[Cite as *State v. Radcliff*, 2012-Ohio-4732.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 11AP-652
v.	:	(C.P.C. No. 11EP-183)
James A. Radcliff,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on October 11, 2012

Ron O'Brien, Prosecuting Attorney, and *Seth Gilbert*, for appellant.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for *amicus curiae*, Franklin County Public Defender.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, State of Ohio, appeals from a judgment of the Franklin County Court of Common Pleas granting the application of defendant-appellee, James A. Radcliff, to seal the record of his prior convictions. Because defendant does not satisfy the criteria for either judicial or statutory expungement, we reverse.

I. Facts and Procedural History

{¶2} On September 13, 2011, defendant filed an application requesting the trial court seal the record of his convictions for breaking and entering and passing bad checks in case No. 81CR-4506. The record indicates that between 1973 and 1981, in addition to the convictions in 81CR-4506, defendant was convicted of several crimes

throughout Ohio, including felonious assault, aiding escape, disorderly conduct, and complicity to commit theft.

{¶3} According to the letters from friends, co-workers, and family members submitted to support defendant's application to seal his record, defendant significantly reversed his behavior and became a productive, law-abiding member of society in the 30 years since defendant's youthful legal troubles. Defendant applied for a custodial position with Dublin City Schools, indicating on the application that he had a criminal background that he was willing to discuss with his prospective employer. Defendant successfully obtained the position and eventually became the lead custodian at Dublin Jerome High School. Defendant married and supported his disabled wife, their child, and his wife's four children from a previous marriage and also became an active member in his church. After 21 years of what appeared to be exemplary service with Dublin City Schools, defendant was fired from his job when a local newspaper published an article noting the criminal records of some school employees.

{¶4} On January 7, 2011, Governor Ted Strickland granted defendant "a full and absolute pardon" for defendant's various convictions, indicating defendant had "been rehabilitated and ha[d] assumed the responsibilities of citizenship." (R. 1-2.) Defendant then filed his application, indicating he was not seeking the order for any of the reasons listed in R.C. 2953.52 but rather because he possessed a pardon. The state objected to the application, noting defendant was ineligible to have his record sealed under either R.C. 2953.52 or 2953.31.

{¶5} The trial court held a hearing on defendant's application on July 7, 2011. The court found the circumstances of the case "a little bit * * * unusual" but concluded the pardon entitled defendant to "a full release." (Tr. 3, 5.) The court issued a judgment entry on July 20, 2011 sealing the record of defendant's conviction pursuant to R.C. 2953.32, noting defendant had no criminal actions pending against him, and concluding that sealing his record was consistent with the public interest.

II. Assignments of Error

{¶6} The state appeals, assigning two errors:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT FAILED TO DETERMINE WHETHER APPLICANT WAS A "FIRST OFFENDER" AS REQUIRED BY R.C. 2953.32.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN EXERCISING ITS JURISDICTION WHEN IT GRANTED APPLICANT'S APPLICATION FOR EXPUNGEMENT AS APPLICANT WAS NOT A "FIRST OFFENDER" AS DEFINED BY R.C. 2953.31.

The state's assignments of error are interrelated and will be addressed together.

III. Expungement: Statutory v. Judicial

{¶7} " 'Expungement is a post-conviction relief proceeding which grants a limited number of convicted persons the privilege of having record of their first conviction sealed.' " *Koehler v. State*, 10th Dist. No. 07AP-913, 2008-Ohio-3472, ¶ 12, quoting *State v. Smith*, 3d Dist. No. 9-04-05, 2004-Ohio-6668, ¶ 9. Neither the United States nor Ohio Constitutions endows one convicted of a crime with a substantive right to have the record of a conviction expunged. *Koehler* at ¶ 14, quoting *State v. Gerber*, 8th Dist. No. 87351, 2006-Ohio-5328, ¶ 9. "Rather, ' "[e]xpungement is an act of grace created by the state" and so is a privilege, not a right.' " *Koehler*, quoting *State v. Simon*, 87 Ohio St.3d 531, 533 (2000), quoting *State v. Hamilton*, 75 Ohio St.3d 636, 639 (1996).

{¶8} R.C. 2953.52(A) permits any person who has been found not guilty by a jury, who is the defendant named in a dismissed indictment, or against whom the Grand Jury enters a no bill, to apply to the court for an order sealing the official records of the case. R.C. 2953.32(A)(1) permits a first offender to apply to the sentencing court for an order sealing the record of conviction. A first offender is "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." R.C. 2953.31(A).

{¶9} Under either section, the court must determine if the prosecutor filed an objection to the application and, if so, consider the prosecutor's reasons for the

objection. R.C. 2953.32(B); R.C. 2953.52(B); *Koehler* at ¶ 13. The court also must weigh the applicant's interests in having the records sealed against the legitimate needs, if any, of the government to maintain the records. R.C. 2953.32(C)(1); R.C. 2953.52(B)(2)(d). If the applicant fails to satisfy any one of the statutory requirements, the court must deny the application. *Id.* at ¶ 13, citing *State v. Krantz,* 8th Dist. No. 82439, 2003-Ohio-4568, ¶ 23. None of the applicable statutes permits a defendant to seek expungement after obtaining a gubernatorial pardon, and defendant acknowledges he is not entitled to expungement under either statutory provision.

