[Cite as *State v. Grossman*, 2011-Ohio-6818.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-1156 (C.P.C. No. 10EP-507)
Jarrod W. Grossman,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 30, 2011

Ron O'Brien, Prosecuting Attorney, and *Susan M. Suriano*, for appellee.

Connor, Evans & Hafenstein LLP, and *Daniel D. Connor*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Jarrod W. Grossman, from an entry of the Franklin County Court of Common Pleas denying appellant's application for an order to seal his record of conviction in case No. 04CR-5985.

{¶2} On September 14, 2004, appellant was indicted in Franklin County on 32 counts of theft in case No. 04CR-5985. The indictment alleged in part that, "from on or about November 3, 2002 to June 19, 2003," appellant stole various prescription drugs,

including Adderall, Adderall XR, Methylin, and Hydrocodone, while working at a Kroger pharmacy. On July 6, 2005, appellant entered a guilty plea to eight counts of theft, each involving the theft of either Adderall or Adderall XR, and the remaining 24 counts were dismissed. The trial court sentenced appellant to five years of community control and ordered him to pay restitution to Kroger.

{¶3} On August 2, 2010, appellant filed a motion, pursuant to R.C. 2953.32 and 2953.52, to seal the official record of convictions and dismissals in case No. 04CR-5985. On September 2, 2010, plaintiff-appellee, state of Ohio ("state"), filed an objection, arguing that appellant did not qualify as a first offender, and that the public's interest in maintaining access to the record outweighed appellant's interest in having his record sealed.

{¶4} The matter came for hearing before the trial court on November 17, 2010, and appellant testified on his own behalf. Appellant is a pharmacist, having received his "PharmD," the "doctorate level program for pharmacy," in 2006. (Tr. 10.) He currently manages a pharmacy in Newark. All of the counts to which appellant pled guilty in case No. 04CR-5985 arose out of conduct while appellant was working as an intern at a Kroger pharmacy. Regarding the acts of theft at work, appellant testified: "Once I started it continued every day. Like every day that I was at work I was stealing narcotics." (Tr. 31.) Appellant acknowledged that his conduct involved "months" of activity. (Tr. 29.) He stated that "there wasn't a day where I didn't take something." (Tr. 32.)

{¶5} On cross-examination, appellant testified that he began working at the Kroger pharmacy in question on November 3, 2002, and he was confronted with stealing drugs in June 2003. During the hearing, counsel for appellant stipulated that the eight

counts arose out of conduct occurring on eight different days. (Tr. 57.) At the close of the hearing, the trial court announced from the bench that it would deny the application, finding that "these are separate and distinct acts." (Tr. 76.) The court filed an entry on November 19, 2010, denying the application.

{¶6} On appeal, appellant sets forth the following assignment of error for this court's review:

> The Franklin County Court of Common Pleas erred in denying Appellant's motion for the sealing of his record of convictions on the basis that he was not a first offender. In doing so, the court held that Appellant's eight convictions could not merge into one conviction, or the same act, for the purposes of determining first offender status under R.C. §§ 2953.31-2953.32[,] because they were not "logically connected."

{¶7} Under this single assignment of error, appellant challenges the trial court's determination that he was not a "first offender" for purposes of Ohio's expungement statute. More specifically, appellant maintains that the offenses should be considered to constitute the "same act" under R.C. 2953.31.

{¶8} Statutory expungement "is a postconviction relief proceeding which grants a limited number of convicted persons the privilege of having the record of their first conviction sealed, should the court in its discretion so decide." *State v. Heaton* (1995), 108 Ohio App.3d 38, 41. Under Ohio law, "[e]xpungement should only be granted when all requirements for eligibility are met." *State v. Suel,* 10th Dist. No. 02AP-1158, 2003-Ohio-3299, ¶10, citing *State v. Hamilton* (1996), 75 Ohio St.3d 636, 640. Further, "[o]nly a first offender may apply to seal the record of conviction." Id., citing R.C. 2953.32(A)(1).

