[Cite as *State v. D.L.*, 2015-Ohio-1664.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26394
	:	
v.	:	T.C. NO. 90CR2719
	:	
[D.L.]	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the _1st_ day of __May___, 2015.

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ANDREW T. FRENCH, Atty, Reg. No. 0069384, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

D.L., Dayton, Ohio
Defendant-Appellant

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DONOVAN, J.

{¶ 1} Defendant-appellant D.L., pro se, appeals from the trial court's judgment denying his application for sealing of the record of his 1991 misdemeanor conviction for assault. For the following reasons, the trial court's judgment is reversed, and the case is remanded to the trial court for further proceedings.

{¶ 2} In November 1990, D.L. was indicted on one count of patient abuse, in violation of R.C. 2903.34(A)(2), a fourth-degree felony. In July 1991, D.L. pled no contest to a reduced charge of assault, in violation of R.C. 2903.13(A), a misdemeanor of the first degree. The trial court sentenced D.L. to six months of confinement and ordered him to pay a $250 fine and court costs. D.L.'s imprisonment was suspended, and he was placed on "pay through status." On November 21, 1991, the trial court found that D.L. had abided by the court's orders and that all of his court costs and fines had been paid. The trial court ordered D.L. to be discharged and his case closed.

{¶ 3} On April 8, 2014, D.L. filed an application for sealing of the record of conviction concerning the 1991 assault. On April 22, 2014, the pretrial services department of the common pleas court prepared a report, indicating that D.L. was not eligible for having his record of conviction sealed, because his assault conviction fell within R.C. 2953.36(C) and he had two additional convictions for OVI; the report provided case numbers for a 1989 traffic case in Vandalia Municipal Court and a 1999 traffic case in Middletown Municipal Court. The report also included a draft order denying the application.

{¶ 4} On April 23, 2014, the judge to whom the case was assigned asked to be removed from the case because he had been a prosecutor at the time D.L. was prosecuted. The court's administrative judge granted the request for disqualification. Although the request for disqualification had already been granted, on April 25, 2014, a hearing on D.L.'s application was scheduled for May 8, 2014, before the original trial judge.

{¶ 5} On April 28, 2014, the case was reassigned to a different trial judge. The

same day, the newly-assigned trial judge denied D.L.'s application without a hearing, using the language of the draft order provided by the pretrial services department. The trial court provided two reasons for the denial: (1) the conviction was for an offense that was precluded from being sealed by R.C. 2953.36, and (2) D.L. had two convictions for OVI, one in Vandalia in 1989 and a second in Middletown in 1999,[1] in addition to the assault conviction. At the time the decision was rendered, the prosecutor had not filed any response to D.L.'s application.

{¶ 6} D.L. appeals from the denial of his application for sealing of the record of his 1991 conviction. His appellate brief does not contain an assignment of error, as required by App.R. 16(A)(3). However, we infer that he is arguing that the trial court erred in denying his application.

{¶ 7} Generally, we review the trial court's decision on an application to seal the record of conviction for an abuse of discretion. When the decision is based on an interpretation of the sealing of records statute, we review the trial court's interpretation without any deference to the trial court. *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, ¶ 6; *State v. Porter*, 2d Dist. Champaign No. 2012 CA 4, 2012-Ohio-5541, ¶ 8.

{¶ 8} The sealing of a criminal record is an "act of grace created by the state." *State v. Hamilton*, 75 Ohio St.3d 636, 639, 665 N.E.2d 669 (1996). Thus, a court is authorized to seal a record of conviction only when all of the eligibility requirements are satisfied. *E.g., State v. Radcliff*, 142 Ohio St.3d 78, 2015-Ohio-235, 28 N.E.3d 69; *State v. Boykin*, 138 Ohio St.3d 97, 2013-Ohio-4582, 4 N.E.3d 980, ¶ 11. Applications

[1] The pretrial services report does not contain a judgment entry of conviction for either case.

for sealing of a record of conviction are governed by R.C. 2953.31 through R.C. 2953.36.[2]

{¶ 9} As an initial matter, R.C. 2953.36 precludes the sealing of certain records of convictions, including "[c]onvictions of an offense of violence when the offense is a misdemeanor of the first degree or a felony and when the offense is not a violation of section 2917.03 [riot] of the Revised Code and is not a violation of section 2903.13 [assault], 2917.01 [inciting to violence], or 2917.31 [inducing panic] of the Revised Code that is a misdemeanor of the first degree." R.C. 2953.36(C). The trial court found that the sealing of D.L.'s 1991 assault conviction was precluded by this provision.

