

[Cite as *State v. Davis*, 2005-Ohio-188.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84470

STATE OF OHIO

Plaintiff-appellant

JOURNAL ENTRY

vs.

AND

ANTRANENE L. DAVIS

OPINION

Defendant-appellee

DATE OF ANNOUNCEMENT
OF DECISION:

JANUARY 20, 2005

CHARACTER OF PROCEEDING:

Criminal appeal from Common
Pleas Court, Case No. CR-359383

JUDGMENT:

Affirmed.

DATE OF JOURNALIZATION:

APPEARANCES:

For plaintiff-appellant:

WILLIAM D. MASON, ESQ.
CUYAHOGA COUNTY PROSECUTOR
DIANE SMILANICK, ESQ.
Assistant County Prosecutor
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

For defendant-appellee:

ANTRANENE L. DAVIS, PRO SE
4424 East 158th Street
Cleveland, Ohio 44128

KARPINSKI, J.:

{¶ 1} Plaintiff, the State of Ohio, appeals the trial court's
granting defendant's motion for expungement.

{¶ 2} In May 1998, defendant pled guilty to an amended indictment¹ charging her with one count of theft in an amount less than \$500.00, in violation of R.C. 2913.02. Defendant was sentenced to a term of sixty days incarceration. Execution of defendant's sentence was suspended and she was ordered to serve six months of inactive probation. Defendant was further ordered to pay all court costs.

{¶ 3} In July 2003, defendant filed an application for sealing her record of conviction. The state opposed the application. Following a hearing on defendant's motion, the trial court granted defendant's request for expungement. The state filed this timely appeal² in which it asserts one assignment of error:

THE TRIAL COURT ERRED IN GRANTING THE APPELLEE'S REQUEST FOR SEALING OF HER RECORD BECAUSE SHE WAS NOT A FIRST OFFENDER PURSUANT TO R.C. 2953.31.

{¶ 4} The state argues that the trial court erred in granting defendant's request for expungement, because she is not a "first offender" as defined in R.C. 2953.31(A).

{¶ 5} Pursuant to R.C. 2953.32³, a defendant is entitled to have a record of conviction sealed only if she is a first offender.⁴

¹In December 1997, defendant was originally indicted on one count of theft in an amount exceeding \$500.00 but less than \$5000.00, in violation of R.C. 2913.02.

²Defendant has not filed an appellate brief.

³The statute, in pertinent part, describes the procedure for sealing a defendant's record of conviction:

(A)(1) Except as provided in section 2953.61 of the Revised Code, a first offender may apply to the sentencing court if convicted in this state *** for the sealing of the conviction record. 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.

(B) Upon the filing of an application under this section, the court shall set a date for a hearing and shall notify the prosecutor for the case of the hearing on the application. The prosecutor may object to the granting of the application by filing an objection with the court prior to the date set for the hearing. The prosecutor shall specify in the objection the reasons for believing a denial of the application is justified.

(C)(1) The court shall do each of the following:

(a) Determine whether the applicant is a first offender[;]

(b) Determine whether criminal proceedings are pending against the applicant;

(c) If the applicant is a first 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.

⁴Even though all the statutory requirements for expungement must be met, we confine our review to the sole issue of whether defendant is a "first offender," since this is the only determination being challenged by plaintiff in this appeal.

{¶ 6} The term "first offender" is defined in R.C. 2953.31.

That definition is as follows:

"(A) "First offender" means anyone 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 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.

{¶ 7} For purposes of, and except as otherwise provided in, this division, a conviction for a minor misdemeanor, a conviction for a violation of any section in Chapter 4511., 4513., or 4549. of the Revised Code, or a conviction for a violation of a municipal ordinance that is substantially similar to any section in those chapters, is not a previous or subsequent conviction. A conviction for a violation of section 4511.19, 4511.192 [4511.19.2], 4511.251 [4511.25.1], 4549.02, 4549.021 [4549.02.1], 4549.03, 4549.042 [4549.04.2], or 4549.07, or sections 4549.41 to 4549.46 of the Revised Code, or a conviction for a violation of a municipal ordinance that is substantially similar to any of those sections, shall be considered a previous or subsequent conviction.

