[Cite as *State v. Davies*, 2018-Ohio-5370.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2017-A-0049**
- vs -	:	
ROBERT R. DAVIES,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court, Western District, Case No. 2000 CRB 00167W.

Judgment: Affirmed in part, reversed in part, and remanded.

Nicholas A. Iarocci, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

Robert R. Davies, pro se, 7455 Harmon Road, Conneaut, OH 44030 (Defendant-Appellant).

THOMAS R. WRIGHT, P.J.

{¶1} Appellant, Robert Davies, appeals the trial court's denial of his motion to unseal the record of a prior criminal proceeding against him. Although appellant has not established that he has any right to "unseal" the record at issue, this court still concludes that he is entitled to have access to the record and review it. Accordingly, we affirm in part, but reverse and remand in part.

{¶2} In April 2000, appellant was convicted of misdemeanor sexual imposition. Twelve years later, he submitted a petition for post-conviction relief seeking to have his conviction declared void due to a flaw in the complaint. Ultimately, the state determined that it could not produce a necessary witness to demonstrate the complaint was valid and, therefore, moved to vacate the conviction and dismiss the case. The state's motion was granted.

{¶3} Within two weeks, appellant moved to seal the record of proceedings under R.C. 2953.52. Over objection, the trial court granted the motion in October 2013.

{¶4} Approximately three years later, appellant moved the trial court to unseal the record, stating that he wanted to file new motions in the case and obtain a transcript of an evidentiary hearing. Although captioned as a request to "unseal," the motion was brought pursuant to R.C. 2953.53(D), which delineates a procedure that allows certain persons to be afforded "access" to a sealed record.

{¶5} In conjunction with the motion to unseal, he also filed a motion to correct the grounds of the state's decision to dismiss the case and a motion to vacate the trial court's prior decision overruling his request to be reimbursed for fines and court costs. Under the motion to correct, he argued that the criminal action should have been dismissed for lack of subject matter jurisdiction. Under the motion to vacate, appellant simply re-argued the merits of his request for reimbursement.

{¶6} None of appellant's new motions were filed under the case number for the criminal action. Instead, the clerk filed all three motions under a new miscellaneous case number.

{¶7} The state did not respond to the motion to unseal; rather, it only moved to

strike the motion to correct the basis of the dismissal of the case. The trial court overruled the motion to unseal and to correct the grounds for dismissal. The motion to vacate, however, was not ruled upon and remains pending.

{¶8} In appealing the ruling on his motion to unseal the record, appellant raises three assignments for review:

{¶9} "[1.] The trial court erred in dismissing defendant-appellant's motion to unseal the record pursuant to R.C. 2953.53(D)(1).

{¶10} "[2.] The trial court erred in dismissing defendant-appellant's motion to vacate the judgment dismissing the criminal complaint.

{¶11} "[3.] The trial court erred in dismissing defendant-appellant's motion to vacate the judgment denying the return of fines and court costs."

{¶12} Under his first assignment, appellant contends that the trial court erred in basing its denial of his motion to unseal upon the fact that four years had passed since the dismissal of the underlying case. Citing R.C. 2953.53, he argues that the court had no discretion to consider the surrounding circumstances because the statute grants him an absolute right to unseal the record.

{¶13} R.C. 2953.52 *et seq.* sets forth the procedure for sealing the official record of a criminal action when, inter alia, the charges against the defendant are dismissed. R.C. 2953.53(D) governs both the compliance with an order to seal and the subsequent examination of the sealed record. That statute provides, in pertinent part:

{¶14} "(D) Upon receiving a copy of an order to seal official records pursuant to division (A) or (B) of this section * * *, a public office or agency shall comply with the order * * *, except that it may maintain a record of the case that is the subject of the order if the

record is maintained for the purpose of compiling statistical data only and does not contain any reference to the person who is the subject of the case and the order.

{¶15} "A public office or agency also may maintain an index of sealed official records, * * * access to which may not be afforded to any person other than the person who has custody of the sealed official records. The sealed official records to which such an index pertains shall not be available to any person, except that the official records of a case that have been sealed may be made available to the following persons for the following purposes:

{¶16} "(1) To the person who is the subject of the records upon written application, and to any other person named in the application, for any purpose;

{¶17} "(2) To a law enforcement officer who was involved in the case, for use in the officer's defense of a civil action arising out of the officer's involvement in that case;

{¶18} "(3) To a prosecuting attorney or the prosecuting attorney's assistants to determine a defendant's eligibility to enter a pre-trial diversion program established pursuant to section 2935.36 of the Revised Code;

{¶19} "(4) To a prosecuting attorney or the prosecuting attorney's assistants to determine a defendant's eligibility to enter a pre-trial diversion program under division (E)(2)(b) of section 4301.69 of the Revised Code."

{¶20} Of the four exceptions to non-access set forth in R.C. 2953.53(D), the final three are very limited in scope. In contrast, the first exception provides that the person who is the subject of the sealed records can have access to them "for any purpose." In light of the broad language in the first exception, the Ninth District has concluded that, notwithstanding the use of both "may" and "shall" in the statute, the first exception does

not confer any discretion upon the trial court; i.e., the defendant's request for access to sealed records must be granted. *Akron v. Frazier*, 142 Ohio App.3d 718, 722, 756 N.E.2d 1258 (9th Dist.2001).

