

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio, :  
 :  
 Plaintiff-Appellant, : No. 14AP-476  
 : (C.P.C. No. 14EP-109)  
 v. :  
 : (REGULAR CALENDAR)  
 [D.G.], :  
 :  
 Defendant-Appellee. :

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D E C I S I O N

Rendered on March 10, 2015

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

*Fusco, Mackey, Mathews & Gill, LLP*, and *Gregory B. Mathews*, for appellee.

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APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, 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, [D.G.], to seal the record of his prior conviction. Because the trial court did not err in granting [D.G.'s] application, we affirm.

**I. Facts and Procedural History**

{¶ 2} On October 4, 2006, [D.G.] was convicted, pursuant to guilty plea, of one count of pandering obscenity, a fifth-degree felony. The trial court ordered [D.G.] to serve a three-year period of community control and ordered him to pay court costs. On February 18, 2014, [D.G.] filed an application for an order to seal the record of his conviction pursuant to R.C. 2953.32. The state objected to [D.G.'s] application on the

basis that the victim in this offense was a minor and, thus, [D.G.] was not eligible to have the record of his conviction sealed.

{¶ 3} At a May 21, 2014 hearing, the trial court explained that the underlying offense involved a nude photograph of [D.G.'s] former girlfriend that the girlfriend took of herself when she was under 18 years old and gave to [D.G.] while they were in a relationship. [D.G.'s] counsel at the hearing referenced [D.G.'s] "poor judgment in the way he acted out" when the relationship ended, an apparent reference to [D.G.'s] supplemental motion to his application for expungement in which [D.G.] states he drove by his former girlfriend's apartment and threw the photograph out of his car window. (Tr. 4.) Based on this factual premise, the trial court noted the publication of the photograph did not occur until the former girlfriend was either 21 or 22 years old. The trial court acknowledged that R.C. 2953.36(F) precludes the sealing of the record of conviction for an offense in which the victim was under 18 years of age. However, the trial court concluded that because the victim was no longer a minor at the time of the publication of the photograph, R.C. 2953.36(F) did not operate to bar [D.G.'s] application. Accordingly, the trial court granted [D.G.'s] application to seal the record of his conviction and journalized its decision in a May 22, 2014 entry. The state timely appeals.

## **II. Assignment of Error**

{¶ 4} The state assigns the following error for our review:

The trial court erred when it granted [D.G.'s] application to seal his felony conviction for pandering obscenity.

## **III. Analysis**

{¶ 5} In its sole assignment of error, the state argues the trial court erred when it granted [D.G.'s] application to seal the record of his conviction. More specifically, the state asserts [D.G.] was not eligible to have the record of his conviction sealed and, thus, the trial court erred as a matter of law when it granted [D.G.'s] application.

{¶ 6} An appellate court generally reviews a trial court's disposition of an application for an order sealing the record of conviction under an abuse of discretion standard. *State v. Norfolk*, 10th Dist. No. 04AP-614, 2005-Ohio-336, ¶ 4, citing *State v. Hilbert*, 145 Ohio App.3d 824, 827 (8th Dist.2001). An abuse of discretion connotes more than an error of law or judgment; it implies that the attitude of the trial court was " 'unreasonable, arbitrary or unconscionable.' " *Id.*, quoting *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. *Id.*, citing *State v. Derugen*, 110 Ohio App.3d 408, 410 (3d Dist.1996).

{¶ 7} " 'Expungement 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). 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." 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. 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." R.C. 2953.32(A)(1).

{¶ 8} "There is no burden upon the state other than to object to an application for expungement where appropriate." *State v. Reed*, 10th Dist. No. 05AP-335, 2005-Ohio-6251, ¶ 13. "Applicants whose conviction falls within any category of R.C. 2953.36 are ineligible for expungement." *State v. Menzie*, 10th Dist. No. 06AP-384, 2006-Ohio-6990, ¶ 7, citing *Simon* at 533. As relevant here, an offender is not eligible for expungement with respect to any conviction of an offense "in circumstances in which the victim of the offense was under eighteen years of age when the offense is a misdemeanor of the first degree or a felony." R.C. 2953.36(F).