{¶ 8} "Whether an applicant is a first offender is a question of law to be determined de novo by a reviewing court. *** However, whether the facts in any case meet the definition of first offender is, in many cases, a question of fact." (Citations omitted), *State v. Black*, Franklin App. No. 03AP-862, 2004-Ohio-5258, ¶7. On appeal, this court reviews a trial court's decision on an

application for expungement under an abuse of discretion standard.

State v. Hilbert (2001), 145 Ohio App.3d 824, 764 N.E.2d 1064.

{¶ 9} During defendant's expungement hearing, the state argued that before her conviction in this case, defendant was convicted in two prior cases: a 1991 petty theft conviction from Lyndhurst, Ohio and another petty theft conviction from Cleveland Hts., Ohio. During the hearing, the following exchange occurred:

{¶ 10} MS. SMILANICK: Yes, your Honor. The State's objecting because in order to have an expungement of an offense that is legally expungible, one has to be a first offender under Code Section 2953.31(A), and to be a first offender one cannot have a previous or subsequent conviction to the offense one wishes to be expunged. And per the abridged expungement investigation report that the Probation office did on Miss Davis, two other convictions, one for petty theft out of Cleveland Heights, and another theft conviction under Cleveland -- out of Cleveland Heights appear. They are convictions, and this would render Miss Davis not a first offender and not, therefore, eligible for an expungement.

{¶ 11} THE COURT: All right. And, Miss Davis, what is your response to that?

{¶ 12} THE DEFENDANT: I don't know. I only know of one, the petty one, but I don't know what the other one is about.

{¶ 13} THE COURT: There's a petty theft from 1991 in Cleveland Heights?

{¶ 14} THE DEFENDANT: Yeah, that's the only one and then the one - -

{¶ 15} THE COURT: And in March of 1991 what happened? You were convicted?

{¶ 16} THE DEFENDANT: I think that's the same thing.

{¶ 17} THE COURT: And you were just fined?

{¶ 18} THE DEFENDANT: Yes.

{¶ 19} THE COURT: And what happened in 1993?

{¶ 20} THE DEFENDANT: That's the one I'm here for now.

{¶ 21} THE COURT: Oh, well, no. This says Garfield Heights. That was the Cleveland Heights' one.

{¶ 22} THE DEFENDANT: No. The Garfield Heights' they transferred to this one.

{¶ 23} THE COURT: But the second one I'm talking about from '93 is from Cleveland Heights.

{¶ 24} THE DEFENDANT: That should have been '91.

{¶ 25} THE COURT: You think you only have one prior one?

{¶ 26} THE DEFENDANT: Garfield Heights is the same one that I did here.

{¶ 27} MS. SMILANICK: It's - -

{¶ 28} THE DEFENDANT: That's the same thing.

{¶ 29} MS. SMILANICK: Well, even if that's true, your Honor, the '91 is still considered a previous conviction.

{¶ 30} THE COURT: Even if the prior was a minor misdemeanor?

{¶ 31} MS. SMILANICK: Pardon?

{¶ 32} THE COURT: Even if the prior one was a minor misdemeanor?

{¶ 33} MS. SMILANICK: I called up. It's not - - a petty theft is not considered a minor misdemeanor there. If it was a minor misdemeanor, that would be okay.

{¶ 34} THE COURT: So it wasn't a minor misdemeanor, huh?

{¶ 35} MS. SMILANICK: No.

{¶ 36} THE COURT: Do you know that to be true?

{¶ 37} THE DEFENDANT: No.

{¶ 38} MS. SMILANICK: And it also appears on her criminal LEADS, from that date, a conviction, and I can introduce this into evidence, your Honor, if you wish to see this.

{¶ 39} THE COURT: Yeah.

(Thereupon State's Exhibit 1 was marked for identification.)

{¶ 40} THE COURT: This proof of the prior conviction is Cleveland Heights. It just states petty theft M1. Is that the one you're saying they consider that a misdemeanor?

{¶ 41} MS. SMILANICK: Yes.

{¶ 42} THE COURT: Do you know anything about that?

{¶ 43} THE DEFENDANT: No.

{¶ 44} THE COURT: Well, what I'll allow you to do is I will continue this for a date for you to go figure out and get a journal entry of that to see if you can show that it was a minor misdemeanor, but the law of Ohio is if you have a prior conviction you can't get an expungement.

