

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 19AP-36 (C.P.C. No. 88CR-3201A)
R.P.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 25, 2019

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellant. **Argued:** *Barbara A. Farnbacher*.

APPEAL from the Franklin County Court of Common Pleas

BEATTY BLUNT, J.

{¶ 1} The Plaintiff-appellant, State of Ohio, appeals a decision from the Franklin County Court of Common Pleas granting an application to seal a criminal record. Defendant-appellee, R.P., has not appeared in the appeal. Because appellee was not an eligible offender when he filed his application, we sustain the state's sole assignment of error and reverse the trial court's decision.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On November 9, 1988, appellee pled guilty to attempted receiving stolen property, a felony in the fourth degree. (See Franklin C. P. No. 88CR-3201A.) This is the conviction appellee seeks to seal.

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{¶ 3} Appellee was also previously convicted of burglary, a felony in the second degree, in 1988. (See Franklin C.P. No. 87CR-3161.)

{¶ 4} Appellee also has a previous conviction for menacing, a fourth-degree misdemeanor. (See Franklin M.C. No. 1994 CRB 014400.¹)

{¶ 5} On September 18, 2018, appellee filed an application to seal his conviction for attempted receiving stolen property. The state opposed the application, arguing that appellee's other convictions preclude him from being eligible to have his record sealed.

{¶ 6} Appellee's application came before the court for a hearing on January 10, 2019. The trial court granted appellee's application.

{¶ 7} The state has appealed the trial court's decision.

II. ASSIGNMENT OF ERROR

{¶ 8} The state submits one assignment of error for our review:

THE TRIAL COURT LACKED JURISDICTION TO SEAL THE
RECORD OF A CONVICTION, AS DEFENDANT WAS NOT
AN "ELIGIBLE OFFENDER."

III. STANDARD OF REVIEW

{¶ 9} An appellate court generally reviews a trial court's decision on an application to seal a record of conviction under an abuse of discretion standard. *State v. Paige*, 10th Dist. No. 15AP-510, 2015-Ohio-4876, ¶ 5, citing *State v. Black*, 10th Dist. No. 14AP-338, 2014-Ohio-4827, ¶ 6. Whether an applicant is an eligible offender for purposes of sealing a criminal record, is an issue of law. *Id.* at ¶ 5, citing *State v. Hoyles*, 10th Dist. No. 08AP-946, 2009-Ohio-4483, ¶ 4. We review questions of law de novo. *Id.*, citing *Black* at ¶ 6.

¹ Appellee filed an application to seal this misdemeanor conviction with the Franklin County Municipal Court on January 10, 2019.

IV. LAW AND ANALYSIS

{¶ 10} In general, " 'expungement is an act of grace created by the state.' " *State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, ¶ 15, quoting *State v. Hamilton*, 75 Ohio St.3d 636, 639 (1996). As such, the sealing of a criminal record is a "privilege, not a right." (Internal quotations omitted.) *Lyons* at ¶ 15. Upon motion to seal, the trial court must hold a hearing on the motion, where it is first required to "[d]etermine whether the applicant is an eligible offender." R.C. 2953.32(C)(1)(a). "[A] court may seal an offender's conviction record 'only when all requirements for eligibility are met.' " *State v. Aguirre*, 144 Ohio St.3d 179, 2014-Ohio-4603, ¶ 16, quoting *State v. Boykin*, 138 Ohio St.3d 97, 2013-Ohio-4582, ¶ 11; *see also Lyons* at ¶ 15 (an application "should only be granted when all statutory requirements are met." (Internal quotations omitted.)).

{¶ 11} The term "eligible offender" is defined by statute. Pursuant to former R.C. 2953.31(A), the provision in force at the time appellee filed his application:

"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.

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{¶ 12} Thus, "[i]n considering whether an applicant is an eligible offender, 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.' " *In re Sealing of the Record of A.H.*, 10th Dist. No. 15AP-555, 2016-Ohio-5530, ¶ 12, quoting *State v. Black*, 10th Dist. No. 15AP-539, 2015-Ohio-4256, ¶ 6.

{¶ 13} R.C. 2953.31 was amended in 2018, and the amendment took effect on October 29, 2018. Through the amendment, the legislature added a second definition of "eligible offender." Beginning on October 29, 2018, an "eligible offender" now also includes:

Anyone who has been convicted of one or more offenses, but not more than five felonies, in this state or any other jurisdiction, if all of the offenses in this state are felonies of the fourth or fifth degree or misdemeanors and none of those offenses are an offense of violence or a felony sex offense and all of the offenses in another jurisdiction, if committed in this state, would be felonies of the fourth or fifth degree or misdemeanors and none of those offenses would be an offense of violence or a felony sex offense[.]²

{¶ 14} Nonetheless, "[t]he statutory law in effect at the time of the filing of the R.C. 2953.32 application to seal a record of conviction is controlling." *State v. Lasalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, paragraph two of the syllabus; *see also State v. Banks*, 10th Dist. No. 13AP-350, 2013-Ohio-4890, ¶ 12, citing *Lasalle*. When appellee filed his

² The state also argues that appellee does not qualify as an eligible offender even under this statute because his convictions are for crimes of "violence," and because one of his convictions was for a second degree felony. The trial court did not consider whether appellee was convicted for crimes of violence, or felonies beyond the fourth degree. Because the amended statute does not apply to appellee's current application, we do not need to address that issue. Should appellee file a new application under the amended statute, the trial court will have to determine whether appellee's "criminal record reflects a permissible number of convictions, [and] that the conviction(s) sought to be sealed is/are currently eligible to be sealed (based on * * * the nature of the conviction)." *In re Sealing of the Record of A.H.*, at ¶ 12.

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application on September 18, 2018, the statute limited the number of offenses an applicant could have to "not more than one felony conviction, not more than two misdemeanor convictions, or not more than one felony conviction and one misdemeanor conviction." R.C. 2953.31 (A). It is undisputed that appellee had two felony convictions and one misdemeanor conviction when he filed his application. Under the plain language of the statute, he was not an eligible offender when he filed his application. The court, therefore, lacked jurisdiction to grant appellee's application. *See State v. Pariag*, 137 Ohio St.3d 81, 2013-Ohio-4010, ¶ 12; *In re Application for Sealing of the Records of: A.R.H.*, 10th Dist. No. 18AP-554, 2019-Ohio-1325.

V. DISPOSITION

{¶ 15} We sustain the state's single assignment of error, and we reverse the judgment of the Franklin County Court of Common Pleas. We remand this matter to the trial court with instructions to vacate the order sealing the record and dismiss appellee's application.

*Judgment reversed; cause
remanded with instructions.*

KLATT, P.J., and NELSON, J., concur.