{¶10} Indeed, defendant sought to seal his records comprising case No. 81CR-4506 based on the pardon he received for those convictions, not the statutory provisions, and the trial court concluded the pardon defendant received, not the statutes, provided the court with authority to seal the record. Similarly, amicus curiae admits the trial court "had no authority to order the record of conviction sealed pursuant to the[] statutory provisions" but instead relied on the proposition that "trial court ha[d] the inherent power to order its records sealed in the interests of justice." (Amicus' brief, 3.)

{¶11} The seminal case defendant cites to support the trial court's decision is *Pepper Pike v. Doe*, 66 Ohio St.2d 374 (1981), stating a court may order a record of conviction sealed "where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter." *Id.* at paragraph two of the syllabus. "When exercising this power, the court should use a balancing test which weighs the privacy interest of the defendant against the government's legitimate need to maintain records of criminal proceedings." *Id; see also State v. Davidson*, 10th Dist. No. 02AP-665, 2003-Ohio-1448, ¶ 15 (stating the enactment of R.C. 2953.31 et seq. did not abrogate the judicial remedy of expungement).

{¶12} In *Pepper Pike*, the charges against the defendant arose out of a domestic quarrel where the complaining witness used the court as "a vindictive tool to harass [the defendant]." *Id.* at 377. After the city dismissed the charges, the defendant filed a motion seeking to expunge the record of arrest. *Id.* at 375. At the time, the General Assembly had not enacted R.C. 2953.52, and the defendant had no statutory basis under which to seek expungement.

{¶13} Finding the circumstances of the case "unusual and exceptional," the court determined the defendant was entitled to expungement based on her "constitutional right to privacy." *Id.* at 377, citing *Roe v. Wade*, 410 U.S. 113 (1973); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Griswold v. Connecticut*, 381 U.S. 479 (1965). The court warned, however, that the case before it was "the exceptional case, and should not be construed to be a carte blanche for every defendant acquitted of criminal charges in Ohio courts." *Pepper Pike* at 377 (observing that when courts exercise the judicial remedy of expungement they should "follow the guidelines set out in Ohio's criminal expungement statute").

{¶14} The "extra-statutory" authority to grant the expungement described in *Pepper Pike* derived "out of a concern for the preservation of the privacy interest," and courts have contrasted the facts and holding of *Pepper Pike* "with the case of adjudicated *offenders*, whose relief is prescribed by statute." (Emphasis sic.) *State v. Weber*, 19 Ohio App.3d 214, 216 (1st Dist.1983). Although *Pepper Pike* determined trial courts have jurisdiction to expunge the records of a criminal case "where the charges are dismissed with prejudice prior to trial by the party initiating the proceedings," it also observed that "[i]n Ohio, convicted first offenders may seek expungement and sealing of their criminal records under the authority of R.C. 2953.32." *Id.* at paragraph one of the syllabus; 376.

{¶15} Thus, "where a defendant has been convicted of an offense, expungement may be granted only as allowed by statute, and the court may not use the judicial (i.e., extra-statutory) expungement remedy used in *Pepper Pike*." *State v. Bailey*, 10th Dist. No. 02AP-406, 2002-Ohio-6740, ¶ 11. As a result, "[t]he only remedy for a convicted defendant is expungement through the statute." *Id.* at ¶ 12. *See also In re Barnes*, 10th Dist. No. 05AP-355, 2005-Ohio-6891, ¶ 14 (noting that because appellee had a previous conviction, "the judicial remedy of expungement [was] unavailable to appellee"); *Davidson* at ¶ 16 (determining that while "[e]xceptional circumstances demonstrating appellee's good character were indeed present under these facts, * * * because appellee was actually convicted of the charge she seeks to have expunged, she [could not] qualify for a judicial expungement"); *State v. Blank*, 10th Dist. No. 04AP-341, 2005-Ohio-2642, ¶ 11 (deciding that "because appellee was convicted of a crime and not just acquitted or

had his case dismissed, appellee cannot qualify for judicial expungement); *Weber* at 217 (concluding the holding of *Pepper Pike* was "clearly and obviously" directed toward "instances of defendants *acquitted of criminal charges*") (Emphasis sic.); *State v. Netter*, 64 Ohio App.3d 322, 325-26 (4th Dist.1989) (noting "a number of cases which have limited Pepper Pike to cases involving no conviction" and concluding that "[b]ecause appellee was convicted, his only remedy was statutory"); *State v. Kidd*, 11th Dist. No. 2004-P-0047, 2005-Ohio-2079, ¶ 12 (stating that "[i]n Ohio, appellate courts, including this one, have uniformly limited this remedy [of judicial expungement] to cases where the person seeking expung[e]ment was not convicted of an offense"); *State v. Fowler*, 12th Dist. No. CA2001-03-005 (Sept. 24, 2001) (concluding that "because appellant was convicted, his only remedy was statutory"); *State v. Chiaverini*, 6th Dist. No. L-00-1306 (Mar. 16, 2001) (stating that "although the judicial power to grant an expungement request still exists, * * * it is limited to cases where the accused has been acquitted or exonerated in some way and protection of the accused's privacy interest is paramount to prevent injustice").

{¶16} None of the above cited cases concerned a defendant convicted and subsequently pardoned by the governor, but the cases suggest trial courts retain inherent jurisdiction to expunge or seal criminal records only where the defendant has not been convicted of the underlying offense. The issue in this case then resolves to whether the governor's absolute pardon erased defendant's conviction and entitled defendant to invoke the court's inherent jurisdiction to judicially expunge his record in order to protect his constitutional right to privacy.

