failure to timely apply to register a motor vehicle, pursuant to R.C. 4503.11, counts as a conviction for the purposes of determining eligibility to seal records of convictions under R.C. 2953.31. Because we have previously decided the exact issue presented by this case and concluded that a violation of R.C. 4503.11 does not count as a conviction for purposes of R.C. 2953.31, we adhere to the principle of stare decisis and affirm the decision of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On January 10, 2014, J.M. filed an application with the Franklin County Court of Common Pleas seeking to seal the records of his felony conviction for receiving

stolen property. J.M. pled guilty to that charge on July 19, 1989 and was sentenced to 18 months in prison, all of which were suspended pending J.M.'s cooperation with the terms of probation for a three-year period. In addition to this conviction, J.M. pled guilty to negligent assault, a third-degree misdemeanor, in 1998 and to a failure to timely apply to renew his vehicle registration in 2013, a fourth-degree misdemeanor.

{¶ 3} The state objected to the application and argued that J.M. was not eligible to have the records sealed because he had too many convictions on his record. The trial court held hearings on the matter on May 29 and October 2, 2014. It granted J.M.'s application by written entry on February 4, 2015. The state now appeals.

II. ASSIGNMENT OF ERROR

{¶ 4} The state advances a single assignment of error for our review:

THE TRIAL COURT LACKED JURISDICTION TO GRANT DEFENDANT'S APPLICATION FOR SEALING, AS HE WAS NOT QUALIFIED AS AN "ELIGIBLE OFFENDER" WITHIN THE MEANING OF R.C. 2953.31(A).

III. DISCUSSION

{¶ 5} Sealing records in Ohio is a two-step process. In the first step, a trial court is called on to determine if a person is eligible. The specific requirements for eligibility vary depending on whether a person is seeking to seal records of convictions and bail forfeitures or seeking to seal records relating to arrests and cases ending in "not guilty" findings, dismissals, and "no bill" verdicts. *Compare* R.C. 2953.32 *with* 2953.52. When an applicant for expungement seeks to seal records of a conviction, he or she must first be determined to be an "eligible offender"; that is, a court must determine whether his or her criminal record reflects a permissible number of convictions, that the conviction(s) sought to be sealed is/are currently eligible to be sealed (based on the time elapsed since the time of final discharge and the nature of the conviction), and that no criminal proceedings are then currently pending against the applicant. *See* R.C. 2953.31(A); 2953.32(A) and (C)(1)(a) and (b).

{¶ 6} R.C. 2953.31(A), as amended by 2012 Am.Sub.S.B. No. 337 ("S.B. No. 337") expanded the number of offenses subject to sealing of the records (also referred to as

"expungement" in some circumstances) in determining whether an applicant is an "eligible offender":

[A]nyone who has been convicted of an offense in this state or any other jurisdiction and ~~who previously or subsequently has not been convicted of the same or a different offense~~ has not more than one felony conviction, not more than two misdemeanor convictions if the convictions are not of the same offense, or not more than one felony conviction and one misdemeanor conviction in this state or any other jurisdiction. When two or more convictions result from or are connected with the same act or result from offenses committed at the same time, they shall be counted as one conviction. When two or three convictions 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, they shall be counted as one conviction, provided that a court may decide as provided in division (C)(1)(a) of section 2953.32 of the Revised Code that it is not in the public interest for the two or three convictions to be counted as one conviction.

(Emphasis sic.) S.B. No. 337.

{¶ 7} Under R.C. 2953.32(C)(1)(a), when a trial court reviews an application for the sealing of an adult criminal record, it must determine as a threshold question whether an applicant is an "eligible offender" as is set forth in R.C. 2953.32(A) and 2953.31(A). A court lacks jurisdiction to seal records when an applicant is not an "eligible offender." *State v. Dominy*, 10th Dist. No. 13AP-124, 2013-Ohio-3744, ¶ 6. Whether an applicant is an eligible offender is an issue that we review de novo (although if factual findings are a necessary predicate to applying the law regarding eligibility, we review those for an abuse of discretion). *State v. Tauch*, 10th Dist. No. 13AP-327, 2013-Ohio-5796, ¶ 7.

