

IN THE SUPREME COURT OF OHIO  
2016

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

ANTONIO L. WASHINGTON, II,

Defendant-Appellee.

Case No.

16-0003

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

Court of Appeals  
Case No. 15AP-538

**MEMORANDUM OF PLAINTIFF-APPELLANT IN SUPPORT OF  
JURISDICTION**

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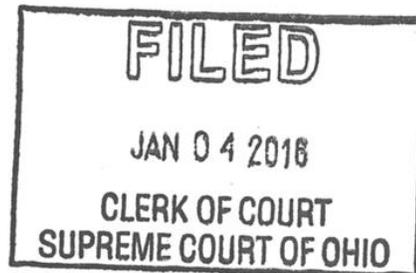
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## EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

The instant case presents questions of great public interest as to warrant further review by this Court involving a defendant's eligibility to seal a criminal conviction and the definition of "eligible offender," in R.C. 2953.31. Here, there was no dispute that the defendant had a felony conviction for carrying a concealed weapon, which he was seeking to seal, along with a conviction for domestic violence in 2009, and two fourth-degree misdemeanor convictions for violations of R.C. 4503.11, in 2008 and in 2014. The lower court, however, followed its own precedent and did not count the defendant's convictions for R.C. 4503.11 when determining whether the defendant met the definition of "eligible offender." Because fourth-degree misdemeanor convictions for violations of R.C. 4503.11 are not included within the statutory exceptions to the definition of "eligible offender," the lower courts improperly ordered the defendant's felony conviction sealed. The lower courts' interpretation of R.C. 2953.31(A) created an additional exception not contained in the statute, which amounts to nothing more than judicial legislation and contravenes the constitutional separation of powers doctrine.

Additionally, there is a conflict between the lower court's decision in this case, and the Fourth District Court of Appeals' decision in *State v. Clark*, 4th Dist. No. 11CA8, 2011-Ohio-6354. In *Clark*, the Fourth District Court of Appeals determined that R.C. 2953.31(A) was clear, and that a conviction for an offense that was not specifically listed in the statute as an exception to the statutory definition acted as a bar to sealing another conviction. *Id.* at ¶17. In *Clark*, the court of appeals determined that the defendant's conviction for violating R.C. 4503.11 rendered him ineligible to seal another conviction. *Id.* In contrast, here, the court of appeals found that the defendant's convictions for violating R.C. 4503.11, although not specifically listed in R.C. 2953.31(A) as an exception to the statutory definition, did not create a bar to the defendant's application.

The citizens and the State of Ohio have an interest in ensuring that felony convictions are not erroneously sealed when a criminal defendant does not meet the statutory criteria. This Court should accept jurisdiction over this case to ensure that R.C. 2953.31 and 2953.32(A)(1) are correctly construed and applied. Further, this Court has certified a conflict in an analogous case, *State v. J.M.*, 143 Ohio St.3d 1476, 2015-Ohio-3958, 38 N.E.3d 899 (Table). It is therefore respectfully submitted that jurisdiction over this case should be accepted.

### **STATEMENT OF CASE AND FACTS**

On October 15, 2008, the defendant entered a guilty plea to one count of carrying a concealed weapon, a fourth degree felony. The trial court ordered him to serve community control.

On February 11, 2015, the defendant filed an application to seal this conviction. The State filed an objection to the application, because the defendant did not meet the definition of “eligible offender” contained in R.C. 2953.31. At the hearing on the defendant’s application, the defendant acknowledged that he had this felony conviction for carrying a concealed weapon, a misdemeanor conviction for domestic violence in 2009, and two fourth-degree misdemeanor convictions for violations of R.C. 4503.11. Notwithstanding these four convictions, the trial court granted the defendant’s request to seal this conviction, finding that the defendant’s two fourth-degree misdemeanor convictions, for violations of R.C. 4503.11, did not count as convictions and that he was therefore an “eligible offender.” The court also found that the defendant’s interest in sealing this record outweighed the State’s interest in maintaining the record.

