[Cite as *State v. Niesen-Pennycuff*, 2011-Ohio-2704.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-11-112
	:	O P I N I O N
- vs -		6/6/2011
	:	
REGINA NIESEN-PENNYCUFF,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CR25758

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

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HENDRICKSON, J.

{¶1} Defendant-appellant, Regina Niesen Pennycuff, appeals the decision of the Warren County Court of Common Pleas denying her application to seal criminal records after dismissal of proceedings. We affirm the trial court's denial, and as a result, sua sponte certify a question to the Ohio Supreme Court regarding the proper application of R.C. 2951.041(E).

{¶2} On April 21, 2009, the Warren County prosecutor filed a bill of information, charging Pennycuff with 12 counts of deception to obtain a dangerous drug in violation of R.C. 2925.22(A), a felony of the fifth degree. Pennycuff then filed a motion for intervention in lieu of conviction according to R.C. 2951.041. The trial court granted Pennycuff's motion after determining that she was eligible for intervention according to the statute. The trial court ordered an intervention plan, and Pennycuff entered a guilty plea pending successful completion of her program.

{¶3} On August 24, 2010, the court filed a termination entry in which it recognized Pennycuff's successful completion of the intervention program, and thereby dismissed the 12 pending charges against her. On September 23, 2010, Pennycuff filed an application for sealing of record after dismissal of proceedings. The state opposed the application and argued that Pennycuff was ineligible for sealing until three years after the dismissal of the charges against her, or August 24, 2013. The trial court denied Pennycuff's application, but invited her to reapply in 2013 once she is eligible. Pennycuff now appeals the decision of the trial court, raising the following assignment of error.

{¶4} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING APPELLANT'S APPLICATION TO SEAL HER RECORD AS UNTIMELY FOLLOWING THE DISMISSAL OF HER CASE AFTER SUCCESSFUL COMPLETION OF INTERVENTION IN LIEU OF CONVICTION."

{¶5} Pennycuff argues in her single assignment of error that the trial court misinterpreted R.C. 2951.041 when it denied her application to seal her record. We disagree, and in doing so, recognize that our decision is in direct conflict with one issued by the Ninth District Court of Appeals.

{¶6} Normally, "the decision whether to grant or deny an application to seal

criminal records lies within the sound discretion of the trial court." *State v. Streets*, Franklin App.No. 09AP-453, 2009-Ohio-6123, ¶6. However, because the correct application of R.C. 2951.041 is a matter of statutory interpretation, and therefore a matter of law, we will review the current issue de novo. *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, ¶6-7.

{¶7} According to R.C. 2951.041(A)(1), "if an offender is charged with a criminal offense and the court has reason to believe that drug or alcohol usage by the offender was a factor leading to the offender's criminal behavior, the court may accept, prior to the entry of a guilty plea, the offender's request for intervention in lieu of conviction." R.C. 2951.041 (E) goes on to state, "if the court grants an offender's request for intervention in lieu of conviction and the court finds that the offender has successfully completed the intervention plan for the offender, including the requirement that the offender abstain from using drugs and alcohol for a period of at least one year from the date on which the court granted the order of intervention in lieu of conviction and all other terms and conditions ordered by the court, the court shall dismiss the proceedings against the offender. Successful completion of the intervention plan and period of abstinence under this section shall be without adjudication of guilt and is not a criminal conviction for purposes of any disqualification or disability imposed by law and upon conviction of a crime, and the court may order the sealing of records related to the offense in question in the manner provided in sections 2953.31 to 2953.36 of the Revised Code."

{¶8} R.C. 2953.31 through 2953.36 detail the process by which a record may be sealed. According to R.C. 2953.32(A)(1), "application may be made at the expiration of three years after the offender's final discharge if convicted of a felony, or at the expiration of one year after the offender's final discharge if convicted of a

misdemeanor."

