

IN THE SUPREME COURT OF OHIO

MICHAEL GYUGO,

Appellant,

v.

FRANKLIN COUNTY BOARD OF
DEVELOPMENTAL DISABILITIES,

Appellee.

CASE NO. 2016-0564

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

Court of Appeals
Case No. 15AP-150

**MERIT BRIEF OF *AMICUS CURIAE*
OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF APPELLANT**

Ron O'Brien (0017245)
Prosecuting Attorney

Denise L. DePalma (0063233) (COUNSEL OF
RECORD)

Assistant Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
Phone: (614) 525-6625
Fax: (614) 525-6012
Email: ddepalma@franklincountyohio.gov

*COUNSEL FOR APPELLEE FRANKLIN
COUNTY BOARD OF DEVELOPMENTAL
DISABILITIES*

Russell S. Bensing (0010602)
1360 East Ninth Street, Suite 600
Cleveland, OH 44114
Phone: (216) 241-6650
Email: rbensing@ameritech.net

*COUNSEL FOR OHIO ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS IN
SUPPORT OF APPELLANT*

Mary Jane McFadden (0005777) (COUNSEL
OF RECORD)

Joseph C. Winner (0019246)
McFadden & Winner
175 South Third Street, Suite 200
Columbus, Ohio 43215
Phone: (614) 221-8868
Email: m_mcfadden@earthlink.net
jcwinner@earthlink.net

*COUNSEL FOR APPELLANT MICHAEL
GYUGO*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF <i>AMICUS</i>	1
STATEMENT OF THE CASE AND THE FACTS.....	1
LAW AND ARGUMENT	2
I. The Consequences of a Criminal Conviction.	2
II. Expungement.....	4
A. Expungement in Ohio.	4
B. Court interpretations of the expungement statute.	5
III. Application to the Fact of this Case.....	6
A. The applicable statutes unambiguously provide that Gyugo was not required to disclose his expunged conviction.	6
B. The expungement statutes should not be interpreted to require the applicant to determine whether an offense “bears a direct and substantial relationship to the position for which the person is being considered.”	7
C. The expungement statutes should not be interpreted to allow a person to be discharged for “dishonesty” for not disclosing an expunged conviction protected by R.C. §2953.33.....	9
CONCLUSION.....	10
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

Cases

<i>Ohio Neighborhood Fin., Inc. v. Scott</i> , 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115...	6
<i>Sears v. Weimer</i> , 143 Ohio St. 312, 55 N.E.2d 413 (1944)	6
<i>State ex rel. Gains v. Rossi</i> , 86 Ohio St. 3d 620, 622, 1999-Ohio-213, 716 N.E.2d 204	6
<i>State v. Hamilton</i> , 75 Ohio St. 3d 636, 639, 1996-Ohio-440, 665 N.E.2d 669	5
<i>State v. Simon</i> , 87 Ohio St. 3d 531, 533, 2000-Ohio-474, 721 N.E.2d 1041	5

Statutes

21 U.S.C. §862.....	2
R.C. §2929.11(A).....	4
R.C. §2953.31	5
R.C. §2953.33(B).....	<i>passim</i>
R.C. §2953.36	4
R.C. §4762.06	6
R.C. 2953.32	7
R.C. 2953.37	7
R.C. 3319.292	7

Other Authorities

Civil Impact of Criminal Convictions under Ohio Law, http://civicohio.org , last accessed September 30, 2016.	2
Creation and Validation of the Ohio Risk Assessment System, Final Report, pages 49-62, http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf , last accessed 9/30/16.....	4

Emsellem, *New Model State Policies Improve Employment Opportunities for People with a Criminal Record* 4 (2010), available at <http://www.nelp.org/page/-/SCLP/2010/ModelStateHiringProtections.pdf?nocdn=1> 3

Heller, Joseph, *Catch-22* 8

Holzer, Raphael, and Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, *Journal of Law and Economics* 49.2 (2006): 451, 453–454, <http://www.irp.wisc.edu/publications/dps/pdfs/dp125402.pdf>, last accessed 4/8/16 3

Rodriguez, Michelle N., and Maurice Emsellem, “65 Million ‘Need Not Apply’: The Case for Reforming Criminal Background Checks for Employment,” New York: National Employment Law Project, March 2011, http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf 3

Soc’y for Human Res. Mgmt., *Background Checking: Conducting Criminal Background* 3

STATEMENT OF INTEREST OF *AMICUS*

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. Its mission is to defend the rights secured by law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; and to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

STATEMENT OF THE CASE AND THE FACTS

Amicus concurs in the Statement of the Case and the Facts presented in the Merit Brief of Appellant.