The State filed a timely appeal, and on November 19, 2015, the court of appeals affirmed the trial court’s decision. The State now brings this appeal, seeking a granting of jurisdiction.

## ARGUMENT

### PROPOSITION OF LAW NO. ONE:

WHEN A STATUTE IS CLEAR AND UNAMBIGUOUS, A COURT MUST ONLY READ AND FOLLOW IT.

### PROPOSITION OF LAW NO. TWO:

WHEN INTERPRETING AND APPLYING AN UNAMBIGUOUS STATUTE, A COURT MAY NOT ADD LANGUAGE TO THE STATUTE NOT INCLUDED BY THE LEGISLATURE.

Sealing criminal records “is an act of grace created by the state, and so is a privilege, not a right.” *State v. Simon*, 87 Ohio St.3d 531, 533, 721 N.E.2d 1041 (2000) (internal quotation marks omitted). “[T]he government possesses a substantial interest in ensuring that expungement is granted only to those who are eligible.” *State v. Hamilton*, 75 Ohio St.3d 636, 640, 665 N.E.2d 669 (1996). Consequently, “expungement should be granted only when all requirements for eligibility are met.” *Simon*, 87 Ohio St.3d at 533, citing *Hamilton*, 75 Ohio St.3d at 640. The sealing procedure set forth in R.C. 2953.31 *et seq.* creates a post-conviction remedy that is civil in nature. *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, ¶19. “Ultimately, it is the responsibility of the trial court to determine whether an applicant is eligible to file for expungement of the record of a conviction.” *State v. Reed*, 10th Dist. No. 05AP-335, 2005-Ohio-6251, ¶14.

An applicant’s eligibility to seal a criminal conviction is governed by R.C. 2953.31, 2953.32, and 2953.36. The applicant must be an “eligible offender,” as defined in R.C. 2953.31(A), must have no pending criminal proceedings, and must have complied with the statutory waiting period. R.C. 2953.32(A) and (C). Yet, even if an applicant meets the criteria

under R.C. 2953.32(A) and (C), that applicant may be ineligible if his conviction is for an offense specified under R.C. 2953.36. See *Simon*, 87 Ohio St.3d 531.

Revised Code 2953.32(A)(1) allows for the sealing of a record of conviction and provides that “an eligible offender may apply to the sentencing court if convicted in this state, or to a court of common pleas if convicted in another state or in a federal court, for the sealing of the record of the case that pertains to the conviction.”

Revised Code 2953.31(A) defines “eligible offender” and provides, in pertinent part:

“Eligible offender” means anyone 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, or not more than one felony conviction and one misdemeanor conviction in this state or any other jurisdiction.  
\* \* \*

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. \* \* \*

The same statute also enumerates certain offenses, convictions for which are to be considered, or counted, as convictions in determining whether an applicant meets the definition of “eligible offender.” Therefore, convictions for these enumerated offenses may create a bar to a defendant’s request to seal a conviction.

Accordingly, under R.C. 2953.31(A), “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” for purposes of determining whether an individual meets the definition of “eligible offender” to seal a record of conviction under R.C. 2953.32. As a result, a defendant’s conviction for a minor misdemeanor, for an offense in any of the listed chapters of

the Revised Code, or for a substantially similar municipal ordinance is not counted when determining an applicant's eligibility to seal the record of a criminal conviction.

The legislature intended to permit a defendant to seal a criminal conviction when the defendant had only a relatively minor conviction, like a conviction for speeding. *City of Dayton v. Sheibenberger*, 115 Ohio App.3d 529, 533, 685 N.E.2d 841 (2nd Dist.1996). But that intent does not permit the judiciary to amend the legislation by adding words to the statute. *City of Fairborn v. Dedomenico*, 114 Ohio App.3d 590, 593-594, 683 N.E.2d 820 (2nd Dist.1996). See also *State v. Clark*, 4th Dist. No. 11CA8, 2011-Ohio-6354, ¶17.