{¶9} Because Pennycuff was charged with 12 counts of a fifth-degree felony, the trial court determined that she would need to wait three years before requesting that her record be sealed. On appeal, Pennycuff relies on *State v. Fortado* (1996), 108 Ohio App.3d 706, for the proposition that she is not required to wait for any amount of time because the charges against her were dismissed once she successfully completed the intervention program.[1]

{¶10} In *Fortado*, the Ninth District considered whether Fortado would have to wait three years before he was eligible to have his record sealed once he successfully completed his intervention program and had the charges against him dismissed.[2] In finding that the trial court did not err in sealing Fortado's record without waiting three years, the Ninth District concluded that "the three-year time limit applies in a situation where a conviction occurs. By definition, the present case does not contain a conviction." Id. at 708-709.

{¶11} Instead, the *Fortado* court applied R.C. 2953.52(A)(1) which provides, "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 his official records in the case. * * * the application may be filed at any

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1. Pennycuff also relies on *State v. Smith*, Marion App. No. 9-04-05, 2004-Ohio-6668. While the *Smith* court did address the last sentence of R.C. 2951.041(E), it did so in reference to whether a trial court can sua sponte order records sealed without application by the offender. However, the court in *Smith* did not interpret R.C. 2951.041(E) specific to whether a three-year waiting period is applicable. Therefore, we will focus on *Fortado* because it is directly on point, and is in direct conflict with our disposition of Pennycuff's appeal.

2. At the time *Fortado* was decided, a slightly different version of R.C. 2951.041 existed. What is now Section (E) was numbered Section (H) and differed from the current version of (E) in that the last sentence of (H) read "and the court may order the expungement of records in the manner provided in sections 2953.31 to 2953.36 of the Revised Code," whereas the current version reads "and the court may order the sealing of records related to the offense in question in the manner provided in sections 2953.31 to 2953.36 of the Revised Code." Because expunge and seal are used interchangeably, the slightly different language between the two version does not impact our analysis or the way in which our interpretation differs from the *Fortado* court.

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." We disagree with the Ninth District, and find that the trial court did not err in denying Pennycuff's request to seal her record because she is not eligible until three years have passed once the charges were dismissed against her.

{¶12} Unlike the *Fortado* court, we read the last sentence of R.C. 2951.041(E) and apply its plain meaning to the case at bar. See *Campbell v. City of Carlisle*, 127 Ohio St.3d 275, 2010-Ohio-5707, ¶8, (stating that a court need not interpret a statute "when statutory language is plain and unambiguous and conveys a clear and definite meaning"). According to R.C. 2951.041(E), "the court may order the sealing of records related to the offense in question in the manner provided in sections 2953.31 to 2953.36 of the Revised Code."

{¶13} After applying the plain meaning of the statute to the case at bar, we find that the unambiguous language of R.C. 2951.041(E) requires a court to follow the provisions within R.C. 2953.31-2953.36, rather than R.C. 2953.52(A)(1). Had the legislators intended to permit the sealing of records immediately upon the successful completion of the intervention program and dismissal of the charges, the General Assembly would have said as much, or included section R.C. 2953.52(A)(1) in the last sentence of Section (E). However, it did not.

{¶14} Recently, the Fourth District Court of Appeals also considered an appellant's challenge to the trial court's decision denying an application to seal a criminal record after successful completion of the intervention in lieu of conviction program. In *State v. Mills*, Ross App. No. 10CA3144, 2011-Ohio-377, the Fourth District was asked to consider whether Mills was a first time offender, as defined in R.C. 2951.041. Although the court did not directly analyze the correct application of R.C. 2951.041(E),

the court dismissed Mills argument that the trial court should have applied R.C. 2953.52, "because R.C. 2951.041(E) expressly states that R.C. 2953.31-36 applies to individuals who have completed an intervention-in-lieu of conviction program." Id. at ¶5. The court went on to find that Mills was a first time offender, and "eligible to have his theft-of-drugs records sealed in the manner provided in sections 2953.31 to 2953.36 of the Revised Code." Id. at ¶11. Although it was not analyzing the applicability of R.C. 2951.041(E), the court, nevertheless, recognized that the plain language of R.C. 2951.041(E) directs a court to proceed with sealing the record in the manner of R.C. 2953.31-2953.36, rather than R.C. 2953.52.