{¶ 8} Once an applicant has been found to be an eligible offender, the statutes require a court to use its discretion to weigh a number of factors that vary, depending on whether the person seeks to seal records of convictions and bail forfeitures or records relating to arrests and cases ending in dismissals, "not guilty" findings, or "no bill" verdicts. *Compare* R.C. 2953.32 *with* 2953.52. When considering sealing records of a conviction for an eligible offender, a trial court must make statutorily required

determinations of: (1) whether the applicant has been rehabilitated to the satisfaction of the court, (2) whether the reasons, if any, offered by the prosecutor in any written objection against sealing the records are persuasive, and (3) whether the interests of the applicant in having conviction records sealed outweigh the legitimate needs, if any, of the state to maintain those records. R.C. 2953.32(C)(1)(c) through (e). We review a trial court's determination on these issues for abuse of discretion. *Tauch* at ¶ 17.

{¶ 9} If the trial court finds that a person is eligible and using its discretion determines that the facts supporting the other required findings should be construed to favor sealing the records of conviction, the trial court "shall order all official records of the case that pertain to the conviction or bail forfeiture sealed." (Emphasis added.) R.C. 2953.32(C)(2). Under S.B. No. 337, if the jurisdictional requirements and discretionary factors are met, a trial court is without authority to refuse to seal the records. Further, the sealing statutes are remedial and are, therefore, to be construed liberally to promote their purpose and assist the parties in obtaining justice. *State ex rel. Gains v. Rossi*, 86 Ohio St.3d 620, 622 (1999), citing R.C. 1.11; *Barker v. State*, 62 Ohio St.2d 35, 42 (1980).

{¶ 10} In this case, the state challenges J.M.'s eligibility based on the number of prior convictions that appear on his record. As relevant to this issue, an "eligible offender" is:

[A]nyone who has been convicted of an offense in this state or any other jurisdiction and who has not more than one felony conviction, not more than two misdemeanor convictions if the convictions are not of the same offense, or not more than one felony conviction and one misdemeanor conviction in this state or any other jurisdiction.¹

R.C. 2953.31(A). The state claims that J.M. does not meet this definition because he has one felony and two misdemeanor convictions. The state contends that he is thus not an eligible offender since the statute only allows him to have "one felony conviction, * * * two misdemeanor convictions, * * * or * * * one felony conviction and one misdemeanor conviction." (Emphasis added.) R.C. 2953.31(A).

¹ Effective September 19, 2014, the legislature removed the language "if the convictions are not of the same offense." 2014 Am.Sub.S.B. No. 143. However, because J.M. filed his application in January 2014, the applicable definition still contained this language.

{¶ 11} In the trial court, J.M.'s position is that his fourth-degree misdemeanor conviction for failure to annually apply to register his vehicle, in violation of R.C. 4503.11, does not count as a conviction under R.C. 2953.31. J.M.'s position that R.C. 2953.31 exempts certain classes of conviction when determining the permissible number and levels of offenses that are permitted by law to be sealed.

For purposes of, and except as otherwise provided in, this division, a conviction for a minor misdemeanor, for a violation of any section in Chapter 4507., 4510., 4511., 4513., or 4549. of the Revised Code, or for a violation of a municipal ordinance that is substantially similar to any section in those chapters is not a conviction. However, a conviction for a violation of section 4511.19, 4511.251, 4549.02, 4549.021, 4549.03, 4549.042, or 4549.62 or sections 4549.41 to 4549.46 of the Revised Code, for a violation of section 4510.11 or 4510.14 of the Revised Code that is based upon the offender's operation of a vehicle during a suspension imposed under section 4511.191 or 4511.196 of the Revised Code, for a violation of a substantially equivalent municipal ordinance, for a felony violation of Title XLV of the Revised Code, or for a violation of a substantially equivalent former law of this state or former municipal ordinance shall be considered a conviction.

