[Cite as *State v. Ruble*, 2018-Ohio-1075.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 17-CA-72
	:	
RYAN W. RUBLE	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Case No. 03 CR 00167
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	March 21, 2018

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
WILLIAM C. HAYES LICKING CO. PROSECUTOR PAULA M. SAWYERS 20 S. Second St., Fourth Floor Newark, OH 43055	DAVID B. STOKES 33 West Main St., Suite 102 Newark, OH 43055

Delaney, J.

{¶1} Appellant Ryan W. Ruble appeals from the August 10, 2017 Judgment Entry of the Licking County Court of Common Pleas overruling his application to seal his record of conviction. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} A statement of the facts underlying appellant's conviction is not necessary to our resolution of this appeal. In 2003, appellant entered a plea of no contest to one count of possession of cocaine pursuant to R.C. 2925.11(A)(C)(4)(a),a felony of the fifth degree. The trial court accepted the plea of no contest, found appellant guilty as charged, and sentenced him to a community control term of 3 years.

{¶3} Appellant successfully completed community control and was terminated on October 8, 2004.

{¶4} On May 30, 2917, appellant moved the trial court to seal the record of the conviction pursuant to R.C. 2953.32. The trial court scheduled the matter for a non-oral hearing on July 17, 2017.

{¶5} Appellee filed a response in opposition on July 17, 2017, arguing appellant is not an eligible offender pursuant to R.C. 2953.31(A) and stating in pertinent part:

> [Appellant] * * * has two prior misdemeanor qualifying convictions, as well as the felony conviction. He was convicted of OVI in the Licking County Municipal Court in 2003, and convicted of Operating a Motor Vehicle after Underage Consumption, a misdemeanor of the 4th degree, in Licking County Municipal Court in 1996. [Appellee] would note that misdemeanor OVI conviction is

> specifically included in 2953.31(A) as being "considered a conviction."

{¶6} Appellant replied to appellee's motion in opposition on July 19, 2017, arguing the 2003 O.V.I. conviction and the felony conviction arose from the same act and were committed at the same time on April 12, 2003, and should therefore be considered as "one conviction."

{¶7} The trial court overruled appellant's motion to seal by judgment entry dated August 10, 2017, finding appellant did not qualify as an eligible offender pursuant to R.C. 2953.31.

{¶8} Appellant now appeals from the trial court's Judgment Entry denying his application to seal the record of conviction.

{¶9} Appellant raises one assignment of error:

ASSIGNMENT OF ERROR

{¶10} "THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SEAL HIS RECORD[,] FINDING THAT APPELLANT WAS NOT AN ELIGIBLE OFFENDER, PER R.C. 2953.31(A)."

ANALYSIS

{¶11} Appellant argues the trial court erred in finding that he does not meet the definition of "eligible offender" in R.C. 2953.31(A). We disagree.

{¶12} R.C. 2953.32 governs sealing of record of eligible offender. Subsection (A)(1) states:

> Except as provided in section 2953.61 of the Revised Code, an eligible 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.

{¶13} An "eligible offender" is defined in R.C. 2953.31(A) as follows:

"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 if the convictions are not of the same offense, 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. * * * *.

For purposes of, and except as otherwise provided in, this division, a conviction for a minor misdemeanor, for a violation of any section in Chapter 4507., 4510., 4511., 4513., or 4549. of the Revised Code, or for a violation of a municipal ordinance that is substantially similar to any section in those chapters is not a conviction. However, a conviction for a violation of section 4511.19, 4511.251, 4549.02, 4549.021, 4549.03, 4549.042, or 4549.62 or

> sections 4549.41 to 4549.46 of the Revised Code, for a violation of section 4510.11 or 4510.14 of the Revised Code that is based upon the offender's operation of a vehicle during a suspension imposed under section 4511.191 or 4511.196 of the Revised Code, for a violation of a substantially equivalent municipal ordinance, for a felony violation of Title XLV of the Revised Code, or for a violation of a substantially equivalent former law of this state or former municipal ordinance shall be considered a conviction.

{¶14} We have previously cited with approval the decision of the Tenth District in *Koehler v. State,* 10th Dist. Franklin No. 07AP–913, 2008–Ohio–3472, ¶ 13, in which the Court describes the procedure for ruling upon an application to seal:

> Before ruling on the application, the trial court must (1) determine whether the applicant is a first offender, (2) determine whether criminal proceedings are pending against the applicant, (3) determine whether the applicant has been rehabilitated to the satisfaction of the court if the court finds the applicant to be a first offender, (4) determine if the prosecutor filed an objection in accordance with R.C. 2953.32(B) and consider the prosecutor's reasons for the objection, and (5) weigh the applicant's interests in having the records sealed against the legitimate needs, if any, of the government to maintain the records.
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> *State v. McBride*, 5th Dist. Ashland No. 13-COA-004, 2013-Ohio-3491, ¶ 11, citing *Koehler*, supra.