{¶15} Given the *Fortado* court's contrary reading, we find it prudent to continue our reasoning and engage in statutory interpretation to support our analysis regarding the proper application of R.C. 2951.041. See *Washington Cty. Home v. Ohio Dept. of Health*, 178 Ohio App.3d 78, 2008-Ohio-4342, ¶29, (finding that "when a statute is subject to various interpretations, a court may invoke rules of statutory construction to arrive at legislative intent").

{¶16} "In cases of statutory construction, our paramount concern is the legislative intent in enacting the statute. To determine intent, we look to the language of the statute and the purpose that is to be accomplished by the statute * * *. Our role * * * is to evaluate a statute as a whole and give such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative. [S]tatutes may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act." *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, ¶20-21. (Internal citations omitted.)

{¶17} We find that the legislator's use of the word "may" in section (E), indicating that a court *may* order the sealing of records, means that a trial court has the discretion to permit sealing of the record, or may in its discretion deny an application to seal the record. However, the "may" does not permit the same trial court to forgo the provisions in R.C. 2953.31 to 2953.36 and elect, instead, to apply R.C. 2953.52(A)(1).

{¶18} Instead, the legislators stated specifically that if the trial court sealed the record, it was to proceed "in the manner provided in sections 2953.31 to 2953.36 of the Revised Code." These sections, as discussed above, set forth the procedure for sealing the record. However, no terms within these sections permit the immediate sealing of records upon dismissal of charges. R.C. 2953.31 defines applicable terms, including first offender. R.C. 2953.32, as quoted above, sets forth general provisions for sealing the record of a first time offender, and requires a one-year hold for misdemeanors, and a three-year waiting period for felonies. R.C. 2953.33 describes the restoration of rights upon sealing of a record, while R.C. 2953.34 states that other remedies are not precluded once sealing occurs, such as seeking appeal of the trial court's decision. R.C. 2953.36 lists the convictions for which sealing the record are precluded.

{¶19} We find the last section, R.C. 2953.36, especially helpful in our analysis. Unlike R.C. 2953.52(A)(1), which grants unconditional sealing of the record,[3] R.C. 2953.36 specifically lists several crimes for which sealing the record is prohibited. We therefore conclude that the legislature specifically drafted R.C. 2951.041(E) to direct a court to seal the record in only certain circumstances rather than in every instance in which a defendant is named in a dismissed complaint, indictment, or information. In reviewing the intervention-in-lieu-of-conviction statute in its entirety, we find that the

3. R.C. 2953.52 makes a single exception for instances in which a defendant faced multiple charges that had different dispositions, as stated in R.C. 2953.61.

General Assembly took caution to differentiate between sealing the record specific to the manner prescribed in R.C. 2953.31 to 2953.36 and the immediate and unconditional sealing under R.C. 2953.52(A)(1).

{¶20} If the legislature had intended that R.C. 2953.52(A)(1) apply, it could have referenced that section specifically, or even made a more general statement that a court could seal the record in accordance with any, or all, of the code sections that prescribe sealing the record. However, the legislature specifically directed a court to proceed "in the manner provided in sections 2953.31 to 2953.36 of the Revised Code."

{¶21} If we were to agree with the *Fortado* court that R.C. 2953.52(A)(1) applies, the last section of R.C. 2951.041(E) would become superfluous. According to the principles of intervention in lieu of conviction, the court dismisses the criminal charges against the defendant upon successful completion of the intervention program. If the legislature had intended to permit immediate and unconditional sealing, it would not have directed a court to proceed in the manner provided in R.C. 2953.31 to 2953.36 because a court would automatically apply R.C. 2953.52(A)(1) wherein any defendant named in a dismissed complaint is entitled to sealing upon the immediate dismissal of the complaint. In interpreting the final section of R.C. 2951.041(E) we are reminded that, "no part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, ¶20-21.

{¶22} Had the General Assembly made the last sentence of Section (E) more general to include any sealing section, then we might agree with the *Fortado* court that R.C. 2953.52(A)(1) is applicable to allow sealing without any waiting period. However, we conclude that the legislature specifically excluded R.C. 2953.52(A)(1) by limiting a

court to the manner provided within R.C. 2953.31 to 2953.36.

