

[Cite as *State v. B.J.*, 2018-Ohio-5358.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 107050

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**B.J.**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
AFFIRMED

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-03-439646-ZA

**BEFORE:** Kilbane, P.J., S. Gallagher, J., and Jones, J.

**RELEASED AND JOURNALIZED:** December 27, 2018

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MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, B.J., appeals from the trial court's judgment denying his expungement motion. For the reasons set forth below, we affirm.

{¶2} The facts and procedural history were set forth by this court in B.J.'s first appeal, *State v. [B.J.]*, 8th Dist Cuyahoga Nos. 87012 and 87400, 2006-Ohio-4756 ("*B.J. I*").

On May 25, 2003, [B.J.] and his wife, [N.J.], were shopping at Sam's Club in the city of Brooklyn, Ohio. After the cashier finished ringing their order, [B.J.] questioned her as to why the tax-exempt status of his Sam's Club business account was not appearing because the receipt showed a charge of \$3.01 for sales tax. The cashier called Supervisor Ann Cefus for assistance. Ms. Cefus escorted [B.J. and N.J.] to the Customer Service Counter, where she referred them to Amy Valentine, Customer Service Clerk. Ms. Valentine took [B.J. and N.J.'s] business account card and sales receipt and proceeded to check the account status.

When Ms. Valentine was unable to find any proof of tax-exempt status, she referred [B.J. and N.J.] to manager Suzanne Kellar, who was unable to immediately assist them because she was with another customer. Apparently unwilling to wait for Ms. Kellar to finish with the other customer, [B.J.] vocalized his agitation.

When [B.J.] allegedly began to complain loudly, Dan Meadows, a Brooklyn police officer and Sam's Club security guard, approached [B.J.]. Officer Meadows asked him several times to calm down and twice asked for his identification. The acts that followed this conversation are disputed; however, the record indicates that [B.J.] and Officer Meadows engaged in a struggle. An altercation ensued, during which the pair fell on the ground. Officer Meadows attempted to handcuff [B.J.], who was resisting, and used pepper spray to force [B.J.'s] cooperation. Two other off-duty officers and one store employee helped subdue [B.J.] so Officer Meadows could restrain him. After the altercation, it was apparent to several witnesses that Officer Meadows' arm was bleeding; these same witnesses heard the officer say that [B.J.] bit him. Officer Meadows was briefly treated for his injuries at the store and was then taken to Deaconess Hospital for further treatment. He was later released.

On July 11, 2003, [B.J.] was indicted on one count of felonious assault of a police officer, in violation of R.C. 2903.11; assault on a police officer, in violation of R.C. 2903.13; and resisting arrest, in violation of R.C. 2921.33. On July 25, 2003, [B.J.] pleaded not guilty.

On July 18, 2005, the State filed a motion in limine to exclude the surveillance videotape, which was granted the following day.

On July 20, 2005, a jury trial began. [B.J.] was found not guilty of felonious assault, in violation of R.C. 2903.11; guilty of the lesser included offense of assault, with a police officer specification, in violation of R.C. 2935.01; and guilty of resisting arrest. [B.J.] was sentenced to one year of community control sanctions.

*Id.* at ¶ 2-7.

{¶3} On appeal, B.J. claimed error in the trial court's denial of his motion for acquittal, the court's failure to enforce subpoenas to material witnesses, suppression of the surveillance videotape, and denial of his motion for a new trial. This court reversed his conviction, finding that the trial court had erred in granting the motion in limine excluding the surveillance videotape as well as reference to it at trial. *Id.* at ¶ 19. We remanded the case for a new trial and ruled that B.J.'s other claims were moot because of the court's ruling. *Id.* at ¶ 21.\_

{¶4} Following our remand, the trial court amended the indictment to reflect the verdict rendered by the jury in the first trial — one count of assault on a peace officer and one count of resisting arrest. The matter then proceeded to a second trial before a jury. The jury convicted B.J. of both counts, and the trial court sentenced him to a 90-day suspended jail sentence, one year of community control, 400 hours of community service, anger management, a mental health assessment, and fines and court costs. The court further found that B.J. had already served his community control sanctions under his first case and ordered community control sanctions terminated. B.J. then appealed in *State v. [B.J.]*, 8th Dist. Cuyahoga No. 92617, 2009-Ohio-6640 (“*B.J. II*”). In *B.J. II*, this court affirmed his convictions.

{¶5} After our decision in *B.J. II*, B.J. filed a motion for expungement. The state filed an opposition, and the trial court denied B.J.’s motion without a hearing. B.J. appealed from the trial court’s denial in *State v. B.J.*, 8th Dist. Cuyahoga No. 105764, 2018-Ohio-177 (“*B.J. III*”). In *B.J. III*, the state of Ohio conceded that the trial court should have held a hearing prior to denying B.J.’s expungement motion. *Id.* at ¶ 5. We found that “the record demonstrates that no hearing was held on B.J.’s motion for expungement as required by R.C. 2953.32(B).” *Id.* at ¶ 7. As a result, we reversed the trial court’s denial and remanded the matter for a hearing. *Id.* at ¶ 9.

