

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellant, : No. 03AP-862
 : (C.P.C. No. 03EXP-3-170)
 v. :
 :
 Nicholle M. Black, : (REGULAR CALENDAR)
 :
 Defendant-Appellee. :

O P I N I O N

Rendered on September 30, 2004

Ron O'Brien, Prosecuting Attorney, and *Jennifer L. Coriell*, for
appellant.

Nicholle M. Black, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by plaintiff-appellant, State of Ohio, from a judgment of the Franklin County Court of Common Pleas, granting the application of defendant-appellee, Nicholle M. Black, to seal a record of conviction pursuant to R.C. 2953.32.

{¶2} On March 26, 2003, appellee filed an "application for sealing of record," seeking to seal all official records of conviction in common pleas case No. 97CR-02-559. On May 3, 2003, the state filed an objection, alleging that appellee was not a "first offender," as required under R.C. 2953.32, and, therefore, not eligible to have her record expunged. Specifically, the state alleged that, in addition to having a first-degree

misdemeanor conviction in common pleas case No. 97CR-02-559 for forgery, appellee had previously been convicted of operating a vehicle while under a suspension.

{¶3} The matter came for hearing before the trial court on August 6, 2003. By entry filed on August 7, 2003, the trial court granted appellee's application.

{¶4} On appeal, the state sets forth the following single assignment of error for review:

THE TRIAL COURT ERRED IN GRANTING THE SEALING OF APPELLEE'S RECORD WHERE APPELLEE WAS INELIGIBLE FOR EXPUNGEMENT BECAUSE SHE WAS NOT A FIRST TIME OFFENDER.

{¶5} R.C. 2953.32 sets forth the procedure for the sealing of a record of conviction for a first offender, and states in part:

(A)(1) Except as provided in section 2953.61 of the Revised Code, a first offender may apply to the sentencing court if convicted in this state * * * 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.

* * *

(B) Upon the filing of an application under this section, the court shall set a date for a hearing and shall notify the prosecutor for the case of the hearing on the application. The prosecutor may object to the granting of the application by filing an objection with the court prior to the date set for the hearing. The prosecutor shall specify in the objection the reasons for believing a denial of the application is justified.

* * *

(C)(1) The court shall do each of the following:

(a) Determine whether the applicant is a first offender[;]

(b) Determine whether criminal proceedings are pending against the applicant;

(c) If the applicant is a first offender who applies pursuant to division (A)(1) of this section, determine whether the applicant has been rehabilitated to the satisfaction of the court;

(d) If the prosecutor has filed an objection in accordance with division (B) of this section, consider the reasons against granting the application specified by the prosecutor in the objection;

(e) Weigh the interests of the applicant in having the records pertaining to the applicant's conviction sealed against the legitimate needs, if any, of the government to maintain those records.

{¶6} R.C. 2953.31 defines the term "first offender," and provides in relevant part as follows:

(A) "First offender" means anyone who has been convicted of an offense in this state or any other jurisdiction and who previously or subsequently has not been convicted of the same or a different offense 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, a conviction for a violation of any section in Chapter 4511., 4513., or 4549. of the Revised Code, or a conviction for a violation of a municipal ordinance that is substantially similar to any section in those chapters, is not a previous or subsequent conviction. A conviction for a violation of section 4511.19, 4511.192 [4511.19.2], 4511.251 [4511.25.1], 4549.02, 4549.021 [4549.02.1], 4549.03, 4549.042 [4549.04.2], or 4549.07, or sections 4549.41 to 4549.46 of the Revised Code, or a conviction for a violation of a municipal ordinance that is substantially similar to any of those sections, shall be considered a previous or subsequent conviction.

{¶7} In *State v. Suel*, Franklin App. No. 02AP-1158, 2003-Ohio-3299, at ¶10-11, this court discussed the trial court's role in considering an application for the sealing of a record of conviction:

Expungement should only be granted when all requirements for eligibility are met. *State v. Hamilton* (1996), 75 Ohio St.3d 636, 640, 665 N.E.2d 669. Only a first offender may apply to seal the record of conviction. R.C. 2953.32(A)(1). Whether an applicant is a first offender is a question of law to be determined de novo by a reviewing court. *State v. Korn* (June 12, 2001), Franklin App. No. 01AP-40, citing *State v. Derugen* (1996), 110 Ohio App.3d 408, 410, 674 N.E.2d 719. However, whether the facts in any case meet the definition of first offender is, in many cases, a question of fact. *Korn*, citing *State v. Patterson* (1998), 128 Ohio App.3d 174, 176, 714 N.E.2d 409. The trial judge makes the factual determination in a hearing based on the specific facts of the applicant's case. The purpose of the hearing is to provide a reviewing court with all relevant information bearing on an applicant's eligibility. *Hamilton*, at 640, 665 N.E.2d 669. Only then may a reviewing court determine whether a trial judge's decision comports with the law. *Patterson*, at 177, 714 N.E.2d 409.

