[Cite as *State v. Burnside*, 2009-Ohio-2653.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 172
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
JOHN O. BURNSIDE,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 1980-CR-1131.
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Attorney Paul J. Gains Prosecuting Attorney Attorney Ralph M. Rivera Assistant Prosecuting Attorney 21 W. Boardman St., 6th Floor Youngstown, OH 44503
For Defendant-Appellant:	John O. Burnside, Pro-se #17973004 P.O. Box 3000 White Deer, PA 17887

JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: June 4, 2009

[Cite as *State v. Burnside*, 2009-Ohio-2653.]
DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, and the parties' briefs. Pro-se defendant-appellant, John Otis Burnside, appeals the decision of the Mahoning County Court of Common Pleas that denied a motion to expunge his attempted rape conviction. Burnside first argues his attempted rape conviction is void for lack of subject matter jurisdiction due to an allegedly defective indictment. He therefore urges this court to reverse and vacate his conviction. Second, Burnside contends the trial court abused its discretion by denying his motion to expunge his attempted rape conviction.

{¶2} Upon review, Burnside's arguments are meritless. First, the defective indictment issue could have been raised in the context of a direct appeal or possibly a petition for post-conviction or habeas relief, however, it is unfit for resolution in the context of the present appeal. Second, Burnside's argument is meritless because amending an indictment to charge attempted rape, instead of rape, does not violate Crim.R. 7(D). Finally, the trial court correctly denied Burnside's motion to expunge because his attempted rape conviction is not eligible for expungement pursuant to both R.C. 2953.36(B) and (D). Accordingly, the judgment of the trial court is affirmed.

Facts

{¶3} On October 15, 1981, Burnside was convicted by the Mahoning County Court of Common Pleas of one count of attempted rape, pursuant to R.C. 2923.02 and R.C. 2907.03(A)(1), following a guilty plea, in a case styled 80-CR-1131.

{¶4} On April 22, 2008, Burnside filed a pro-se motion to expunge that conviction with the trial court, pursuant to R.C. 2952.32. In its brief in opposition thereto, the State argued that since Burnside was convicted of rape pursuant to R.C. 2907.02(A)(1), his conviction was ineligible for expungement or sealing pursuant to R.C. 2953.36(B). Burnside replied, arguing that since he was actually convicted of *attempted* rape, R.C. 2953.36(B) should not apply and the court should therefore grant his motion to expunge. Burnside also appeared to argue his conviction was somehow the result of government corruption. Burnside attached as exhibits the Youngstown Municipal Court complaint against him, the Mahoning County Grand Jury indictment, portions of the docket from

Case No. 80-CR-1131, his Plea of Guilty, the Judgment Entry of Sentencing, and an undated newspaper article about a government informant who assisted with the breakup of organized crime in Youngstown. The trial court overruled Burnside's motion to expunge.

The Validity of the Underlying Conviction

{¶5} In his first of two assignments of error Burnside asserts:

{¶6} "Whether the Court of Common Pleas erred in denying the Appellant's Motion to Expunge Appellant's Criminal Conviction, since the Court of Common Pleas never had any subject-matter jurisdiction in Case No: 1980-CR-1131."

{¶7} Burnside first challenges the validity of the attempted rape conviction he seeks to expunge. He argues his attempted rape conviction was void for lack of subject matter jurisdiction because of an allegedly defective indictment. He claims that he was originally indicted for rape and that the trial court improperly permitted the State to amend the indictment to a charge of attempted rape without presenting that amended charge to the grand jury. He therefore posits his conviction was void for lack of subject matter jurisdiction, and urges this court to reverse and vacate the conviction. The State argues this court should disregard Burnside's argument, as it is untimely and irrelevant.

{¶8} As an initial matter, Burnside never raised this issue during the expungement proceedings below. The defective indictment issue could have been raised in the context of a direct appeal or possibly a petition for post-conviction or habeas relief. Moreover, Burnside's defective indictment argument is meritless because amending an indictment to charge attempted rape, instead of rape, absent re-presentment to the grand jury is proper. Contrary to Burnside's assertions, such an amendment does not change the "identity of the crime charged," and therefore does not violate Crim.R. 7(D). See *State v. Russell* (Oct. 20, 2000), 2d Dist. Nos. 18155, 18194, at *1 (holding that the "trial court was allowed to permit amendment of the indictment to charge [the defendant] with an attempt to commit the specific offense with which he was originally indicted without violating Crim.R. 7(D).") Accordingly, Burnside's first assignment of error is meritless.

The Trial Court's Denial of the Motion to Expunge

{¶9} In his second assignment of error, Burnside asserts:

{¶10} "Whether the Court of Common Pleas abused its discretion in denying the Appellant's Motion to Expunge."

{¶11} Burnside reiterates his contention that his underlying conviction is void, and argues the trial court should have therefore granted the motion to expunge. The State counters that the trial court properly dismissed the motion to expunge because Burnside's conviction is ineligible for sealing pursuant to R.C. 2953.36(B).

