

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 12AP-771
 : (C.P.C. No. 11EP-200)
 Patricia A. Lawson (nka Thompson), : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on May 23, 2013

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Swope and Swope, and *Richard F. Swope*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN J.

{¶ 1} Defendant-appellant, Patricia A. Lawson (nka Thompson) ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas denying her application filed, pursuant to R.C. 2953.32, for sealing of the record (expungement) of two 2006 felony stalking convictions and a first-degree misdemeanor offense. For the following reasons, we affirm.

I. Facts and Case History

{¶ 2} On November 1, 2006, the trial court entered judgment convicting appellant of menacing by stalking with trespass, in violation of R.C. 2903.211, and menacing by stalking an individual with a protection order, also in violation of R.C. 2903.211. These two criminal offenses were third-degree felonies. The court also convicted appellant of violating a protection order while committing menacing by stalking without trespass, in violation of R.C. 2903.21, a first-degree misdemeanor. We affirmed

the conviction. *State v. Lawson*, 10th Dist. No. 06AP-1112, 2007-Ohio-2656 ("*Lawson I*").

{¶ 3} On March 11, 2011, appellant filed her application for expungement as authorized by R.C. 2953.32(A). On May 26, 2011, the trial court denied her application, and appellant appealed. We vacated the judgment denying her application and remanded the case because appellant had not been afforded notice of a scheduled hearing on the application. *State v. Lawson*, 10th Dist. No. 11AP-546, 2011-Ohio-5772 ("*Lawson II*").

{¶ 4} On remand, the trial court held a hearing on the application for expungement, which both appellant and her counsel attended. After considering the evidence, the trial court found that appellant had met all the statutory requirements for expungement as enumerated in R.C. 2953.32(C)(1)(a) through (e) but found that appellant was nevertheless ineligible for expungement. The court reached this conclusion because a different statute, R.C. 2953.36(C), specifically prohibits expungement of violations of an "offense of violence when the offense is a misdemeanor of the first degree or a felony." "Offense of violence" is a term defined for purposes of the Ohio Revised Code in R.C. 2901.01(A)(9)(a) and specifically includes violations of R.C. 2903.21 and 2903.211.

{¶ 5} The court, citing *State v. Davenport*, 116 Ohio App.3d 6 (12th Dist.1996), also rejected appellant's argument that the statutes precluding expungement of her conviction were unconstitutional because no legitimate governmental purpose is served by denying expungement of stalking convictions not involving physical violence. The trial court therefore denied appellant's application.

{¶ 6} Appellant timely appealed to this court and has asserted a single assignment of error, as follows:

Appellant did not commit an offense of violence and the definition of offense of violence is overly broad and discriminates between non-violent offenders, all contrary to the Fifth and Fourteenth Amendments to the U.S. Constitution and the Ohio Constitution, Article I, Sections 1, 2 and 10.

II. Legal Analysis

{¶ 7} R.C. 2953.31 through 2953.36 establish a general statutory framework for the expungement of criminal records. Pursuant to R.C. 2953.32(A)(1), a first offender convicted of a felony may apply for the sealing of the conviction record three years after

the offender's final discharge. Pursuant to R.C. 2953.32(B), the court in which the application has been filed must set a date for a hearing and notify the prosecutor of the criminal case, who may object to the expungement. The court must direct probation officers to investigate the applicant and provide the court with written reports. Pursuant to R.C. 2953.32(C), the trial court must then determine whether a number of specified criteria have been met. Those criteria include inter alia that the applicant has been rehabilitated, that no criminal proceeding is pending against the applicant and that "the interests of the applicant in having the records * * * sealed are not outweighed by any legitimate governmental needs to maintain those records." R.C. 2953.32(C)(2).

{¶ 8} In this case, the trial court found that appellant met all the necessary R.C. 2953.32(C) criteria for the sealing of her criminal case. But, it nevertheless denied appellant's application based on its conclusion that R.C. 2953.36(C) precluded expungement. That statute provides in pertinent part:

Sections 2953.31 to 2953.35 of the Revised Code do not apply to any of the following:

* * *

(C) *convictions of an offense of violence when the offense is a misdemeanor of the first degree or a felony* * * * [.]

(Emphasis added.)

{¶ 9} The term "offense of violence" is not defined in R.C. 2953.31 to 2953.36—the specific code sections governing expungement. R.C. 2901.01, however, does provide a definition of the term for use in the Ohio Revised Code, and that definition includes the offenses of which appellant was convicted. When applying R.C. 2953.36(C), we therefore use the definition of "offense of violence" provided in R.C. 2901.01, as follows:

(A) As used in the Revised Code:

* * *

(9) "*Offense of violence*" means any of the following:

(a) *A violation of section * * * 2903.21, 2903.211 * * * of the Revised Code* * * * [.]

(Emphasis added.)

{¶ 10} Consistent with this statutory text, we have held in two prior cases that "menacing by stalking is an offense of violence for purposes of the exclusion set forth in R.C. 2953.36(C)," and that records of convictions of menacing by stalking may not be expunged. *State v. Glass*, 10th Dist. No. 10AP-155, 2010-Ohio-4954, ¶ 5 citing *State v. Miller* 10th Dist. No. 06AP-192, 2006-Ohio-5954, ¶ 10. In both cases, we concluded that there is "[no] distinction between the 'cause physical harm' and the 'cause mental distress' forms of the offenses of menacing by stalking." *Glass* at ¶ 5, quoting *Miller* at ¶ 10. Moreover, "[R.C. 2901.01(A)(9)(a)] expressly includes a violation of R.C. 2903.211 as an 'offense of violence,' and does not differentiate between conduct causing physical harm and conduct causing mental distress. Since the General Assembly did not make that distinction, neither shall we." *Id.*

{¶ 11} Appellant does not dispute that application of the statutes and our precedent precluded the court from expunging her convictions. She argues, despite *Glass* and *Miller*, that it was improper for the General Assembly to include stalking within the statutory definition of "offense of violence" and that the expungement statutes are unconstitutional when applied to persons convicted of stalking offenses not causing physical harm. She contends that application of these statutes to her case violates due process, equal protection, or both. And in *Glass* and *Miller*, we did not discuss the constitutionality of exempting persons convicted of stalking offenses from the benefits of expungement.

{¶ 12} We begin our analysis by recognizing that expungement is not a fundamental right, but rather "'an act of grace created by the state,'" and so is a privilege, not a right." *Miller*, quoting *State v. Simon*, 87 Ohio St.3d 531, 533 (2000), and *State v. Hamilton*, 75 Ohio St.3d 636, 639 (1996). Moreover, as correctly observed by the Fifth District Court of Appeals, "[t]he expungement statute is remedial and not substantive in nature * * * [and a] party does not have a vested right in a remedial remedy." *State v. Moorehart*, 5th Dist. No. 2008-CA-0072, 2009-Ohio-2844, ¶ 9. In *Moorehart*, the court found that application of the expungement statutes to an offender who had been convicted of felonious assault did not violate his right to due process or equal protection or other constitutional safeguards.

{¶ 13} Because expungement is an act of grace, the General Assembly may determine that records of certain offenses should not be sealed. The legislature chose to exclude the stalking offenses of which appellant was convicted from the possibility of expungement. That choice was not irrational.

{¶ 14} Appellant cites a dictionary definition of the word "violence" as "[u]se of *physical force* so as to damage or injure." (Emphasis sic.) (Appellant's brief, at 8.) It is not relevant, however, whether stalking is, or is not, "violent" as that word is used in a colloquial sense. We acknowledge that general definitions and usage may be of value in determining the intent of the General Assembly when a statute is deemed ambiguous. But we have previously recognized that "R.C. 2901.01(A)(9)(a) * * * is not ambiguous and needs no interpretation." *Miller* at ¶ 10. Had the General Assembly not specifically defined the term "offense of violence" for purposes of interpreting the Revised Code, appellant might have had a credible argument that stalking should not be considered to be an offense of violence. *But see U.S. v. Mohr*, 554 F.3d 604 (2d Cir.2010) (finding stalking to be a "crime of violence" for purposes of federal sentencing guidelines even though the relevant state stalking statute did not include as an element the use, attempted use, or threatened use, of force). Dictionary definitions of the word "violence" that include references to the use of physical force, however, do not supersede or invalidate the wholly unambiguous specific statutory definition of "offense of violence" expressly contained in R.C. 2901.01(A)(9)(a). Read together, R.C. 2901.01(A)(9)(a) and 2953.36(C) are not unconstitutionally vague nor overbroad in violation of due process.

{¶ 15} Similarly, we reject appellant's argument that the statutory expungement framework violates equal protection by excluding from the benefits of expungement individuals who have been convicted of stalking violations. Appellant argues that the General Assembly has authorized the expungement of some other offenses which do include elements of physical violence and also precluded the expungement of some other offenses that include elements of physical violence. But those circumstances do not compel the conclusion that the statutes violate equal protection.

{¶ 16} Appellant does not assert that expungement is a fundamental right or that she is in a suspect class. Accordingly, we use a rational-basis test in reviewing the General Assembly's determination that the offenses of which she was convicted may not be

expunged. *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, ¶ 80. Under this test, "a challenged statute will be upheld if the classifications it creates bear a rational relationship to a legitimate government interest or are grounded on a reasonable justification, even if the classifications are not precise." *Id.* The expungement statutes, which are presumed valid, therefore will survive appellant's equal protection challenge if they bear a "rational relationship to a legitimate government interest." *Id.* See also *Davenport*, at 116 Ohio App.3d 12 ("R.C. 2953.36 classifies offenders and determines their eligibility for expungement based upon the nature of the offense they were convicted of committing; therefore, the statute need only be rationally related to some legitimate governmental interest in order to survive appellant's equal protection challenge because it does not implicate any suspect classification or fundamental right. ").

{¶ 17} The General Assembly has the authority to enact statutes to promote the state's safety and welfare, which is a legitimate governmental interest. The state contends that "[g]iven the nature of and seriousness of offenses involving the commission of or threat of physical harm to person or property, the legislature's decision to maintain public access to those records will protect Ohio citizens." (Appellee's brief, at 16.) We agree that a rational relationship exists between the state's legitimate governmental interest in promoting the state's safety and welfare and making available to the public the criminal records of persons who have engaged in past harassing and menacing conduct where that conduct causes mental distress.

{¶ 18} Equal protection requires that similarly situated persons be treated similarly under the law. "But the Equal Protection Clause 'does not require things which are different in fact * * * to be treated in law as though they were the same.'" *GTE North, Inc. v. Zaino*, 96 Ohio St.3d 9 (Feb. 27, 2002), ¶ 22, quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940). Moreover, "rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993), quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). A victim of stalking who suffers mental distress may suffer as much harm, or more harm, than a victim who suffers physical harm. We therefore reject appellant's argument that the General Assembly could not differentiate within the class of criminal

offenders by making expungement unavailable to persons who have engaged in stalking and menacing behavior while making expungement available to persons convicted of other crimes, whether involving physical violence or not. It is of no consequence that the General Assembly codified that policy determination by including stalking offenses within the R.C. 2901.01(A)(9)(a) definition of "offense of violence." Accordingly, appellant was not deprived of equal protection by the application of R.C. 2953.36 in her case, as further clarified by the definition of "offense of violence" contained within R.C. 2901.01(A)(9)(a).

{¶ 19} Finally, appellant further challenges the constitutionality of the anti-stalking laws themselves, arguing that they criminalize the exercise of the right to free expression guaranteed by the First Amendment. She suggests that those laws prohibit constitutionally protected conduct that would otherwise be legal. That argument presents, however, a challenge to the validity of her underlying conviction, rather than to the denial of her application for expungement. The argument is therefore untimely, as the validity of her conviction is *res judicata*. In any event, Ohio's statutes defining and prohibiting stalking have been recognized as constitutional. *See State v. Dario*, 106 Ohio App.3d 232 (1st Dist.1995); *State v. Schwab*, 119 Ohio App.3d 463 (12th Dist.1997); *Dayton v. Smith*, 68 Ohio Misc.2d 20 (1994).

III. Conclusion

{¶ 20} Accordingly, we overrule appellant's assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT, P.J., and CONNOR, J., concur.
