[Cite as *State v. Shaffer*, 2010-Ohio-6565.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-G-2929**
- vs -	:	
JESSE M. SHAFFER,	:	
Defendant-Appellant.	:	

Civil Appeal from the Chardon Municipal Court, Case No. 2005 CRB 00568.

Judgment: Affirmed.

James M. Gillette, City of Chardon Police Prosecutor, National City Bank Building, 117 South Street, #208, Chardon, OH 44024 (For Plaintiff-Appellee).

Mark B. Marein, Marein & Bradley, 222 Leader Building, 526 Superior Avenue, Cleveland, OH 44114-1210 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Jesse M. Shaffer, appeals the judgment of the Chardon Municipal Court denying his application to seal the record of his conviction of vehicular homicide. At issue is whether appellant is entitled to an expungement. For the reasons that follow, we affirm.

{¶2} On June 13, 2005, appellant was charged with vehicular homicide, a misdemeanor of the first degree, in violation of R.C. 2903.06(A)(3). The charge arose out of an incident in which appellant, while making a left-hand turn, failed to yield the

right of way and crashed into Daniel Hill, who was riding his motorcycle in the opposite direction. The collision resulted in Mr. Hill's death.

{¶3} On January 3, 2006, appellant pled no contest to the charge, was found guilty, and sentenced to 180 days in jail, of which 150 were suspended.

{¶4} Thereafter, on April 30, 2009, appellant filed an application to seal the record of his conviction. The state filed a brief in opposition, arguing, inter alia, that vehicular homicide is an offense that cannot be expunged. On July 9, 2009, the trial court entered judgment denying appellant's application without a hearing.

{¶5} Thereafter, on August 6, 2009, appellant filed a motion for reconsideration in which he asked the court to vacate its judgment denying his application for expungement and to hold a hearing on his application. On August 7, 2009, the trial court granted the motion, vacating its July 9, 2009 judgment denying appellant's application and setting it for oral hearing on September 15, 2009.

{¶6} Appellant concedes that the court conducted a "full hearing on the merits of the motion to seal." However, while counsel argued their respective positions, appellant did not present any testimony or other evidence in support of his application. Following the hearing, on September 16, 2009, the trial court entered judgment in which it found that vehicular homicide is an offense that can be expunged, but that in this case the need of the government to maintain the record of appellant's conviction outweighs appellant's interest in having the record of his conviction sealed.

{¶7} On October 15, 2009, appellant appealed the trial court's judgment. On December 21, 2009, this court dismissed, sua sponte, the appeal on the ground that appellant failed to timely appeal the trial court's July 9, 2009 judgment denying his

application to seal the record. We held appellant's motion for reconsideration was a nullity and thus ineffective to toll the time for him to file an appeal.

{¶8} Thereafter, on December 28, 2009, appellant filed in this court a motion for reconsideration of our dismissal entry, arguing that on August 7, 2009, the trial court vacated its July 9, 2009 judgment denying his application for expungement. He argued that, after vacating its ruling, the trial court conducted a hearing on his application for expungement and entered a final order denying his application to seal on September 16, 2009. He argued his appeal, filed on October 15, 2009, was therefore timely.

{¶9} On January 26, 2010, we remanded the case to the trial court to clarify whether its September 16, 2009 judgment was meant to be a ruling on appellant's application for expungement or on his August 6, 2009 motion for reconsideration. On February 12, 2010, the trial court entered judgment in which it: (1) explained that in its August 7, 2009 judgment, it treated appellant's motion for reconsideration as a motion to vacate its judgment denying expungement and vacated that judgment; (2) clarified that in its September 16, 2009 entry, it meant to deny appellant's application for expungement; and (3) expressly denied appellant's application. In light of the trial court's entry, on March 3, 2010, we granted appellant's motion for reconsideration, which we construed as a motion to reinstate the appeal, and vacated our dismissal entry.

{¶10} Appellant asserts the following as his sole assignment of error:

{¶11} "The trial court erred when it denied the application to seal the conviction upon the unfounded, and incorrect, belief that the record would not be readily

accessible to the government for use in the future should the defendant ever be charged with vehicular homicide."