As pertinent here, R.C. 2953.31(A) allows an applicant with no more than two convictions to be considered an "eligible offender." In this case, the defendant did not meet the definition of "eligible offender" contained in R.C. 2953.31(A), because he had convictions for more than one felony and one misdemeanor. Specifically, the defendant had the instant felony conviction for carrying a concealed weapon, plus a misdemeanor conviction for domestic violence. He also had two convictions for violating R.C. 4503.11, fourth-degree misdemeanors. Revised Code 4503.11 is not specifically listed in R.C. 2953.31(A) as a conviction that does not count for purposes of determining eligibility. Because of these additional fourth-degree misdemeanor convictions, the defendant could not qualify as an "eligible offender" as defined in R.C. 2953.31(A), and the lower courts erred in permitting him to seal his felony conviction.

Here, the lower courts erroneously determined that the defendant's misdemeanor convictions for violating R.C. 4503.11 did not affect his eligibility for sealing his felony conviction. In doing so, the courts revised the General Assembly's definition of "eligible offender" contained in R.C. 2953.31(A) by adding R.C. 4503.11 to the list of convictions that do not count for purposes of determining eligibility. This was error. See *Sheibenberger*, 115 Ohio

App.3d at 533-534 (third-degree misdemeanor conviction of municipal housing ordinances barred sealing record); *Dedomenico*, 114 Ohio App.3d 590 (determining R.C. 2953.36 did not apply to substantially similar municipal ordinances); *Clark*, 2011-Ohio-6354, ¶17 (R.C. 4503.11 conviction barred sealing).

“[W]hen a statute is unambiguous, a court must only read and follow it.” *Dedomenico*, 114 Ohio App.3d at 593. “That the legislature made no reference to [R.C. 4503.11] when it clearly could have if it so wished indicates that the omission is intentional.” *Id.* at 594. In *Dedomenico*, as here, the lower courts were not empowered to alter the plain and unambiguous language of R.C. 2953.31(A). *Id.* The decision to expand the statutory list to include defendant’s convictions for other unspecified offenses is unwarranted. *Sheibenberger*, 115 Ohio App.3d at 534. See also *Clark*, 2011-Ohio-6354, ¶17. “The General Assembly determined which violations should not be considered convictions for purposes of expungement \* \* \* .” *Id.* Because R.C. 4503.11 is not included in any of those exceptions, the defendant’s fourth-degree convictions must be considered a conviction under R.C. 2953.31. And the defendant was not an “eligible offender.” See *id.*

The court of appeals’ analysis rewrites R.C. 2953.31(A), adding another exception to the list of convictions excluded from the definition of “eligible offender,” one not included by the legislature. Where, as here, the language of the statute is clear and unambiguous, it requires no interpretation. *Id.* See, e.g., *State v. Miller*, 10th Dist. No. 06AP-192, 2006-Ohio-5954, ¶¶10-11 (duty of the court to give effect to words used, not to delete words used or add words not used). The court’s construction of R.C. 2953.31(A) in this case is nothing more than judicial legislation and contravenes the separation of powers doctrine protected by both the state and federal constitutions by adding language to R.C. 2953.31(A) that the General Assembly did not use.

Because defendant could not qualify as an “eligible offender” within the meaning of R.C. 2953.31(A), the trial court lacked jurisdiction to grant the defendant’s application for sealing the record of his felony conviction. See *State v. McCoy*, 10th Dist. No. 04AP-121, 2004-Ohio-6726, ¶11. The appellate court erroneously affirmed the trial court’s decision, and that decision should be reversed. The State’s propositions of law warrant review.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal presents questions of such great public interest as to warrant further review by this Court. It is respectfully submitted that jurisdiction should be accepted.

Respectfully submitted,

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Prosecuting Attorney



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Counsel for Plaintiff-Appellant

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, January 4, 2016, to Antonio L. Washington, II, 760 Cherryhurst Dr., Columbus, Ohio, 43228, defendant-appellee, pro se.