{¶23} Moreover, we see a statutory difference between a person who asks the court for intervention in lieu of conviction and a person who is found not guilty by a trier of fact, or otherwise has the charges against them dismissed by the state or because of the state's inability to convict. Unlike a defendant who maintains innocence throughout the proceedings until the charges are dismissed, defendants who seek intervention in lieu of conviction admit their guilt at the onset of proceedings. If a court determines that the defendant is eligible to participate in an intervention program, the defendant offers a guilty plea, and according to R.C. 2951.041(C), "the court *shall* accept the offender's plea of guilty," in addition to the defendant's waiver of speedy trial rights, grand jury indictment, and even arraignment. (Emphasis added.) If the court determines that a defendant who has been afforded the opportunity to seek intervention in lieu of conviction fails to comply with the terms and conditions imposed upon him, the court "shall enter a finding of guilty and shall impose an appropriate sanction under Chapter 2929 of the Revised Code." R.C. 2951.041(F).

{¶24} Unlike a person who has been acquitted by a trier of fact, or otherwise has had the charges dismissed because the state no longer seeks to, or cannot, convict them, a participant in the intervention-in-lieu-of-conviction program has acknowledged criminal responsibility for his or her conduct by pleading guilty, and hopes to exchange treatment for punishment. Stated more directly, participants have the pending charges dismissed because they successfully completed a treatment program, not because they were not guilty of the charges against them.

{¶25} By directing a court to apply the provisions in R.C. 2953.31 to 2953.36, the legislature codified the distinction between those who participate in the intervention in lieu of conviction program from those who have the charges against them dismissed for

other reasons. When considering the prospect of sealing a record specific to intervention in lieu of conviction, our conclusion that a court is limited to the manner provided in R.C. 2953.31 to 2953.36, rather than R.C. 2953.52(A)(1), comports with the plain language of the statute, as well as the legislation's purpose.[4]

{¶26} The decision to grant an application to seal records rests within the sound discretion of a trial court that must balance several factors in determining whether sealing the record is proper. Sealing the record "'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.

{¶27} Various reasons exist that may cause a trial court to determine that the public interest outweighs a participant's request to have their record sealed, and not every request to seal will be granted. However, should a trial court find that the applicant is eligible for sealing, it must adhere to the statutory provision set forth in R.C. 2951.041(E) and order the sealing of records in the manner provided in R.C. 2953.31 to 2953.36. Because Pennycuff requested that her felony charges be sealed, the trial court was correct in denying her motion because, and according to R.C. 2953.32, three years has not passed since the charges against her were dismissed.

{¶28} As stated throughout our analysis, we recognize that our holding is in direct conflict with the Ninth District. Therefore, we sua sponte certify a conflict between our holding in this case and that of the Ninth District Court of Appeals in *State v. Fortado* (1996), 108 Ohio App.3d 706. Section 3(B)(4), Article IV, of the Ohio Constitution vests in the courts of appeals the power to certify the record of a case to the Supreme Court

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4. We also note and agree with the dissent in *Fortado*, in which Judge Quillin stated, "when it comes to sealing criminal records, the legislature, in its wisdom, has determined to treat those who admit their guilt and request treatment in lieu of conviction differently from those who do not. There is simply no other reading of R.C. 2951.041(H). If R.C. 2951.041(H) doesn't apply in this case, it never applies in any case. And, if it never applies in any case, what is the purpose of the statute?" 108 Ohio App.3d at 709.

of Ohio for review and final determination "[w]henever the judges * * * find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state."

{¶29} Specifically, we certify the following question to the Supreme Court of Ohio:

{¶30} Must a trial court order the sealing of records in the manner provided in R.C. 2953.32, which requires a one-year waiting period for misdemeanors and a three-year waiting period for felonies, or may the trial court employ R.C. 2953.52(A)(1) and determine that a defendant who has successfully completed the intervention in lieu of conviction program is eligible to have their record sealed immediately upon successful completion of the program?

{¶31} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.