

[Cite as *State v. Kraushaar*, 2009-Ohio-3072.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91765

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

RUTH KRAUSHAAR

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-409292

BEFORE: Gallagher, P.J., Rocco, J., and Blackmon, J.

RELEASED: June 25, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

{¶ 1} Plaintiff-appellant, the state of Ohio, appeals the decision of the Cuyahoga County Court of Common Pleas granting defendant-appellee, Ruth Kraushaar's application for sealing of the record. For the reasons that follow, we reverse and remand.

{¶ 2} In 2001, Kraushaar was charged with two counts of drug possession and one count of possession of criminal tools. She pled guilty to two counts of attempted possession of drugs, as amended, and the possession of criminal tools was dismissed.

{¶ 3} In 2008, Kraushaar filed an application for sealing of the record. The state filed a brief in opposition, arguing that Kraushaar was ineligible because she was not a first offender as defined by R.C. 2953.31(A).

{¶ 4} The trial court held a hearing. The state argued that Kraushaar had three other convictions, which included one minor misdemeanor and two misdemeanors of the fourth degree, and thus she was not a first offender.

{¶ 5} Kraushaar argued that she did qualify for expungement because one conviction was a minor misdemeanor and the other two convictions were uncounseled.

{¶ 6} The trial court ruled that Kraushaar was not a first offender; however, because it found Kraushaar's arguments compelling regarding the uncounseled pleas, the court granted Kraushaar's motion. This appeal follows. The state's sole assignment of error states the following: "The trial court erred in granting the

appellee's request for sealing of the record because appellee was not a first offender pursuant to R.C. 2953.31."

{¶ 7} A first offender may apply to seal the record of conviction. R.C. 2953.32(A)(1). Upon application, the court shall set a date for hearing and notify the prosecutor; the state may object. R.C. 2953.32(B). Whether an applicant is a first offender is a question of law to be determined de novo by a reviewing court. *State v. Gerber*, Cuyahoga App. No. 87351, 2006-Ohio-5328; *State v. Krantz*, Cuyahoga App. No. 82439, 2003-Ohio-4568; *State v. McGinnis* (1993), 90 Ohio App.3d 479, 629 N.E.2d 1084.

{¶ 8} Neither the United States Constitution nor the Ohio Constitution endows one convicted of a crime with a substantive right to have the record of a conviction expunged. *Bird v. Summit Cty.* (C.A.6, 1984), 730 F.2d 442, 444. Instead, expungement is an act of grace created by the state. *State v. Hamilton*, 75 Ohio St.3d 636, 639-640, 1996-Ohio-440, 665 N.E.2d 669. Moreover, the government possesses a substantial interest in ensuring that expungement is granted only to those who are eligible. *Id.* Expungement eliminates the general public's access to conviction information. *Id.* Accordingly, expungement should be granted only when an applicant meets all the requirements for eligibility set forth in R.C. 2953.32. *Id.*

{¶ 9} Pursuant to R.C. 2953.32(C), before ruling on a motion to seal a record of conviction, the trial court must determine whether the applicant is a first offender, whether criminal proceedings are pending against the applicant, and whether the applicant has been rehabilitated to the satisfaction of the court; consider objections

raised by the prosecutor; and 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. *Krantz*, supra.

{¶ 10} The statutory requirements are independent of one another and are in the conjunctive. *Id.* Therefore, if the movant fails to satisfy one of these requirements, the trial court must deny the motion. *Id.* Moreover, the applicant's status as a first offender is a prerequisite to the trial court's jurisdiction over an application to seal records. *Id.*, citing *State v. Saltzer* (1985), 20 Ohio App.3d 277, 278, 485 N.E.2d 831.

{¶ 11} In this case, the state argues that Kraushaar is not a first offender because she had two prior convictions that were misdemeanors of the fourth degree and thus she is ineligible for expungement. The state contends that uncounseled misdemeanor convictions constitute prior offenses for purposes of R.C. 2953.31(A). We agree.

{¶ 12} This court has previously held that "[a] prior uncounseled misdemeanor conviction constitutes a prior offense for purposes of R.C. 2953.31(A) so as to deny [defendant] the benefit of first offender status." *State v. Oskay* (Feb. 10, 1994), Cuyahoga App. No. 65679, citing *State v. Alaeldin* (Feb. 11, 1993), Cuyahoga App. No. 64100; *State v. Ware* (Dec. 27, 1990), Cuyahoga App. No. 59867.

{¶ 13} While there are a series of cases that hold certain uncounseled prior convictions cannot be used for enhancing purposes and the trial court may have relied upon these cases in good faith, these cases are not applicable to

expungement proceedings. See *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533; *State v. Putich*, Cuyahoga App. No. 89005, 2008-Ohio-681; *State v. Thompson*, 121 Ohio St.3d 250, 2009-Ohio-314. Kraushaar is not a first offender as defined by R.C. 2953.31(A); accordingly, the trial court was without jurisdiction to order the records sealed. The state's sole assignment of error is sustained.

{¶ 14} Judgment reversed and case remanded.

{¶ 15} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

SEAN C. GALLAGHER, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
PATRICIA ANN BLACKMON, J., CONCUR