[Cite as *State v. Weiss*, 2015-Ohio-3015.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 14AP-957
v.	:	(C.P.C. No. 14EP-522)
Shane M. Weiss,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on July 28, 2015

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

Keith A. Yeazel and *Brian D. Joslyn*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

HORTON, J.

{¶ 1} Plaintiff-appellant, the State of Ohio ("state"), appeals from a judgment of the Franklin County Court of Common Pleas, granting an application filed by defendant-appellee, Shane M. Weiss, to seal the record of his prior conviction. The state assigns the following sole assignment of error for our review:

> THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S APPLICATION TO SEAL HIS CONVICTION, WHEN HE WAS NOT AN "ELIGIBLE OFFENDER."

Because defendant does not qualify as an eligible offender, we reverse the trial court's judgment.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} In 2010, in case No. 10CR-4628, the state indicted defendant on one count of attempted unlawful sexual conduct with a minor. Defendant struck a plea bargain with the state and, on October 3, 2011, pled guilty to one count of criminal mischief, a misdemeanor of the third degree. On July 29, 2014, defendant filed an application to seal the record of his conviction. The state filed an objection to the application on September 8, 2014, asserting that defendant was not an eligible offender, and thus could not seal the record of his criminal mischief conviction, because defendant had two separate misdemeanor convictions for operating a vehicle while under the influence of alcohol ("OVI"), from 1996 and 2004, respectively.

{¶ 3} The court held a hearing on defendant's application. At the hearing, defendant argued that he was an "eligible offender" under R.C. 2953.31(A). Specifically, defendant argued that the phrase "not more than two misdemeanor convictions if the convictions are not of the same offense," as used in the version of R.C. 2953.31(A) then in effect, obligated the trial court to count his two prior OVI convictions as one conviction for the purposes of the sealing.[1] Defendant asserted that the quoted statutory language implied that, if the convictions "are the same offense, then more than two would count as one." (Tr. 4.) Accordingly, defendant asserted that he had only two misdemeanor convictions on his record: one for criminal mischief and one for OVI, and was an eligible offender. Alternatively, defendant asserted that the quoted language from R.C. 2953.31 was ambiguous.

{¶ 4} The state asserted that the statute was unambiguous, and that defendant was not an eligible offender as he had three misdemeanor convictions. The court noted that defendant's OVI convictions were not committed at the same time, and accordingly observed that defendant had "three [misdemeanor] convictions." (Tr. 9.) Nevertheless, the court also stated the statute was ambiguous, and noted that the statute "does say two or more, not of the same offense." (Tr. 9.) As such, the court decided that it was "going to

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[1] Subsequent to the filing of defendant's application herein, the General Assembly amended R.C. 2935.31, and removed the phrase "if the convictions are not of the same offense." For ease of discussion, references to R.C. 2935.31(A) in this decision refer to the version of the statute that was in effect from September 28, 2012 to September 18, 2014, unless noted otherwise.

do [defendant] a favor and grant" his application. (Tr. 9.) The court filed the entry sealing the record of defendant's criminal mischief conviction on October 21, 2014.

II. DEFENDANT IS NOT AN ELIGIBLE OFFENDER

{¶ 5} 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*, 1oth Dist. No. 14AP-338, 2014-Ohio-4827, ¶ 6. However, whether an applicant is considered an eligible offender is an issue of law for a reviewing court to decide de novo. *See State v. Hoyles*, 10th Dist. No. 08AP-946, 2009-Ohio-4483, ¶ 4.

{¶ 6} " 'Expungement is a post-conviction relief proceeding which grants a limited number of convicted persons the privilege of having record of their * * * 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. Expungement " ' "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).

{¶ 7} 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." For a misdemeanor conviction, a defendant may apply for sealing "at the expiration of one year after the offender's final discharge." R.C. 2953.31(A)(1). 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, citing *In re White*, 10th Dist. No. 05AP-529, 2006-Ohio-1346, ¶ 4-5.

{¶ 8} R.C. 2953.31(A) defines the term "eligible offender" as anyone who has "not more than one felony conviction, not more than two misdemeanor convictions if the convictions are not of the same offense, or not more than one felony conviction and one misdemeanor conviction." Defendant asserts that the phrase "not more than two misdemeanor convictions if the convictions are not of the same offense," as used in R.C. 2953.31(A) is ambiguous. For the reasons which follow, we disagree.

{¶ 9} The interpretation of a statute is a question of law which we review de novo. *State v. Vanzandt*, 142 Ohio St.3d 223, 225, 2015-Ohio-236, ¶ 6, citing *State v. Pariag*, 137 Ohio St.3d 81, 2013-Ohio-4010, ¶ 9. The Supreme Court of Ohio has explained that:

> [w]hen analyzing statutory provisions, our paramount concern is to ascertain and give effect to the intention of the General Assembly. We primarily seek to determine legislative intent from the plain language of a statute. "If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary." An unambiguous statute must be applied by giving effect to all of its language, without adding or deleting any words chosen by the General Assembly.

