[Cite as *State v. Ninness*, 2013-Ohio-974.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio — Court of Appeals No. OT-11-024

Appellee — Trial Court No. 06-CR-146

v.

Sally Ninness — **DECISION AND JUDGMENT**

Appellant — Decided: March 15, 2013

* * * * *

Mark Mulligan, Ottawa County Prosecuting Attorney, and
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellee.

Loretta A. Riddle., for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} Defendant-appellant, Sally Ninness, appeals a judgment of the Ottawa County Common Pleas Court denying her application to seal the record of her convictions for felony drug possession and misdemeanor child endangering.

I. Record Below

{¶ 2} The pertinent facts are not disputed.

{¶ 3} On November 16, 2006, Ninness entered guilty pleas to two counts of a five-count indictment that arose from an incident in which she operated a vehicle while under the influence of a drug of abuse, in violation of R.C. 4511.19. The counts to which she pled guilty were cocaine possession, a fifth-degree felony in violation of R.C. 2925.11(A), and child endangering, a first-degree misdemeanor in violation of R.C. 2919. 22 (C)(1). The latter charge was based upon the fact that police found a three-year-old child inside the car Ninness was driving. That count specifically alleged that "one or more children under eighteen years of age" were in the vehicle when she violated R.C. 4511.19.[1] After fully advising Ninness of the meaning and consequences of pleading guilty, the court accepted her pleas to these counts.[2] The remaining counts were dismissed and she was later sentenced to three years of community control sanctions. By

[1] R.C. 2919.22(C)(1) states, in relevant part: "No person shall operate a vehicle, streetcar, or trackless trolley within this state in violation of division (A) of section 4511.19 of the Revised Code *when one or more children under eighteen years of age* are in the vehicle[.] * * *. Notwithstanding any other provision of law, a person may be convicted at the same trial or proceeding of a violation of this division and a violation of division (A) of section 4511.19 of the Revised Code that constitutes the basis of the charge of the violation of this division." (Emphasis added).

[2] We have reviewed the entirety of the transcript of the November 16, 2006 plea hearing even though nothing relating to her guilty pleas has been raised as error in this appeal. The trial court's inquiries at that hearing, Ninness' responses, and the court's findings after questioning her further, satisfy us that her pleas were made knowingly and with an understanding of the consequences.

April 2008, however, Ninness had successfully completed the terms of those sanctions, and the court approved early termination.

{¶ 4} In May 2011, Ninness filed an application to seal the record of her convictions, which the state opposed. A hearing was held on June 27, 2011, and after further argument, the court denied her application, stating:

{¶ 5} "[A]s to the child endangering charge, I think by virtue of it being a child endangering charge, it is inherent that there was a child who was a victim of that offense. So I am * * * without authority by the [expungement] statute to grant the relief you request[.]"

{¶ 6} This appeal followed. The sole error assigned for our review states:

> The trial court committed prejudicial error and abused its discretion by denying a motion to seal [a] conviction that includes a child endangering conviction when it determines that the child was a victim by the mere virtue of the charge.

II. Applicable Law

(A) Expungement Procedure

{¶ 7} Ohio's expungement statutes, R.C. 2953.31 et seq., permit a first-time offender to apply to the sentencing court for an order to seal the record of his or her conviction. The procedure for sealing a conviction record has been well-summarized by the Tenth Appellate District:

> Expungement is a privilege, not a right. * * * Expungement proceedings are not adversarial because the primary purpose of an expungement hearing is to gather information. * * * The rules of evidence do not apply in an expungement hearing. Expungement may be granted pursuant to statute *only* when all of the requirements for eligibility are met.
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> To invoke the jurisdiction of the trial court in proceedings brought under R.C. 2953.31 et seq., the applicant must be eligible for expungement and the offense must be one that is subject to expungement. To be eligible, an applicant must be a "first offender" as defined in R.C. 2953.31(A). Moreover, the offense must be subject to expungement *and not excluded by R.C. 2953 .36.* Additionally, the application must not be filed until the time set by R.C. 2953.32(A)(1) has expired. *Unless the application meets all of these requirements, the trial court lacks jurisdiction to grant an expungement.* (Citations omitted; emphasis added). *State v. Reed*, 10th Dist. No. 05AP-335, 2005-Ohio-6251, ¶ 7-8.

