

[Cite as *State v. Dvorkin*, 2009-Ohio-5694.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
**No. 92534**

---

## **STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**M.D.**

DEFENDANT-APPELLANT

---

**JUDGMENT:**  
REVERSED AND REMANDED

---

Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-360551

**BEFORE:** Boyle, J., Cooney, A.J., and McMonagle, J.

**RELEASED:** October 29, 2009

**JOURNALIZED:**

## **ATTORNEY FOR APPELLANT**

Larry W. Zukerman  
Zukerman, Daiker & Lear Co., L.P.A.  
3912 Prospect Avenue, East  
Cleveland, Ohio 44115

## **ATTORNEYS FOR APPELLEE**

William D. Mason  
Cuyahoga County Prosecutor  
Diane Smilanick  
Assistant County Prosecutor  
Justice Center, 8<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, Ohio 44113

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).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, M.D., appeals from a judgment denying his application to seal his record of conviction. He raises one assignment of error for our review: the trial court abused its discretion when it denied his application to seal all official records of conviction. Because the trial court did not issue findings, either orally at the hearing or in its written judgment entry, we reverse and remand.

#### Procedural Background

{¶ 2} In 1998, M.D. was convicted of receiving stolen property, forgery, uttering, obstructing justice, and tampering with evidence. He was sentenced to one year in prison and fined \$3,500. Pursuant to this court's mandate in *State v. [M.D.]* (Mar. 2, 2000), 8th Dist. Nos. 75339, 75340, and 75341, the trial court vacated M.D.'s conviction for tampering with evidence.

{¶ 3} On July 2, 2008, M.D. filed an application to seal his record of conviction. He attached ten letters to his application, including his own, where, inter alia, he expressed remorse and regret. The nine other letters were from family members, friends, coworkers, and employers, and attested to his good moral character and admirable work ethic.

{¶ 4} The state filed a brief in opposition to M.D.'s motion, claiming only that "[d]ue to the nature of the Crime [sic], the State of Ohio has a

legitimate interest in maintaining these records of applicant's conviction that outweighs applicant's interest in having it sealed."

{¶ 5} The trial court held a hearing on the matter. At the hearing, M.D.'s attorney explained that M.D. never had any criminal infractions before or after his conviction in this case. M.D. also testified to his remorse, as well as his determination and success in becoming a productive member of society.

{¶ 6} The state responded at the hearing that "[t]his was an extremely important case in our office," and then restated its position as it set forth in its opposition brief; essentially because of "the nature of the crime," the state claimed its interest outweighed M.D.'s privacy interest.

{¶ 7} At the conclusion of the hearing, the trial court indicated that it needed time to consider the application. At a later date, the court issued an entry stating only that "[t]he defendant's application to seal all official records, filed 7/2/08, is denied."

#### Expungement Purpose and Provisions

{¶ 8} The purpose of expungement, or sealing a record of conviction, is to recognize that persons who have only a single criminal infraction may be rehabilitated. *State v. Petrou* (1984), 13 Ohio App.3d 456, 456. In enacting the expungement provisions, the legislature recognized that "people make mistakes, but that afterwards they regret their conduct and are older, wiser, and sadder. The enactment and amendment of R.C. 2953.31 and 2953.32 is,

in a way, a manifestation of the traditional Western civilization concepts of sin, punishment, atonement, and forgiveness. Although rehabilitation is not favored in current penal thought, the unarguable fact is that some people do rehabilitate themselves.” *State v. Boddie*, 170 Ohio App.3d 590, 2007-Ohio-626, ¶8, quoting *State v. Hilbert* (2001), 145 Ohio App.3d 824, 827.

{¶ 9} “The expungement provisions are remedial in nature and ‘must be liberally construed to promote their purposes.’” *Id.*, quoting *State ex rel. Gains v. Rossi*, 86 Ohio St.3d 620, 622, 1999-Ohio-213. Further, an expungement proceeding is not an adversarial one; rather, the primary purpose of an expungement hearing is to gather information. *State v. Simon* (2000), 87 Ohio St.3d 531, 533. The Rules of Evidence do not apply to such non-adversary statutory proceedings. *Id.*; see, also, Evid.R. 101(C)(7).