{¶12} Pursuant to R.C. 2953.32(A)(1), a first offender may request that the records of his conviction be sealed. Upon filing such request, R.C. 2953.32(C)(1) requires the trial court to determine: (1) whether the applicant is a first offender; (2) whether criminal proceedings are pending against the applicant; (3) whether the applicant has been rehabilitated to the satisfaction of the court; and (4) whether the prosecutor has filed an objection and, if so, to consider the prosecutor's reasons for the objection. Further, the trial court must weigh the interest of the applicant in having the record of his conviction sealed against the legitimate need of the government to maintain it. R.C. 2953.32(C)(1)(e). If the trial court determines that the applicant's interest in having the record of his conviction sealed is equal to or greater than the government's need to maintain the record, then the trial court is required to issue an order sealing it. R.C. 2953.32(C)(2).

{¶13} "'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-Ohio-474, quoting *State v. Hamilton*, 75 Ohio St.3d 636, 639, 1996-Ohio-440. In *State v. Mahaney* (Aug. 12, 1988), 11th Dist. No. 12-208, 1988 Ohio App. LEXIS 3314, this court held:

{¶14} "'Because expungement is a matter of privilege rather than of right, the requirements of the expungement statute must be adhered to strictly.' *State v. Thomas* (1979), 64 Ohio App.2d 141, 145. 'When exercising this power, the court should use a balancing test which weighs the privacy interest of the defendant against the government's legitimate need to maintain records of criminal proceedings.' *Pepper Pike*

v. Doe (1981), 66 Ohio St.2d 374, paragraph two of the syllabus. 'Typically, the public interest in retaining records of criminal proceedings, and making them available for legitimate purposes, outweighs any privacy interest the defendant may assert.' *Chase v. King* (1979), 267 Pa. Super. 498; *Pepper Pike*, supra, at 377." *Mahaney*, supra, at *4-*5.

{¶15} The standard of review of an appellate court addressing an application to seal a record of conviction is abuse of discretion. *State v. Selesky*, 11th Dist. No. 2008-P-0029, 2009-Ohio-1145, at ¶17, citing *State v. Hilbert* (2001), 145 Ohio App.3d 824, 827-828. This court has recently stated that the term "abuse of discretion" is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, at ¶30, citing *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. The Second Appellate District has also recently adopted this definition of the abuse of discretion standard in *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶65, quoting Black's Law Dictionary (4 Ed.Rev.1968) 25 ("'A discretion exercised to an end or purpose not justified by and clearly against reason and evidence'").

{¶16} Appellant attempts to avoid the abuse of discretion standard of review by arguing the trial court's denial of his application was based on the court's incorrect assumption that expungement would prevent the state from having access to his record of conviction for penalty-enhancement under R.C. 2903.06(C) should he commit another vehicular homicide offense. He argues this is a legal determination subject to de novo review. However, the trial court's judgment was not based on such assumption. While the court acknowledged the enhancement provision in its ruling, the

court did not state, as appellant argues, that its denial of appellant's application was based on its belief that expungement would prevent the state from having access to appellant's present conviction for later enhancement purposes. The trial court merely found: "*** [G]iven the enhancement provision of R.C. Sec. 2903.06(C), the Court finds that the legitimate needs of the government to maintain a readily-accessible record *** of Defendant's conviction outweigh the interest of Defendant in having the record of his conviction sealed." The trial court's reference to this statute was unnecessary and gratuitous, but it did not negate the court's essential finding that the state's need to maintain the record of appellant's conviction outweighed his privacy interests. As a result, the court's denial of appellant's application was not based on an incorrect assumption, and there is no reason to depart from the abuse of discretion standard.

{¶17} Moreover, contrary to appellant's argument, his position is not supported by *Cleveland v. Cooper-Hill*, 8th Dist. No. 84164, 2004-Ohio-6920. In that case the wife had been convicted of domestic violence. That offense is also subject to penalty enhancement for subsequent convictions. At the hearing on her motion for expungement, the wife testified that since completing probation, she had obtained a B.A. and a teaching position and that she was concerned her conviction might affect her ability to obtain teaching positions. Despite this evidence, the trial court denied her motion, incorrectly finding it could not seal the wife's record of conviction because that would preclude its use for later enhancement if the wife should commit another domestic violence offense. Even though the trial court's decision in that case was based on an incorrect legal assumption, the Eighth District still applied the abuse of discretion standard. Id. at ¶19.