{¶ 45} THE DEFENDANT: Okay.

{¶ 46} THE COURT: Unless it's a minor misdemeanor. So let me give you a date to come back. There may be another one of these for you to get an opportunity for you to look at that.

{¶ 47} THE DEFENDANT: Okay.

{¶ 48} THE COURT: Let my [sic] give you this written down. Can you give me another date to continue some of these and we'll just do them on the same day that's convenient to Miss Smilanick and me. 1991, it looks like Cleveland Heights. Does it give us a case number? Is there a number on this, Diane, or is it just the arrest number?

{¶ 49} MS. SMILANICK: You mean a code section, your Honor?

{¶ 50} THE COURT: No. For the conviction. There's probably no case number. It just says March 19, '91.

{¶ 51} MS. SMILANICK: Wait a minute. Let me look at the LEADS here. Petty theft.

{¶ 52} THE COURT: It says Lyndhurst Muni Court.

{¶ 53} MS. SMILANICK: That's even another one.

{¶ 54} THE COURT: March 5th of '91 out of Lyndhurst. Did you have one out of Lyndhurst?

{¶ 55} THE DEFENDANT: No.

{¶ 56} MS. SMILANICK: So that's another one.

{¶ 57} THE COURT: And then this other one is - -

{¶ 58} MS. SMILANICK: Apparently these other thefts aren't even showing up.

{¶ 59} THE COURT: - - Cleveland Heights. Although I don't know if that one out of Lyndhurst was an actual conviction.

{¶ 60} MS. SMILANICK: It says convicted, your Honor, petty theft under the judicial - -

{¶ 61} THE COURT: Okay. I see that. Then where is the conviction for the Cleveland Heights' one?

{¶ 62} MS. SMILANICK: That's above it. Arrested, Cleveland Heights, petty theft, but it says Lyndhurst.

{¶ 63} THE COURT: Yeah. I think it's the same one. Anyways, I'll allow you to check this out and come back, okay?

So it's Cleveland Heights, 1991, conviction for theft, petty theft. What you need to do is go to Cleveland Heights Muni Court and get a journal entry, a certified journal entry of that conviction.

{¶ 64} THE DEFENDANT: Okay.

{¶ 65} THE COURT: And bring it back on the date that my bailiff gives you.

{¶ 66} THE DEFENDANT: Okay.

{¶ 67} THE COURT: I'll write it down. And you believe that that's the only other conviction that you have?

{¶ 68} THE DEFENDANT: Yes.

{¶ 69} THE COURT: You don't have a copy of your brief in opposition, do you?

{¶ 70} MS. SMILANICK: No, but - -

{¶ 71} THE COURT: I have to keep mine then.

{¶ 72} MS. SMILANICK: No, I don't have a copy.

{¶ 73} THE COURT: Do you want me to keep this exhibit? So, continued - - I'm just going to give you a date to verify prior conviction and - - do you have a date? March 4th or March 11th, Diane?

{¶ 74} MS. SMILANICK: Are those nonFridays?

{¶ 75} THE COURT: They are Thursdays.

{¶ 76} MS. SMILANICK: Perfect. March 4th is fine.

{¶ 77} THE COURT: Okay.

{¶ 78} MS. SMILANICK: What time, please?

{¶ 79} THE COURT: March 4th. Continued till March 4th. Is that all right with you?

{¶ 80} THE DEFENDANT: Yes.

{¶ 81} THE COURT: What time is it set for, two? 2:00.

{¶ 82} MS. SMILANICK: Fine, thank you.

{¶ 83} THE COURT: And then get a copy of that and we'll see if we can resolve it for you. All right?

{¶ 84} THE DEFENDANT: Okay.

Tr. 4-10.

{¶ 85} Even though State's Exhibit 1, purportedly a record of defendant's prior misdemeanor conviction in Cleveland Hts., was marked for identification during the hearing, it was not submitted into evidence and it is not, therefore, part of the record in this case. We further note that during the hearing, defendant admitted she had previously been convicted of a petty theft offense in Cleveland Hts. She maintained, however, that the offense was only a minor misdemeanor. The prosecutor disagreed. On this

record, the only issue is whether the trial court erred in granting defendant's application for expungement.

