[Cite as *State v. Nichols*, 2015-Ohio-581.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 14AP-498
v.	:	(C.P.C. No. 14EP-118)
Andrew Nichols,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on February 17, 2015

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

Andrew Nichols, pro se.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Appellant, State of Ohio, appeals from a judgment of the Franklin County Court of Common Pleas granting the application of defendant-appellee, Andrew Nichols, and sealing the records of the dismissed charges in case No. 12CR-5747. For the reasons that follow, we reverse the judgment of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On November 13, 2012, a Franklin County Grand Jury indicted appellee on charges of possession of cocaine, in violation of R.C. 2925.11(A), a felony of the fifth degree, and tampering with evidence, in violation of R.C. 2921.12(A), a felony of the third

degree. In addition to the felony drug-related charges pending in the court of common pleas, appellee also faced charges in the Franklin County Municipal Court, including operating a motor vehicle while under influence of alcohol or a drug of abuse ("OVI"), in violation of R.C. 4511.19(A)(1)(a), a misdemeanor of the first degree. All of the charges arose from a single traffic stop that occurred on December 16, 2011.

{¶ 3} Appellee pleaded guilty to the OVI charge in the municipal court and he was convicted of the offense. Appellant acknowledges the felony charges pending in the court of common pleas were "nolled because the defendant entered a guilty plea in Franklin County Municipal Court's ADAP program." (Appellant's Brief, 1.)

{¶ 4} On February 21, 2014, appellee filed an application, pursuant to R.C. 2953.52, to seal the record of the dismissed charges. Appellee did not apply for the sealing of the misdemeanor OVI conviction. Appellant objected to the application arguing that R.C. 2953.61 barred sealing the record of the dismissed charges because appellee was convicted of the non-sealable offense of OVI arising out of the same incident. On May 29, 2014, the trial court held a hearing on the application.

{¶ 5} On June 2, 2014, the trial court granted appellee's application and sealed the record of the dismissed charges for the stated reason that sealing is "consistent with the public interest" since "defendant has been rehabilitated." Appellant timely appealed to this court by filing a notice of appeal on June 25, 2014.

II. ASSIGNMENT OF ERROR

{¶ 6} Appellant's assignment of error is as follows:

> The trial court erred when it granted the defendant's application to seal the record of dismissal, where sealing was barred by R.C. 2953.61.

A. Standard of Review

{¶ 7} A reviewing court "will not reverse a trial court's decision on an R.C. 2953.52 application to seal absent an abuse of discretion." *In re Dumas*, 10th Dist. No. 06AP-1162, 2007-Ohio-3621, ¶ 7, citing *State v. Haney*, 70 Ohio App.3d 135, 138 (10th Dist.1991). "The term 'abuse of discretion' connotes more than an error of law or

judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). However, where questions of law are in dispute, an appellate court reviews the trial court's determination de novo. *State v. Pariag*, 137 Ohio St.3d 81, 2013-Ohio-4010, ¶ 9.

B. Legal Analysis

{¶ 8} " 'Expungement is a post-conviction relief proceeding which grants a limited number of convicted persons the privilege of having record of their * * * conviction sealed.' " *In re Koehler*, 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.' " *Id.* at ¶ 14, quoting *State v. Simon*, 87 Ohio St.3d 531, 533 (2000), quoting *State v. Hamilton*, 75 Ohio St.3d 636, 639 (1996). In Ohio, "expungement" remains a common colloquialism used to describe the process of sealing criminal records pursuant to statutory authority. *Pariag* at ¶ 11.

{¶ 9} R.C. 2953.52(A)(1) governs an application to seal records in cases where an indictment has been dismissed. The statute provides, in relevant part, as follows:

> Any person, who is found not guilty of an offense by a jury or a court or who is the defendant named in a dismissed complaint, indictment, or information, may apply to the court for an order to seal the person's official records in the case. Except as provided in section 2953.61 of the Revised Code, the application may be filed at any time after the finding of not guilty or the dismissal of the complaint, indictment, or information is entered upon the minutes of the court or the journal, whichever entry occurs first.

