[Cite as *State v. C.S.*, 2018-Ohio-1841.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106021

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

C.S.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-07-500126-A

BEFORE: Kilbane, P.J., E.T. Gallagher, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: May 10, 2018

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MARY EILEEN KILBANE, P.J.:

{¶1} Plaintiff-appellant, the state of Ohio ("State"), appeals from the trial court's decision granting the application for expungement of the criminal record in favor of defendant-appellee, C.S. For the reasons set forth below, we affirm.

{¶2} In April 2008, C.S. pled no contest and was found guilty of two counts of theft. The charges are the result of C.S.'s misappropriation of her client's funds.[1] In June 2018, the court sentenced C.S. to five years of community control sanction under the supervision of the probation department, with the following conditions:

> Defendant to abide by the rules and regulations of the probation department. Defendant to perform court community work service for 500 hours. Violation of the terms and conditions may result in more restrictive sanctions as approved by law. * * * The defendant is ordered to pay supervision fee(s). Restitution to be paid at a minimum of $750.00 a month. No fine imposed. Defendant is to pay court costs.

{¶3} The trial court's judgment entry does not state the total amount owed or name the victim. It appears from the record that at some point before February 2008, C.S. had already repaid the victim $15,000.[2]

{¶4} In March 2010, the trial court held a probation compliance hearing. The trial court found C.S. to be in compliance and current with restitution. The court denied C.S.'s motion to terminate community control and placed C.S. on inactive probation.

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[1]C.S. was an attorney at the time of the offense.

[2]The State indicated such in its February 2008 response to C.S.'s bill of particulars.

The court ordered C.S. to continue to make monthly restitution payments and noted: "community control to terminate upon restitution in full."

{¶5} In December 2012, C.S. filed a pro se motion to terminate her community control sanction. In her motion, C.S. stated that she owed a total of $100,000 in restitution to the victim. She paid $63,250 directly to the victim, with the remaining $36,750 balance paid to the victim through the Ohio Attorneys Client's Security Fund ("Fund"). She further stated that she has paid $10,035 of the $36,750 owed to the Fund, making her total payments $73,285. In January 2013, C.S. entered into a cognovit note with the Fund in the amount of $26,250, with the original balance of $36,750. After C.S. filed this cognovit note with the court in January 2013, the trial court then terminated C.S.'s community control sanction.

{¶6} In April 2017, C.S. filed a pro se motion for expungement, which the State opposed. The trial court ordered an expungement investigation report and set the matter for a hearing in June 2017. At the hearing, the State argued that it opposed the expungement because C.S. still owes $26,250 in restitution. C.S. agreed with the general proposition that if restitution is owed, then an expungement should not be granted, but argued that the victim in this case is not owed any restitution because the Fund made the victim whole by paying the victim the remaining balance of the restitution. Defense counsel advised that C.S. entered into an agreement with the Fund in which she is making payments through the Ohio attorney general's office from a cognovit note between C.S. and the Fund. At the time, C.S. owed the Fund $26,250. C.S. argues that the Fund

made the victim whole in this case, and in effect is acting as an insurer. Since the victim has been made whole and the matter is now between C.S. and the Fund via the attorney general's office, C.S. argued that the restitution order has been satisfied and she is eligible for an expungement. The trial court granted C.S.'s motion, finding:

> In this case, the victim was made whole. And I really liken the — the Clients' Security Fund as an insurance policy. And it is — it is well-decided that the common pleas court — we do not give restitution to an insurance company.
>
> Now, they can go after the person, but we don't use that in deciding, for example, the terms of their community control or things of that nature because it is insurance. And we don't force them to pay — defendants to pay to make restitution to insurance companies.
>
> With that being said, the Court finds that there is good cause to grant the sealing of the record in this case. The * * * $10 court cost and $200 supervision fee this Court will waive because I am well aware of the policy in the probation department that if there is money owed, they will not apply anything to supervision fees. They will apply that at the end.
>
> So I will waive that. And I will grant over the State's objection the defendant's motion to seal her criminal record.

{¶7} The State now appeals, raising the following single assignment of error for review.

Assignment of Error

> A trial court errs in granting an application to seal a criminal record pursuant to [R.C. 2953.32] when [C.S. did] not pay the court ordered restitution pursuant to her sentence.

{¶8} The State argues the trial court erred when it granted C.S.'s expungement because she still owes $26,250 in restitution. As a result, the State contends that C.S.'s sentence is not fully satisfied.

{¶9} In *State v. A.S.*, 8th Dist. Cuyahoga No. 100358, 2014-Ohio-2187, this court explained the standard of review of a ruling on a motion to seal a record of conviction as follows:

> Generally, a trial court's decision to grant or deny a motion to seal records filed pursuant to R.C. 2953.52 is reviewed for an abuse of discretion. *State v. C.K.*, 8th Dist. Cuyahoga No. 99886, 2013-Ohio-5135, ¶ 10, citing *In re Fuller*, 10th Dist. Franklin No. 11AP-579, 2011-Ohio-6673, ¶ 7. * * * However, the applicability of R.C. 2953.36 to an applicant's conviction is a question of law that this court reviews de novo. *State v. M.R.*, 8th Dist. Cuyahoga No. 94591, 2010-Ohio-6025, ¶ 15, citing *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, ¶ 6.