IV. The Effect of a Pardon

A. *Ohio's Pardon Jurisprudence*

{¶17} The Ohio Constitution grants the governor the "power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as the governor may think proper; subject, however, to such regulations, as to the manner of applying for commutations and pardons, as may be prescribed by law." Ohio Constitution, Article III, Section 11. Article III, Section 11 "was adopted as part of extensive revisions to the Constitution made in 1851." *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 517 (1994). The only

limits on the clemency power are those that Article III, Section 11 authorizes. *Id.* at 518. The General Assembly may not interfere with the discretion of the governor in exercising the clemency power, and the governor's exercise of discretion in using the clemency power is not subject to judicial review. *Id.*

{¶18} In 1883, the Supreme Court of Ohio explained that a pardon is," in effect, a reversal of the judgment, a verdict of acquittal, and a judgment of discharge thereon," creating a "complete estoppel of record against further punishment pursuant to such conviction." *Knapp v. Thomas*, 39 Ohio St. 377, 381 (1883). Relying on United States Supreme Court precedent, *Knapp* held that " 'a pardon reaches both the punishment prescribed for the offense and the guilt of the offender, * * * 'obliterates, in legal contemplation, the offense itself,' " and " 'so far blots out the offense, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights.' " *Id.*, quoting *Ex Parte Garland*, 71 U.S. 333, 380 (1866); *Carlisle v. U.S.*, 83 U.S. 147, 151 (1872); *Knote v. U.S.*, 95 U.S. 149 (1877). *See also State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 629, 650 (1885) (stating that a full and absolute pardon "releases the offender from the entire punishment prescribed for his offense, and from all the disabilities consequent on his conviction").

{¶19} In *State ex rel. Atty. Gen. v. Hawkins*, 44 Ohio St. 98, 117 (1886), the court clarified its holding in *Knapp*, stating that "[w]hatever the theory of the law may be as to the effect of a pardon, it cannot work such moral changes as to warrant the assertion that a pardoned convict is just as reliable as one who has constantly maintained the character of a good citizen." In *Hawkins*, the defendant police commissioners defended their choice of police officers, some of whom were "gamblers; * * * ha[d] served terms in the workhouse, * * * ha[d] been keepers of houses of prostitution, and a number of whom ha[d] been discharged by said board for drunkenness;" they claimed at least some of the officers had been pardoned and "thereby restored to citizenship and entitled to the same confidence as if they had never been convicted." *Id.* at 98, 116-17. *Hawkins* called it "a perversion of language to give to the views expressed by Judge Okey in *Knapp v. Thomas*, 39 Ohio St. 377, such a construction. He never meant anything of the kind." *Id.* at 117.

{¶20} In a later case that considered whether a probation department interfered with the governor's pardoning power, the court explained that "[a] full pardon purges away all guilt and leaves the recipient from a legal standpoint, in the same condition as if the crime had never been committed." *State ex rel. Gordon v. Zangerle*, 136 Ohio St. 371, 376 (1940), citing *Knapp* at 381. Thus, probation could not interfere with the governor's pardoning power, as an absolute pardon would "set[] the accused free from the custody of the law, * * * terminate[] existing probation and make[] anticipated probation impossible." *Id; see also State v. Morris*, 55 Ohio St.2d 101, 105 (1978), citing *Knapp* at 381 (holding that "a full pardon not only results in a remission of the punishment and the guilt, but also a remission of the crime itself").

{¶21} More recently, two Ohio appellate courts considered the effect a gubernatorial pardon on the recipient's ability to seek expungement of the pardoned offense. In *State v. Cope*, 111 Ohio App.3d 309 (1st Dist.1996), the court, observing trial courts have inherent powers to seal records pursuant to *Pepper Pike*, stated that while a factual distinction could be "drawn between a person who has charges dismissed with prejudice and a person who is convicted and receives a pardon, that distinction is immaterial, because the pardon places the recipient, from a legal standpoint, *in the same condition as if the crime had never been committed*." (Emphasis sic.) *Id.* at 311, citing *Gordon*. The court held that granting a pardon "is an 'exceptional and unusual' circumstance" entitling the trial court to seal the record of conviction, "regardless of whether the petitioner has other offenses on his record. 'A pardon without expungement is not a pardon.' " *Id.* at 312, quoting *Commonwealth v. C.S.*, 517 Pa. 89 (1987).

{¶22} By contrast, *State v. Boykin*, 9th Dist. No. 25752, 2012-Ohio-1381, concluded that, although trial courts have "authority to grant judicial expungement in situations in which an executive pardon is at issue," a pardon does not "conclusively entitle the recipient to have the record sealed." *Id.* at ¶ 7, 13. The court noted a careful reading of *Knapp* revealed that "a pardoned individual is 'a new man' insofar as the restoration of competency and the further imposition of punishment are concerned," but that the pardon "does not wipe away all traces of the criminal case." *Id.* at ¶ 10. Reviewing case law from various states and the federal courts, the court decided a "majority of courts that have considered the question" concluded a pardon does not

entitle the recipient to have their record of conviction sealed. *Id.* at ¶ 13. The *Boykin* court further found its holding correct because, "[i]n Ohio, the legislature has not provided for sealing records of a pardoned individual by statute" as "[s]ome other jurisdictions have." *Id.* at ¶ 14.

{¶23} Thus, the two Ohio appellate courts to recently consider the effect of a pardon on the recipient's ability to seek expungement have reached differing conclusions regarding the proper effect of a pardon. *Knapp* is at the root of the pardon jurisprudence in Ohio and based its understanding of the power to pardon on the United States Supreme Court holdings in *Garland*, *Knote*, and *Carlisle*.