{¶ 10} R.C. 2953.52 permits "[a]ny person" to apply to seal the records of a dismissed complaint "at any time" after the dismissal, subject only to the waiting period in R.C. 2953.61. The waiting period is set out in R.C. 2953.61 as follows:

> When a person is charged with two or more offenses as a result of or in connection with the same act and at least one of the charges has a final disposition that is different than the final disposition of the other charges, the person may not apply to the court for the sealing of his record in any of the cases until such time as he would be able to apply to the court and have all of the records in all of the cases pertaining to those charges sealed pursuant to divisions (A)(1) and (2) of

> section 2953.32 and divisions (A)(1) and (2) of section 2953.52 of the Revised Code.

{¶ 11} R.C. 2953.36 provides that "Sections 2953.31 to 2953.35 of the Revised Code," outlining the criteria, process, and effect of the sealing of the records of convictions, do not apply to "[c]onvictions under * * * Chapter 4511 * * * of the Revised Code." R.C. 2953.36(A) and (B). Here, appellee was convicted of OVI, in violation of R.C. 4511.19(A)(1)(a). Thus, pursuant to R.C. 2953.36(B), the records of appellee's OVI conviction cannot be sealed. *Pariag* at ¶ 19.

{¶ 12} Appellant contends that because the records of the OVI conviction cannot be sealed, R.C. 2953.61 precludes sealing the record of the dismissed charges inasmuch as those charges arise out of the same incident as the OVI charge. In support of its argument, appellant relies on the decision of the Supreme Court of Ohio in *Pariag*.

{¶ 13} In *Pariag*, Pariag was charged with several offenses arising out of a single traffic stop. He was charged with driving under a suspended license in a municipal court case, and in a second case in common pleas court, Pariag was charged with drug-related offenses. Pariag was convicted of the non-sealable traffic offense by the municipal court, and the court of common pleas dismissed the remaining drug charges. Pariag applied to have the records of the dismissed charges sealed, and the court granted the application. A divided panel of this court affirmed.[1]

{¶ 14} On appeal, the Supreme Court in *Pariag* held as follows:

> A trial court is precluded, pursuant to R.C. 2953.61, from sealing the record of a dismissed charge if the dismissed charge arises "as the result of or in connection with the same act" that supports a conviction when the records of the conviction are not sealable under R.C. 2953.36, regardless of whether the charges are filed under separate case numbers.

Id. at syllabus. Further, the Supreme Court held:

> *The trial court, on remand, must determine whether those charges arose "as the result of or in connection with the same act" as his traffic conviction.*

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[1] *In re Application of Pariag*, 10th Dist. No. 11AP-569, 2012-Ohio-1376 (Sadler, J., dissenting).

(Emphasis added.) *Id*. at ¶ 22.

{¶ 15} Recently, in *State v. C.A.*, 10th Dist. No. 13AP-982, 2014-Ohio-2621, we applied the *Pariag* decision to a case arising under similar circumstances. In that case, the Ohio State Highway Patrol issued numerous citations to C.A. in the course of a single traffic stop, including speeding, OVI, and four drug-related offenses. C.A. pleaded guilty to OVI in the municipal court case. The common pleas court subsequently dismissed the drug charges in two separate cases after C.A. successfully completed a specialty program administered by the court.

{¶ 16} C.A. filed two applications, pursuant to R.C. 2953.52, asking the court to seal the records of the two cases involving the four drug-related charges. C.A. did not seek the sealing of the record of her OVI case. The court held a hearing on the applications and ordered the sealing of the records in the two cases involving the dismissed charges.

{¶ 17} On appeal, the state argued that *Pariag* precluded sealing of the records of C.A.'s drug-related cases because those charges "arose from the same incident" as the OVI. *C.A.* at ¶ 18. Although the record showed that all charges arose out of an incident that occurred on the same date, at the same location, and involved the same police officer, we rejected the state's argument that charges arising "from the same incident" necessarily arise "as the result of or in connection with the same act." *Id*. In our discussion of the *Pariag* case, we made the following observations:

> The Supreme Court in *Pariag*, * * * could have, but did not, dispose of that case by remanding it to the trial court with instructions to deny the application. Rather, it remanded the case for the trial court to determine in the first instance whether Pariag's DUS charge and drug possession charges arose "as a result of or in connection with the same act." It did so, even though the facts were clear in *Pariag*, as in the case now before us, that the traffic charges and the drug-related charges both arose out of the same traffic stop. * * * Moreover, the record before us is devoid of facts concerning the events surrounding the traffic stop. *We therefore order the same disposition in this case as the Supreme Court ordered in Pariag; i.e., reversal of the trial court's judgment sealing the records and remand to that court for it to reconsider the applications.*

(Emphasis added.) *Id.* at ¶ 19.