LAW AND ARGUMENT

I. The Consequences of a Criminal Conviction.

A fourth-degree misdemeanor conviction for possession of marijuana – less than four ounces worth – would seem to rank low on the hierarchy of criminal offenses. Four states and the District of Columbia have legalized recreational use, and five more states have the issue on the ballot in November. And more than half the states, including Ohio, have legalized medical use.

Various Ohio statutes also provide that if you have a misdemeanor marijuana conviction, it can affect you in 227 ways. You can't get a concealed handgun license. It will automatically cost you your job if you work as a state park officer, private investigator, anesthesiologist assistant, acupuncturist, or dialysis technician. It may disqualify you from contracting as a Medicaid provider, or from obtaining accreditation and approval for running a training program for EMS technicians.¹

This, for a misdemeanor. If you are convicted of possession of any amount of cocaine, the potential adverse consequences more than double, to 538.

This doesn't even include the Federal consequences. Under 21 U.S.C. §862, those convicted of drug offenses may be made ineligible for grants, licenses, contracts, and other federal benefits, excluding retirement, welfare, Social Security, health, disability, public housing, benefits based on military service, and benefits for which payments or services are required.

And it doesn't include the most significant consequence: Employers are much less likely to hire you. Study after study has documented that regardless of the offense, employers often

¹ All of the examples here and elsewhere in this brief are taken from the website, Civil Impact of Criminal Convictions under Ohio Law, <http://civiccoho.org>, last accessed September 30, 2016.

categorically reject applicants with a prior criminal record. One found that a majority of employers would “probably” or “definitely” not be willing to hire an applicant with a criminal record. Holzer, Raphael, and Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, *Journal of Law and Economics* 49.2 (2006): 451, 453–454, <http://www.irp.wisc.edu/publications/dps/pdfs/dp125402.pdf>, last accessed 4/8/16. Another found frequent use of blanket “no-hire” policies of those with a prior conviction by major corporations. Rodriguez, Michelle N., and Maurice Emsellem, “65 Million ‘Need Not Apply’: The Case for Reforming Criminal Background Checks for Employment,” New York: National Employment Law Project, March 2011, http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf, last accessed 4/8/16. According to a survey published in 2010 by the Society of Human Resources Management, ninety-two percent of their members perform criminal background checks on at least some job candidates, and seventy-three percent perform checks on *all* candidates. Soc’y for Human Res. Mgmt., *Background Checking: Conducting Criminal Background Checks 3* (2010). A recent study of online job ads posted on Craigslist in five major cities noted widespread use of blanket policies refusing to hire anyone with any type of conviction in entry-level jobs such as warehouse workers, delivery drivers, and sales clerks. Emsellem, *New Model State Policies Improve Employment Opportunities for People with a Criminal Record 4* (2010), available at <http://www.nelp.org/page/-/SCLP/2010/ModelStateHiringProtections.pdf?nocdn=1> (announcement of job opening in data entry and clerical positions by Bank of America warned that applicants will not be considered if a background check reveals either a felony or misdemeanor conviction).

One of the key goals of criminal sentencing is rehabilitation, a fact reflected by its specific inclusion in R.C. §2929.11(A) as one of the principles and purposes of sentencing. The link between employment and rehabilitation should be self-evident, and any doubts on that score can be dispelled by looking at Ohio's adoption of a Risk Assessment System, used to aid in setting bail bonds, determining whether to place a defendant on community control sanctions, housing a defendant in prison, and aiding in re-entry from prison back into the community. The defendant's employment history, and especially if he was employed at the time of the arrest, is a critical factor in each of those assessments. Creation and Validation of the Ohio Risk Assessment System, Final Report, pp. 49-62, http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf, last accessed 9/30/16. Simply put, an ex-offender with a job has much less chance of recidivating is not something merely intuitively known, but scientifically proven.

Amicus submits that the logical goal of any criminal justice system, and one compelled by the clear mandate of Ohio law, is that, where possible, the consequences of a criminal conviction should be minimized, especially for those who are more capable of rehabilitation and less likely to pose a threat to the public.

Expungement provides the primary method for minimizing those consequences.

