

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 04AP-384
Plaintiff-Appellant,	:	(C.P.C. No. 03EXP-9-478)
v.	:	
	:	(ACCELERATED CALENDAR)
Adam S. Winship,	:	
	:	
Defendant-Appellee.	:	

O P I N I O N

Rendered on November 30, 2004

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellant.

Adam S. Winship, pro se.

APPEAL from the Franklin County Court of Common Pleas.

McCORMAC, J.

{¶1} The State of Ohio, plaintiff-appellant, appeals from the judgment of the Franklin County Court of Common Pleas which granted the application of Adam S. Winship, defendant-appellee, for sealing of his criminal record under R.C. 2953.32.

{¶2} Appellant's sole assignment error reads as follows:

THE TRIAL COURT ERRED WHEN IT GRANTED THE APPLICATION FOR EXPUNGEMENT, THERE BEING INSUFFICIENT EVIDENCE TO SUPPORT THE

CONCLUSION THAT DEFENDANT IS A "FIRST OFFENDER."

{¶3} In case No. 98CR-1528, appellee herein was indicted for carrying a concealed weapon, a fourth-degree felony. He pled guilty to Carrying a Concealed Weapon, a felony of the fifth degree, on September 15, 1998. On September 18, 2003, appellee filed his application for sealing of his record under R.C. 2953.32.

{¶4} Appellant filed an objection to the expungement of appellee's record on January 26, 2004, asserting that appellee is not a "first offender" as required by R.C. 2953.32(A)(1). The state attached a copy of the BCI and BMV printout to the objection. The BMV printout revealed that appellee was convicted of stopping after accident upon streets and collision with unattended vehicle (i.e., leaving the scene of an accident), in Gahanna Mayor's Court, a misdemeanor of the first degree on March 6, 1998. His driver's license was suspended due to that offense.

{¶5} On March 19, 2004, the trial court held a hearing on the expungement request and granted it. In the entry granting the petition, the trial court found appellee was a first offender.

{¶6} A review of the trial court transcript shows that appellee appeared pro se and that an assistant county prosecutor appeared on behalf of the state of Ohio. The trial court stated that: "[a]pparently, Mr. Winship in Gahanna was found to have violated Gahanna City Code 335.12, Collision with an Unattended Vehicle, and didn't leave sufficient information or something." The trial court asked appellee if he remembered what it was about and his response was "[n]ot really[,] '98, that's when - - if you look, I was running with the wrong crowd and that's when I got my CCW, and that whole year

was a bad year. I dropped out of high school." Then appellee stated that he had changed his life and that he needed to get that felony conviction off his record. There was substantial evidence that appellee had, in fact, made significant changes in his life; however, concerning the Gahanna offense, the assistant prosecutor, who was apparently not the prosecutor who filed a succinct and correct motion opposing expungement, stated somewhat paradoxically: "Your Honor, wouldn't that qualify as a traffic - - the first offense? Are we objecting to it based on the fact that there's a prior." The court answered "yeah." The court noted: "I am not overly convinced that it's something that would bar it." The prosecutor commented: "I'm thinking that it's a prior traffic offense which I don't believe would bar it in that situation." The court stated: "[t]hank you very much for your candor and your support."

{¶7} Before we consider the issue of whether the Gahanna offense was one that rendered appellee to be other than a first offender, we need to consider the law concerning expungement of records.

{¶8} The first basic principle is that expungement is an act of grace created by the state and is a privilege, not a right. *State v. Simon* (2000), 87 Ohio St.3d 531, 533. Continuing, the *Simon* court explained that "[e]xpungement should be granted only when all requirements for eligibility are met."

{¶9} One of the statutory requirements is that defendant must be a "first offender" in order to apply for expungement. R.C. 2953.32(A). A "first offender" is generally defined as someone who has been convicted of a criminal offense and "who previously or subsequently has not been convicted of the same or a different offense in this state or any other jurisdiction." R.C. 2953.31(A). If the applicant is not a first

offender, the court lacks jurisdiction to order expungement. An expungement of the record of a person who is not a first offender is void for lack of jurisdiction and may be vacated at any time. *State v. Thomas* (1979), 64 Ohio App.2d 141, 145. A prosecutor's failure to object or attend a hearing does not constitute a waiver because the trial court's lack of jurisdiction voids the expungement. Thus, in this case, even though the prosecutor encouraged the state to consider the previous conviction as the type of traffic case which is not statutorily defined as a first offense, the prosecutor's actions are not a bar to collaterally attacking the judgment nor is it a waiver of the state's right to appeal the judgment.

{¶10} R.C. 2953.31(A) defines a first offender; while generally traffic offenses are excluded, there are exceptions. R.C. 2953.31(A) provides, in part, as follows: "a conviction * * * for a violation of section * * * 4549.02 * * * 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" thus, barring expungement or sealing of the record.

{¶11} Gahanna City Code §335.12 "Stopping After Accident upon Streets; Collision with Unattended Vehicle" mirrors R.C. 4549.02, which states in part:

In case of accident to or collision with persons or property upon any of the public roads or highways, due to the driving or operation thereon of any motor vehicle, the person so driving or operating such motor vehicle, having knowledge of such accident or collision, shall immediately stop his motor vehicle at the scene of the accident or collision and shall remain at the scene of such accident or collision until he has given his name and address * * *.

{¶12} The Ohio Supreme Court has stated that this interpretation of R.C. 2953.31 is consistent with the General Assembly's intent as expressed throughout the expungement statute. "Before the 1984 amendment, R.C. 2953.31 defined a 'first offender' as anyone who had not been convicted of *any* offense, which must be construed to include traffic violations and drunk driving." *State v. Yackley* (1989), 43 Ohio St.3d 181, 182. The General Assembly later amended the statute to exclude most traffic offenses but it retained some traffic offenses, including "hit skip," as offenses that would disqualify the applicant from being a "first offender."

{¶13} Appellant's assignment of error is sustained. The judgment of the Franklin County Court of Common Pleas is reversed, and this case is remanded to that court to set aside its previous order and to enter a new order denying the request for relief pursuant to R.C. 2953.32.

Judgment reversed and cause remanded with instructions.

BRYANT and BROWN, JJ., concur.

McCORMAC, J., retired of the Tenth Appellate District,
assigned to active duty under authority of Section 6(C), Article
IV, Ohio Constitution.