{¶21} In applying R.C. 2953.53(D)(1) to the facts of this case, it must first be noted that, in moving to "unseal" the record of the sexual imposition case, appellant was actually seeking to reopen that case for the purpose of filing two new motions to vacate or modify two prior judgments. However, the plain and unambiguous language of the statute only grants a defendant one form of relief: i.e., access to the sealed record. The statute does not contain any reference to unsealing or reopening a case so that new proceedings can be held. By only expressly allowing for "access" to sealed records, the statute implicitly excludes all other forms of potential relief, such as unsealing and reopening. *See State v. Kelley*, 3rd Dist. Auglaize Nos. 2-05-34 & 2-05-35, 2006-Ohio-605, ¶10.

{¶22} In conjunction with the foregoing, it must also be noted that appellant did not reference any other statute or common law rule in support of his request to reopen the dismissed criminal action. Instead, his motion to unseal was predicated solely upon R.C. 2953.53(D). Since that statute only provides for the granting of access to sealed records, appellant was not entitled to have his case unsealed so that he could file new motions in the matter.

{¶23} Nevertheless, as part of his motion to unseal the record, appellant asserted that he wanted to obtain a transcript of an evidentiary hearing that was held in April 2013. Given that obtaining a copy of a document logically falls within the parameters of having access to a sealed record, the trial court should have granted appellant's motion to that limited extent; i.e., he should have been afforded access to the record of the sealed case

and allowed to make copies of any document. On this sole basis, the first assignment has merit.

{¶24} Appellant's final two assignments allege the trial court erred in overruling his motions to correct the grounds for the dismissal and to vacate the prior judgment regarding reimbursement of fines and court costs. The judgment overruling the motion to correct is affirmed for the reasons previously stated. The motion to vacate was not ruled upon, and therefore, is not properly before us.

{¶25} The judgment of the Ashtabula County Court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion,

COLLEEN MARY O'TOOLE, J., dissents.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶26} I agree with the judgment of the majority, reversing the trial court's decision not to allow Davies to access his sealed criminal record. I write separately, however, to further clarify which motions are properly on appeal before this court and to explain the correct interpretation of mandatory terms in a statute.

{¶27} The majority concludes that the trial court failed to rule on the motion to vacate a judgment on fees and court costs, precluding consideration of this issue on appeal. It is accurate that the trial court's failure to rule on post-conviction motions generally prohibits this court from considering issues arising in such motions. It should

be recognized that, in some instances, this court may presume a motion to be overruled when it has not been ruled upon by the trial court. However, this principle is typically applied when there is a final judgment disposing of all pending matters before the court or when the motion is rendered moot or inapplicable due to the circumstances of the case. *See State v. McDowell*, 11th Dist. Portage No. 99-P-0048, 2001 WL 703868, *3 (June 22, 2001) (the defendant's motion to attend a hearing was deemed overruled when the hearing was held without his attendance); *State v. Moore*, 11th Dist. Ashtabula No. 2009-A-0024, 2010-Ohio-2407, ¶ 39 (where a motion to appoint a forensic expert was filed but not ruled upon and a trial was held without the appointment of an expert, it was presumed overruled). In the instance of the present post-conviction motion, a ruling on issues relating to unsealing the record would not impact the motion to vacate a judgment on payment of costs. That issue must be ruled upon by the trial court.

{¶28} It must be emphasized that the trial court's judgment was not entirely clear in relation to the motions on which it had ruled. There is no question that the single judgment from which Davies appeals does not state the court considered or ruled upon the issue of vacating fees. However, a review of the trial court's judgment appears to indicate that it ruled on the motion to "correct" the reason for dismissal. The court's entry states: "The defendant now over 4 years after the dismissal and nearly 4 years after the request to seal the record of dismissal is seeking relief to reopen the matter and 'correct an opinion.' * * * This matter was dismissed and not objected to nor appealed. This motion will not be a substitute for the appeal that the Defendant did not file. The motion is dismissed." This demonstrates that the court intended to deny the request to unseal as well as to correct the opinion as it references both motions and both the sealing of the

record and the dismissal. The reference to the failure to appeal would logically relate to the motion to correct the reasons for dismissal, as Davies' primary concern, as clearly conveyed in this appeal, is not the sealing of the record itself but pursuing his argument that the matter was dismissed for the wrong reason. Thus, it is appropriate for this court to consider the assignment related to this motion, although a review of that error ultimately reveals it lacks merit.

{¶29} As a final matter, it is necessary to emphasize that although this court has been inconsistent with its application of the word "shall," failing to recognize its mandatory meaning, as in *Burnett Road Assocs., LLC v. Franklin Twp.*, 11th Dist. Portage No. 2017-P-0054, 2018-Ohio-3842, such concerns are not applicable here in the interpretation and application of R.C. 2953.53(D). In that statute, the legislature used both the word "shall" and the word "may," providing a discretionary authority ("may") exception to the directory ("shall") provision modified thereby. Shall is not used singularly or in an unambiguous manner, as in cases like *Burnett*. Nonetheless, the statute's requirement that Davies be provided access to his sealed records under R.C 2953.53(D) is properly determined by the majority. *See Akron v. Frazier*, 142 Ohio App.3d 718, 723, 756 N.E.2d 1258 (9th Dist.2001) (the language of the statute evidences an intent to provide access to sealed records to specifically enumerated individuals, including a criminal defendant).

{¶30} For the foregoing reasons, and since the law requires reversal solely to allow Davies to access his sealed records, I concur in judgment only.