BARBARA A. FARNBACHER 0036862  
Assistant Prosecuting Attorney

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

|                            |   |                       |
|----------------------------|---|-----------------------|
| State of Ohio,             | : |                       |
|                            | : |                       |
| Plaintiff-Appellant,       | : |                       |
|                            | : | No. 15AP-538          |
| v.                         | : | (C.P.C. No. 15EP-102) |
|                            | : |                       |
| Antonio L. Washington, II, | : | (REGULAR CALENDAR)    |
|                            | : |                       |
| Defendant-Appellee.        | : |                       |

D E C I S I O N

Rendered on November 19, 2015

*Ron O'Brien*, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} The State of Ohio is appealing from the granting of an application to seal a conviction. It assigns a single error for our consideration:

THE TRIAL COURT ERRED IN GRANTING AN APPLICATION TO SEAL A CONVICTION WHEN THE OFFENDER DID NOT MEET THE DEFINITION OF "ELIGIBLE OFFENDER."

{¶ 2} In October 2008, Antonio L. Washington, II, was convicted of a single count of carrying a concealed weapon. Over six years later, he applied to have the records of the conviction sealed. The state opposed the application, asserting that Washington had multiple convictions and that the multiple convictions barred him from being an "eligible offender" as defined in R.C. 2953.31(A), which reads:

"Eligible offender" means anyone 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, 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.

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.

{¶ 3} The state argues that Washington had a conviction for domestic violence in 2009 and two convictions for fourth-degree misdemeanors, namely, violation of R.C. 4503.11. R.C. 4503.11(A) reads:

Except as provided by sections 4503.103, 4503.172, 4503.41, 4503.43, and 4503.46 of the Revised Code, no person who is the owner or chauffeur of a motor vehicle operated or driven upon the public roads or highways shall fail to file annually the application for registration or to pay the tax therefor.

{¶ 4} Stated more simply, the state argues that conviction for failure to register your motor vehicle should work as a bar to having a felony expunged. The state argues that our earlier cases of *In re Mooney*, 10th Dist. No. 12AP-376, 2012-Ohio-5904, and *State v. Dominy*, 10th Dist. No. 13AP-124, 2013-Ohio-3744, were wrongly decided. The state makes no argument with respect to the domestic violence conviction.

{¶ 5} We are not prepared to fault the trial court for following our binding decision. We overrule the sole assignment of error. We therefore affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN, P.J., concurs.

DORRIAN, J., concurs in judgment only.

DORRIAN, J., concurring in judgment only.

{¶ 6} Given the precedent of this court, and based on the doctrine of stare decisis, I concur. However, consistent with my dissent in *State v. J.M.*, 10th Dist. No. 15AP-77, 2015-Ohio-2669, I note that I believe our precedent contradicts the plain language of the relevant statutes.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

|                            |   |                       |
|----------------------------|---|-----------------------|
| State of Ohio,             | : |                       |
|                            | : |                       |
| Plaintiff-Appellant,       | : |                       |
|                            | : | No. 15AP-538          |
| v.                         | : | (C.P.C. No. 15EP-102) |
|                            | : |                       |
| Antonio L. Washington, II, | : | (REGULAR CALENDAR)    |
|                            | : |                       |
| Defendant-Appellee.        | : |                       |

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on November 19, 2015, appellant's single 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 shall be assessed against appellant.

TYACK, J., BROWN, P.J., & DORRIAN, J.

/S/ JUDGE

Tenth District Court of Appeals

**Date:** 11-19-2015  
**Case Title:** STATE OF OHIO -VS- ANTONIO L WASHINGTON II  
**Case Number:** 15AP000538  
**Type:** JEJ - JUDGMENT ENTRY

So Ordered



/s/ Judge G. Gary Tyack

Electronically signed on 2015-Nov-19 page 2 of 2