{¶ 9} The state argues that, while [D.G.] has received a final discharge and waited the requisite three years before his application, [D.G.] nonetheless is not an eligible offender within the meaning of the statute because the circumstances of his conviction involve a victim under the age of 18. The question of whether [D.G.] is ineligible because

the offense was in circumstances in which there was a minor victim is a question of law that we review de novo. *State v. Williamson*, 10th Dist. No. 12AP-340, 2012-Ohio-5384, ¶ 11.

{¶ 10} Initially, the state indicted [D.G.] on one count of illegal use of a minor in a nudity oriented material or performance, in violation of R.C. 2907.323, a felony of the second degree. Ultimately, [D.G.] pled guilty and was convicted of the stipulated lesser included offense of pandering obscenity, in violation of R.C. 2907.32, which provides, in pertinent part:

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that the material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when the offender is reckless in that regard[.]

{¶ 11} While illegal use of a minor in nudity oriented material or performance specifically provides that the subject of the offense is under age 18, neither the statute for pandering obscenity nor the judgment entry of [D.G.'s] conviction makes such a specification. Indeed, the pandering obscenity statute does not mention or define the term "victim" at all. We also note that [D.G.] was not charged with or convicted of the more specific offense of pandering sexually oriented matter involving a minor under R.C. 2907.322, which again specifies a victim under age 18.

{¶ 12} Although the age of the victim is not an element of the offense of which [D.G.] was convicted, our case law has indicated that "the age of the victim may be considered in making a determination under [R.C. 2953.36(F)], even if the age of the victim has been dismissed pursuant to a plea agreement." *Norfolk* at ¶ 10. Further, "the Supreme Court of Ohio has found that whether an applicant for the privilege of expungement meets all of the requisite criteria for eligibility is determined not only by examining the plea ultimately entered, but rather by also reviewing the events that resulted in the original charges." *Id.* at ¶ 11, citing *Simon* at 533. *See also Williamson* at ¶ 12-14 (construing *Simon* to require a court to go "behind the judgment entry" and

examine the entire record to determine whether the applicant is eligible for expungement).

{¶ 13} Here, [D.G.'s] conviction involved a photograph of his former girlfriend that she took of herself and gave to [D.G.] before she was 18 years old. However, [D.G.] did not throw the photograph out of his car window until the woman was over 18. The trial court determined that the relevant inquiry was the victim's age at the time of publication rather than the age at the time the photograph was taken.

{¶ 14} In disagreeing with the trial court's granting of the application to seal the record of conviction, the state asserts that even though the victim in this case was no longer a minor at the time the photograph was published, the fact that the photograph was taken when the victim was under the age of 18 is sufficient to show "circumstances in which the victim of the offense was under eighteen years of age." R.C. 2953.36(F). The state relies on the Eighth District's decision in *State v. M.R.*, 8th Dist. No. 94591, 2010-Ohio-6025, which reversed a trial court's granting of an application to seal the record of convictions for five counts of attempted pandering obscenity in violation of R.C. 2907.32. In *M.R.*, the defendant took a photograph of his three-year-old child in a state of nudity after a bath and showed the photograph to a stranger. At the hearing on his application to seal the record of his convictions, M.R. argued that, although the original contemplated charge was pandering obscenity involving a minor, " 'through the negotiation process it was determined that this child was not a victim and it would not be an appropriate charge and, therefore, that was dropped. So there is no child/victim in this case.' " *M.R.* at ¶ 9. After the trial court granted the application, the Eighth District reversed, concluding that there was no dispute that the five attempted pandering obscenity charges all "involved" the defendant's three-year-old child, so R.C. 2953.36(F) applied to prevent the sealing provisions from applying to the defendant's convictions. *M.R.* at ¶ 24.