{¶ 86} The trial court's docket shows that the court continued the expungement hearing to March 4, 2004, so that *defendant* could produce a certified copy of her prior conviction from Cleveland Hts. Contrary to the trial court's ruling, however, it is the state, not defendant, which bears the burden of proving that a defendant is not a first offender. *State v. Patterson* (1998), 128 Ohio App.3d 174, 714 N.E.2d 409. When the state does not meet its burden, "all reasonable presumptions consistent with the record will be indulged in favor of the validity of the judgment under review and of the regularity and legality of the proceeding below." *Id.*, at 178, citing *In re Sublett* (1959), 169 Ohio St. 19, 20, 157 N.E.2d 324.

{¶ 87} Neither the docket nor the record in this case confirms that there was a March 4th hearing⁵ or that defendant had a prior conviction other than a minor misdemeanor in Cleveland Heights. On March 19, 2004, the court granted defendant's motion for expungement. In the Judgment of Expungement of Conviction, the court noted that it had relied on a probation report from the County Probation Department and that it "has considered the evidence and the reasons against granting the applicant specified in the objection, if any, filed by the Prosecutor." Journal Entry,

⁵The record does not include a transcript from the March 4th hearing.

dated March 19, 2004. The record, however, does not include the probation report.

{¶ 88} During the expungement hearing, the state maintained that defendant's prior conviction was not a minor misdemeanor. At all times relevant hereto, the state bears the burden of proving the degree of that offense in order to establish that defendant is not a first offender. The state, however, has altogether failed to meet its burden of proof.

{¶ 89} We reject the state's reliance on *State v. Thomas* (1979), 64 Ohio App.2d 141, 411 N.E.2d 845. *Thomas* is inapplicable in this case because it was decided under the unamended version of R.C. 2953.31 et seq. Before the statute was amended in 1984, it did not permit expungement of a defendant's record of conviction if the defendant had been previously convicted of any offense.⁶ See, *State v. Yackley* (1989), 43 Ohio St.3d 181, 539 N.E.2d 1118. After the amendment, a defendant previously convicted of a minor misdemeanor was eligible for expungement.

{¶ 90} In the case at bar, we note the state has deleted the pertinent language in the amended version of the statute, namely, " *** a conviction for a minor misdemeanor *** is not a previous or subsequent conviction." We further observe that during the expungement hearing, the state conceded that defendant would be

⁶Before the 1984 amendment, the statute, in part, defined a "first offender" as "*** anyone who has once been convicted of an offense in this state or any other jurisdiction. ***"

eligible for expungement if she had a prior minor misdemeanor conviction.

{¶ 91} We also reject the state's reliance on *Thomas* for the following proposition:

{¶ 92} If, at anytime subsequent to the granting of expungement, there is brought to the court's attention evidence demonstrating that appellant's status was not that of a "first offender" at the time of application, then the expungement is void and must be vacated, the court having lacked jurisdiction to grant the expungement in the first place.

{¶ 93} *Id.*, at 145. Nothing in our record demonstrates that defendant was not a first offender. We acknowledge the state's motion to supplement the record with purported proof of defendant's prior conviction from Lyndhurst, Ohio. The state, however, filed that motion in the trial court **after** it had filed its notice of appeal. Even though the court granted that motion, that ruling was nonetheless a nullity because the trial court was divested of jurisdiction once the notice of appeal was filed. *Majnaric v. Majnaric* (1975), 46 Ohio App.2d 157. More importantly, the motion to supplement was never included in the papers that are part of this appeal. Nor has the state asked this court to include them.

{¶ 94} On the record before us, there is no definitive evidence, either prior to or subsequent to the trial court's granting of defendant's motion for expungement, that she was not a first offender. Accordingly, pursuant to the presumption of regularity

afforded to the trial court's decision, we presume that the court determined that defendant's 1991 petty theft conviction did not constitute a previous conviction that would preclude expungement under the statute. Accordingly, we affirm the judgment of the trial court and overrule the state's sole assignment of error.

It is ordered that appellee recover of appellant her costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, P.J., AND

JAMES D. SWEENEY, J.*, CONCUR.

DIANE KARPINSKI
JUDGE

*SITTING BY ASSIGNMENT: JUDGE JAMES D. SWEENEY, RETIRED, OF THE EIGHTH DISTRICT COURT OF APPEALS.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the

court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).