{¶12} An appellate court generally reviews a trial court's disposition of a motion to expunge and seal the record under an abuse of discretion standard. *State v. Pierce*, 10th Dist. Case No. 06AP-931, 2007-Ohio-1708 at ¶5, citing *State v. Hilbert* (2001), 145 Ohio App.3d 824, 827, 764 N.E.2d 1064. An abuse of discretion means trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140. However, where, as here, questions of law are in dispute, an appellate court reviews the trial court's determination de novo. *Pierce* at ¶5, citing *State v. Derugen* (1996), 110 Ohio App.3d 408, 410, 674 N.E.2d 719.

{¶13} Pursuant to R.C. 2953.32, an expungement, also called "sealing of a record of conviction," is a "postconviction remedy that is civil in nature." *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, at ¶19 (internal citations omitted). "'[E]xpungement 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, 2000-Ohio-474, 721 N.E.2d 1041, quoting, *State v. Hamilton*, 75 Ohio St.3d 636, 639, 1996-Ohio-440, 665 N.E.2d 669.

{¶14} Specific statutory provisions, set forth in R.C. 2953.31 through 2953.36, govern the sealing of a record of conviction, and except convictions for certain crimes from eligibility. "[I]f an applicant's conviction is not eligible for expungement, the trial court lacks jurisdiction to grant the requested relief." *Pierce* at ¶4, citing *State v. Jithoo*, 10th Dist. No. 05AP-436, 2006-Ohio-4978, at ¶15. "The statutory law in effect at the time of the filing of the application to seal a record of conviction is controlling." *LaSalle* at ¶19. At the time Burnside filed his motion to expunge, R.C. 2953.32 and R.C. 2953.36 were in

effect and in their present form.

{¶15} R.C. 2953.32 provides, in pertinent part:

{¶16} "(A)(1) Except as provided in section 2953.61 of the Revised Code, a first 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 conviction record. Application may be made at the expiration of three years after the offender's final discharge if convicted of a felony, or at the expiration of one year after the offender's final discharge if convicted of a misdemeanor." R.C. 2953.32.

{¶17} R.C. 2953.36 lists several types of "convictions precluding sealing." Relevant to this case are the following provisions:

{¶18} "(B) Convictions under section 2907.02, 2907.03, 2907.04, 2907.05, 2907.06, 2907.321, 2907.322, or 2907.323, former section 2907.12, or Chapter 4507., 4510., 4511., or 4549. of the Revised Code, or a conviction for a violation of a municipal ordinance that is substantially similar to any section contained in any of those chapters." R.C. 2953.36(B).

{¶19} "(G) Convictions of a felony of the first or second degree." R.C. 2953.36(G).

{¶20} Burnside was convicted of attempted rape pursuant to R.C. 2923.02 and R.C. 2907.03(A)(1). Convictions under R.C. 2907.03 are precluded from sealing pursuant to R.C. 2953.36(B). And even though Burnside was convicted of *attempted* rape and not rape, the exception contained in R.C. 2953.36(B) exception still applies. The Second District addressed a similar issue in *State v. Reid*, 2d Dist. No. 2005CA0028, 2006-Ohio-840. In *Reid*, a criminal defendant who was convicted of attempted gross sexual imposition appealed the trial court's denial of his motion to expunge that conviction. Gross sexual imposition is listed as an excepted offense under R.C. 2953.36(B). The court held that "having been convicted of an *attempted violation* of R.C. 2907.06, Sexual Imposition, Defendant was not eligible as a matter of law to have the records of his conviction sealed or expunged." *Reid* at ¶13 (emphasis added).

{¶21} Burnside was convicted of attempted rape. A conviction for rape, like gross sexual imposition, is one that is excepted from sealing pursuant to R.C. 2953.36(B). It

therefore follows that, as a matter of law, Burnside was not eligible to have his attempted rape conviction expunged.

{¶22} Moreover, Burnside's attempted rape conviction also falls under the R.C. 2953.36(G) exception, which includes "convictions of a felony of the first or second degree." Attempted rape pursuant to R.C. 2923.02 and R.C. 2907.03(A)(1) is a felony of the second-degree, both now, and when Burnside was convicted in 1981. See *State v. Earich* (1982), 4 Ohio App.3d 183, 183, 4 OBR 285, 447 N.E.2d 121.

{¶23} Based on the foregoing, the trial court correctly overruled Burnside's motion to expunge. Burnside's second assignment of error is meritless.

Conclusion

{¶24} Both of Burnside's assignments of error are meritless. First, although the defective indictment issue could have been raised to challenge Burnside's conviction within a direct appeal or possibly a petition for post-conviction or habeas relief, it is unfit for resolution in the context of the present appeal. In any event, Burnside's argument is meritless because amending an indictment to charge attempted rape, instead of rape, absent re-presentment to the grand jury, does not violate Crim.R. 7(D). In addition, the trial court properly denied Burnside's motion to expunge because his attempted rape conviction is not eligible for expungement pursuant to both R.C. 2953.36(B) and (D). Accordingly, the judgment of the trial court is affirmed.

Vukovich, P.J., concurs.

Waite, J., concurs.