{¶15} Because expungement is a privilege and not a right, a trial court shall only grant expungement to an applicant who meets all the requirements presented in R.C. 2953.32. *State v. Morris*, 5th Dist. Licking No. 09-CA-128, 2010-Ohio-2403, ¶ 8, citing *State v. Simon*, 87 Ohio St.3d 531, 533, 2000-Ohio-474, 721 N.E.2d 1041. An appellate court reviews a trial court's decision to grant or deny a motion to seal records pursuant to R.C. 2953.52 for an abuse of discretion. *State v. Poole*, 5th Dist. Perry No. 10-CA-21, 2011-Ohio-2956, ¶ 11, citing *State v. Widder,* 146 Ohio App.3d 445, 766 N.E.2d 1018, 2001–Ohio–1521, ¶ 6 (9th Dist.). In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *State v. Spencer*, 5th Dist. Guernsey No. 08CA21, 2009-Ohio-563, ¶ 14, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶16} "[T]he determination of [appellant's] status as an [eligible] offender is a question of law subject to an independent review by this court without deference to the trial court's decision." *State v. Derugen,* 110 Ohio App.3d 408, 410, 674 N.E.2d 719 (3rd Dist.1996); *Spencer*, supra, citing *State v. Pierce*, 10th Dist. Franklin No. 06AP-931, 2007-Ohio-1708, ¶ 5; *State v. Holdren*, 5th Dist. Licking No. 03 CA 25, 2003-Ohio-6789, ¶ 10.

{¶17} In the instant case, the judgment entry of the trial court indicates the court reviewed appellant's criminal record and found he is not an eligible offender. The trial court's entry is silent as to appellant's argument that the 2003 O.V.I. arose at the same time as the instant felony and therefore the two should count as one conviction for

purposes of R.C. 2953.31(A). However, we reject appellant's argument that the O.V.I. offense should be treated with the felony offense as "one conviction."

{¶18} In *State v. Sandlin*, 86 Ohio St.3d 165, 1999-Ohio-147, 712 N.E.2d 740 (1999), the Ohio Supreme Court held:

> [A] conviction for a violation of R.C. 4511.19, inter alia, must be considered to be a previous or subsequent conviction. R.C. 2953.31(A). Accordingly, when a person is convicted for DUI, he or she will have "previously or subsequently * * * been convicted of the same or a different offense" and cannot meet the definition of a "first offender" under R.C. 2953.31(A). **Thus, a conviction of DUI always bars expungement of the record of a conviction for another criminal offense.** We fail to see the reason for a distinction between cases in which the two convictions result from the same act and cases in which the two convictions result from separate acts, as long as one of the convictions is for DUI. (Emphasis added.)
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> *State v. Sandlin*, 86 Ohio St.3d 165, 1999-Ohio-147, 712 N.E.2d 740.

{¶19} Appellant is not a "first offender" under R.C. 2953.31(A) because his record contains a conviction for violating R.C. 4511.19 in addition to the felony conviction he seeks to have expunged. *State v. McCullough*, 10th Dist. Franklin No. 12AP-41, 2012-Ohio-3768, ¶ 8, citing *Sandlin*, supra*; State v. Morris,* 5th Dist. No. 09–CA–128, 2010–Ohio–2403, ¶ 15 [DUI conviction prevents expungement for previous conviction].

{¶20} R.C. 2953.31(A) was amended effective September 28, 2012, to replace the term "first offender" with "eligible offender." However, the language regarding convictions of, e.g., 4511.19 remain the same. The Tenth District therefore held that the amendments to R.C. 2953.31(A) did not impact the holding of *Sandlin:*

> The amendments did not impact the statute as it relates to OVI convictions. Rather, the amendments relate to exceptions for applicants that have multiple convictions arising from the same act. Moreover, the *Sandlin* court rejected reliance on earlier versions of those exceptions when an applicant has a previous conviction for OVI, in light of "how seriously the General Assembly considers the offense of driving while under the influence of alcohol." *Id.* at 168. *See also State v. Thompson,* 10th Dist. No. 06AP–881, 2007–Ohio–1503, ¶ 7–8 (sealing of other convictions barred when person has OVI conviction, regardless of whether the OVI conviction resulted from the same act).
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> *State v. McCullough*, 10th Dist. Franklin No. 12AP-41, 2012-Ohio-3768, ¶ 9, citing *State v. Sandlin*, 86 Ohio St.3d 165, 168, 1999-Ohio-147, 712 N.E.2d 740.

{¶21} Appellant's convictions upon possession of cocaine in 2003, O.V.I. in 2003, and O.M.V.U.A.C. in 1996 render him an ineligible offender under R.C. 2953 .31(A). Since appellant did not qualify as an eligible offender under the statute, the trial court could not use its discretion to seal the record. *State v. McBride*, 5th Dist. Ashland No. 13-COA-004,

2013-Ohio-3491, ¶ 15, citing *State v. Lovelace,* 1st Dist. Hamilton No. C–110715, 2012–Ohio–3797.

{¶22} Appellant further argues appellee made only a "bare, unsupported statement" regarding his conviction of underage O.V.I., and the trial court improperly denied the application for expungement because the alleged prior conviction was not established with a certified copy of a judgment entry. The record before us contains appellant's driving record filed April 14, 2003, containing, e.g., the conviction of O.M.V.U.A.C. [driving after underage consumption] dated November 13, 1996, in the Licking County Municipal Court.

{¶23} Moreover, appellant did not raise the issue of the sufficiency of appellee's evidence before the trial court. An appellate court will not consider any error which the party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been corrected or avoided by the trial court. *State v. Muller*, 5th Dist. Knox No. 99CA18, 2000 WL 1681025, *1, citing *Schade v. Carnegie Body Co.,* 70 Ohio St.2d 207, 436 N.E.2d 1001 (1982).

{¶24} The trial court's denial of appellant's motion to seal record of conviction is consistent with R.C. 2953 31, et seq., and does not violate the Ohio Constitution, Article I, Section 9, and the Eighth Amendment to the U.S. Constitution. *McBride*, supra, 2017-Ohio-3797 at ¶ 17.

{¶25} Upon review, we find the trial court did not err in denying appellant's motion to seal record of conviction.

CONCLUSION

{¶26} Appellant's sole assignment of error is overruled and the judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J.,

Gwin, P.J. and

Hoffman, J., concur.