R.C. 2953.31(A). Although neither R.C. Chapter 4503 nor section 4503.11 is specifically exempted by the sealing of records statute, J.M.'s position that a violation of R.C. 4503.11 is essentially an administrative traffic offense substantially similar to the offenses contemplated in the excluded chapters and, on that basis, should be excluded also.

{¶ 12} J.M.'s position appears to be based on an Eighth District decision, *State v. Ellis*, 8th Dist. No. 83207, 2004-Ohio-3108. In *Ellis*, the Eighth District considered whether driving under a license suspension counted as a conviction for purposes of R.C. 2953.31 and held as follows:

The question is whether the municipal ordinances for driving under suspension are substantially similar to R.C. Chapter 4511, 4513, or 4549, or whether they are substantially similar to R.C. 4511.19, 4511.192, 4511.251, 4549.02, 4549.021, 4549.03, 4549.042, 4549.07, 4549.41, or 4549.46.

Chapters 4511, 4513, and 4549 all involve traffic law. Driving under suspension is essentially a violation of driver's license

law. These types of convictions are substantially similar to other traffic laws and not the type of law found, for example, in driving under the influence, R.C. 4511.19.

We find that a driving under suspension charge is not substantially similar to those laws the statute cites as driving under the influence of alcohol or drugs, street racing, hit and run, vehicle master key possession, or deceptive practices regarding odometer rollback and disclosure. Driving under suspension relates better to the Ohio Revised Code chapters representing the excluded convictions than it does to the provisions which count against expungement.

In the case at bar, appellant's DUS was an administrative violation. Her driving under suspension charge was traffic related, a violation of the Financial Responsibility Act regarding her insurance. Appellant's previous suspensions were traffic related and, therefore, similar to the situations in which expungement applies. In determining whether a driving under suspension offense is analogous to a traffic offense, we look to the underlying basis for the suspension. Here the suspension was based on an administrative violation directly related to the operation of a motor vehicle under the Financial Responsibility Act. As such, the suspension was, in effect, traffic related. Whether a driving under suspension offense under the previous statute meets the criteria of a traffic related offense is dependent on the basis of the underlying suspension.

Id. at ¶ 17-20.

{¶ 13} In *State v. Black*, 10th Dist. No. 03AP-862, 2004-Ohio-5258, this court considered the same question presented in *Ellis*, whether driving under a suspension imposed for a violation of the Financial Responsibility Act was an offense that would disqualify an otherwise eligible person from seeking to seal records. This court found *Ellis* to be persuasive and followed it. *Black* at ¶ 10-14.

{¶ 14} Eight years later, in *In re Mooney*, 10th Dist. No. 12AP-376, 2012-Ohio-5904, this court applied *Black* and *Ellis* in the context of R.C. 4503.11. We held in *Mooney* that failing to register one's vehicle, in violation of R.C. 4503.11, was an offense that is "administrative in nature" (like driving under a Financial Responsibility Act suspension). *Id.* at ¶ 7-9. We held that a violation of R.C. 4503.11 is not of such a nature

as to count as a separate misdemeanor for purposes of determining eligibility under R.C. 2953.31. *Id.*

{¶ 15} Most recently, we considered the *Ellis* line of cases in the context of a violation of R.C. 5577.04(A), which regulates the weights of vehicles on public highways. *Dominy*. In *Dominy* we reasoned as follows:

Pursuant to [R.C. 2953.31(A)], certain convictions do not count as convictions for purposes of determining whether an offender is eligible for the sealing of convictions. While convictions under R.C. 5577.04 are not expressly listed, this court in *State v. Black*, 10th Dist. No. 03AP-862, 2004-Ohio-5258, concluded that certain traffic-related convictions, even if not set forth in the statute, do not count as a conviction if they " 'relate[] better to the Ohio Revised Code chapters representing the excluded convictions than it does to the provisions which count against expungment.' " *Black* at ¶ 14, quoting *State v. Ellis*, 8th Dist. No. 83207, 2004-Ohio-3108, ¶ 19.