{¶18} It is well-settled that, when considering a motion for expungement, the defendant has the burden to demonstrate his interest in having the records of his conviction sealed is equal to or greater than the legitimate need of the government to maintain those records. *State v. Haney* (1991), 70 Ohio App.3d 135, 139. In that oft-cited case, the Tenth Appellate District affirmed the trial court's denial of expungement, holding:

{¶19} "Necessarily, *** the determination as to whether the legitimate governmental need to maintain the records outweighs the applicant's interest in having the records sealed is a matter lying within the sound discretion of the trial court. Here, defendant has not demonstrated an abuse of discretion. An examination of the record indicates that, although there was a hearing, no evidence, only argument of counsel, was presented. ***

{¶20} "***

{¶21} "At the oral hearing, counsel for defendant did state in argument (but without evidence) that defendant has functioned as a totally responsible citizen and has become a paralegal and needs the expungement to enhance job opportunities. However, no evidence was adduced supporting the argument of counsel. Defendant in other words has presented no evidence as to his interest in having the records in the case sealed ***.

{¶22} "*** *The statute *** clearly places upon the applicant the burden of demonstrating that his interests in having the records in the case sealed are at least equal to the legitimate governmental need to maintain the records.*" (Emphasis added.) Id. at 138-139.

{¶23} The Tenth District reaffirmed and amplified its holding in *Haney* in *State v. Newton*, 10th Dist. Nos. 01AP-1443 and 01AP-1444, 2002-Ohio-5008, in which it held:

{¶24} "The burden is on appellant to demonstrate that his interest in having the records sealed [is] equal to or greater than the government's interest in maintaining those records. *Haney*, supra, at 138. Appellant failed to meet his burden. Appellant's written request merely states that he meets all the requirements of R.C. 2953.52. At the oral hearing, counsel for appellant did not *** present any evidence supporting appellant's interest in sealing the records. ***. The trial court has discretion *** to grant or deny such a request depending upon the interests of the respective parties. *Given *** the absence of any evidence supporting appellant's motion, no abuse of discretion has been shown*.

{¶25} "Appellant points out that the state failed to present any evidence warranting the denial of his application. However, as noted above, it is appellant's burden to show that his interest in sealing the records is equal to or outweighs the state's interest in maintaining those records. Therefore, there is no requirement that the state present any evidence at this hearing. *Haney*, supra (affirming denial of expungement request even without evidence from the state). ***" (Emphasis added.) *Newton*, supra, at ¶9-10.

{¶26} In holding the trial court did not abuse its discretion in denying the defendant's motion to seal the records, the Tenth District in *In re Sealing of the Record of Brown*, 10th Dist. No. 07AP-715, 2008-Ohio-4105, stated: "appellant did not provide any testimony or other evidence supporting her interest in sealing her criminal records. Although appellant made a vague reference to her inability to earn money, she later

stated she was on disability leave from her place of employment, and she did not clearly articulate that her financial problems were related to her criminal record." Id. at ¶13.

{¶27} Further, the Eighth Appellate District adopted the Tenth District's holding in *Haney* in *State v. Andrasek*, 8th Dist. No. 81398, 2003-Ohio-32, appeal denied by the Supreme Court of Ohio at 99 Ohio St.3d 1414, 2003-Ohio-2480, 2003 Ohio LEXIS 1327, in which the Eighth District held that the burden is on the defendant to demonstrate that his interest in having the records sealed is equal to or greater than the government's interest in maintaining those records. Id. at ¶12.

