

[Cite as *State v. M.E.*, 2018-Ohio-4715.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106298

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

M.E.

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-90-250201

BEFORE: Keough, J., Kilbane, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: November 21, 2018

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KATHLEEN ANN KEOUGH, J.:

{¶1} Plaintiff-appellant, the state of Ohio, appeals the trial court's decision granting the motion to seal record filed by defendant-appellee, M.E. For the reasons that follow, we reverse and remand to the trial court for further proceedings.

{¶2} In 1990, M.E. was convicted of theft, in violation of R.C. 2913.02, which at the time of conviction was a felony of the fourth degree. In 2004, M.E., pro se, moved to seal his felony conviction. The state opposed the motion, contending that his 1992 conviction for operating a motor vehicle while under the influence of alcohol or drugs ("OVI") made him ineligible. M.E.'s motion was denied.

{¶3} The law changed in September 2012 defining who was an eligible offender for expungement purposes. Accordingly, in September 2016, M.E. applied to expunge his felony

theft conviction. The state again opposed the motion, contending that M.E.'s 1992 OVI conviction and 1996 fourth-degree misdemeanor open container conviction made him ineligible. The matter was set for hearing, and on February 3, 2017, M.E. withdrew his motion.

{¶4} In August 2017, M.E. again applied to seal his record of conviction. The state opposed, contending that M.E.'s 1992 OVI conviction in Cleveland Heights, 1993 OVI conviction in Cleveland, and 1996 open container conviction made him an ineligible offender. In response, M.E. advised the court that the 1993 OVI conviction in Cleveland was dismissed in July 2017 following the withdrawal of his plea. M.E. further argued that the open container conviction should be treated as a minor misdemeanor for expungement purposes because other jurisdictions and the Ohio Revised Code classify an open container violation a minor misdemeanor. He claimed that he was being denied equal protection under the law.

{¶5} Following a hearing, the trial court granted M.E.'s motion to seal his record of conviction. The state now appeals, raising as its sole assignment of error that the trial court erred in granting M.E.'s application to seal his criminal record pursuant to R.C. 2953.32 because M.E. was ineligible.

I. Standard of Review

{¶6} An appellate court generally reviews a trial court's disposition of an application to seal a record of conviction under an abuse of discretion standard. *State v. Black*, 10th Dist. Franklin No. 14AP-338, 2014-Ohio-4827, ¶ 6. However, whether an applicant is considered an eligible offender is an issue of law for a reviewing court to decide 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; *State v. Clemens*, 10th Dist. Franklin No. 14AP-945, 2015-Ohio-3153, ¶ 7.

{¶7} While “expungement is a state-created act of grace and ‘is a privilege, not a right,’ *State v. Simon*, 87 Ohio St.3d 531, 533, 721 N.E.2d 1041 (2000), a trial court may only grant expungement when an applicant meets all of the statutory requirements. *State v. Hamilton*, 75 Ohio St.3d 636, 640, 665 N.E.2d 669 (1996).” *State v. Williamson*, 10th Dist. Franklin No. 12AP-340, 2012-Ohio-5384, ¶ 10. R.C. 2953.32 governs the sealing of a record of conviction for “eligible offenders.”

{¶8} An “eligible offender” includes those convicted of “not more than one felony conviction, not more than two misdemeanor convictions, or not more than one felony and one misdemeanor conviction.” R.C. 2953.31(A). A minor misdemeanor and certain other traffic- or vehicle-related offenses are not counted for purposes of determining an applicant’s eligibility. R.C. 2953.31(A).

{¶9} It is undisputed that M.E. has one felony conviction (theft) and two qualifying misdemeanor convictions (OVI and open container). Accordingly, pursuant to the plain language of R.C. 2953.31 as it existed at the time of application, M.E. is not an eligible offender for expungement purposes because he has too many convictions.¹

{¶10} The trial court, however, did not make an explicit determination that M.E. was an “eligible offender” pursuant to R.C. 2953.31. The court stated that it “never understood the basis for [the open container] crime at all,” and opined that the open container ordinance is “just a revenue generating piece of legislation for local governments.” (Tr. 6.)

¹ The definition of “eligible offender” was expanded once again through 132 SB 66, effective October 29, 2018. S.B. 66 provides an additional category of eligible offenders — those who have been convicted of one or more offenses, but not more than five felonies, if all the offenses are misdemeanors or fourth- or fifth-degree felonies, and none of the offenses are offenses of violence or felony sex offenses. *See* R.C. 2953.31(A)(1)(a) (effective October 29, 2018). In this case, M.E. has three offenses on his record — two misdemeanors and theft, a felony of the fourth degree.

{¶11} Regardless of the trial court’s opinion about the open container law, M.E. was not an eligible offender pursuant to a plain and strict reading of the statute. The trial court should have, therefore, proceeded to address M.E.’s contention that the open container conviction should be treated as a minor misdemeanor because (1) the Cleveland Heights Ordinance now provides that the offense is a minor misdemeanor, and (2) he is being deprived of equal protection under the law because the Ohio Revised Code and other local municipalities treat open container convictions as minor misdemeanors; thus, individuals convicted under the statute or those ordinances would be eligible to have their open container conviction expunged.