Convictions that do not count as convictions under the statute include: (1) violations of R.C. Chapters 4507 and 4510, which relate to administrative drivers license concerns; (2) R.C. Chapter 4511, which relates to traffic controls and signs; (3) R.C. Chapter 4513, which relates to vehicle equipment requirements and load limitations; and (4) R.C. Chapter 4549, which generally relates to motor vehicle crimes. On the other hand, the offenses that do count as convictions under the statute are more serious traffic offenses, including: (1) violations of R.C. 4511.19, operation of a vehicle while intoxicated; (2) R.C. 4511.251, street racing; and (3) R.C. 4549.02, 4549.021 and 4549.03, stopping after an accident. They also include serious crimes like: (1) R.C. 4549.042, involving the sale or possession of master car keys for illegal purposes; (2) R.C. 4549.62, vehicle identification number fraud; (3) R.C. 4549.41 through 4549.46, odometer fraud; and (4) R.C. 4510.11 and 4510.14, driving under suspension.

In *Black*, we concluded that a conviction for driving under a Financial Responsibility Act suspension in violation of R.C. 4507.02 did not count as a conviction because that conviction was "analogous to a traffic offense" and not similar to the convictions listed in the statute that do count as convictions. *Black* at ¶ 12-14. In *In re Mooney*, 10th Dist. No. 12AP-376, 2012-Ohio-5904, we similarly concluded that a conviction for

failing to register a vehicle in violation of R.C. 4503.11 did not count as a conviction for purposes of eligibility for sealing. We noted that such conviction was even more administrative in nature than the conviction in *Black. Mooney* at ¶ 9.

Dominy argues that his weight convictions are similar to the convictions that did not count as convictions in *Black* and *Mooney*. We agree, as Dominy's weight convictions have more in common with the convictions that do not count towards eligibility. Those are generally less serious traffic offenses or more administrative types of offenses. The offenses that do count as convictions are much more serious traffic offenses and more serious crimes involving vehicle fraud. Because Dominy's weight convictions relate better to the Ohio Revised Code chapters representing excluded convictions than they do to the more serious offenses that count as convictions, the trial court did not err when it found that Dominy was an eligible offender.

Id. at ¶ 9-12. Thus, having decided the precise issue of whether R.C. 4503.11 is a misdemeanor offense that counts for the purposes of determining eligible offender status, we adhere to the principle of stare decisis in reaching our decision to affirm the judgment of the trial court. *Mooney*.

{¶ 16} We note that, prior to our decisions in *Mooney* and *Dominy* and the changes to the law expanding opportunities for sealing of the records of criminal conviction, the Fourth District Court of Appeals, in *State v. Clark*, 4th Dist. No. 11CA8, 2011-Ohio-6354, narrowly read R.C. 2953.31(A) to exempt exactly and only the sections listed in that section. The Fourth District specifically concluded that a violation of R.C. 4503.11 counts as a conviction for the purposes of determining eligibility for the sealing of records of criminal conviction. *Id.* at ¶ 15-20. The two cases for which we observe stare decisis were decided *after* the Fourth District decided *Clark* and *after* the adoption of S.B. No. 337, which expanded access to the sealing of criminal records beginning September 28, 2012. The state has brought this appeal, fully aware of our prior holdings on this very issue and apparently seeks a holding that reflects a different outcome. We find no emergent justification to change our prior course to adopt the holding in *Clark*.

{¶ 17} In addition to noting that *Clark* was decided before the enactment of S.B. No. 337, we note that the strict reading applied by the Fourth District is inconsistent with

law providing that the sealing statutes are remedial and are to be construed liberally to promote their purpose and assist the parties in obtaining justice. *Rossi* at 622, citing R.C. 1.11; *Barker* at 42. The Fourth District's literal reading of R.C. 2953.31 denies access to remedies found in R.C. 2953.31 because of what are essentially administrative, traffic-related mistakes. We prefer to allow the statutory scheme to achieve its designated purpose as we have previously interpreted it, to give eligible offenders who have learned from their mistakes, a second chance. In doing so, we adhere to our prior holdings that a trial court is empowered to find that an administrative, traffic-related offense, such as R.C. 4503.11, is exempt from being counted as a misdemeanor in determining eligible offender status under R.C. 2953.31. *Dominy; Mooney*.