Id. at ¶ 7.

{¶10} In the instant case, the issue presented is whether C.S. is eligible under R.C. 2953.32 to have her record sealed. Accordingly, we apply the de novo standard of review.

{¶11} Under R.C. 2953.32(A)(1), "an eligible offender may apply to the sentencing court if convicted in this state * * * for the sealing of the record of the case that pertains to the conviction. Application may be made at the expiration of three years after the offender's final discharge if convicted of a felony[.]" An offender is not finally discharged, within the meaning of R.C. 2953.32(A) until the offender has served the

sentence previously imposed by the court. *See Willowick v. Langford*, 15 Ohio App.3d 33, 34, 472 N.E.2d 387 (11th Dist.1984).

{¶12} In this case, C.S. was ordered to pay restitution "at a minimum of "$750.00 a month." The order does not specify the total amount owed, nor does it specifically list the victim's name. It also does not state that the Fund must be repaid. Under R.C. 2929.18(A)(1), the court shall order that the restitution be made to the victim in open court and include the amount owed to the victim. The trial court's failure to comply with these requirements can be a basis to reverse the restitution order. *State v. Burrell*, 8th Dist. Cuyahoga No. 96123, 2011-Ohio-5655, ¶ 32. However, neither the State nor C.S. argue that the restitution order should be reversed. C.S. concedes that this "[c]ourt need not reach this issue because * * * restitution has already been satisfied" — the victim has been made whole. Thus, the issue before us is whether C.S. satisfied the restitution order.

{¶13} We recognize the well-established principle that the court speaks through it journal. *State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324, ¶ 15. Here, the court's order states that "restitution is to be paid," but the order does not include the restitution amount and name of the victim. This, in effect, renders the court's order as a payment plan of $750 per month for five years, which was the length of C.S.'s community control sanction. The terms of this payment plan result in C.S. owing $45,000 ($750/month x 60 months) at the end of five years. At the time C.S.'s community control terminated, C.S had paid more than the $45,000 she owed according

to the court's entry. The record reflects that she had already paid $15,000 to the victim at some point prior to February 2008.

{¶14} While the trial court did not order the restitution in open court and did not include the total amount owed to the victim, the trial court's disposition of C.S.'s motion to terminate community control, after C.S. filed the cognovit note, demonstrates that C.S. owed the victim a total of $100,000 and the court was satisfied that the victim was paid $100,000. Indeed, C.S. has admitted that she is obligated to pay the victim $100,000 in restitution. She recognizes this obligation, and it is reflected by her signing a cognovit note for the remaining balance.

{¶15} When the trial court held a compliance hearing, it found C.S. to be in compliance and current with restitution. The court placed C.S. on inactive probation and ordered her to continue to make monthly restitution payments, noting that "community control to terminate upon restitution in full."

{¶16} Then in December 2012, C.S. filed a pro se motion to terminate her community control sanction. In her motion, C.S. stated that she owed a total of $100,000 in restitution to the victim. She paid $63,250 directly to the victim, with the remaining $36,750 balance paid to the victim through the Fund. The court granted the unopposed motion but stated that "community control may terminate upon execution of cognovit note." In response, C.S. filed the cognovit note and the court terminated C.S.'s community control thereafter.

{¶17} When the trial court terminated C.S.'s community control sanction, the trial court was satisfied that her sentence was completed. Even though the court was satisfied that C.S.'s sentence was complete, C.S. recognizes her obligation and is still making payments on the $26,250 balance she owes the Fund. At the expungement hearing, defense counsel acknowledged that C.S. recently lost her job and made reduced payment arrangements with the attorney general's office in light of the loss of income. C.S. stated, "I have paid actually $18,750 over the course of the last five years. Since my unemployment in January [2017], I have an agreement with the Attorney General's Office to pay $25 a month until I do become reemployed."

{¶18} Based on the foregoing, we find that C.S. was "finally discharged" for purposes of expungement as set forth in R.C. 2953.32(A)(1). C.S. repaid $45,000, which was a condition of her payment plan, and from what can be gleaned from the sparse record, she has continued to repay the Fund. Moreover, the trial court terminated C.S.'s community control sanction after C.S. filed the cognovit note with the court. Once the trial court was satisfied that the $100,000 was repaid the to victim, the trial court found C.S.'s sentence was complete. Compliance with the restitution order was a condition of C.S.'s community control. Since C.S was in compliance with the restitution order, she was in compliance with her probation and, therefore, was "finally discharged" within the meaning of R.C. 2953.32(A) for purposes of expungement of her record.

{¶19} We note that C.S. continues to demonstrate a good faith effort in creating the obligation of the cognovit note. She signed the cognovit note to be responsible for

the balance and has continued to pay it, despite losing her job. She has repaid the Fund almost $19,000 since the signing of the cognovit note. In total, it appears that she has repaid over $80,000. In seeking an expungement of her criminal record, C.S. hopes to obtain gainful employment so that she can continue to repay the cognovit note until it is satisfied.

{¶20} Therefore, we find that the trial court did not err by granting C.S.'s application for expungement of criminal record.

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

{¶22} 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.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR