

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 14AP-582 (C.P.C. No. 14EP-302)
Walter C. Martin,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on April 23, 2015

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

*The Maher Law Firm, LLC*, and *Colin R. Maher*, for appellee.

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APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Plaintiff-appellant, State of Ohio, appeals from an entry of the Franklin County Court of Common Pleas granting the application of defendant-appellee, Walter C. Martin, to seal the record of his prior conviction. Because appellee failed to pay all restitution required by his sentence, the trial court erred in granting appellee's application to seal his record. Therefore, we reverse.

**Facts and Procedural History**

{¶ 2} In July 1997, appellee entered a guilty plea to one count of theft, a fifth-degree felony. The trial court accepted appellee's plea and sentenced him to serve five years of community control. If appellee violated the terms of his community control, he

would serve 12 months in prison. The trial court also ordered appellee to pay \$40,000 restitution to the victim, Sun TV, pursuant to R.C. 2929.18.

{¶ 3} On April 18, 2014, appellee filed an application to seal his felony theft conviction. The state objected to appellee's application because appellee failed to pay all restitution owed and, therefore, failed to receive a final discharge of his sentence. It is undisputed that appellee still owes approximately \$38,325 in restitution.

{¶ 4} The trial court conducted a hearing on appellee's application. Appellee's counsel represented to the trial court that Sun TV filed for Chapter 7 bankruptcy in the late 1990s. However, appellee presented no evidence regarding the disposition of the bankruptcy or whether Sun TV's rights were transferred to any other legal entity. Nor did appellee present evidence that he attempted to pay all restitution required by his sentence. The trial court granted appellee's application to seal the record despite appellee's failure to pay restitution.

{¶ 5} The state timely appealed and assigns the following error:

The trial court erred when it granted an application to seal conviction when the defendant had not paid all of the court-ordered restitution and received a final discharge.

### **Standard of Review**

{¶ 6} An appellate court generally reviews a trial court's disposition of an application to seal a record of conviction under an abuse of discretion standard. *State v. Black*, 10th Dist. No. 14AP-338, 2014-Ohio-4827, ¶ 6. An abuse of discretion connotes more than an error of law or judgment; it requires that the court's decision is "unreasonable, arbitrary or unconscionable." *State v. Norfolk*, 10th Dist. No. 04AP-614, 2005-Ohio-336, ¶ 4, quoting *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). However, we review questions of law de novo. *Black* at ¶ 6.

### **Law of Expungement**

{¶ 7} In its sole assignment of error, the state contends the trial court erred when it granted appellee's application to seal his felony theft conviction because appellee failed to pay all restitution owed and, therefore, failed to obtain a final discharge of sentence. We agree.

{¶ 8} Expungement is an act of grace created by the state, and so is a privilege, not a right. *Black* at ¶ 8; *State v. Simon*, 87 Ohio St.3d 531, 533 (2000), quoting *State v.*

*Hamilton*, 75 Ohio St.3d 636, 639 (1996). A court may grant expungement only when all statutory requirements for eligibility are met. *State v. Brewer*, 10th Dist. No. 06AP-464, 2006-Ohio-6991, ¶ 5.

{¶ 9} Pursuant to R.C. 2953.32(A)(1), "an eligible offender may apply to the sentencing court \* \* \* for the sealing of the record of the case that pertains to the conviction." Further, where the offender was convicted of a felony "[a]pplication may be made at the expiration of three years after the offender's final discharge." *Black* at ¶ 9, quoting R.C. 2953.32(A)(1).

{¶ 10} The state asserts that because appellee has not made full restitution, he has not received a final discharge for purposes of the statute. We agree. This court has repeatedly held that an offender who has not made full restitution has not received a final discharge for purposes of R.C. 2953.32(A)(1). *Black* at ¶ 10; *State v. Hoover*, 10th Dist. No. 12AP-818, 2013-Ohio-3337, ¶ 7 (stating "this court and others have repeatedly held that final discharge under the statute does not occur until court-ordered restitution has been satisfied"); *State v. Black*, 10th Dist. No. 12AP-375, 2012-Ohio-6029, ¶ 6 (noting the offender has made only partial restitution and stating "[f]inal discharge under the statute does not occur until restitution has been satisfied"); *State v. Jordan*, 10th Dist. No. 07AP-584, 2007-Ohio-6383, ¶ 7 (concluding that where "it is undisputed that appellant had not been finally discharged \* \* \* because he had not paid the ordered restitution," appellant thus "was not yet eligible to apply to seal his conviction records"); *In re White*, 165 Ohio App.3d 288, 2006-Ohio-233, ¶ 7 (10th Dist.) (holding "[a]n offender is not finally discharged for purposes of R.C. 2953.32(A)(1) if the offender still owes restitution").

{¶ 11} Despite this case precedent, the trial court relied on this court's decision in *State v. Aguirre*, 10th Dist. No. 12AP-415, 2013-Ohio-768 ("*Aguirre I*") in granting appellee's application even though it is undisputed that appellee did not make full restitution as required by his sentence. In *Aguirre I*, this court affirmed a trial court's grant of expungement even though the applicant had not paid restitution owed to two third-party insurance companies.<sup>1</sup>

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<sup>1</sup> We note that *Aguirre I* made no mention of this court's decisions in *Black*, *Jordan*, and *White*, all of which were decided before *Aguirre I*.

{¶ 12} However, the Supreme Court of Ohio has since reversed this court's decision in *Aguirre I*, holding that "[a]n offender does not attain a final discharge, and is thus ineligible to have his or her felony conviction records sealed under R.C. 2953.32(A)(1), until she has paid all court ordered restitution." *State v. Aguirre*, \_\_ Ohio St. \_\_, 2014-Ohio-4603, syllabus ("*Aguirre II*"). The Supreme Court noted that this court's decision in *Aguirre I* represented a departure from this court's precedent and reiterated that "final discharge cannot occur until restitution is fully paid." *Id.* at ¶ 20; *Black* at ¶ 12. Only after restitution has been fully paid "does the three-year waiting period in R.C. 2953.32(A)(1) commence to run, and only after the expiration of that period may an offender ordered to pay restitution have his or her record sealed." *Id.*

{¶ 13} Accordingly, based on *Aguirre II* and this court's recent decision in *Black*, we conclude that because appellee has failed to make full restitution, he has not yet received a final discharge and thus, is not eligible to have the record of his conviction sealed. Therefore, the trial court erred in granting appellee's application and we sustain the state's assignment of error.

{¶ 14} Having sustained the state's assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas and remand the matter to the trial court with instructions to deny appellee's application.

*Judgment reversed;  
cause remanded with instructions.*

SADLER and DORRIAN, JJ., concur.

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