{¶ 15} *M.R.* is not binding on this court and is easily distinguishable. First, in *M.R.*, the defendant took the photographs of the child. Here, the trial court noted at [D.G.'s] hearing that the former girlfriend took the photograph of herself and then gave it to [D.G.]. The origin of the obscene material is not an element of pandering obscenity, but it is a relevant consideration when either the trial court or this court "examine[s] the

entire record" to determine whether a conviction is ineligible for sealing under R.C. 2953.36 as the Supreme Court of Ohio directs a court must do. *Simon* at 535. Second, the publication of the obscene material in *M.R.* occurred while the child who was the subject of the photographs was still a minor. The unique temporal circumstances we have in this case simply do not exist in *M.R.* Thus, we do not find *M.R.* applicable in discerning whether there was a "victim" in the present case.

{¶ 16} As we have already noted, whether a provision in R.C. 2953.36 operates to preclude [D.G.'s] conviction from eligibility for the expungement proceedings is a question of law that we review de novo. *Williamson* at ¶ 11. However, that question first requires a court to make factual determinations regarding the identity and age of the victim, and we review questions of fact under an abuse of discretion standard. *Norfolk* at ¶ 4. Although the state would have the trial court defer to the charged offense in the indictment to determine this conviction involved a minor victim, that is not what *Simon* and its related case law requires. Instead, *Simon* directs that the trial court consider "the entire record" to determine whether a conviction is eligible for expungement. The trial court here considered the entire record in making its determination that R.C. 2953.36(F) did not operate to make [D.G.] ineligible for expungement. While the trial court was aware that the originally charged offense involved a minor, the trial court considered the entire record to determine that the former girlfriend became the victim when [D.G.] threw the photograph out of his car window. There is no dispute that the victim was no longer a minor when [D.G.] published the photograph. The trial court did not abuse its discretion in making that determination.

{¶ 17} We conclude the trial court did not err in concluding R.C. 2953.36(F) did not operate to bar [D.G.'s] application to seal the record of his conviction. Accordingly, the trial court did not err in granting [D.G.'s] application, and we overrule the state's sole assignment of error.

#### **IV. Disposition**

{¶ 18} Based on the forgoing reasons, we conclude the trial court did not err in granting [D.G.'s] application to seal the record of his conviction. Having overruled the

state's sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN, P.J., concurs.

BRUNNER, J., concurs in judgment only.

BRUNNER, J., concurring in judgment only.

{¶ 19} I concur with the majority in judgment only. In applying the longstanding analysis that expungement is a privilege as opposed to a right, it is essential that we more specifically define the nature of our hybrid standard of review of the trial court's sealing of [D.G.'s] record of criminal conviction. *See State v. Aguirre*, \_\_\_ Ohio St.3d \_\_\_, 2014-Ohio-4603, ¶ 16; *State v. Boykin*, 138 Ohio St.3d 97, 2013-Ohio-4582, ¶ 11. This is especially important in light of the fact that *Aguirre* resolved a conflict between the Tenth and Eighth District Courts of Appeal in interpreting statutory changes enacted by Amended Substitute Senate Bill No. 337 ("Am.Sub.S.B. No. 337") of the 129th General Assembly, effective September 28, 2012.<sup>1</sup>

{¶ 20} Am.Sub.S.B. No. 337, among other changes, modified Ohio statutes governing the sealing of criminal convictions to permit more persons than "first offenders" to have the records of one or more of their criminal convictions sealed. These legislative changes created additional factors for review by trial courts and thereby require a more specifically defined hybrid review by this court. Certain steps of the review process of the trial court are subject to de novo review, while others are subject to an abuse of discretion review.