{¶ 10} D.L.'s 1991 conviction was for an offense of violence that was a first-degree misdemeanor. However, it was a violation of R.C. 2903.13 (assault) that was a first-degree misdemeanor, which is excluded from the offenses which are precluded. *See* R.C. 2953.36(C); *Dayton v. P.D.*, 149 Ohio App.3d 684, 2002-Ohio-5589, 778 N.E.2d 648, ¶ 6 (2d Dist.). In its appellate brief, the State acknowledges that the trial court erred in finding that R.C. 2953.36(C) applied. We agree with the State that R.C. 2953.36(C) did not prevent D.L. from seeking to seal his 1991 assault conviction, and the trial court erred in relying on that statute in denying D.L.'s application.

{¶ 11} The procedure for addressing an application for sealing a record of conviction is set forth in R.C. 2953.32. Upon the filing of an application for sealing of a record of conviction, the trial court "shall set a date for a hearing" and notify the prosecutor

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[2] Several of these statutes were amended, effective September 19, 2014, by 2014 S.B. 143. Because D.L. filed his application in April 2014, we apply the version in effect between September 28, 2012 and September 18, 2014. *See State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, paragraph two of the syllabus ("The statutory law in effect at the time of the filing of an R.C. 2953.32 application to seal a record of conviction is controlling.").

of the hearing. R.C. 2953.32(B); *see State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, 14 N.E.3d 989, ¶ 28 (noting, with reference to R.C. 2953.52, that the term "shall" generally "connotes a mandatory obligation"). The prosecutor may file objections with the court prior to the hearing. *Id.* In addition, the court must direct the probation department to "make inquiries and written reports as the court requires concerning the applicant." *Id*. R.C. 2953.32(C) then directs the trial court to do the following:

> (a) Determine whether the applicant is an eligible offender * * *.
>
> (b) Determine whether criminal proceedings are pending against the applicant;
>
> (c) If the applicant is an eligible offender who applies pursuant to division (A)(1) of this section, determine whether the applicant has been rehabilitated to the satisfaction of the court;
>
> (d) If the prosecutor has filed an objection in accordance with division (B) of this section, consider the reasons against granting the application specified by the prosecutor in the objection;
>
> (e) Weigh the interests of the applicant in having the records pertaining to the applicant's conviction sealed against the legitimate needs, if any, of the government to maintain those records.

{¶ 12} This court and other appellate districts have held that a trial court errs when it fails to conduct a hearing on an application for sealing a record of conviction, as required by R.C. 2953.32(B). *E.g*., *State v. Hutchen*, 191 Ohio App.3d 388, 2010-Ohio-6103, 946 N.E.2d 270, ¶ 9 (2d Dist.); *P.D*. at ¶ 6-8; *State v. Grillo*,

2015-Ohio-308, 27 N.E.3d 951 (5th Dist.) ("A trial court errs in ruling on a motion for expungement filed pursuant to R.C. 2953.32 without first holding a hearing."); *State v. Sass*, 11th Dist. Trumbull No. 2014-T-19, 2014-Ohio-4745, ¶ 17 ("when a request to seal the record is made, a hearing must be held by the trial court"); *State v. B.C.*, 8th Dist. Cuyahoga No. 100984, 2014-Ohio-4091; *State v. Wright*, 191 Ohio App.3d 647, 2010-Ohio-6259, 947 N.E.2d 246, ¶ 9 (3d Dist.) ("once an offender files an application to seal his records under R.C. 2953.32, a hearing is mandatory").

{¶ 13} Here, D.L. was never provided a hearing on his application. A hearing before the judge originally assigned to review his application was scheduled for May 8, 2014, but the case was reassigned to a different judge before that hearing. The newly-assigned trial judge did not set a date for a hearing and did not notify the prosecutor of the date set for the hearing, as required by R.C. 2953.32(B). Accordingly, the trial court erred when it ruled on D.L.'s application without first holding a hearing.

{¶ 14} The State asserts that the trial court properly overruled D.L.'s application for sealing of his record of conviction because he was not an "eligible offender." At the time D.L. filed his application, R.C. 2953.31(A) defined an "eligible offender" as "anyone who has been convicted of an offense in this state or any other jurisdiction and 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 in this state or any other jurisdiction."

{¶ 15} The pretrial services report provided to the trial court indicated that D.L. had two OVI convictions. However, D.L. was not informed of the information in the pretrial services report, and in the absence of a hearing, he had no opportunity to object to

and correct, if necessary, any information contained therein. Nothing in D.L.'s filings mentions OVI convictions, and the trial court could not reasonably find that he conceded that he has two OVI convictions. Contrast *State v. Clark*, 4th Dist. Athens No. 11CA8, 2011-Ohio-6354 (trial court did not err in failing to hold a hearing where petitioner conceded that he had a prior conviction and there were no factual questions related to petitioner's first-offender status). Accordingly, in the absence of a hearing, the trial court erred in relying on the pretrial services report regarding the existence of additional convictions and denying D.L.'s application.

{¶ 16} The trial court's judgment is reversed, and the matter is remanded to the trial court for further proceedings.

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HALL, J. and WELBAUM, J., concur.

Copies mailed to:

Andrew T. French
D.L.
Hon. Steven K. Dankof