{¶28} Finally, this court adopted the ruling of *Haney* in *State v. Severino*, 11th Dist. No. 2009-A-0045, 2010-Ohio-2674, in which this court held:

{¶29} "'In view of the language contained in [the expungement statute], a trial court must hold an oral hearing prior to issuing a decision on an application for sealing of records. See *** *Haney*[, supra] (finding that the rationale for requiring a hearing "is obviously predicated upon the fact that *** a trial court would be required to hear evidence prior to rendering its decision in order to make several determinations pursuant to [the expungement statute]").'" *Severino*, supra, at ¶28.

{¶30} Thus, based on the foregoing authority, an applicant for expungement has the burden to demonstrate his privacy interest is equal to or outweighs the government's need to maintain the record of his conviction. In order to sustain that burden, the applicant must present evidence in support of his application. Generally, this involves testimony that his conviction has damaged his ability to earn a living.

{¶31} Based on our thorough review of the transcript of the hearing, appellant presented no testimony or other evidence that his interest in having the records

pertaining to his conviction sealed is equal to or outweighs the governmental need to maintain those records. Specifically, appellant did not testify his employment prospects have been adversely affected by his conviction. In fact, his attorney argued: "he's done quite well in the last four years. He's in college. He works two jobs." Appellant's attorney argued that appellant wants to go to the police academy, but, he argued, "with a conviction like this, the only police academy he's going to go to is the showing of the comedy *Police Academy*." (Emphasis sic.) However, appellant did not testify that he had any interest or intention to go to the police academy or to become a police officer or that his conviction had hindered his ability to enter the academy or become a police officer. As a result, appellant did not demonstrate that his privacy interest is equal to or greater than the government's legitimate need to maintain the record of his conviction.

{¶32} In addition, an applicant for expungement must demonstrate he has been rehabilitated. R.C. 2953.32(C)(1)(c); *Aurora v. Bulanda* (June 14, 1996), 11th Dist. No. 95-P-0130, 1996 Ohio App. LEXIS 2453, *11. In *Mahaney*, supra, this court affirmed the trial court's denial of the defendant's motion for expungement because she failed to testify or to present other evidence of her rehabilitation at the expungement hearing. Id. at *5-*6.

{¶33} In the case sub judice, appellant did not testify or present any evidence of his rehabilitation. As a result, appellant did not demonstrate that he has been rehabilitated.

{¶34} In view of the foregoing, we hold the trial court did not abuse its discretion in denying appellant's motion to seal the record of his conviction.

{¶35} We note that, even if the trial court had based its denial of appellant's application on the incorrect assumption that expungement would prevent the state from having access to the record of his conviction for later penalty enhancement, as appellant argues, any error would have been harmless for two reasons. First, appellant is not entitled to expungement because he failed to meet his burden of production as outlined above. Second, R.C. 2953.32(D)(6) does not permit the sealing of the record appellant seeks. That section provides:

{¶36} "(D) Inspection of the sealed records included in the order may be made only by the following persons or for the following purposes:

{¶37} "***

{¶38} "(6) By any law enforcement agency *** as part of a background investigation of a person who applies for employment with the agency as a law enforcement officer ***."

{¶39} The only possible harm resulting from appellant's conviction suggested by his counsel at the expungement hearing was appellant's possible exclusion from the police academy and employment as a police officer. However, even if appellant was entitled to an expungement, a hiring law enforcement agency would be authorized to inspect the record of his conviction as part of a background check in connection with his application for employment with the agency. Thus, expungement would not prevent such agency from inspecting appellant's record of conviction.

{¶40} The argument presented by the state on appeal is also unpersuasive. On the one hand, it repeats the argument it made in the trial court that because R.C. 2953.36 excludes certain traffic offenses from the expungement statute, and because in

its view vehicular homicide is a traffic-related offense, conviction of the latter offense cannot be expunged. Yet, on the other hand, the state concedes in its brief that vehicular homicide is not one of the traffic offenses that is excluded from expungement under R.C. 2953.36. Further, the state concedes that it "cannot in good faith argue that [vehicular homicide] is excluded by R.C. 2953.36." As a result, the state's argument that vehicular homicide is an offense that cannot be expunged is waived on appeal.

{¶41} The state also argues that it has a legitimate need to maintain the record of appellant's conviction because expungement will result in the deletion of the record from LEADS. However, the state concedes that vehicular homicide is an offense that *can* be expunged under R.C. 2953.36. If we were to accept the state's argument, then no vehicular homicide conviction could be expunged. If the General Assembly wanted to achieve this result, it would have included vehicular homicide among those offenses that are not subject to expungement pursuant to R.C. 2953.36. However, as the state concedes, the legislature did not do so. We are not empowered to second-guess the wisdom of this omission or to alter the effect of this plain and unambiguous statute. *Fairborn v. De Domenico* (1996), 114 Ohio App.3d 590, 594.

{¶42} Appellant's assignment of error is overruled.

{¶43} For the reasons stated in the Opinion of this court, the assignment of error is not well taken. It is the order and judgment of this court that the judgment of the Chardon Municipal Court is affirmed.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

_____

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶44} I respectfully dissent.

{¶45} In affirming the judgment of the trial court, the majority contends that the denial of appellant's application to seal the record of his conviction of vehicular homicide was proper. I disagree.

{¶46} The legislature to date has not included the conviction of vehicular homicide under R.C. 2903.06 as a non-sealable offense or as an offense of violence. This omission seems at odds with other similar statutes given the nature of this offense. However, the trial court in this matter denied the defendant's request for expungement and reasoned that a sealed conviction would not be accessible to the government for purposes of the Ohio Courts Network ("OCN"). The trial court in its judgment entry mentioned as one of its reasons for not sealing the record, the requirements of OCN as a compelling reason to not expunge the defendant's record. OCN is a secure state-wide data system in which access is limited to court personnel, law enforcement officials, and other justice partner agencies. All court proceedings in Ohio as well as LEADS, BCI, and any national and statewide databases are uploaded into this system by courts, clerks, and police. This system is maintained by the Supreme Court of Ohio.

{¶47} This writer notes, however, that sealed records may be accessed "[b]y a law enforcement officer or prosecutor, or the assistants of either, to determine whether the nature and character of the offense with which a person is to be charged would be

affected by virtue of the person's previously having been convicted of a crime[.]" R.C. 2953.32(D)(1).

{¶48} OCN can be accessed by the judge in real time and is a closed, confidential record history of any person the court chooses to research for use by courts and law enforcement only. The defendant and his attorney, or a witness, whose record is being evaluated are not privy to these records. This new database presents a whole host of evidentiary and ethical issues. The prosecutor, an arm of the executive branch, is provided evidence by the court which is not being shared with the defendant. This creates a knowledge and information disparity created by the court during proceedings which places the state strategically in a superior position to the defendant, who does not have that information and does not have the ability to accurately challenge and confront the reliability and admissibility of the court's record.

{¶49} One can argue that OCN is the same as the present system maintained by law enforcement, BCI and LEADS. However, the court in real time does not have access to LEADS and BCI databases. They are databases maintained by the prosecution and are not admissible unless disclosed and shared in advance with the defendant or witness.

{¶50} The court, in the underlying matter, placed its own interest in maintaining its database; a record that will be used to determine the future guilt or innocence, credibility or veracity of a litigant or witness in future judicial proceedings as against the defendant's statutory ability to obtain an expungement, in the present proceeding. The common and justified temptation for the court to preserve information for a future proceeding in an attempt to do the right thing at the cost of the objective, impartial

application of the statute is just one of the pitfalls of this new technology. The purpose of an expungement is just that - to seal takes away the taint of the prior conviction.

{¶51} In regard to the concerns of the trial court in this matter as to OCN, it appears as if its reasoning was misplaced. The government has ready access to sealed records via OCN. Convictions that have been sealed are deleted from OCN's database. However, when a conviction has been sealed, the user of the system is alerted and directed to contact the appropriate Clerk of Courts for details of the particular sealed case. There is no other reason contained in the record at bar for not sealing the defendant's record. Therefore, I would find the court's ruling unsupported in the record and as such an abuse of discretion.

{¶52} Thus, I believe the trial court abused its discretion by holding that the legitimate needs of the government to maintain a readily-accessible record of appellant's conviction outweigh appellant's interest in having the record of his conviction sealed.

{¶53} I dissent.