{¶ 10} The standards for granting or denying a motion to seal a record of conviction are set forth in R.C. 2953.32(C)(1). This statute provides:

{¶ 11} “(C)(1) The court shall do each of the following:

{¶ 12} “(a) Determine whether the applicant is a first offender or whether the forfeiture of bail was agreed to by the applicant and the prosecutor in the case. \*\*\*

{¶ 13} “(b) Determine whether criminal proceedings are pending against the applicant;

{¶ 14} “(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;

{¶ 15} “(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;

{¶ 16} “(e) Weigh the interest 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.”<sup>1</sup>

{¶ 17} Thus, the standard to be applied in an expungement case, pursuant to R.C. 2953.32, requires “[t]he court \*\*\* [to] weigh the interest of the public’s need to know as against the individual’s interest in having the record sealed, and must liberally construe the statute so as to promote the legislative purpose of allowing expungements.” *Hilbert*, 145 Ohio App.3d at 827. In doing so, the trial court has a significant amount of discretion in determining whether to seal an applicant’s record of conviction. *State v. McGinnis* (1993), 90 Ohio App.3d 479, 481.

{¶ 18} Here, however, we cannot discern from the record what discretion the trial court exercised. The trial court neither stated its findings orally at

---

<sup>1</sup>At oral argument before this court, the state conceded that M.D. was a first offender for purposes of expungement.

the hearing or issued written findings in its judgment entry when it summarily denied M.D.'s application.

{¶ 19} This court, as well as other appellate courts, have reversed a trial court's decision to deny an application pursuant to R.C. 2953.32 when it fails to place its findings on the record for review. See *Cleveland v. Hogan*, 8th Dist. No. 85214, 2005-Ohio-3167, at ¶12 ("while the trial court may have considered facts relative to the R.C. 2953.52(B) findings, the findings were not placed on the record"); *Youngstown v. Sims* (Oct. 31, 1996), 7th Dist. No. 96-CA-26 (judgment reversed when the trial judge simply signed a journal entry stating "motion for expungement denied"); *State v. Haas*, 6th Dist. No. L-04-1315, 2005-Ohio-4350 (reversed because trial court did not demonstrate its exercise of discretion on the record in order to facilitate meaningful appellate review); *State v. Bates*, 5th Dist. No. 03-COA-057, 2004-Ohio-2260 (reversed when trial court failed to make "any findings, either on the record or otherwise," and upon remand, instructed the trial court to make findings as required by R.C. 2953.32); cf., *State v. Smith*, 8th Dist. No. 91853, 2009-Ohio-2380 (affirmed when "the trial court's reasoning was clearly explained in the transcript," and thus, this court was "not hampered by the simple entry denying Smith's motion to expunge").

{¶ 20} We further find guidance in the Ohio Supreme Court's reasoning requiring trial courts to issue findings on the record when granting or

denying a motion for a new trial for the express purpose of appellate review: “[W]ithout some articulated basis for granting a new trial, the trial court’s decision is virtually insulated from meaningful appellate review. As previously stated, an appellate tribunal will not reverse the trial court’s ruling absent an abuse of discretion. However, when the trial court offers no reasons for its decision, the court of appeals practically must defer to the trial court’s conclusion that the verdict was against the weight of the evidence.” *Antal v. Olde Worlde Products, Inc.* (1984), 9 Ohio St.3d 144, 146.

{¶ 21} Since the trial court in this case offered no reasons for its denial of M.D.’s application, we cannot simply defer to the trial court’s discretion in this matter — especially in light of the overwhelming information presented in M.D.’s application and at the hearing, establishing that he is not only remorseful, but also that he is a highly productive member of society, a valued friend, father, son, and husband, and a man of high moral character. Moreover, this was M.D.’s first encounter with the law, and he has not had any other infractions since that time.

{¶ 22} Further, in its opposition brief and at the hearing, the state simply referred to “the nature of the crime” when explaining why its interest outweighed M.D.’s. The nature of the offense, however, “cannot provide the sole basis to deny an application.” *Haas*, supra, at ¶24, citing *Hilbert*, supra (aggravated arson for act of cross-burning); *State v. Berry* (1999), 135 Ohio App.3d 250, 253 (reversed for failure to hold a hearing and on the separate basis of error to “summarily and categorically [deny] the application because the matters

investigated were sex offenses”); *In re Byrd*, 10th Dist. No. 04AP-854, 2005-Ohio-3148 (sex offense); *State v. Bates*, 5th Dist. No. 03-COA-057, 2004-Ohio-2260 (reversed where gambling addiction was sole basis for denying expungement of theft offense).

{¶ 23} M.D.’s sole assignment of error is sustained.

{¶ 24} The trial court’s judgment summarily denying M.D.’s application is reversed and remanded. Upon remand, we instruct the trial court to issue findings in accordance with R.C. 2953.32, weighing “the interest of the public’s need to know as against the individual’s interest in having the record sealed,” and remembering that expungement provisions must be liberally construed so as to promote the legislative purpose of allowing expungements.

It is ordered that appellant recover of appellee 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.

---

MARY J. BOYLE, JUDGE

CHRISTINE T. McMONAGLE, J., CONCURS;  
COLLEEN CONWAY COONEY, A.J., CONCURS IN JUDGMENT ONLY