B. *United States Supreme Court's Pardon Jurisprudence*

1. *Ex Parte Garland*

{¶24} In *Ex Parte Garland*, the U.S. Supreme Court explained that a pardon "blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence." *Id.* at 380. Garland was an Arkansas attorney admitted to practice before the United States Supreme Court prior to the civil war. *Id.* at 336. Following the war, Congress passed an act requiring any person seeking to practice before a court of the United States to take an oath affirming that he neither took up arms against the United States nor aided the Confederacy. *Id.* at 334-35. Because Garland represented Arkansas in the Confederate Congress, he could not take the oath. *Id.* at 336. Garland received a presidential pardon in 1865 for offenses he committed by taking part in the rebellion, presented the pardon to the court, and requested that he be admitted to practice without having to take the oath. *Id.* at 336-37.

{¶25} The court agreed with Garland's assertion that the act was unconstitutional, concluding the act was "of the nature of bills of pains and penalties" and thus "subject to the constitutional inhibition against the passage of bills of attainder." *Id.* at 377. The court also determined the act violated the constitutional prohibition against ex post facto laws, as it "impose[d] a punishment for some of the acts specified which were not punishable at the time they were committed, and for other of the acts it add[ed] a new punishment to that before prescribed." *Id.* at 377.

{¶26} After finding the act unconstitutional, the court stated its conclusion was "strengthened by a consideration of the effect of the pardon produced by the petitioner."

Id. at 380. The court explained that "[a] pardon reaches both the punishment prescribed for the offence and the guilt of the offender," releasing the offender from punishment, "blot[ting] out of existence the guilt" and rendering the offender "as innocent as if he had never committed the offence." *Id.* at 380. When granted after conviction, the pardon "removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity." *Id.* at 380-81. The court acknowledged, however, that a pardon would not "restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment." *Id.* at 381. In the end, due to the pardon, the oath "could not be exacted, even if that act were not subject to any other objection than the one thus stated." *Id.*

{¶27} Modern case law has dismissed the "blotting out" language from *Garland* as dictum and rejected *Garland*'s expansive view of the power to pardon. *See In re Abrams*, 689 A.2d 6, 17 (D.C.App.1997) (noting that "[b]y the time Justice Field reached the issue of the pardon, the case had already been decided[,] * * * the statute was deemed invalid on other constitutional grounds"); *Bjerkan v. U.S.*, 529 F.2d 125, 128 (7th Cir.1975), fn.2 (noting "[a] pardon does not 'blot out guilt' nor does it restore the offender to a state of innocence in the eye of the law as was suggested in *Ex Parte Garland*"); *In re North*, 62 F.3d 1434, 1437 (D.C.Cir.1994) (concluding the Supreme Court "did not rest its judgment [in *Garland*] on the theory that the pardon blotted out Garland's guilt," and that "expansive view of the effect of a pardon turned out to be dictum"); *State v. Skinner*, 632 A.2d 82, 84 (Del.1993) (noting that "[w]hile the U.S. Supreme Court, in *Ex Parte Garland*, * * * stated that a full pardon 'releases the punishment and blots out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense,' that dictum has since been rejected"); *Hirschberg v. Commodity Futures Trading Comm.*, 414 F.3d 679, 682 (7th Cir.2005) (dismissing Hirschberg's reliance on *Garland*, noting that "modern caselaw emphasizes * * * that this historical language was dicta and is inconsistent with current law"); *U.S. v. Noonan*, 906 F.2d 952, 958 (3d Cir.1990) (noting the Supreme Court, by 1915, "made clear that it was not accepting the *Garland* dictum that a pardon 'blots out of existence the guilt' ").

{¶28} "While the U.S. Supreme Court has never expressly overruled *Garland*, since that decision the Court has eroded its broad articulation of the power by narrowing its scope in *Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 151 U.S. 1 * * * (1894), *Burdick v. United States*, 236 U.S. 79 * * * (1915), and *Carlesi v. New York*, 233 U.S. 51 * * * (1914)." *In re Sang Man Shin*, 125 Nev. 100, 105 (Nev.2009). "In *Angle*, the Court held that a third-party civil right of action to recover damages remains regardless of a pardon." *Id.*, citing *Angle* at 19. In *Carlesi*, the Supreme Court determined a court applying a habitual offender statute could consider "past offenses committed by the accused as a circumstance of aggravation, even although for such past offenses there had been a pardon granted." *Id.* at 59. *See Abrams* at 18 (stating "[t]he result in *Carlesi* cannot be reconciled with the notion that the presidential pardon 'blot[ted] out' of existence the conduct that led to Carlesi's federal conviction").

{¶29} In *Burdick*, the court similarly departed from *Garland*'s view, holding instead that a pardon "carries an imputation of guilt; acceptance a confession of it." *Id.* at 94. Burdick refused to answer questions before a Grand Jury regarding his sources for a newspaper article, and the state procured a presidential pardon for Burdick, hoping the pardon would induce Burdick to testify. *Id.* at 85. Burdick refused to accept the pardon and refused to answer the questions. *Id.* at 86. The court first determined a pardon may be "rejected by the person to whom it is tendered" and a court may not force the pardon on the unwilling recipient. *Id.* at 90. The court then explained why someone would reject a pardon, stating an individual may wish to "escape [the] confession of guilt implied in the acceptance of a pardon * * *, —preferring to be the victim of the law rather than its acknowledged transgressor." *Id.* at 90-91. *See also North* at 1437, citing *Burdick* at 91 (noting *Burdick*, "which recognized that the acceptance of a pardon implies a confession of guilt," implicitly rejected *Garland*'s dictum).

2. *Carlisle v. U.S.* and *Knote v. U.S.*

{¶30} The other two cases *Knapp* relied on, *Carlisle* and *Knote*, both concerned claims for reimbursement for property the United States government seized and sold during the Civil War. Although both cases rely on *Garland*'s interpretation of the

pardoning power, each case also qualifies the power, acknowledging that a pardon does not erase past conduct.

{¶31} In *Carlisle,* the claimants sought recovery under the Captured and Abandoned Property Act for cotton the United States Navy seized and sold during the Civil War. *Id.* at 148. Although the claimants aided the rebellion by selling saltpetre to the Confederate Army, rendering them unable to recover under the terms of the act, they presented the court with a presidential pardon which "obliterate[d] in legal contemplation the offence itself." *Id.* at 149, 151. The Supreme Court held that, while "the pardon and amnesty do not and cannot alter the actual fact that aid and comfort were given by the claimants, * * * they forever close the eyes of the court to the perception of that fact as an element in its judgment, no rights of third parties having intervened." *Id.* at 151.

{¶32} In *Knote,* the claimant sought reimbursement for his land confiscated and sold during the war, the proceeds of which were paid into the United States Treasury. *Id.* at 152. The claimant received a pardon for his participation in the rebellion, and the Supreme Court noted that, while a pardon "so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights[,] * * * it does not make amends for the past." *Id.* at 153. Because the pardoned offense has been "established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required." *Id.* at 154. Because the rights to the property had vested in the buyer and the monies from the sale deposited into the United States Treasury, the court concluded the claimant was not entitled to reimbursement from the sale. *Id.*

{¶33} Given the facts of the cases on which it relied, *Knapp*'s foundation for holding that a pardon blots out the offense and operates as a verdict of acquittal is problematic. *Carlisle* and *Knote* both indicate that a pardon cannot erase past conduct, and recent case law dismisses *Garland*'s broad articulation of a pardon as dictum.

C. *Ancillary Authority on the Effect of a Pardon*

{¶34} By 1915, the debate over the proper interpretation and effect to be given a pardon had become so heated that Professor Williston wrote his seminal article: Samuel

Williston, *Does a Pardon Blot Out Guilt?*, 28 Harv.L.Rev. 647 (1915). Williston noted the "often quoted" language from *Garland* and concluded that, "when it is said that in the eye of the law [pardoned convicts] are as innocent as if they had never committed an offence, the natural rejoinder is, then the eyesight of the law is very bad." *Id.* at 647-48. Williston analyzed English and United States case law and commentaries, concluding "[t]he true line of distinction seems to be this: The pardon removes all legal punishment for the offence," thus removing any legal disqualifications which may flow from the offense, but "if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible." *Id.* at 653.

{¶35} Williston's comments about the effect of a pardon upon character have been followed widely in various contexts. Many courts have determined an attorney, suspended or disbarred after committing a crime, is not entitled to reinstatement upon receiving a pardon for the underlying conviction, since disbarment "is not a part of the punishment inflicted for the commission of the crime" but rather takes away the acquired right "because of misconduct." *Branch v. State*, 120 Fla. 666, 670 (1935). *See, e.g., State v. Snyder*, 136 Fla. 875 (1939) (noting the "very fact of embezzlement is cause for disbarment and a pardon does not blot out that fact"); *Grossgold v. Supreme Ct of Illinois*, 557 F.2d 122, 125-26 (7th Cir.1977); *In re Beck*, 264 Ind. 141, 146 (1976), quoting *In re Lavine*, 2 Cal.2d 324, 329 (1935); *Abrams* at 15, quoting *In re Harrington*, 134 Vt. 549, 555 (1976).

{¶36} Cases concerning other types of professional licenses similarly conclude that a pardon will not erase the historical fact of a conviction or render its recipient morally fit for admission to the profession. *See Stone v. Oklahoma Real Estate Comm.*, 369 P.2d 642, 646 (Okla.1962) (concluding, for purposes of considering Stone's fitness to become a real estate broker, the pardon did not remove the stigma of Stone's prior convictions, and "[i]n [the court's] opinion a pardon simply does not 'wipe the slate clean' "); *Sandlin v. Criminal Justice Standards & Training Comm.*, 531 So.2d 1344, 1345-46 (Fla.1988) (holding that although a "pardon removes all disabilities resulting from a crime[,] * * * [p]ersons seeking to practice certain professions or employments,

* * * can be required to demonstrate their good moral character, even though they may have been fully pardoned for previous crimes").

{¶37} "Thus, while a pardon will foreclose punishment of the offense itself, it does not erase the fact that the offense occurred, and that fact may later be used to the pardonee's detriment." *Fletcher v. Graham*, 192 S.W.3d 350, 363 (Ky.2006). *See also Talarico v. Dunlap*, 177 Ill.2d 185, 190 (1997) (concluding that because a pardon does not "obliterate the fact of the commission of the crime and the conviction thereof[,] * * * Talarico's pardon did not negate the fact of his criminal conviction for purposes of collateral estoppel"); *North*, at 1438 (noting the pardon did "not blot out guilt or expunge the indictment," and "George's disability—the fact of his indictment—remain[ed], preventing the court from awarding him attorney's fees").

D. *The Effect of a Pardon on Expungement*

{¶38} Prior to the First District's ruling in *Cope*, two other courts had held a pardon entitled its recipient to record expunction. In *C.S.*, the court, noting a pardon "*blots out the very existence of * * * guilt*, " concluded "[t]here [was] no way that the state [could] retain the record of a former criminal who is 'as innocent as if he had never committed the offense.' " (Emphasis sic.) *Id.* at 92-93, quoting *Commonwealth v. Sutley*, 474 Pa. 256, 273-74 (1977). The court held that "[a] pardon without expungement is not a pardon." *Id.* at 93. *Cf. Skinner* at 86 (concluding *C.S.*'s holding, that a pardon without expungement is not a pardon, was "inexact because a pardon without expungement is clearly significant in that it restores civil rights that may have been lost").

{¶39} In *State v. Bergman*, 558 N.E.2d 1111 (Ind.App.1990), an Indiana appellate court concluded a gubernatorial pardon entitled its recipient to expungement. Although *Bergman* relied on *Garland* and *C.S.* to find the expungement proper, the court also noted that the pardon at issue specifically stated it was granted to enhance Bergman's career opportunities " 'and *to clear his name*.' " (Emphasis sic.) *Id.* at 1114. To carry out the executive mandate, "the court had no choice but to 'clear his name' by expunging the record of Bergman's conviction." *Id. Cf. Blake v. State*, 860 N.E.2d 625, 631 (Ind.App.2007) (noting "a majority of the case law from [Indiana's] sister states rejects the original principles drawn from *Ex parte Garland* and indicate[s] that a

pardon does not entitle the pardonee to expunction of all criminal records," so that even though the trial court had to expunge the record of defendant's conviction pursuant to *Bergman*, it did not have to expunge the arrest records).

{¶40} The majority of courts to consider the issue hold that a pardon does not entitle its recipient to records expungement. *R.J.L. v. State*, 887 So.2d 1268, 1279 (Fla.2004) (deciding that of the "nine jurisdictions [to] have directly addressed whether a pardon entitles an individual to records expunction," the majority "held that a pardoned individual is not entitled to records expunction"). *R.J.L.* addressed whether a pardon "eliminate[d] [the defendant's] adjudication of guilt, so as to entitle him to a certificate of eligibility for records expunction" under the Florida expungement statute. *Id.* at 1271. The court observed that, although "a pardon has the effect of removing punishment and disabilities, and restoring civil rights[,] * * * the denial of records expunction does not constitute a punishment" and "eligibility for records expunction is not a civil right restored by the grant of a gubernatorial pardon." *Id.* at 1280. The court thus concluded that "[a] pardon does not eliminate the adjudication of guilt, creating a fiction that the crime never occurred." *Id.*

{¶41} In *Noonan*, the Third Circuit similarly addressed whether a pardon would directly or indirectly expunge a judicial branch record of a criminal conviction. The court explained that the pardoning power was "an executive prerogative of mercy, not of judicial record-keeping" and determined the notion that the president has the ability to tamper with judicial records flew "in the face of the separation of powers doctrine." *Id.* at 955-56. *See also* Ashley M. Steiner, *Remission of Guilt or Removal of Punishment? The Effects of a Presidential Pardon*, 46 Emory L.J. 959 (1997) (noting that, if the presidential pardoning power functions as a check on the judicial power to fix judgments, "acceptance of the view that a pardon obliterates guilt and the fact of conviction would usurp th[e] judicial power" to decide cases and impose punishments, thus "counteracting the balancing function of a pardon and resulting in a power in the executive that itself must be checked"); *Nixon v. U.S.*, 506 U.S. 224, 232 (1993), quoting Black's Law Dictionary 1113 (6th Ed.1990) (stating that "a pardon is in no sense an overturning of a judgment of conviction by some other tribunal" but "is '[a]n executive action that mitigates or sets aside *punishment* for a crime' "). (Emphasis sic.)

{¶42} Reviewing varying authorities, *Noonan* determined a presidential pardon could not " 'create any factual fiction' that Noonan's conviction had not occurred" as would "justify expunction of his criminal court record." *Id.* at 960. *See also Bjerkan* at 126 (holding a pardon "cannot erase the basic fact of conviction, nor can it wipe away the social stigma that a conviction inflicts"); *State v. Blanchard*, 100 S.W.3d 226, 230-31 (Tenn.Crim.App.2002) (concluding the pardon did not render the defendant as though never convicted and noting "[n]umerous state courts have also recognized that a pardon does not eradicate the underlying conviction but rather releases the defendant from further punishment"); *Skinner* at 85 (stating that "[w]hile the pardon may have forgiven his conviction, it did not obliterate the public memory of the offense"); *People v. Thon*, 319 Ill.App.3d 855, 861 (2001) (concluding "petitioner's pardon did not erase his convictions" but "merely served to release petitioner from further punishment," so that petitioner was "an individual previously convicted of a criminal offense" and "ineligible for expungement"); *State v. Bachman*, 675 S.W.2d 41, 51-52 (Mo.App.1984) (deciding that while a "pardon gives new effect to the criminal conviction of a defendant, * * * a pardon does not grant authority to close or expunge criminal records"); *Commonwealth v. Vickey*, 381 Mass. 762, 769 (1980), quoting *Commissioner of Metropolitan Dist. Comm. v. Dir. of Civil Serv.*, 348 Mass. 184, 194 (1964) (stating that " 'even if a pardon may remit all penal consequences of a criminal conviction, it cannot obliterate the acts which constituted the crime' "); *Abrams* at 7 (determining that "although the presidential pardon set aside Abrams' convictions, as well as the consequences which the law attaches to those convictions, it could not and did not require the court to close its eyes to the fact that Abrams did what he did"); *U.S. v. Smith*, 841 F.2d 1127 (6th Cir.1988) (unpublished disposition), citing *U.S. v. Doe*, 556 F.2d 391, 392 (6th Cir.1977) (concluding the petitioner's reliance on *Garland* was misplaced, as "[a] presidential pardon restores the offender's civil rights, but, as this court has recognized, a presidential pardon does not require the expungement of a criminal conviction"); U.S. Dept. of Justice, Office of Legal Counsel, *Whether a Presidential Pardon Expunges Judicial and Executive Branch Records of a Crime* (Aug. 11, 2006), available at http://www.justice.gov/olc/memoranda-opinions.html (accessed September 27, 2012) (stating that while "a presidential pardon removes,

either conditionally or unconditionally, the punitive legal consequences that would otherwise flow from conviction for the pardoned offense," a pardon "does not erase the conviction as a historical fact or justify the fiction that the pardoned individual did not engage in criminal conduct").

{¶43} More recently, states have continued to conclude a pardon does not erase the underlying conviction or entitle the recipient to have his or her criminal record expunged. *See Harscher v. Commonwealth*, 327 S.W.3d 519, 522 (Ky.App.2010) (holding that "while a full pardon has the effect of removing all legal punishment for the offense and restoring one's civil rights, * * * [b]ecause a pardon does not erase the fact that the individual was convicted * * * a pardon does not entitle an individual to expungement of his criminal record"); *Sang Man Shin* at 101, 110 (concluding "the pardoning power does not bequeath innocence or erase the historical fact of the underlying criminal act and conviction," and, although "a pardon is an act of forgiveness that restores civil rights," nothing in the "Nevada Constitution * * * create[d] a civil right to expunge a criminal record"). Notably, no recent case has adopted the reasoning of *C.S.*, *Bergman*, or *Cope*, which concluded a pardon entitles its recipient to expungement.

E. *Ohio Statutes Addressing Pardons*

{¶44} In *People v. Glisson*, 69 Ill.2d 502, 506 (1978), the Supreme Court of Illinois concluded that the "effects of a pardon are not unlimited," as the legislature "explicitly provided in certain areas for rights and benefits to the pardonee beyond those afforded by the granting of the pardon." As an example, the court cited to an Illinois statute which "restored the right to hold public office to certain pardoned persons." *Id.*, citing Ill.Rev.Stat.1975, Chapter 46, par. 29-15.

{¶45} In Ohio, the General Assembly also enacted statutes delineating the rights and benefits restored to a pardonee. R.C. 2967.01(B) defines a pardon as "the remission of penalty by the governor in accordance with the power vested in the governor by the constitution." A pardon "relieves the person to whom it is granted of all disabilities arising out of the conviction or convictions from which it is granted." R.C. 2967.04(B).

{¶46} Although a pardon returns to a felon the right to be an elector or juror and to hold an office of honor, trust, or profit, a pardoned felon remains incompetent to

circulate a petition. R.C. 2961.01(A), (B). Despite the civil rights returned to a pardoned felon, the pardon does "not release the person from the costs of a conviction in this state, unless so specified." R.C. 2961.01(A)(2). *Compare* Williston, 28 Harv. L. Rev. at 658 (stating that "[i]f one who has paid a fine on conviction of crime and is subsequently pardoned, is indeed an innocent man, or is to be so regarded by the law, he should have the fine which he has paid returned to him"). *See also* Evid.R. 609(C) (providing that "[e]vidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon * * *, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year"); *Boykin* at ¶ 11, citing R.C. 2923.14(C) (noting that "[a] pardon does not automatically remove the recipient's disability with respect to carrying a concealed weapon").

{¶47} The Ohio Constitution and the Revised Code require a record of both the pardon and the corresponding conviction. The governor must "communicate to the general assembly, at every regular session, each case of * * * pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the * * * pardon, * * * with the Governor's reasons therefor." Ohio Constitution, Article III, Section 11. *See also* R.C. 107.10(E) (requiring the governor to keep a "pardon record" containing the date of each application for pardon, the name of the convict, the crime committed, in what county, the term of court where the convict was convicted, the sentence of the court, the action of the governor, the reason for that action, and the date of that action).

{¶48} Warrants of pardon must be issued in "triplicate, one to be given to the convict, one to be filed with the clerk of the court * * * in whose office the sentence is recorded, and one to be filed with the head of the institution in which the convict was confined, in case he was confined." R.C. 2967.06. The warrant of pardon must be "recorded by said clerk." *Id; see also* R.C. 2967.04(A) (obligating the clerk of court to "record the warrant [of pardon] * * * in the journal of the court, which record, or a duly certified transcript thereof, shall be evidence of such pardon or commutation, the conditions thereof, and the acceptance of the conditions").

{¶49} Lastly, R.C. 2953.52 provides that any person may seek to expunge records relating to a charge that resulted in a finding of not guilty, in a dismissed indictment, or

a no bill; the General Assembly did not list a pardon as one such scenario. *See Blanchard* at 229 (noting that where the legislature specified a finding of not guilty, a dismissed indictment, a no bill, or reversal on appeal would entitle an individual to expungement, the court was "forced to conclude that the legislature's failure to mention the grant of an expungement" following a pardon, "while mentioning numerous other grounds, serve[d] to exclude the instant pardon as a basis for the remedy sought"); *Vickey* at 767 (noting that, where the statute permitted records to be sealed if the defendant was found not guilty, the case dismissed, nolle prosequi, or a no bill returned, the court could not agree "that the omission of the term 'pardon' from these sections," all of which were "premised on a presumption of innocence," created a statutory gap, and "the omission of pardon [was] not fortuitous").

{¶50} Other jurisdictions have enacted statutes entitling a pardon recipient to expunge the record underlying the pardoned conviction. See 20 Ill.Comp.Stat. 2630/5.2(e) (stating that "[w]henever a person who has been convicted of an offense is granted a pardon by the Governor which specifically authorizes expungement, he or she may * * * have a court order entered expunging the record of arrest"); Conn.Gen.Stat.Ann. § 54-142a(D)(1) (providing that whenever "any person who has been convicted of an offense in any court of this state has received an absolute pardon for such offense, such person * * * may * * * file a petition * * * for an order of erasure"); Tex.Code.Crim.Pro.Art. 55.01(a)(1)(B)(i) (providing that a person who has been arrested "is entitled to have all records and files relating to the arrest expunged if: * * * the person is tried * * * and is * * * convicted and subsequently * * * pardoned").

V. Disposition

{¶51} In the final analysis, the state and federal law governing the effect of a pardon on a recipient's ability to seek expungement compels us to conclude that a pardon neither erases the conviction nor renders the pardon recipient innocent as if the crime were never committed. Recent case law dismissed *Garland*'s interpretation of a pardon as dicta and acknowledged the United State Supreme Court's implicitly overruling *Garland's* dicta in *Burdick*. Because a pardon cannot work a legal fiction and erase the fact of conviction, and *Bailey* and similar cases have limited *Pepper Pike*'s

application to cases where the defendant has not been convicted, defendant cannot invoke the court's inherent jurisdiction to seal his records.

{¶52} Moreover, the General Assembly enacted laws specifically (1) requiring the governor to maintain a copy of both the pardon and the conviction, (2) requiring the clerk of court to maintain a copy of the warrant of pardon, which identifies the pardoned conviction, and (3) authorizing expungement of records when an individual is acquitted, found not guilty, or a no bill returned. Under (1) and (2), sealed records are of questionable value if the record of conviction, accessible through the internet, continues to reveal the underlying conviction. Under (3), if a pardon truly rendered the defendant innocent as if the crime were never committed, the General Assembly should have included pardons with the other innocence-based reasons for expungement contained in R.C. 2953.52. *See New Albany Park Condominium Assn. v. Lifestyle Communities, Ltd.*, 195 Ohio App.3d 459, 2011-Ohio-2806, ¶ 23 (10th Dist.), quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003), citing *U.S. v. Vonn*, 535 U.S. 55, 65 (2002); *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, ¶ 35 (noting the expression " '*unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an "associated group or series," justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence' ").

{¶53} Our decision is a particularly difficult one to reach, knowing today's technologically based society makes the harm perpetrated through a public criminal record accessible to virtually everyone. As a result, the so-called "[c]ollateral consequences" of a conviction "take the form of employment disqualifications in the public and private sectors, prohibitions on federal educational subsidies, housing exclusions, public benefit ineligibility, and political punishment." Lahny R. Silvia, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U.Cin.L.Rev. 155, 164 (2010). In terms of rehabilitation, "[p]ost-release employment appears to be a, if not the, determinative factor in post-release success," but employers are typically unwilling to hire an individual with a criminal conviction. *Id.* at 162, 168 (citing a 1987 study of the Federal Bureau of Prisons demonstrating "ex-offenders, who arranged for post-release employment, had a recidivism rate of 27.6% compared to

53.9% of those who did not" and to additional "studies conducted over the past fifteen years" consistently showing "that on average 60% of employers indicate that they would 'probably not' or 'definitely not' consider hiring an individual with a criminal history").

{¶54} A convicted felon more deserving of a fresh start, based on the evidence in the record, is hard to imagine than defendant and his impressive turn-around. Based on the noted authority, however, defendant's pardon alone does not erase his conviction and entitle him to judicial expungement. The applicable statutes governing expungement similarly do not provide defendant with the relief desired. If that is to change, the General Assembly likely will be the entity to accomplish it. *See Miller v. Fairley*, 141 Ohio St. 327, 334 (1943), citing *State ex rel. Bishop v. Bd. of Edn. of Mt. Orab Village School Dist.*, 139 Ohio St. 427, 438 (1942) (noting that if a statute does "not give the relief desired, the remedy lies with the legislative branch of the state government"); *Skinner* at 86, fn. 7 (stating it could be "argued that a pardon to be complete should entitle the pardoned individual * * * to secure the removal of public records of his or her arrest," and the legislature "may wish to consider amending the expungement statute to permit a pardoned individual to seek expungement").

{¶55} Because defendant is ineligible to seek judicial expungement, and also ineligible for statutory expungement, we reluctantly sustain the state's assignments of error, reverse the judgment of the Franklin County Court of Common Pleas, and remand the matter to the trial court with instructions to deny the requested record sealing.

Judgment reversed, case remanded.

BROWN, P.J., and DORRIAN, J., concur.