

[Cite as *State v. Novak*, 2009-Ohio-6220.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92586

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MORRIS NOVAK

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-336024

BEFORE: McMonagle, J., Cooney, A.J., and Blackmon, J.

RELEASED: November 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).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant Morris Novak appeals from the trial court's judgment denying his application for expungement. He contends that because the indictments in Case Nos. CR-336024 and CR-342603 were duplicative, the trial court erred in expunging CR-342603 but not CR-336024. He argues further that the prohibition against double jeopardy required that both cases be expunged. Finding no merit to his appeal, we affirm.

{¶ 2} In March 1996, Novak was indicted in Case No. CR-336024 and charged with complicity in the commission of (1) attempted murder, (2) attempted felonious assault, and (3) attempted felonious sexual penetration. In September 1996, he was reindicted on the same charges in Case No. CR-342603, which was later dismissed on October 1, 1996, with a reference in the dismissal entry to Case No. CR-336024.

{¶ 3} In December 1996, Novak pled guilty in Case No. CR-336024 to complicity in the commission of attempted murder and the trial court sentenced him to 5 to 25 years incarceration. This court affirmed Novak's conviction on appeal. *State v. Novak* (Sept. 10, 1998), Cuyahoga App. No. 72849. Novak's subsequent application to reopen his appeal was denied by this court in *State v. Novak* (Oct. 3, 2000), Cuyahoga App. No. 72849.

{¶ 4} In February 2005, the trial court granted Novak's motion for judicial release and placed him on two years probation.

{¶ 5} Subsequently, in June 2008, Novak moved to expunge his criminal record as allowed under R.C. 2953.32. After a hearing, the trial court granted Novak's motion with respect to Case No. CR-342603, but denied his motion with respect to Case No. CR-336024. Novak appeals from the judgment in Case No. CR-336024 denying his application.

{¶ 6} In his first assignment of error, Novak argues that Case No. CR-342603 was never dismissed and therefore he was tried and sentenced twice for the same criminal charges. He contends that to remedy this double jeopardy violation both cases should have been expunged. Novak's argument fails.

{¶ 7} First, the expungement statute is not the vehicle for attacking the validity of an underlying judgment on double jeopardy (or other) grounds. The expungement statute is a remedial statute used to expunge the criminal record of an eligible offender under certain circumstances. Any argument relating to the validity of the offender's conviction simply does not apply in the context of an application for expungement.

{¶ 8} Furthermore, the transcript of the expungement hearing in Case No. CR-336024 reflects that the trial judge stated several times during the hearing that the records before him indicated that Case No. CR-342603 was

dismissed as a duplicative indictment before Novak pled guilty in Case No. CR-336024. Thus, the trial court properly sealed Case No. CR-342603 under R.C. 2953.52, which provides for the sealing of records relating to a dismissed indictment.

{¶ 9} Finally, as Novak did not appeal the order in Case No. CR-342603, that case is not properly before us and we cannot consider any alleged errors relating to it. Accordingly, we overrule the first assignment of error.

{¶ 10} In his second and third assignments of error, Novak argues that the trial court should have expunged both cases because they were duplicative. He contends that because the indictments were the same in both cases, an expungement of one case necessarily required an expungement of the other. We disagree.

{¶ 11} Expungement is an act of grace created by the state and is a privilege, not a right. *State v. Simon* (2000), 87 Ohio St.3d 531, 533, citing *State v. Hamilton* (1996), 75 Ohio St.3d 636, 639. It should only be granted when all the requirements for eligibility are met. *Id.* An applicant must be a “first offender” to qualify for expungement. R.C. 2953.32(A)(1); *State v. McCoy*, Franklin App. No. 04AP-121, 2004-Ohio-6726, ¶8. A trial court has no jurisdiction to grant expungement unless the applicant is a first offender. *State v. Krantz*, Cuyahoga App. No. 82439, 2003-Ohio-4568, ¶24, citing *State*

v. Saltzer (1985), 20 Ohio App.3d 277, 278. Whether an applicant is a first offender is a question of law to be determined de novo by a reviewing court. *Krantz* at ¶9, citing *State v. McGinnis* (1993), 90 Ohio App.3d 479, 481.

{¶ 12} As relevant to this appeal, R.C. 2953.31(A) defines “first offender” as “anyone who has been convicted of an offense in this state * * * and who previously or subsequently has not been convicted of the same or a different offense in this state * * *.” In other words, “[t]hat means he must have no other criminal convictions.” *State v. Saltzer* (Apr. 22, 1985), Cuyahoga App. Nos. 48933 to 48940.

{¶ 13} During the expungement hearing, the trial court stated that the expungement investigation report prepared by the probation department indicated that Novak had other Ohio convictions, including a 1980 conviction for operating a motor vehicle while impaired (OVI), a hit-skip conviction in 1989, and another OVI conviction in 1995. These offenses involved violations of municipal ordinances substantially equivalent to R.C. 4511.19 (driving while intoxicated) and 4549.02 (stopping after an accident), and therefore are previous convictions under R.C. 2953.31. See R.C. 2953.31(A). Novak acknowledged that he was convicted of the offenses, and defense counsel conceded that because of the convictions, Novak was not a first offender eligible for expungement.

{¶ 14} In addition, Novak's offense, complicity in the commission of attempted murder, was an offense of violence under R.C. 2953.36(C) and therefore not an expungeable offense. Accordingly, the trial court did not err in denying Novak's application for expungement and we therefore overrule his second and third assignments of error.

Affirmed.

It is ordered that appellee recover from appellant 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.

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

CHRISTINE T. McMONAGLE, JUDGE

COLLEEN CONWAY COONEY, A.J., and
PATRICIA A. BLACKMON, J., CONCUR