{¶ 18} In another recent decision of this court, *In re K.J.*, 10th Dist. No. 13AP-1050, 2014-Ohio-3472, we reviewed the recent case law regarding the sealing of records and made the following observations:

> [I]n both *C.A.* and *R.L.M.*,[2] this court applied *Pariag* and remanded those cases to the trial court for it to consider in the first instance whether the charges at issue arose as a result of or in connection with the same act.
>
> Here, unlike [*Pariag*], *C.A.*, and *R.L.M.*, the trial court held a hearing and determined, based on the evidence presented at the hearing, that the dismissed charges did not arise as a result of or in connection with the same act which led to the non-sealable traffic conviction.
>
> *[W]here the record does not contain facts regarding the events which led to the multiple charges at issue under R.C. 2953.61, the trial court will have to hold a hearing to ascertain those facts.* The trial court thus assumes the role of the trier of fact, and must evaluate the credibility of the witnesses and resolve any factual questions presented by the evidence. After resolving any factual issues, the court must apply the facts to R.C. 2953.61, to determine whether the multiple charges at issue arose as a result of or in connection with the same act.

(Emphasis added.) *Id.* at ¶ 15-17.

{¶ 19} In this case, as in *Pariag*, *C.A.*, and *State v. R.L.M.*, 10th Dist. No. 13AP-981, 2014-Ohio-2661, the trial court's judgment entry contains no determination whether the dismissed drug-related charges arose "as a result of or in connection with the same act" as the non-sealable traffic conviction. The only relevant finding made by the trial court in this case is that "[h]e did get convicted of drunk driving out of the same incident." (Tr. 3.) As we noted in *C.A.*, charges arising "from the same incident" do not necessarily

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[2] In *State v. R.L.M.*, 10th Dist. No. 13AP-981, 2014-Ohio-2661, we reversed a trial court judgment sealing the record of dismissed felony charges and remanded the case for the trial court to make a determination "in the first instance" whether appellee's drug-related charges and traffic offenses arose as a result of or in connection with the same act. *Id.* at ¶ 17.

arise "as a result of or in connection with the same act." This court will not make the required factual determination in the first instance. *C.A.*; *R.L.M.*

{¶ 20} Similarly, though appellee testified at the hearing, he was not asked about the various acts that resulted in the multiple charges against him. Rather, appellee was asked to discuss his successful completion of the "program in Municipal Court," the counseling he received, whether he was currently drug free, and the adverse impact the record of the dismissed charges has had on his ability to obtain employment and housing. (Tr. 5.) The transcript in this case contains almost no evidence regarding the acts that resulted in the charges against appellee. As we noted in *K.J.*, "where the record does not contain facts regarding the events which led to the multiple charges at issue under R.C. 2953.61, the trial court will have to hold a hearing to ascertain those facts." *Id. at* ¶ 17.

{¶ 21} *K.J.* presented this court with a record that contained a detailed account from the applicant of the facts and circumstances that led to the multiple charges and a specific finding by the trial court that the dismissed charges did not arise as a result of or in connection with the same act which led to the non-sealable traffic conviction. Under such circumstances, this court was able to properly review the trial court judgment and determine whether the trial court abused its discretion by sealing the dismissed charges in light of the non-sealable OVI conviction. Here, the record does not contain any of the evidence the trial court would be required to consider in order to make findings regarding the various acts that resulted in the multiple charges against appellee.

{¶ 22} For the foregoing reasons, we conclude that this case stands on the same footing as *Pariag*, *C.A.*, and *R.L.M.*, and it requires the same result. Accordingly, we hold the trial court erred in sealing the record of the dismissed drug-related charges in case No. 12CR-5747 without first conducting an evidentiary hearing to determine whether the dismissed charges arise "as a result of or in connection with the same act" as the OVI charge. *Pariag*; *C.A.*; *R.L.M.*; *K.J.*; R.C. 2953.61.

{¶ 23} Accordingly, we sustain appellant's assignment of error to the extent set forth above.

III. CONCLUSION

{¶ 24} Having sustained appellant's assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas and remand this matter for further proceedings consistent with this decision.

Judgment reversed;
cause remanded.

DORRIAN and T. BRYANT, JJ., concur.

T. BRYANT, J., retired, formerly of the Third Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).

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