The trial court has considerable discretion when deciding whether to grant or deny an application to seal a criminal record. *State v. Tyle[r]*, Franklin App. No. 01AP-1055, 2002-Ohio-4300, citing *State v. Haney* (1991), 70 Ohio App.3d 135, 139, 590 N.E.2d 445. * * * An expungement proceeding is not an adversarial one; rather, the primary purpose of an expungement hearing is to gather information. *State v. Simon* (2000), 87 Ohio St.3d 531, 533, 721 N.E.2d 1041. * * *

{¶8} The state argues on appeal, as it did at the hearing before the trial court, that appellee was previously convicted of the offense of driving under suspension, and, therefore, is not a first offender as defined under R.C. 2953.31(A). In response, appellee's main contention is that the state failed to introduce properly authenticated records of the traffic offense or to identify appellee as the person named in those records. We note, however, that, during the August 6, 2003 hearing before the trial court, appellee did not dispute that she had been convicted of driving under suspension; rather, she merely represented that the offense "was years ago," and that she did not receive the maximum sentence. (Tr. 6.) Nor did appellee raise before the trial court the issue of whether the documents submitted by the state were properly authenticated. Under these

circumstances, we view the dispositive issue as whether the trial court erred in granting appellee's application based upon the court's determination that appellee's earlier conviction for the offense of driving under suspension did not constitute a previous conviction that would preclude expungement.

{¶9} In its objection filed with the trial court challenging appellee's application for sealing of record, the state attached a printout from the Bureau of Criminal Identification and Investigation, purporting to show the "validated criminal history record" and "driver license information" for Nicholle M. Black. The document indicates a plea of guilty and conviction for "driving under FRA [Financial Responsibility Act] suspension," with the date of offense listed as November 13, 1999. The printout does not cite an ordinance number or an Ohio Revised Code section. At the hearing before the trial court, in response to an inquiry by the trial court, the state represented to the court that the alleged prior conviction was under R.C. 4507.02.

{¶10} In *State v. Ellis*, Cuyahoga App. No. 83207, 2004-Ohio-3108, the Cuyahoga County Court of Appeals recently addressed the issue whether or not a conviction for the offense of driving under a Financial Responsibility Act suspension constitutes a subsequent conviction for purposes of determining whether appellee could be considered a first offender in a proceeding to seal records related to a prior conviction.

{¶11} The *Ellis* court initially noted that the Ohio legislature enacted new law, effective January 4, 2004, "to provide additional clarification and reduce possible inconsistency and/or confusion in R.C. 2953.31." *Id.* at ¶17. Specifically, the amended version now provides in part: "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 previous or subsequent conviction." R.C. 2953.31. (Emphasis added.) However, in *Ellis*, based upon the date of appellee's case, the court was required to "consider the situation under the law at the time the case was brought," i.e., the prior version of R.C. 2953.31 (which is also applicable to the facts of this case). *Ellis*, supra, at ¶17.

{¶12} Applying former R.C. 2953.31, the *Ellis* court analyzed the issue "whether the municipal ordinances for driving under suspension are substantially similar to R.C. Chapter 4511, 4513 or 4549, or whether they are substantially similar to R.C. 4511.19, 4511.192, 4511.251, 4549.02, 4549.021, 4549.03, 4549.042, 4549.07, 4549.41, or 4549.46." *Id.* The court initially observed that R.C. Chapters 4511, 4513 and 4549 "all involve traffic law." *Id.* at ¶18. The court held in pertinent part:

Driving under suspension is essentially a violation of driver's license law. These types of convictions are substantially similar to other traffic laws and not the type of law found, for example, in driving under the influence, R.C. 4511.19.

We find that a driving under suspension charge is not substantially similar to those laws the statute cites as driving under the influence of alcohol or drugs, street racing, hit and run, vehicle master key possession, or deceptive practices regarding odometer rollback and disclosure. Driving under suspension relates better to the Ohio Revised Code chapters representing the excluded convictions than it does to the provisions which count against expungement.

Id. at ¶18-19.

{¶13} In considering the issue whether driving under suspension is analogous to a traffic offense, the *Ellis* court considered the "underlying basis for the suspension." *Id.* at ¶20. Under the facts of *Ellis*, the court noted that the individual's conviction for driving under suspension was an administrative violation, i.e., "a violation of the Financial Responsibility Act regarding her insurance." *Id.* Further, because the suspension "was

based on an administrative violation directly related to the operation of a motor vehicle under the Financial Responsibility Act," the court concluded that such suspension was, "in effect, traffic related." *Id.* Thus, the court affirmed the trial court's decision granting appellee's expungement.

{¶14} We find the decision and reasoning by the court in *Ellis* to be persuasive. As noted above, under the facts of the instant case, the document submitted by the state identified the prior conviction as "driving under FRA suspension." Applying the reasoning of *Ellis*, the offense at issue, being analogous to a traffic offense, "relates better to the Ohio Revised Code chapters representing the excluded convictions than it does to the provisions which count against expungement." *Id.* at ¶19. Accordingly, the trial court did not err in failing to consider the offense of driving under suspension to be a previous conviction, and we find that the court did not abuse its discretion in granting appellee's application to seal her record of conviction in common pleas case No. 97CR-02-559.

{¶15} Based upon the foregoing, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

LAZARUS, P.J., and PETREE, J., concur.