(B) Standard of Review

{¶ 8} Appellate review of the lower court's treatment of an application for expungement is subject to one of two standards depending on how the application was handled. At least presumptively, a "decision to grant or deny a request to seal records is subject to an abuse-of-discretion standard of review." *In re Application of Pariag*, 10th Dist. No. 11AP-569, 2012-Ohio1376, ¶ 6. However, whether the court correctly applied

or interpreted a provision in the expungment statute is subject to *de novo* review. *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, ¶ 6-7. This is because the matter of expungement, at least at the outset, is jurisdictional. *State v. Ryback*, 11th Dist. No.2011-L-084, 2012-Ohio-1791, ¶ 13-14. More specifically, whether any of the exclusions under R.C. 2953.36 apply to the applicant's conviction is purely a question of law. *Futrall*; *State v. Ricks*, 194 Ohio App. 3d 511, 2011-Ohio-3866, 957 N.E.2d 63, ¶ 6 (2d Dist.). Therefore, because the success or failure of Ninness' expungment application is determined by an interpretation of R.C. 2953.36, de novo review is appropriate.

III. Analysis

{¶ 9} R.C. 2953.36 presently identifies several types of convictions and one bail forfeiture for which expungement is disallowed.[3] Among these, subsection (F) excludes "[c]onvictions 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*, except for convictions under section 2919.21 of the Revised Code." (Emphasis added.)

{¶ 10} Counsel for Ninness urges that the critical issue here is the meaning of the word "victim" in R.C. 2953.36(F), which the expungement statute does not define. She argues that the trial court erred in assuming the young child "was a victim by the mere virtue of the [endangering] charge" itself, without some sort of further evidentiary finding

[3] R.C. 2953.36 has been amended over the years. Hence, "[t]he 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." *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, paragraph two of the syllabus.

in that regard. The child, she maintains, was never treated like a "crime victim" in relation to the charged offenses – in that Ninness was not under any restraining or similar "no contact" order with respect to the child, nor was the child injured when she committed her offenses. With less cogency, and without citing any decisional authority, counsel insists that because other sections of the Revised Code do define the term "victim" for certain purposes, such as R.C. 2969.11(B) (crime victims recovery fund) and R.C. 2930.01(H) (rights of crime victims), it was necessary, before ruling on her application, for the court to determine whether the child was truly a "victim." The state responds, first, that those sections have no relevance because their definitions are explicitly limited to their respective chapters, and, second, that any alleged definitional issue is a *nonissue* due to Ninness' guilty pleas.

{¶ 11} We agree with state. A wild chase through the bramble bushes of the Revised Code, in pursuit of some comparative meaning for the allegedly elusive term "victim," is unnecessary for three reasons.

{¶ 12} First, the ancient doctrine of *noscitur a sociis* guides us here: the meaning of a common but undefined word may be derived from the words that immediately accompany it or are contextually associated with it. *Compare Inland Prods., Inc. v. Columbus*, 193 Ohio App.3d 740, 2011-Ohio-2046, 954 N.E.2d 141 (10th Dist.), ¶ 25. In R.C. 2953.36 (F), the words immediately after "victim" refer to a felony or misdemeanor offense involving someone under the age of 18. And it should be a common sense inference that R.C. 2919.22(C)(1) already specifies who the "victim" of the endangering

offense is even without using that term (i.e., "one or more children under 18 years of age").

{¶ 13} Second, nothing in R.C. 2953.36(F) requires inquiry by the court – let alone a series of judicial findings – into "who the victim was," or "what the victim [thought] about the [guilty] plea," nor, as Ninness' counsel also suggests, is the receipt of a victim-impact statement necessary before the court may rule on an expungment application. Those unsettling invitations would have us read into subsection (F) a set of extraneous requirements not even remotely suggested by its language. Indeed, doing so would defeat the "primary purpose" of the expungement hearing which is *informational*, not adversarial. *State v. Simon*, 87 Ohio St. 3d 531, 533, 721 N.E.2d 1041 (2000). The state has no burden in this process beyond opposing an expungement application where appropriate reason exists. *State v. Menzie*, 10th Dist. No.06AP-384, 2006-Ohio-6990, ¶ 7. For that purpose, it is sufficient under R.C. 2953.36(F) if the court receives information that the core act on which the conviction is based involved as a putative victim a person under 18-years-old. That a three-year-old child was involved in Ninness' offenses was never disputed below.[4]

