

[Cite as *State v. McCullough*, 2012-Ohio-3768.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-41 (C.P.C. No. 11EP-08-702)
Lisa McCullough,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on August 21, 2012

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

Brian S. Piper Co., LPA, and *Brian S. Piper*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Plaintiff-appellant, the State of Ohio, appeals from a judgment of the Franklin County Court of Common Pleas granting a motion to seal records filed by defendant-appellee, Lisa McCullough. Because McCullough is not eligible to have her records sealed, we vacate that judgment and remand the matter to the trial court with instructions to deny her motion.

I. Factual and Procedural Background

{¶ 2} In 1996, McCullough pled guilty in two cases to charges that arose from a traffic stop in Franklin County. In the common pleas court, she pled guilty to one charge of carrying a concealed weapon in violation of R.C. 2923.12. In the municipal court, she pled guilty to one charge of operating a vehicle while under the influence in violation of R.C. 4511.19(A)(1) ("OVI").

{¶ 3} In 2011, McCullough filed a motion pursuant to R.C. 2953.32 to seal the records of her conviction for carrying a concealed weapon. The State objected to the motion, arguing that because McCullough has an OVI conviction, she is not a "first offender" and therefore is not eligible to have her records sealed. McCullough argued that she was eligible to have her records sealed because her convictions arose out of the same act and, therefore, should be considered as one conviction. The trial court granted McCullough's motion and ordered the records of her conviction for carrying a concealed weapon sealed.

{¶ 4} The State appeals and assigns the following error:

The trial court erred in exercising its jurisdiction when it granted applicant's application for expungement as applicant is not a first offender.

II. The State's Assignment of Error-Is McCullough a First Offender?

{¶ 5} "'[E]xpungement is an act of grace created by the state,' and so is a privilege, not a right." *State v. Simon*, 87 Ohio St.3d 531, 533 (2000), quoting *State v. Hamilton*, 75 Ohio St.3d 636, 639 (1996). In light of its nature, "[e]xpungement should be granted only when all requirements for eligibility are met." *Simon* at 533. The State argues that McCullough does not meet the statutory requirements to have her records sealed because she is not a first offender. We agree.

{¶ 6} R.C. 2953.32 permits a "first offender" to apply to the sentencing court for sealing of a conviction record. If the applicant is not a first offender, the trial court lacks jurisdiction to grant the requested expungement. *In re Barnes*, 10th Dist. No. 05AP-355, 2005-Ohio-6891, ¶ 12. "'As a result, an order expunging the record of one "who is not a first offender is void for lack of jurisdiction and may be vacated at any time." ' " *Id.* at ¶ 13, quoting *State v. McCoy*, 10th Dist. No. 04AP-121, 2004-Ohio-6726, ¶ 11. Whether an applicant is considered a first offender is an issue of law that we review de novo. *State v. Hoyles*, 10th Dist. No. 08AP-946, 2009-Ohio-4483, ¶ 4.

{¶ 7} R.C. 2953.31(A) defines a "first offender" as "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." That statute further mandates that "a conviction for a violation of section 4511.19 * * * shall be considered a previous or subsequent conviction."

{¶ 8} As a result, "when a person is convicted for DUI, he or she will have 'previously or subsequently * * * been convicted of the same or a different offense' and cannot meet the definition of a 'first offender' under R.C. 2953.31(A). Thus, a conviction of DUI [now known as OVI] always bars expungement of the record of a conviction for another criminal offense." *State v. Sandlin*, 86 Ohio St.3d 165, 168 (1999). See also *In re White*, 10th Dist. No. 05AP-529, 2006-Ohio-1346, ¶ 8 (reversing expungement of conviction due to subsequent conviction for violation of R.C. 4511.19). McCullough is not a "first offender" under R.C. 2953.31(A) because her record contains a conviction for violating R.C. 4511.19 in addition to the conviction she seeks to have expunged. *Id.*; *State v. Morris*, 5th Dist. No. 09-CA-128, 2010-Ohio-2403, ¶ 15 (DUI conviction prevents expungement for previous conviction).

{¶ 9} McCullough argues, however, that amendments to R.C. 2953.31 made after the *Sandlin* decision demonstrates the General Assembly's intent to increase the availability of sealing convictions. Her reliance on those amendments is misplaced. The amendments did not impact the statute as it relates to OVI convictions. Rather, the amendments relate to exceptions for applicants that have multiple convictions arising from the same act. Moreover, the *Sandlin* court rejected reliance on earlier versions of those exceptions when an applicant has a previous conviction for OVI, in light of "how seriously the General Assembly considers the offense of driving while under the influence of alcohol." *Id.* at 168. See also *State v. Thompson*, 10th Dist. No. 06AP-881, 2007-Ohio-1503, ¶ 7-8 (sealing of other convictions barred when person has OVI conviction, regardless of whether the OVI conviction resulted from the same act).

{¶ 10} Because McCullough is not a first offender and is not eligible to have her records sealed, the trial court did not have jurisdiction to grant her application and its judgment is void. Accordingly, we sustain the State's assignment of error, vacate the judgment of the Franklin County Court of Common Pleas, and remand this case to that court for it to enter judgment denying McCullough's motion.

Judgment vacated; cause remanded with instructions.

SADLER and CONNOR, JJ., concur.