A. Change in Cleveland Heights Ordinance

{¶12} M.E. argued in the trial court, and now on appeal, that his open container conviction should be treated as a minor misdemeanor for expungement purposes because Cleveland Hts. Codified Ord. 529.07(b) has recently been amended to provide that an open container violation is a minor misdemeanor, which would not count as a conviction under R.C. 2953.31(A). The Ohio Supreme Court considered and rejected a similar argument in *State v. J.M.*, 148 Ohio St.3d 113, 2016-Ohio-2803, 69 N.E.3d 642.

{¶13} In 2014, J.M. filed an application seeking to seal the record of his 1989 felony conviction for receiving stolen property.² When he applied, he also had a third-degree misdemeanor conviction for negligent assault and a fourth-degree misdemeanor conviction for failure to register a motor vehicle under R.C. 4503.11(A). In addition to arguing that the motor vehicle offense was merely administrative, J.M. argued to the Ohio Supreme Court that during the pendency of his appeals, the statute was amended to provide that an offender convicted under

²The facts and procedural history are taken from the court of appeals decision. See *In re J.M.*, 10th Dist. Franklin No. 15AP-77, 2015-Ohio-2669.

R.C. 4503.11 on or after July 1, 2015, was only guilty of a minor misdemeanor. Based on the notion that the record-sealing statutes are remedial and should be construed liberally, J.M. argued that the court should treat his fourth-degree misdemeanor as a minor misdemeanor. The Ohio Supreme Court disagreed and held that the legislative body did not indicate that the “change should retroactively affect those who were previously convicted and sentenced under an earlier version of the statute.” *Id.* at ¶ 13.

{¶14} In this case, no authority has been presented to this court that the city of Cleveland Heights intended that the change in degree of the open container offense and penalty would have retroactive application to individuals like M.E. Accordingly, M.E.’s argument is without merit.

B. Equal Protection Under the Law

{¶15} M.E. also argued in the trial court and now on appeal that he is being deprived of equal protection under the law because the Ohio Revised Code and other local municipalities treat open container convictions as minor misdemeanors, and thus individuals convicted under the statute or those ordinances would be eligible to have their open container conviction expunged. Accordingly, he contends that R.C. 2953.31 violates the Equal Protection Clauses to the Ohio and United States Constitutions as applied to him.

{¶16} The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that “[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws.” Article I, Section 2 of the Ohio Constitution provides that “[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit[.]” As explained in *Conley v. Shearer*, 64 Ohio St.3d 284, 595 N.E.2d 862 (1992):

Equal protection of the law means the protection of equal laws. It does not preclude class legislation or class action provided there is a reasonable basis for

such classification. The prohibition against the denial of equal protection of the laws requires that the law shall have an equality of operation on persons according to their relation. So long as the laws are applicable to all persons under like circumstances and do not subject individuals to an arbitrary exercise of power and operate alike upon all persons similarly situated, it suffices the constitutional prohibition against the denial of equal protection of the laws.

Id. at 288-290.

{¶17} Because the Equal Protection Clauses in the United States Constitution and the Ohio Constitution are functionally equivalent, they require the same analysis. *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251, ¶ 11. “Equal protection analysis begins with the rebuttable presumption that statutes are constitutional.” *State v. Peoples*, 102 Ohio St.3d 460, 2004-Ohio-3923, 812 N.E.2d 963, ¶ 5. The party asserting that a statute is unconstitutional has the burden of proving that the statute is unconstitutional beyond a reasonable doubt. *State v. Collier*, 62 Ohio St.3d 267, 269, 581 N.E.2d 552 (1991).

{¶18} In *State v. J.S.*, 8th Dist. Cuyahoga No. 101329, 2015-Ohio-177, this court reviewed the same issue we are presented with here — whether the equal protection clauses are violated when treating the applicant’s “conviction that arose under the Cleveland Heights Municipal Code as a fourth-degree misdemeanor when determining eligibility for expungement when the offense is a minor misdemeanor for individuals who are charged under the Ohio Revised Code.” *Id.* at ¶ 12.

{¶19} This court held that “the expungement statutes do not implicate a fundamental right or suspect classification.” *Id.* at ¶ 14. Therefore, “it must be determined whether precluding the sealing of records for individuals convicted under a municipal ordinance with an increased

penalty, while allowing it for similarly situated individuals convicted under a minor misdemeanor under an analogous state statute, is rationally related to a legitimate governmental interest.” *Id.* The *J.S.* court remanded the matter for the trial court to conduct an analysis on this issue because the record was undeveloped for this court to do so. *Id.*

{¶20} Much like in *J.S.*, we are reluctant to decide the constitutional question when the trial court has failed to address the issue. We recognize that unlike in *J.S.*, the parties in this case have fully briefed the constitutional issue in the trial court. However, we also recognize that the law governing sealing of records was changed effective October 29, 2018, and this change seemingly affects M.E.’s status as an “eligible offender.” Accordingly, we remand the matter to the trial court to consider the constitutional issue raised by M.E., if it finds that the issue is still relevant for consideration in light of S.B. 66.

II. Conclusion

{¶21} The trial court erred in finding that M.E. was an eligible offender under the plain language of R.C. 2953.31(A) as it existed at the time of application. Accordingly, the state’s assignment of error is sustained.

{¶22} Judgment reversed and remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed. It is ordered that a special mandate be sent to said 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.

KATHLEEN ANN KEOUGH, JUDGE

MARY EILEEN KILBANE, P.J., and

MELODY J. STEWART, J., CONCUR