[4] In *State v. M.R.*, 8th Dist. No. 94591, 2010-Ohio-6025, the Eight District rejected virtually the identical argument Ninness makes in this appeal. The expungement applicant there pled guilty to five misdemeanor charges of attempted pandering of obscenity, in violation of R.C. 2923.02 and 2907.32. These charges arose from certain pictures the applicant had taken of his three-year-old child. When he later moved to have the conviction record sealed, the state objected based on R.C. 2953.36(F). Without explanation the trial court granted the application and the state appealed, arguing that expungment should have been denied because *the act* on which the convictions were based "involved a person under the age of eighteen." *Id.* at ¶ 11-12. The applicant

{¶ 14} Finally, Ninness' guilty plea to child endangering is itself dispositive of the expungment issue. As to the general effect of a defendant's plea of guilty to a charged offense, we have previously stated:

{¶ 15} "Brimacombe's plea of guilty operated as a *judicial admission of factual guilt*. * * * As a complete admission of guilt, it embraced not only the discrete acts alleged, but the totality of the substantive conduct involved in committing the crime." (Citations omitted; emphasis added). *State v. Brimacombe*, 195 Ohio App.3d 524, 2011-Ohio-5032, 960 N.E.2d 1042, ¶ 16 (6th Dist.).

{¶ 16} Regarding R.C. 2953.36(F) and the specific charge of child-endangering, the Tenth District in *Reed* held that the "[defendant's] guilty plea to Count 3 of the indictment [felony child endangering] was *a judicial admission* that he had committed a felony offense and that *the victim was under 18 years of age at the time of the offense*." *See Reed*, 10th Dist. No. 05AP-335, 2005-Ohio-6251, at ¶ 16-17, citing *State v. Guyton*, 18 Ohio App.3d 101, 481 N.E.2d 650 (9th Dist.1984). *See also Menzie, supra,* 2006-Ohio-6990 at ¶ 11-13 (expungement application denied: "appellant's plea of guilty [to

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responded that the elements of his pandering charges "did not involve a minor," "the child was not a victim," and "there is no child/victim in this case." Indeed, neither the term "minor" nor "victim" is found in R.C. 2907.32, nor was the applicant charged with the separate offense of pandering obscenity involving a minor under R.C. 2907.321. In reversing the expungment order nonetheless, the Eighth District looked beyond this façade and applied the plain language of R.C. 2953.36(F) to hold that the applicant's "crime *involved* the distribution of pictures of a child *who was under the age of 18*" and, without dispute, the "convictions all *involved* his three-year-old child." (Emphasis added.) Thus, the mere involvement of a young child in the behavior which led to the applicant's convictions, was deemed sufficient to trigger the exemption in R.C. 2953.36(F). *Id.* at ¶ 23-24.

disseminating matter harmful to juveniles] operates as a judicial admission that *the victim of his offense was a 'juvenile,'* defined for purposes of R.C. 2953.31 et seq. as, 'an unmarried person under the age of eighteen.' R.C.2907.01(I)." Emphasis added.)

{¶ 17} Similarly, Ninness' guilty plea to child endangering completely admitted the *factual truth* of all its constituent elements, including that "one or more children under eighteen years of age [were] in the vehicle" at the time she offended. Having judicially admitted that element, she thereby rendered her conviction ineligible for expungement under R.C. 2953.36(F) and, in turn, left the trial court without jurisdiction to grant the requested relief. *Menzie*, *supra*, at ¶ 14-15.

{¶ 18} As a final matter, the state is also correct in maintaining that because R.C.2953.36(F) exempts the child-endangering conviction from expungement, it also prevents the sealing of Ninness' drug conviction because both convictions stemmed from the same indictment with the same case number (06-CR-146). *See State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497.[5]

{¶ 19} Accordingly, the sole assigned error is not well-taken.

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[5] In *Futrall* the Ohio Supreme Court held:

> [W]hen an applicant with multiple convictions under one case number moves to seal his or her criminal record in that case pursuant to R.C. 2953.32 and one of those convictions is exempt from sealing pursuant to R.C. 2953.36, the trial court may not seal the remaining convictions. *Id.* at ¶ 21.

IV. Conclusion

{¶ 20} On consideration whereof, the judgment of the Ottawa County Common Pleas Court is hereby affirmed. Pursuant to App. R.24(A)(4), costs are assessed against appellant.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE