[Cite as *State v. L.M.*, 2010-Ohio-5614.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 94896 and 94897

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

L.M.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-457431 and CR-465315

BEFORE: Celebrezze, J., Gallagher, A.J., and McMonagle, J.

RELEASED AND JOURNALIZED: November 18, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} The state of Ohio appeals from the grant of expungement of the assault conviction of L.M.[1] ("appellee"). The state argues that the trial court failed to hold a required expungement hearing to give it an opportunity to object and that the trial court erred in finding appellee to be a first offender under the expungement statute. After a thorough review of the record and pertinent case law, we affirm.

[1]The anonymity of the defendant is preserved in accordance with this court's established Guidelines for Sealing Records on Criminal Appeals.

{¶ 2} Appellee was initially arrested and charged in the Cleveland Municipal Court with assaulting a police officer on September 4, 2004. The case was bound over and indicted in Case No. CR-457431. Appellee was charged with assault in violation of R.C. 2903.13 with a peace officer specification. She failed to appear at a pretrial, and a warrant was issued for her arrest on December 6, 2004. After several continuances at appellee's request, the case was dismissed without prejudice.

{¶ 3} On April 28, 2005, appellee was indicted on the same charge of assaulting a police officer with additional charges of obstructing official business and obstructing justice in Case No. CR-465315.[2] On July 25, 2005, she pled guilty to assault, and the state agreed to eliminate the peace officer specification and dismiss the other two charges. Appellee was sentenced to a $250 fine and court costs.

{¶ 4} On September 14, 2009, appellee filed a motion to have the record of these two cases expunged pursuant to R.C. 2953.32(A)(1) and 2953.52(A)(1). The trial court ordered the preparation of an expungement report, and an expungement hearing was set for March 1, 2010. The state filed an objection pointing out that the expungement report listed a conviction from the Parma Municipal Court for disorderly conduct, and that it had

[2]These two cases alleged the same conduct on the same date, namely that appellee struck Officer Joe Bujnak in the face with her cell phone.

substantial interest in maintaining the records due to the lengthy history and nature of the cases. The state claims that, at the hearing, the trial court immediately issued its order granting appellee's request without hearing from any of the parties present. The journal entry expunging the record in CR-457431 explained that appellee was not found guilty and the charges were dismissed in that case, and ordered expungement. In CR-465315, the trial court found that appellee was a first offender and ordered expungement.

Law and Analysis

{¶ 5} The state appeals these two decisions assigning the same two errors: "A trial court errs in ruling on a motion for expungement filed pursuant to R.C. 2953.32 without first holding a hearing[,]" and "[a] trial court erred in granting a motion to seal the record of conviction when it is without jurisdiction to grant said motion to an applicant who is not a first offender." This court consolidated the cases into the present appeal.

Failure to Hold a Hearing

{¶ 6} The state first claims that the trial court failed to provide it an opportunity to be heard and fulfill its statutory duty to hold a hearing on appellee's motions for expungement. The state claims that the trial court immediately issued its ruling without hearing from the parties present at the hearing.

{¶ 7} Under both R.C. 2953.32(B) and 2953.52(B), the trial court is required to hold a hearing on a motion to expunge the records of a criminal

conviction or a dismissed indictment, respectively.[3] However, we must note initially that an appellant bears the burden of affirmatively demonstrating error on appeal. *Ivery v. Ivery* (Jan. 12, 2000), 9th Dist. No. 19410. The Ohio Supreme Court has determined that "[t]he duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384, citing *State v. Skaggs* (1978), 53 Ohio St.2d 162, 372 N.E.2d 1355. The Court went on to explain, "[t]his principle is recognized in App.R. 9(B), which provides, in part, that '* * * the appellant shall in writing order from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record * * *.' When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." Id.

{¶ 8} Because this court has not been provided with a transcript from the hearing on appellee's motions for expungement or an App.R. 9(C)

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[3] R.C. 2953.32(B) and 2953.52(B) provide that once an application for expungement is filed, the court must set a hearing date and must notify the prosecutor of the hearing.

statement of the evidence,[4] we must presume regularity in the proceedings below. *In re Magar v. Konyves*, Cuyahoga App. No. 85832, 2005-Ohio-5723, ¶15. The journal entries granting appellee's expungement requests indicate a hearing was held. The state has failed to show otherwise. Therefore, this assignment of error is overruled.

First Offender

{¶ 9} The state argues that appellee was not a first offender as defined by R.C. 2953.31(A) because of her 2004 conviction for disorderly conduct in the Parma Municipal Court. The court below found appellee to be a first offender and granted her motions for expungement.

{¶ 10} R.C. 2953.32 allows a court to expunge a criminal record under certain circumstances. It states in relevant part: "(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[.]"

{¶ 11} Under R.C. 2953.32(B), the court must hold an expungement hearing to give the state an opportunity to oppose the application. At an

[4]This rule provides in part: "If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection."

expungement hearing, the court must determine, among other things, whether the applicant is a first offender as defined in R.C. 2953.31(A). See R.C. 2953.32(C)(1). This section defines a first offender in pertinent part as "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." R.C. 2953.31(A) excludes a conviction for a minor misdemeanor or a violation of any section in Chapters 4507, 4510, 4511, 4513, or 4549 of the Revised Code (or a substantially similar municipal ordinance) from the calculus of determining if an applicant is a first offender.

{¶ 12} In this case, the state claims appellee has a prior conviction for disorderly conduct for violating Brooklyn Codified Ordinances 509.03, a fourth-degree misdemeanor. The state argues appellee is not a first offender as defined in R.C. 2953.31(A) because of this prior misdemeanor conviction. However, the state has failed to provide this court with the expungement report or any indication this conviction exists other than its own unsupported statements. The state has a duty to support its arguments with evidence in the record. *Knapp* at 199. It has failed to do so regarding appellee's prior criminal conviction. Accordingly, the state cannot demonstrate the claimed error, and this court must presume regularity in the trial court proceedings as well as the validity of its judgment.

Conclusion

{¶ 13} The state has failed to support its claimed errors by neglecting to provide this court with a record that supports the alleged errors committed by the trial court. Therefore, the decision of the trial court must be presumed to be correct.

Judgment affirmed.

It is ordered that appellee recover of said 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.

FRANK D. CELEBREZZE, JR., JUDGE

CHRISTINE T. McMONAGLE, J., CONCURS;

SEAN C. GALLAGHER, A.J., DISSENTS (WITH SEPARATE OPINION)

SEAN C. GALLAGHER, A.J., DISSENTING:

{¶ 14} I respectfully dissent. L.M. is not a first offender as outlined under R.C. 2953.31(A). Further, I would not hold the state accountable for

the failure to produce a record when they were hardly afforded the opportunity to make one. See *State v. Severino,* Ashtabula App. No. 2009-A-0045, 2010-Ohio-2674.

{¶ 15} While individuals like L.M. may be good candidates for expungement, the legislature needs to act to modify the eligibility requirements.