{¶6} Following our last remand, the trial court held a hearing on B.J.’s expungement motion. At the conclusion of the hearing, the trial court denied B.J.’s motion, finding that it did not have jurisdiction to order an expungement because B.J. was convicted of an offense of violence that does not qualify for an expungement.

{¶7} It is from this order that B.J. now appeals, raising the following single assignment of error for review.

### Assignment of Error

The trial court committed reversible error by finding [B.J.] ineligible for the expungement and/or sealing of his felony conviction arising out of a misunderstanding with an off-duty police officer working security at a Sam's Club.

{¶8} B.J. first argues that the trial court erred when it found that he was ineligible for the sealing of his conviction for assault on a police officer in violation of R.C. 2903.13.

{¶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. In this matter, the question presented herein is whether B.J. was eligible for an expungement under R.C. 2953.36. This inquiry is a matter of statutory interpretation, which is a question of law. Accordingly, we apply the de novo standard of review.

{¶10} We recognize that a person convicted of a crime has no substantive right to have the record of that conviction sealed. The sealing of the record of a conviction "is an act of grace created by the state." *State v. Hamilton*, 75 Ohio St.3d 636, 639, 1996-Ohio-440, 665 N.E.2d 669. Before the trial court can make its determination whether to seal an applicant's record of conviction, the applicant must first cross the threshold of statutory eligibility. R.C. 2953.32(C)(1)(c); R.C. 2953.36. R.C. 2953.36 precludes the sealing of records of certain convictions, and states in pertinent part:

(A) Except as otherwise provided in division (B) of this section, sections 2953.31 to 2953.35 of the Revised Code do not apply to any of the following:

\* \* \*

(3) Convictions of an offense of violence when the offense is a misdemeanor of the first degree or a felony and when the offense is not a violation of section 2917.03 of the Revised Code and is not a violation of section 2903.13, 2917.01, or 2917.31 of the Revised Code that is a misdemeanor of the first degree[.]

Thus, according to R.C. 2953.36(A), in order for B.J., to qualify for expungement, his conviction must be a first-degree misdemeanor that is not a violation of R.C. 2903.13.

{¶11} Here, B.J. was convicted of assault of a peace officer in violation of R.C. 2903.13. Assault, as used in R.C. 2903.13, is listed as an offense of violence in R.C. 2901.01(A)(9)(a). As applicable to the instant case, an assault on a peace officer under R.C. 2903.13(C) is a fourth-degree felony. Because an assault on a peace officer is a violation of R.C. 2903.13, and is not a misdemeanor, the exceptions set forth in R.C. 2953.36(A) do not apply to B.J. *State v. Derison*, 8th Dist. Cuyahoga No. 95225, 2011-Ohio-1570, ¶ 9-11 (where this court found that appellant was not eligible for expungement when the appellant was convicted of assault on a police officer — a fourth-degree felony). Consequently, B.J. is not eligible for expungement, and the trial court did not err when it found that he cannot have his record sealed under R.C. 2953.36.

{¶12} B.J. next argues that R.C. 2953.36 is ambiguous. In *Derison*, this court recognized,

[w]hile this statutory provision [R.C. 2953.36] is not the paragon of clarity as this court has previously recognized, [*Euclid v. El-Zant*, 143 Ohio App.3d 545, 758 N.E.2d 700 (8th Dist.2001)], we are bound by the rules of statutory construction to give the words used their full effect. *State v. Wilson*, 77 Ohio St.3d 334, 336-337, 1997-Ohio-35, 673 N.E.2d 1347. As we noted in *El-Zant*, “subsection (C) \* \* \* conjunctively excepts four specific violent offenses from the general preclusion: riot (R.C. 2917.03), and misdemeanor violations of assault (R.C.

2903.13), inciting violence (R.C. 2917.01), and inducing panic (R.C. 2917.31).”  
*Id.* at 547.\_

\* \* \*

In *State v. Ventura*, Butler App. No. CA2005-03-079, 2005-Ohio-5048, ¶12, the Twelfth District, agreed with this interpretation. Further, if this interpretation were incorrect, then the legislature is free to amend this section to clarify its meaning. The fact that it has amended R.C. 2953.36(C)\_after the decisions in *El-Zant* and *Ventura*, but left it as is, bolsters this court’s interpretation. See former R.C. 2953.36; Am.S.B. No. 18.\_

*Id.* at ¶ 9-10.

{¶13} Based on the foregoing, we find B.J.’s argument unpersuasive.

{¶14} B.J. further argues that R.C. 2953.36 is inapplicable because it violates the constitutional prohibition against retroactive legislation. We note that the statutory law in effect at the time of the filing of an application to seal a record of conviction is controlling. *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E. 2d 1172, ¶ 19. Moreover, this court has previously found that expungement provisions are remedial in nature and the retroactive application of R.C. 2953.36 does not violate the constitutional prohibition against ex post facto laws. *S. Euclid v. Drago*, 8th Dist. Cuyahoga No. 79030, 2001 Ohio App. LEXIS 1783, \*12-\*13 (Apr. 19, 2001); *State v. Hartup*, 126 Ohio App.3d 768, 773, 711 N.E.2d 315 (8th Dist.1998).

{¶15} Therefore, the sole assignment of error is overruled.

{¶16} 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.

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MARY EILEEN KILBANE, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and  
LARRY A. JONES, SR., J., CONCUR