{¶ 18} J.M.'s failure to timely register his car did not count as a criminal conviction for the purposes of determining his eligibility to have his records of criminal conviction sealed under R.C. 2953.31. Thus, J.M. had one felony conviction and one misdemeanor conviction on his record and was, therefore, an eligible offender pursuant to R.C. 2953.31(A). The state's assignment of error is overruled.

{¶ 19} The state requests that we certify to the Supreme Court of Ohio a conflict between our decision today and the decision of the Fourth District Court of Appeals on the identical issue in *Clark*, concerning whether a violation of R.C. 4503.11, concerning failure to register a motor vehicle, a fourth-degree misdemeanor, must be counted as an offense when determining eligible offender status under R.C. 2953.31. While Loc.R. 14 of the Tenth District Court of Appeals requires the filing of a motion, we recognize the conflict as discussed in the state's brief. Based on the state's request in its brief and pursuant to S.Ct.Prac.R. 8.01 and Ohio Constitution, Article IV, Section 3(B)(4), we sua sponte certify the record of this case to the Supreme Court for review and final determination, recognizing that our judgment today is in conflict with the judgment of the Fourth District Court of Appeals in *Clark*, on the same question, that being:

Whether a violation of R.C. 4503.11, concerning failure to register a motor vehicle, a fourth-degree misdemeanor, must be counted as an offense when determining eligible offender status under R.C. 2953.31?

IV. CONCLUSION

{¶ 20} The state's assignment of error is overruled, and we affirm the decision of the Franklin County Court of Common Pleas. Being in conflict with the judgment of the Fourth District Court of Appeals in *Clark*, we hereby certify a conflict pursuant to S.Ct.Prac.R. 8.01 and Ohio Constitution, Article IV, Section 3(B)(4).

*Judgment affirmed;
sua sponte certify a conflict.*

SADLER, J., concurs in judgment only.
DORRIAN, J., concurs in part; dissents in part.

SADLER, J., concurring in judgment only.

{¶ 21} Based solely on the doctrine of stare decisis and the recent holding of this court in *In re Mooney*, 10th Dist. No. 12AP-376, 2012-Ohio-5904, where the precise issue before us was previously decided, I concur with the lead decision in affirming the judgment of the trial court. Additionally, as we did in *Mooney*, I would expressly limit our holding to the facts presented herein.

{¶ 22} Finally, I concur in the decision to sua sponte certify a conflict to the Supreme Court of Ohio.

DORRIAN, J., concurring in part; dissenting in part.

{¶ 23} I respectfully dissent. Given the plain language of the relevant statutes, I would overrule our precedent in *In re Mooney*, 10th Dist. No. 12AP-376, 2012-Ohio-5904, *State v. Black*, 10th Dist. No. 03AP-862, 2004-Ohio-5258, and *State v. Dominy*, 10th Dist. No. 13AP-124, 2013-Ohio-3744.

{¶ 24} I concur, however, with the sua sponte certification of this case to the Supreme Court of Ohio to determine a conflict between this decision and the decision of the Fourth District Court of Appeals in *State v. Clark*, 4th Dist. No. 11CA8, 2011-Ohio-6354.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellant, :
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 v. : No. 15AP-77
 : (C.P.C. No. 14EP-18)
 [J.M.], : (ACCELERATED CALENDAR)
 :
 Defendant-Appellee. :

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 30, 2015, 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 to appellant.

BRUNNER & SADLER, JJ.

By /S/ JUDGE
Judge Jennifer Brunner

Tenth District Court of Appeals

Date: 07-01-2015
Case Title: STATE OF OHIO -VS- JOHN S MERRION
Case Number: 15AP000077
Type: JEJ - JUDGMENT ENTRY

So Ordered



/s/ Judge Jennifer Brunner

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

State of Ohio,

Plaintiff-Appellee,

v.