{¶9} In general, an appellate court reviews a trial court's decision on an application to seal a record for abuse of discretion. *State v. Wilson,* 10th Dist. No. 06AP-

1060, 2007-Ohio-1811, ¶6. However, the issue of whether an applicant is a "first offender is a question of law, and appellate courts may apply a de novo standard when reviewing that issue." *State v. Kesman,* 8th Dist. No. 89973, 2008-Ohio-3020, ¶12. See also *State v. Brewer,* 10th Dist. No. 06AP-464, 2006-Ohio-6991, ¶10 ("[w]hether an individual is a first offender is reviewed de novo by the appellate court").

{¶10} R.C. 2953.32(A) states in part: "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, or to a court of common pleas if convicted in another state or in a federal court, for the sealing of the conviction record." The threshold issue in any proceeding in which an applicant seeks to seal the record of a criminal conviction "is whether the applicant is qualified for 'first offender status.' " *Dayton v. Salmon* (1996), 108 Ohio App.3d 671, 674.

{¶11} R.C. 2953.31(A) defines "first offender," and states in part as follows:

> "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. When two or three convictions result from the same indictment, information, or complaint, from the same plea of guilty, or from the same official proceeding, and result from related criminal acts that were committed within a three-month period but do not result from the same act or from offenses committed at the same time, they shall be counted as one conviction, provided that a court may decide as provided in division (C)(1)(a) of section 2953.32 of the Revised Code that it is not in the public interest for the two or three convictions to be counted as one conviction.

{¶12} Appellant argues that the issue in this case is whether his convictions, pursuant to the above statute, "result from or are connected with the same act" so as not

to preclude his eligibility for expungement. Appellant maintains that his multiple convictions do not preclude "first offender" status because they arise out of the "same act," i.e., the theft of Adderall and Adderall XR, while he was working at the same store and for the same employer. Appellant further argues that his offenses were logically connected and in furtherance of one overall vice, i.e., the theft of a particular drug (Adderall) from the same store to support his addiction.

{¶13} In response, the state argues that the trial court did not err in determining that appellant's conduct involved separate acts for purposes of the expungement statute. The state contends that the facts of the present case are similar to those in *State v. Smith,* 3d Dist. No. 9-04-05, 2004-Ohio-6668, and *In re Koehler*, 10th Dist. No. 07AP-913, 2008-Ohio-3472.

{¶14} Under the facts of *Smith,* the defendant was employed as a licensed pharmacist, and became dependent on the pain reliever Hydrocodone, a Schedule III controlled substance. The defendant took Hydrocodone on a daily basis from the pharmacy for approximately seven years until the theft was discovered. He was indicted on eight counts of theft of drugs, and was subsequently indicted on three counts of possession of drugs based upon the defendant's possession of Hydrocodone during three separate periods of time from 1997 through 1999. He subsequently entered a guilty plea to a reduced charge of three misdemeanor counts of possession of drugs, and was sentenced to a prison term of six months. The defendant later filed an application for expungement of his record, pursuant to R.C. 2953.32, which the trial court granted.

{¶15} The state appealed, arguing that the defendant's multiple convictions did not result from the same act; rather, the state argued, each time the defendant possessed

a Hydrocodone product from his employer's inventory for personal use, he committed a new offense. On appeal, the court agreed with the state's argument, holding in part: "Although Smith committed the same offense three times, the fact that the offenses were committed over a three-year period precludes Smith from being classified as a 'first offender,' as defined by R.C. 2953.31." *Smith* at ¶17.

{¶16} In *Smith,* the Third District Court of Appeals relied in part upon its earlier decision in *State v. Derugen* (1996), 110 Ohio App.3d 408, in which that court held that an offender who had six convictions based on acts that occurred over a four-day period was not a first offender. In reviewing that decision, the *Smith* court noted: "Despite the fact the offenses could have been considered logically connected as being the result of the offender's drug dependency, we held that the convictions were separate and unrelated based on the fact they were committed at different times." Id. at ¶15. The court in *Smith* further cited with approval *State v. Radey* (Aug. 17, 1994), 9th Dist. No. 2293-M (applicant convicted of six counts of passing bad checks over a seven-month period of time was not a first offender), and *State v. Aggarwal* (1986), 31 Ohio App.3d 32 (sale of unregistered securities on three separate occasions, arising out of same offering, did not merge into a single offense).