(Citations omitted.) *Vanzandt* at ¶ 7, quoting *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545 (1996), citing *Henry v. Cent. Natl. Bank*, 16 Ohio St.2d 16 (1968), paragraph two of the syllabus.

{¶ 10} Defendant asserts that the phrase "if the convictions are not of the same offense" means that, in the event a defendant has two convictions for the same offense, they should "merge" and be counted as one conviction. (Appellee's Brief, 6.) The quoted language, however, does not allow for merger, as it simply provides a definition for who qualifies as an eligible offender.

{¶ 11} Notably, R.C. 2953.31(A) does provide for merger of convictions in certain circumstances. *See In re K.J.*, 10th Dist. No. 13AP-1050, 2014-Ohio-3472, ¶ 21, citing *State v. Cook*, 128 Ohio St.3d 120, 2010-Ohio-6305, ¶ 45 (noting that "[a]ll statutes relating to the same subject matter must be read *in pari materia*, and construed together, so as to give the proper force and effect to each and all such statutes"). The statute states that, "[w]hen 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," and further states that if two or three convictions result from acts "committed within a three-month period * * * they shall be counted as one conviction." R.C. 2953.31(A). Because defendant's two OVI convictions did not result from the same act, were not committed at the same time, and did not result from acts committed within a three-month period, as defendant committed the offenses separately in 1996 and 2004, the OVI convictions are not subject to merger under R.C. 2953.31(A).

{¶ 12} Moreover, in *Bedford v. Bradberry*, 8th Dist. No. 100285, 2014-Ohio-2058, the court addressed whether the phrase "if the convictions are not of the same offense" from R.C. 2935.31(A) was ambiguous. The court concluded that the phrase was

unambiguous, noting that "[t]he plain and ordinary meaning of the statute excludes persons that have two misdemeanor convictions of the same offense." *Id.* at ¶ 9. The court further observed that, while:

> the 2012 amendment expanded the opportunity for expungement to now allow sealing of records for those with two convictions from the more limited "first offender" definition contained in the 2010 statute, which permitted the sealing of records for those who had only one conviction, the amendment clearly contains limitations. Specifically, the statute limits the definition of eligible offender to those that have been convicted of either a felony and a misdemeanor or two misdemeanors provided that they were not for "the same offense."

Id. at ¶ 13. Speaking to legislative intent, the *Bradberry* court noted that "[t]he statute as written evidences the General Assembly's intent to exclude offenders who have a propensity of committing the same offense." *Id.* at ¶ 14 (fn. omitted). *See also State v. Mullin*, 12th Dist. No. CA2013-04-033, 2014-Ohio-764, ¶ 16 (similarly holding that "the language of R.C. 2953.31(A) is definite and unambiguous").

{¶ 13} The General Assembly amended R.C. 2935.31(A), effective September 19, 2014, and removed the phrase "if the convictions are not of the same offense." Under the new version of the statute, an applicant is now an eligible offender if they simply have not more than two misdemeanor convictions. The General Assembly's stated purpose in amending R.C. 2953.31(A) was "to include persons convicted twice of the same misdemeanor as eligible offenders for purposes of sealing records of the convictions." Am.Sub.S.B. No. 143. Thus, the General Assembly has cearly demonstrated that the disputed language from R.C. 2953.31(A) was intended to prohibit individuals who were convicted twice of the same misdemeanor from qualifying as an eligible offender. The disputed language was not intended to permit a defendant to merge two separate misdemeanor convictions into one conviction for purposes of becoming an eligible offender, as defendant asserts.

{¶ 14} We find the language in R.C. 2935.31(A) clear and unambiguous. The plain meaning of the phrase "not more than two misdemeanor convictions if the convictions are not of the same offense" means that an applicant is an eligible offender if they have two

misdemeanor convictions, provided that the two misdemeanor convictions are not of the same offense. It does not provide for the merger of convictions. Accordingly, because defendant has three misdemeanor convictions, he had more than two misdemeanor convictions and was not an eligible offender under R.C. 2935.31(A). As such, the trial court erred in granting defendant's application to seal the record of his criminal mischief conviction.

{¶ 15} Based on the foregoing, the state's sole assignment of error is sustained. As such, we reverse the judgment of the Franklin County Court of Common Pleas and remand the case for proceedings consistent with this decision.

Judgment reversed and remanded.

BROWN, P.J. and KLATT, J., concur.