

[Cite as *State v. Smith*, 2009-Ohio-2380.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 91853**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JOSEPH SMITH**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-466444

**BEFORE:** Cooney, A.J., Celebrezze, J., and Jones, J.

**RELEASED:** May 21, 2009

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and

26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Defendant-appellant, Joseph Smith (“Smith”), appeals the trial court’s denial of his application for expungement and motion to seal the record.

Finding no merit to the appeal, we affirm.

{¶ 2} In June 2005, Smith was indicted along with several other individuals and corporations for various counts of theft, money laundering, forgery, and engaging in a pattern of corrupt activity.<sup>1</sup> As part of a plea agreement, Smith pled guilty to aggravated theft under R.C. 2913.02, a first degree misdemeanor. The trial court sentenced him to six months in jail, but his sentence was suspended and he was placed on six months of inactive probation and ordered to pay a \$300 fine.

{¶ 3} In March 2008, Smith moved to expunge his criminal record. The State filed its brief in opposition in April 2008. At a hearing, the trial court denied Smith’s motion, finding that a compelling public interest exists.

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<sup>1</sup>The charges stemmed from an investigation conducted by the Ohio Department of Natural Resources concerning the removal of fish from Lake Erie.

{¶ 4} Smith appeals, raising one assignment of error, in which he argues that the trial court abused its discretion in denying his application for expungement and motion to seal the record.

{¶ 5} The standard of review for an appellate court addressing an application to seal a record of conviction is abuse of discretion. *State v. Hilbert* (2001), 145 Ohio App.3d 824, 764 N.E.2d 1064. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 6} The procedure for expungement is set forth in R.C. 2953.32 and provides that the court shall do each of the following when considering the application:

“(C)(1)(a) Determine whether the applicant is a first offender or whether the forfeiture of bail was agreed to by the applicant and the prosecutor in the case.\*\*\*;

“(b) Determine whether criminal proceedings are pending against the applicant;

“(c) If the applicant is a first offender who applies pursuant to division (A)(1) of this section, determine whether the applicant has been rehabilitated to the satisfaction of the court;

“(d) If the prosecutor has filed an objection in accordance with division (B) of this section, consider the reasons against granting the application specified by the prosecutor in the objection;

“(e) Weigh the interests of the applicant in having the records pertaining to the applicant’s conviction sealed against the legitimate needs, if any, of the government to maintain those records.”

{¶ 7} Thus, in an expungement case under R.C. 2953.32, the trial court “must weigh the interest of the public’s need to know as against the individual’s interest in having the record sealed, and must liberally construe the statute so as to promote the legislative purpose of allowing expungements.” *Hilbert*, at 827.

{¶ 8} Smith argues that the trial court abused its discretion in denying his application because he met all the criteria set forth in R.C. 2953.32(C)(1)(a)-(e). Specifically, he claims that the legitimate needs of the government in maintaining his record of conviction are met by the fact that the conviction of Smith Fisheries, Inc. is available for public inspection.<sup>2</sup> Smith also relies on *Hilbert* and argues that his expungement should be granted because the journal entry “simply states” that his “motion to seal the record is opposed by the State and denied by the court.”<sup>3</sup>

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<sup>2</sup>Smith Fisheries, through its officer, Smith, pled guilty to theft. As part of the plea agreement, it was required to pay \$70,000 in restitution and a \$7,500 fine.

<sup>3</sup>Smith also argues that his conviction should be expunged because other defendants in a similar case had their records expunged. This argument lacks merit because he failed to raise it at the trial court, and we cannot review a case that has been expunged.

{¶ 9} In *Hilbert*, the defendant pled guilty to criminal mischief for burning a cross in front of his apartment building. After a hearing, the trial court denied Hilbert's motion to expunge his conviction. We reversed the court's denial, stating, "[a]lthough we are hampered in this case because the trial court's entry simply denied the motion to expunge without giving any reasons therefor, we believe that in light of all the facts in this case, the trial court abused its discretion in failing to carry out the clear legislative intent in enacting R.C. 2953.31 and 2953.32." *Id.* at 828.

{¶ 10} Thus, our reversal of the trial court's judgment in *Hilbert* was not based on the fact that the court's entry denying the motion to expunge failed to include any reasons, but rather we considered all of the facts of the case and found that the trial court failed to carry out the clear legislative intent in R.C. 2953.31 and 2953.32.<sup>4</sup>

{¶ 11} In the instant case, Smith pled guilty to aggravated theft for the removal of fish from Lake Erie. At the hearing, the State objected to the expungement because it felt that the public needed to be aware of the individuals involved in the theft to avoid dealing with them in the future. The

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<sup>4</sup>Hilbert, a black man, burned a cross on the front lawn of his apartment building in a predominantly white neighborhood in frustration, because he felt that his harassment complaints to local authorities and the NAACP had been ignored. He pled guilty to a misdemeanor, criminal mischief.

trial judge agreed, stating that there is a compelling public interest because “I [trial judge] do remember the facts of the case and I do remember the large amounts of restitution that were ordered to be paid and I do remember that plea bargaining was done, as I said, a reduction in some very serious charges in exchange for tens of thousands of dollars in restitution.”

{¶ 12} Because the trial court’s reasoning was clearly explained in the transcript, we are not hampered by the simple entry denying Smith’s motion to expunge. Moreover, the trial court is “in the best position to determine whether appellant was dangerous and whether the interest of the state in maintaining the records of the case outweighed appellant’s interest in having the records sealed.” *State v. Grove* (1986), 29 Ohio App.3d 318, 320, 505 N.E.2d 297. Therefore, we conclude that the trial court’s decision denying Smith’s application for expungement was not unreasonable, arbitrary, or unconscionable.<sup>5</sup>

{¶ 13} Accordingly, we find no abuse of discretion in the court’s denial of Smith’s motion for expungement.

{¶ 14} The sole assignment of error is overruled.

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<sup>5</sup>Furthermore, we reject any notion that R.C. 2953.32 mandates the trial court to include its findings in the judgment entry. The clear language of R.C. 2953.32 provides that when considering an application for expungement, the court shall determine whether the applicant is a first offender, whether criminal proceedings are pending against the applicant, whether the applicant has been rehabilitated to the satisfaction of the court, consider objections raised by the prosecutor, and weigh the interests of the applicant in having the records pertaining to the applicant’s conviction sealed against the legitimate needs, if any, of the government to maintain those records.

Judgment is affirmed.

It is ordered that appellee recover of appellant 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

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COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., and  
LARRY A. JONES, J., CONCUR