{¶17} Under the facts of *Koehler,* the applicant for expungement was indicted on 36 counts of the sale of unapproved drugs, in violation of R.C. 2925.09(A), all felonies of the fifth degree. Pursuant to a plea agreement, he entered guilty pleas to the stipulated lesser-included offenses of Counts 1 through 36 (attempted sale of unapproved drugs). The applicant was convicted and sentenced by the trial court to concurrent six-month jail terms on each of the 36 counts. He subsequently sought to have the record of conviction

sealed under R.C. 2953.32(A), asserting that he qualified as a first offender. The trial court agreed with the applicant that the 36 convictions counted as one conviction for purposes of expungement.

{¶18} On appeal, this court reversed, holding in pertinent part:

> The record in this case does not support a finding that the 36 counts for which appellee was convicted had a sufficient connection or relationship to each other such that they "result from or are connected with the same act." As noted by appellant, appellee pled guilty to 36 separate violations of attempted sale of unapproved drugs occurring on 35 separate days over the span of five years. Although neither the indictment nor the guilty plea form set forth precisely what criminal activity transpired on each of the 35 days, counsel for appellee averred at the hearing that the records appellee relinquished as part of the unrelated Medicare investigation chronicled when physicians contacted him and requested the vaccine, when he manufactured batches of the vaccine, and when he collected payment from the purchasing physicians for the sale of the vaccine. The indictment and the information provided at the hearing, taken together, clearly establish that appellee's convictions resulted from his violating different sections of R.C. 2925.09(A) on separate days over several years and that his crimes involved several different physicians.
>
> Accordingly, we conclude that appellee's 36 convictions for attempted sale of unapproved drugs constituted separate offenses committed at separate times. Appellee's violation of several different sections of R.C. 2925.09 and the substantial gap in time between offenses precluded appellant from being classified as a first offender.

Koehler at ¶32-33.

{¶19} In *Koehler,* this court cited in support other courts that had reached similar determinations "when offenses are committed at different times." Id. at ¶25. See *Brewer* at ¶14 (because appellee's convictions for attempted forgery, involving conduct that occurred on five separate days over one week, and attempted possession of criminal

tools, involving conduct occurring over a three-month period of time, "were based upon separate and distinct acts that occurred on different days, the convictions do not merge into a single offense for expungement purposes"); *State v. Iwanychyj* (Oct. 14, 1993), 8th Dist. No. 65462 ("[o]ffenses of like nature committed over a period of time do not become a single offense regardless of the similarity of criminal activity"); *Derugen.*

{¶20} In *State v. Vann,* 5th Dist. No. 03 CA 6, 2003-Ohio-7275, the defendant was convicted of theft of checks and forgery involving the same victim, with the forgery offense occurring two days after the theft. The defendant subsequently sought expungement on the basis that the convictions were "connected." Id. at ¶17. The court in *Vann,* however, found no error with the trial court's conclusion that the "connectedness required by R.C. 2953.31(A) was lacking." Id. at ¶18. Similarly, in *State v. Cresie* (1993), 93 Ohio App.3d 67, the defendant was convicted of an attempted theft offense occurring on October 26, 1984, and an attempted forgery offense occurring on October 27, 1984. The court in *Cresie,* citing a "long line of cases," held that "the two convictions resulting from these two offenses which occurred at separate times cannot be counted as one conviction under R.C. 2953.31." Id. at 69.

{¶21} In the present case, appellant's contention that his convictions are "connected" because each of his crimes was committed in furtherance of a drug compulsion is not persuasive. See *Derugen* at 411 (rejecting defendant's claim that he qualified as first offender because all of his convictions were the result of drug dependency; rather, where defendant was convicted of separate and unrelated offenses, some of which were committed at different times, the acts involved "were not logically related"). Further, the fact that offenses are of a "like nature does not cause them to be

treated as a single offense." *State v. Saltzer* (1985), 20 Ohio App.3d 277, 278. Here, appellant's eight convictions were the result of separate offenses of theft that occurred on eight different days, arising from an indictment alleging conduct over an eight-month time period. Upon review, we agree with the state that appellant's convictions did not result from or were not connected with the same act (nor did the convictions result from offenses committed at the same time). *Smith; Brewer; Vann; Cresie*. Accordingly, we conclude that the trial court did not err in finding that appellant did not qualify as a first offender and in denying his application to seal the criminal record.

{¶22} 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.

KLATT and CONNOR, JJ., concur.

_____