{¶ 21} Prior to Am.Sub.S.B. No. 337, expungement law offered to "first offenders" almost exclusively what interpretive case law characterized as an act of grace or a privilege. *See, e.g., State v. Tauch*, 10th Dist. No. 13AP-327, 2013-Ohio-5796, ¶ 7. Am.Sub.S.B. No. 337 extends the sealing of criminal records beyond first offenders to "eligible offenders." Persons with up to several criminal offenses in specified situations may seek and be granted the sealing of the records of their criminal offenses. R.C. 2953.32

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<sup>1</sup> While still good law, I would prefer to rely on *Aguirre* and *Boykin* to better assist in following the legislative progression and the Supreme Court of Ohio's interpretation of the new law.

and 2953.31. This new law did not open the flood gates to any offender for any offense. It created additional and specific exceptions to crimes eligible for expungement, appearing to balance a public policy call for more "second chances" with public safety. *See* R.C. 2953.36. The privilege versus right "driving" analysis that had been generally applied by the Supreme Court of Ohio was extended to apply to the new version of the law contained in Am.Sub.S.B. No. 337 for the purpose of supporting both the Supreme Court's resolution of a conflict between appellate districts and an apparent conflict between the Tenth District's application of the expungement and restitution laws (R.C. 2953.31 et seq. and 2929.18(A)(1)). *Aguirre* at ¶ 16. In using the privilege versus right analysis, the Supreme Court held that, "[n]o court is ever required to seal conviction records," pointing to the fact that the trial court must determine whether an applicant has been rehabilitated and whether, in balancing interests, those interests weigh in favor of the applicant over the government's interest to maintain records. *Id.* at ¶ 27. In *Aguirre*, the Supreme Court noted that, "the General Assembly has decreed that courts are required to *refuse to seal* a record when the offender is not yet eligible to have her conviction records sealed." (Emphasis sic.) *Id.* It is important that we clarify in [D.G.'s] situation which factors determined by a trial court are subject to de novo review and which factors are discretionary and therefore reviewed under an abuse of discretion standard, i.e., R.C. 2953.32(C)(1)(c) and (e) (and presumably regarding subdivision (d) regarding a prosecutor's objections). *See id.* at ¶ 27.

{¶ 22} Reviewing R.C. 2953.31(A) as it appears in legislative enactment form in Am.Sub.S.B. No. 337, an "eligible offender" is:

[A]nyone 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~~ 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 in this state or any other jurisdiction. When 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. When two

or three convictions result from the same indictment, information, or complaint, from the same plea of guilty, or from the same official proceeding, and result from related criminal acts that were committed within a three-month period but do not result from the same act or from offenses committed at the same time, they shall be counted as one conviction, provided that a court may decide as provided in division (C)(1)(a) of section 2953.32 of the Revised Code that it is not in the public interest for the two or three convictions to be counted as one conviction.

The major change to the law regarding the sealing of adult criminal convictions is its expansion of persons who are eligible to avail themselves of this provision of the law. This change resulted in creating the definition of "eligible offender" and the factors required to be satisfied in order to be an eligible offender for the purposes of expungement.

{¶ 23} Under the post-Am.Sub.S.B. No. 337 version of R.C. 2953.32 (at (C)(1)(a)), a trial court that reviews an application for the sealing of an adult criminal conviction record must determine as a threshold question whether an applicant for expungement is an "eligible offender" as the same is set forth in R.C. 2953.31(A) and 2953.32(C). *See also Aguirre* at ¶ 27 ("[n]o discretionary consideration can justify granting an application to seal before the offender has established eligibility to apply," citing R.C. 2953.32(C)(1) and (2)). The Supreme Court recognizes that the determination of whether a person is an eligible offender, including whether, for instance, certain crimes may be counted as one conviction, is an objective determination that is made by a trial court as a matter of law pursuant to R.C. 2953.31(A) and 2953.31(C)(1) and (2). As such, whether an applicant is an eligible offender is an issue of law we review de novo. *Tauch* at ¶ 7, citing *State v. Hoyles*, 10th Dist. No. 08AP-946, 2009-Ohio-4483, ¶ 4.

{¶ 24} It is this critical threshold determination, that an applicant is an eligible offender, which then requires a trial court to consider and make findings on additional objective factors, such as whether criminal proceedings are pending against the applicant and whether the prosecutor has filed a timely objection in conformity with R.C. 2953.32(B). If no other criminal proceedings are pending against the applicant, it is then and at this point that the court must use its discretion to determine the following additional factors: (1) whether the applicant has been rehabilitated to the satisfaction of

the court; (2) whether the reasons, if any, offered by the prosecutor in the written objection against granting the expungement are persuasive; and (3) after weighing the interests of the applicant in having conviction records sealed against the legitimate needs, if any, of the state to maintain those records, whether such an analysis weighs in the applicant's favor. R.C. 2953.32(C). These above three factors are reviewed according to an abuse of discretion standard. *Tauch* at ¶ 17.

{¶ 25} Once all required objective and discretionary factors have been determined to be in an applicant's favor, the trial court must grant an application to seal the record of criminal conviction. *See id.* at ¶ 7, citing *State v. Simon*, 87 Ohio St.3d 531, 533 (2000). The plain language of the statute is mandatory:

[I]f the court determines, after complying with division (C)(1) [of R.C. 2953.32] that the applicant is an eligible offender \* \* \* that no criminal proceeding is pending against the applicant, and that the interests of the applicant in having the records pertaining to the applicant's conviction \* \* \* sealed are not outweighed by any legitimate governmental needs to maintain those records, and that the rehabilitation of an applicant who is an eligible offender applying pursuant to division (A)(1) of this section has been attained to the satisfaction of the court, the court \* \* \* *shall* order all official records pertaining to the case sealed \* \* \*.

(Emphasis added.) R.C. 2953.32(C)(2). Our de novo review of the trial court's application of R.C. 2953.36(F) resolved the question of whether [D.G.] was an eligible offender. In applying the Supreme Court's resolution of *Aguirre* to [D.G.'s] situation, it is important to distinguish that, after the trial court resolved the discretionary factors contained in R.C. 2953.32(C), it was required to seal [D.G.'s] records of criminal conviction and could not refuse to seal it.

{¶ 26} This court has previously found the determination of "eligible offender" is a jurisdictional question. *Tauch* at ¶ 7, citing *In re Barnes*, 10th Dist. No. 05AP-355, 2005-Ohio-6891. Under *Tauch*, if the trial court erred in finding [D.G.] to be an eligible offender, it had no jurisdiction to grant his application for expungement.

{¶ 27} In our de novo review of the trial court's decision to order that [D.G.'s] record of criminal conviction be sealed, we affirm and clarify our dual standards of review

of the trial court's decision. The underlying offense, one count of pandering obscenity, in violation of R.C. 2907.32, a fifth-degree felony, involved a nude photograph of [D.G.'s] former girlfriend that the girlfriend took of herself when she was under 18 years of age and gave to [D.G.] while they were in a relationship. When the relationship ended, both were over 18, and publication occurred when [D.G.] drove by his former girlfriend's apartment and threw the photograph out of his car window. The trial court acknowledged that R.C. 2953.36(F) would preclude the sealing of the record of conviction if the victim were less than 18 years of age. However, the trial court concluded that, because the victim was no longer a minor at the time of the publication of the photograph, R.C. 2953.36(F) did not bar [D.G.'s] application or essentially deprive the court of jurisdiction to consider [D.G.'s] expungement application. This is the question of law that we review de novo. It is the crux of the state's appeal.