Jerrod Clark,

Defendant-Appellant.

Case No: 11CA8

DECISION AND
JUDGMENT ENTRY

Filed: December 7, 2011

APPEARANCES:

K. Robert Toy, Toy Law Office, Athens, Ohio, for Appellant.

Keller J. Blackburn, Athens County Prosecutor, and Sabrina J. Ennis, Athens County Assistant Prosecutor, Athens, Ohio, for Appellee.

Kline, J.:

{¶1} Jerrod Clark (hereinafter “Clark”) appeals the judgment of the Athens County Court of Common Pleas, which denied his application to seal a conviction record. On appeal, Clark contends that the trial court erred by not holding a hearing on his application. We disagree. First, the trial court was not necessarily required to hold a hearing under R.C. 2953.32. And second, no hearing was necessary because the trial court correctly found that Clark is not a first offender. Accordingly, we overrule Clark’s assignment of error and affirm the judgment of the trial court.

I.

{¶2} In 2003, Clark was convicted of possession of cocaine.

{¶3} On May 18, 2009, Clark filed a “Motion for Expungement of Record of Conviction and to Seal Records of Arrest.” After the state objected, the trial court ordered Clark to “respond to the State’s information that he has two misdemeanor convictions.” March 29, 2010 Entry. Clark did not respond, however, and the trial court dismissed his application for expungement.

{¶4} On November 10, 2010, Clark filed a second “Motion for Expungement of Record of Conviction and to Seal Records of Arrest.” In his second motion, Clark addressed his two misdemeanor convictions. As to the first conviction, Clark acknowledged that he was convicted of a minor misdemeanor. Clark noted, however, that a minor misdemeanor is “not considered a subsequent conviction for purposes of expungement.” November 10, 2010 Motion for Expungement. As to the second conviction, Clark acknowledged that he was “convicted of a violation of Ohio Revised Code Section 4503.11.” *Id.* But for various reasons, Clark argued that “his conviction under R.C. 4503.11 should not be considered a subsequent conviction for purposes of expungement.” *Id.*

{¶5} On November 12, 2010, the trial court ordered the Adult Parole Authority to conduct an investigation “and report back to the Court regarding Defendant’s eligibility for expungement.” November 12, 2010 Order for Investigation.

{¶6} On January 14, 2011, the state filed its objection to Clark’s second motion for expungement. Once again, the state argued that Clark is not a first offender.

{¶7} The trial court did not (1) set a hearing date or (2) hold a hearing on Clark’s second motion for expungement. Instead, the trial court denied his motion in a March 18, 2011 journal entry. As the trial court found, the Adult Parole Authority Expungement

Investigation Report “shows that the Defendant was convicted of the failure to file annual registration in violation of R.C. 4503.11, a first degree misdemeanor [sic], in the Athens County Municipal Court Case No. 2008TRD04823 on July 19, 2008. R.C. 4503.11 is not an exclusion listed under the definition of ‘first offender’ in R.C. 2953.31.

{¶18} “Because the Defendant is not a ‘first offender’ pursuant to R.C. 2953.31, he is ineligible to have his felony conviction herein expunged. Accordingly, the Court denies his motion.” Journal Entry Denying Motion For Expungement.

{¶19} Clark appeals and asserts the following assignment of error: I. “THE TRIAL COURT ABUSED ITS DISCRETION BY NOT CONDUCTING A HEARING ON APPELLANT’S APPLICATION FOR EXPUNGEMENT.”

II.

{¶10} In his sole assignment of error, Clark contends that the trial court erred by not holding a hearing on his motion for expungement.