II. Expungement

A. Expungement in Ohio. Ohio passed its expungement statute in 1974. Since then, it has gone in two separate directions. As originally enacted, R.C. §2953.36 permitted first offenders to expunge their convictions unless those were for offenses where they were not eligible for probation, or for traffic offenses. Since then, the number of offenses eligible for expungement have been substantially narrowed. Sex offenses were added to the list of

proscribed convictions in 1994, and subsequent amendments preclude expungement for felonies of the first or second degree, most offenses of violence except simple assault, and any crime where the victim was a juvenile.

While most of the amendments restricted those eligible for expungement, several changes, especially the more recent ones, have expanded that pool. A 2000 amendment broadened the definition of a “first offense” to include two or three convictions from the same indictment if the offenses were committed within a three-month period. In 2012, R.C. §2953.31 was amended to allow persons with two misdemeanor convictions, or one felony and one misdemeanor conviction, to expunge both. That amendment, though, required that the two misdemeanor conviction not be of the same crime. Two years later, the statute was again amended to remove that restriction; now, someone with two misdemeanor theft offenses can have them expunged.

B. Court interpretations of the expungement statute. The courts have similarly expressed ambivalence toward expungement. On the one hand, any number of decisions, including some from this Court, approach expungement with the view that “expungement is an act of grace created by the state,” *State v. Hamilton*, 75 Ohio St. 3d 636, 639, 1996-Ohio-440, 665 N.E.2d 669, “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.

On the other hand, Ohio courts, including this one, have recognized the obviously remedial purposes of the expungement, and that it thus falls within the instruction of R.C. §1.11 that “[r]emedial laws and all proceedings under them shall be liberally construed in order to promote their object.” *State ex rel. Gains v. Rossi*, 86 Ohio St. 3d 620, 622, 1999-Ohio-213, 716

N.E.2d 204 (“the remedial expungement provisions of R.C. 2953.32 and 2953.33 must be liberally construed to promote their purposes”).

This is especially critical in light of the vast increase in collateral consequences for convictions. Many of those are of recent vintage; the prohibition against retaining a license as a radiologist assistant or an oriental medicine practitioner for one convicted of misdemeanor marijuana possession came into being by an amendment in 2012, for example. R.C. §4762.06.

Amicus submits that, in light of the dramatic collateral consequences of a criminal conviction, even of a minor offense, the penological goal of rehabilitation is best served by limiting those consequences through a liberal interpretation of the remedial purpose of the expungement statutes

III. Application to the Fact of this Case.

A. The applicable statutes unambiguously provide that Gyugo was not required to disclose his expunged conviction. It is a cardinal principle that statutory interpretation is unnecessary if the statute’s meaning is clear, and interpretation is unnecessary. As this court explained over 70 years ago in *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944),

Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation. To interpret what is already plain is not interpretation, but legislation, which is not the function of the courts, but of the general assembly. An unambiguous statute is to be applied, not interpreted.

The Court reiterated that rule just two years ago in *Ohio Neighborhood Fin., Inc. v. Scott*, 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶23.

The statute at issue in this case is R.C. §2953.33(B), which provides:

(1) In any application for employment, license, or other right and privilege ... except as provided in division (E) of section 2953.32 and in section 3319.292 of the Revised Code and subject to division (B)(2) of this section, a person may be questioned only with respect to convictions not sealed ... unless the question bears a direct and substantial relationship to the position for which the person is being considered.

R.C. §2953.32(E) has no application here; it allows questioning in a *criminal proceeding* about an expunged conviction if the conviction would otherwise be admissible. Neither is R.C. §3319.292, which permits a state board of education or the Department of Education to ask prospective employees about any convictions, expunged or not.

That leaves the last phrase, whether “the question bears a direct and substantial relationship to the position for which the person is being considered.” Significantly, the provision does not state that the *conviction* has to bear a direct and substantial relationship, but whether the *question* does. The plain meaning of the statute thus imposes upon the *employer* the burden of limiting what questions can be asked, not on the *applicant* in how they have to be answered.

The appellate court’s decision here runs contrary to the clear meaning of the statute. In fact, nothing in the question presented to Mr. Gyugo at the time of his original application or in the subsequent questions, and nothing given to Mr. Gyugo in conjunction with them, placed him notice that there *were* any disqualifying offenses, or how he might determine what they were. The question simply asked him to include any sealed convictions in his response, a question that Mr. Gyugo knew from the statute it was impermissible to ask, and that he was not required to answer.