{¶ 28} The Supreme Court has long held that Ohio's laws on the sealing of criminal convictions are remedial and therefore are to be liberally construed to promote their purposes. *State ex rel. Gains v. Rossi*, 86 Ohio St.3d 620, 622 (1999) (citing R.C. 1.11; *Barker v. State*, 62 Ohio St.2d 35, 42 (1980)). In determining that [D.G.] was an eligible offender, the trial court was obliged to liberally construe the statutory scheme to promote its remedial purposes in finding that R.C. 2953.36(E)<sup>2</sup> did not apply to [D.G.]. The trial court found that the time of publication and not the time of production of the obscene material was determinative of whether the victim was under 18 years of age. We agree with the trial court's finding on this issue of law in keeping with *Gains*. Once the trial court made this finding, [D.G.] was an eligible offender, and the court had jurisdiction to consider the other statutory factors in determining whether it was required to grant [D.G.'s] application. The trial court made the appropriate findings, did not abuse its discretion in making such findings, and was, therefore, obliged to render a decision to seal [D.G.'s] record of criminal conviction under R.C. 2907.32.

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<sup>2</sup> R.C. 2953.36(E) provides: "Convictions on or after October 10, 2007, under section 2907.08, 2907.09, 2907.21, 2907.22, 2907.23, 2907.31, 2907.311, 2907.32, or 2907.33 of the Revised Code when the victim of the offense was under eighteen years of age."

{¶ 29} Inapposite to this established law, the majority notes, after stating that an application for expungement is not mandatory: "A court *may* grant expungement only when all statutory requirements for eligibility are met," citing *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. (Emphasis added.) (Original Decision at ¶ 7.) This is neither the state of case law interpreting the application of R.C. 2953.32, nor what is required by the "shall" language of R.C. 2953.32(C)(2). Moreover, not even the pre-Am.Sub.S.B. No. 337 version of R.C. 2953.32 gave to a trial court discretion *not* to grant expungement for first offenders if all statutory requirements were met.<sup>3</sup>

{¶ 30} Am.Sub.S.B. No. 337 is sweeping remedial legislation that contains other, similar remedial provisions beyond expanding the circumstances in which an offender may obtain the sealing of the records of his or her crimes. The Act also creates alternatives to drivers license suspensions (known as "collateral sanctions"), clarifies confidentiality of juvenile records and expands the ability to seal them, reduces restrictions on persons entering specific professions, and allows child support modifications based on actual earning capacity, taking into account the incarcerated

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<sup>3</sup> The pre-Am.Sub.S.B. No. 337 version of R.C. 2953.32(C)(2) as it appears in the enacted version of Am.Sub.S.B. No. 337 is as follows:

(2) If the court determines, after complying with division (C)(1) of this section, that the applicant is ~~a first~~ an eligible offender or the subject of a bail forfeiture, that no criminal proceeding is pending against the applicant, and that the interests of the applicant in having the records pertaining to the applicant's conviction or bail forfeiture sealed are not outweighed by any legitimate governmental needs to maintain those records, and that the rehabilitation of an applicant who is ~~a first~~ an eligible offender applying pursuant to division (A)(1) of this section has been attained to the satisfaction of the court, the court, except as provided in divisions (G) and (H) of this section, *shall* order all official records pertaining to the case sealed and, except as provided in division (F) of this section, all index references to the case deleted and, in the case of bail forfeitures, shall dismiss the charges in the case. The proceedings in the case shall be considered not to have occurred and the conviction or bail forfeiture of the person who is the subject of the proceedings shall be sealed, except that upon conviction of a subsequent offense, the sealed record of prior conviction or bail forfeiture may be considered by the court in determining the sentence or other appropriate disposition, including the relief provided for in sections 2953.31 to 2953.33 of the Revised Code.

(Emphasis added.)

status of an individual. Am.Sub.S.B. No. 337 and our decisions after this law's enactment have rendered less effective the privilege versus right analysis in reviewing trial courts' decisions on expungement, because of the more specific nature of the current law. Liberal construction of expungement statutes to promote their purposes of remediation is required. *Gains*. Our review of such decisions begins with a de novo jurisdictional review and thereafter, if appropriate, an abuse of discretion review. The trial court properly granted [D.G.'s] application for expungement. Accordingly, and for the reasons stated in this decision, I concur with the majority in judgment only.

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