{¶11} “We review a trial court’s decision to deny an application to seal a record under an abuse-of-discretion standard.” *State v. Wright*, 191 Ohio App.3d 647, 2010-Ohio-6259, at ¶7. The present case, however, requires us to interpret and apply various sections of the Ohio Revised Code. To the extent that we must interpret and apply these statutes, our review is de novo. See *Roberts v. Bolin*, Athens App. No. 09CA44, 2010-Ohio-3783, at ¶20, quoting *State v. Sufronko* (1995), 105 Ohio App.3d 504, 506 (“When interpreting statutes and their application, an appellate court conducts a *de novo* review, without deference to the trial court’s determination.”).

A. R.C. 2953.32

{¶12} Initially, we note that the trial court failed to set a date for Clark's expungement hearing. R.C. 2953.32(B) states that, "[u]pon 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." Usually, "[t]he word 'shall' is * * * interpreted to make the provision in which it is contained mandatory." *State v. Smith*, Stark App. No. 2010-CA-00335, 2011-Ohio-3206, at ¶48. Therefore, the trial court erred because it failed to set a date for Clark's expungement hearing.

{¶13} Even though a trial court must set a date for a hearing, we also find that a trial court is not necessarily required to hold that hearing. We base this finding on the plain language of R.C. 2953.32. Here, "we are forbidden to add a nonexistent provision to the plain language of [a statute]." *State ex rel. Steffen v. Court of Appeals, First Appellate Dist.*, 126 Ohio St.3d 405, 2010-Ohio-2430, at ¶26, citing *State ex rel. Lorain v. Stewart*, 119 Ohio St.3d 222, 2008-Ohio-4062, at ¶36; *State v. Hughes*, 86 Ohio St.3d 424, 427, 1999-Ohio-118. And R.C. 2953.32 requires only that a hearing date be set. There is no requirement that a hearing must be held. Under R.C. 2953.32(B), "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." (Emphasis added.) Importantly, the events outlined in R.C. 2953.32(B) transpire *before* the hearing date, and R.C. 2953.32 does not require that a hearing be held *after* the prosecutor objects and the trial court makes its

investigation. Therefore, in our view, R.C. 2953.32 contemplates that a trial court may, without a hearing, deny an application based on (1) the application itself, (2) the prosecutor's objections, and (3) the investigation reports. But, see, *State v. Saltzer* (1984), 14 Ohio App.3d 394, 395 (“[T]he requirement of a hearing is mandatory and each application for expungement must be set for hearing.”).

{¶14} Accordingly, we find the following: (1) the trial court erred by not setting a hearing date; and (2) the trial court was not necessarily required to hold a hearing.

B. Clark's Status as a First Offender

{¶15} Here, we find (1) that Clark is not a first offender and (2) that the trial court correctly denied his application based on the application itself, the prosecutor's objections, and the investigation reports. Accordingly, the trial court was not required to hold a hearing. And although the trial court erred by not setting a hearing date, that error is harmless. See Crim.R. 52(A).

{¶16} “The determination of [Clark's] status as a first-time offender * * * is a question of law subject to an independent review by this court without deference to the trial court's decision.” *State v. Derugen* (1996), 110 Ohio App.3d 408, 410. R.C. 2953.31(A) defines a “first offender” as “anyone who has been convicted of an offense in this state or any other jurisdiction and who previously or subsequently has not been convicted of the same or a different offense in this state or any other jurisdiction.” Under R.C. 2953.32(A)(1), only first offenders are eligible for expungement.

{¶17} Clark is not a first offender because he has a fourth-degree misdemeanor conviction for violating R.C. 4503.11. This conviction does not fall under any of the exceptions contained in R.C. 2953.31(A). In the proceedings below, Clark did not deny

his R.C. 4503.11 conviction. Instead, Clark argued that, “even though Chapter 4503 is not currently listed as an exclusion in R.C. 2953.31, it is substantially similar to those exclusions that are listed and that [Clark’s] conviction under R.C. 4503.11 should not be considered a subsequent conviction for purposes of expungement.” November 10, 2010 Motion for Expungement of Record of Conviction and to Seal Records of Arrest. However, “where the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom.” *Sherwin-Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St.3d 52, 2006-Ohio-6498, at ¶14, quoting *Hubbard v. Canton City School Bd. of Educ.*, 97 Ohio St.3d 451, 2002-Ohio-6718, at ¶14. And here, the language of R.C. 2953.31(A) is clear. The General Assembly determined which violations should not be considered convictions for purposes of expungement, and R.C. 4503.11 does not fall under any of those exceptions. Accordingly, Clark does not qualify as a first offender, and the trial court correctly denied his application based on (1) the application itself, (2) the prosecutor’s objections, and (3) the investigation reports. Therefore, the trial court was not required to hold a hearing on Clark’s application.

{¶18} Clark cites several cases for the proposition that a trial court must hold a hearing under R.C. 2953.32. But we find the present case distinguishable for a number of reasons. Most importantly, Clark conceded his fourth-degree misdemeanor conviction under R.C. 4503.11. As a result, there are *no factual questions* related to Clark’s status as a first offender. Furthermore, Clark had the opportunity to present his argument at the trial court level. And finally, the trial court stated why it denied Clark’s

application -- because Clark "is not a 'first offender' pursuant to R.C. 2953.31[.]" Journal Entry Denying Motion For Expungement.

{¶19} The cases cited by Clark do not share these similarities. For example, there were factual questions related to the petitioner's first-offender status in *State v. Woolley* (Mar. 30, 1995), Cuyahoga App. No. 67312. The *Woolley* petitioner did not concede his prior convictions. Instead, the petitioner presented "documentation from the Royal Canadian Mounted Police (RCMP) showing it had no record of any criminal conviction relating to defendant." *Id.* There were also factual questions related to the petitioner's first-offender status in *State v. Hagopian* (Sep. 21, 1999), Franklin App. No. 98AP-1572. As the Tenth District Court of Appeals found, "[W]e cannot determine that a hearing would be futile, as the only item in the record suggesting defendant is not a first offender is the 'objection' the state filed, with no supporting documentation attached." *Id.* Finally, *Wright* features at least two key differences from the present case. First, in *Wright*, "the record [did] not reflect that the state filed any opposition to Wright's application[.]" *Wright* at ¶13. And second, it was not clear "whether [Wright's] presentence investigation was before the trial court when it denied her application." *Id.* at ¶13, fn. 1. Therefore, the *Wright* court could not have found that the trial court properly acted upon (1) the petitioner's application, (2) the prosecutor's objections, and (3) the investigation reports.

{¶20} Additionally, the trial courts did not indicate why applications were denied in *Wright*, *Hagopian*, and *Woolley*. See *Wright* at ¶13. As a result, in those cases, it was unclear how the trial courts resolved the various factual issues. In the present case, however, Clark conceded his conviction, and the trial court expressly found that Clark is

not a first offender. Therefore, many of the concerns present in *Wright*, *Hagopian*, and *Woolley* are not present here.

C. Conclusion

{¶21} In conclusion, because Clark is not a first offender, the trial court correctly denied his application for expungement based on (1) the application itself, (2) the prosecutor's objections, and (3) the investigation reports. Therefore, the trial court was not required to hold a hearing, and any error related to the hearing date is harmless.

{¶22} Because the trial court did not abuse its discretion, we overrule Clark's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Harsha, P.J., Concurring in Judgment Only:

{¶23} I agree that when an application for expungement admits the existence of a non-exempt conviction, the trial court need not conduct a hearing to determine the applicant is not a first offender. However, I cannot join the opinion's overly broad conclusion that the court may forgo the need for a hearing based upon the prosecutor's objections and/or the court's investigative reports. A myriad of courts have determined that normally a hearing is required prior to deciding whether to grant an application to seal the record. See, *State v. Minch*, Cuyahoga App. No. 87820, 2007-Ohio-158, at ¶12, citing at least ten appellate decisions to that effect. Even though expungement is a privilege and not a right, due process requires an opportunity to contest assertions made by the state and its agents.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED. Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, J.: Concurs in Judgment and Opinion.

Harsha, P.J.: Concurs in Judgment Only with Opinion.

For the Court

BY: _____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.