B. The expungement statutes should not be interpreted to require the applicant to determine whether an offense “bears a direct and substantial relationship to the position for which the person is being considered.” The only possible issue for interpretation here is who

bears the burden of demonstrating that the applicant's conviction is one which bears a direct and substantial relationship to the position he is seeking. As noted, the plain wording of the statute places that burden on the employer: it is the *question*, not the *conviction*, that must bear that relationship.

But apart from the statute's wording, the purpose of the expungement statute compels such an interpretation. That purpose is to allow first offenders who have committed non-violent offenses to avoid the drastic effects on employment that a criminal conviction can create.

Imagine the situation from the perspective of the applicant. He has had his conviction expunged, and the law states that this means an employer can't ask him about it. The job application asks him whether he has any criminal convictions. There is no limit in the application as to what those convictions are. The question does not even ask him if he has any convictions which "bear a direct and substantial relationship" to the job he is applying for. That, at least, would allow him to hazard a guess as to what those offenses might be. One might acknowledge, for example, that someone applying for a position in a pharmacy should know that a drug conviction bears a substantial relationship to that position.

The question here, though, fails in two respects. First, the question specifically demands that the applicant disclose any and all convictions, even those which were expunged. The applicant knows that this question, unlimited in scope, is specifically prohibited by law. Even assuming he knows that the law allows the question to be asked if it bears a direct and substantial relationship with the job, an unlikely scenario, he has no means of determining whether that applies to his situation.

More critically, allowing an employer to demand information as to all convictions, even expunged ones, defeats the entire purpose of the expungement statutes. While the statute permits

the employer to ask about sealed convictions which bear a substantial and direct relationship to the job, there is nothing limiting its power to deny the applicant employment because of *any* conviction. In short, the procedure allowed here by the appellate court permits an employer to demand information regarding any sealed conviction, and then deny an applicant a job because he has one, regardless of whether it is related to the position. This runs directly contrary to the entire purpose of the expungement statutes.

C. The expungement statutes should not be interpreted to allow a person to be discharged for “dishonesty” for not disclosing an expunged conviction protected by R.C.

§2953.33. Of course, the Board and the majority of the court below determined that R.C. §2953.32 was not violated: the Board did not inquire about Mr. Gyugo’s expunged conviction, it simply fired him when it learned he had one, because he had been “dishonest” in failing to disclose it.

The meaning of R.C. §2953.33(B) is unambiguous: a person cannot be questioned in an employment application about expunged convictions. The Board tries to create an ambiguity by contending that while Gyugo was not required to answer the question at all, he can be discharged because he was “dishonest” in not answering it.

The argument that an employee can be discharged for “dishonesty” because he did not disclose something the law clearly permitted him not to disclose can only be described as Heller-esque.² Even worse than its logical infirmities is that it would gut the legislative purpose of allowing offenders to alleviate the collateral consequences of their convictions by having them

² “That’s some catch, that Catch-22,” he observed. “It’s the best there is,” Doc Daneeka agreed. Heller, Joseph, *Catch-22*, p. 46.

expunged. The Board's argument runs completely contrary to the liberal interpretation of the expungement statutes that the law requires, and should be summarily rejected.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Ohio Association of Criminal Defense Lawyers prays this Honorable Court to reverse the lower court's decision, and remand the case for further proceedings consistent with the Court's opinion.

Respectfully submitted,

/s/Russell S. Bensing
Russell S. Bensing (0010602)
1360 East Ninth Street, Suite 600
Cleveland, OH 44114
(216) 241-6650

COUNSEL FOR *AMICUS CURIAE* OHIO
ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Association of Criminal Defense Lawyers, in Support of Appellant was served by ordinary U.S. Mail, postage prepaid, to the following:

Denise L. DePalma
Assistant Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215

*COUNSEL FOR APPELLEE FRANKLIN COUNTY BOARD OF DEVELOPMENTAL
DISABILITIES*

Mary Jane McFadden (0005777) (COUNSEL OF RECORD)
Joseph C. Winner (0019246)
McFadden & Winner
175 South Third Street, Suite 200
Columbus, Ohio 43215
Phone: (614) 221-8868
Email: m_mcfadden@earthlink.net
jcwinner@earthlink.net

COUNSEL FOR APPELLANT MICHAEL GYUGO

/s/Russell S. Bensing
Russell S. Bensing