[Cite as *Mayfield Hts. v. N.K.*, 2010-Ohio-909.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93166

CITY OF MAYFIELD HEIGHTS

PLAINTIFF-APPELLEE

vs.

N.K.

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED

Civil Appeal from the
Lyndhurst Municipal Court
Case No. 07 CRB 001039

BEFORE: Boyle, J., Stewart, P.J., and Dyke, J.

RELEASED: March 11, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, N.K., appeals from the trial court's order sua sponte vacating its prior order sealing the record of her prior conviction. Finding merit to her appeal, we reverse the judgment of the trial court and reinstate the order sealing her conviction.

Procedural History and Facts

{¶ 2} The facts of this case are not in dispute. In October 2007, N.K. was convicted of persistent disorderly conduct, a misdemeanor of the first degree. A little over a year later, N.K. filed an application with the Lyndhurst Municipal Court, requesting that it seal the record of her conviction. The city did not object to the application. In December 2008, the trial court held a hearing on the matter, subsequently granted N.K.'s petition, and issued an order sealing the record of her conviction.

{¶ 3} The record reflects that in March 2009, the Ohio Bureau of Criminal Identification and Investigation ("BCI") sent the trial court's order to seal all records back to the Lyndhurst Municipal Court, stating: "BCI is sending back the expungement and will not process. We will not process because this individual already has an expungement through another court. Per ORC 2953.32 this individual is not eligible." BCI cautioned the trial court that it "should be doing a background to determine if they qualify." BCI then enclosed the original "sealing

order" (that showed that N.K. had previously been convicted of disorderly conduct in 2004) and a "printout of the rap sheet," which indicated that for N.K., "more data may be available per Ohio Revised Code Section 2953.32(D) or (E)." Circling that information of the "rap sheet," BCI further explained to the court, "[w]hen you see that, it means something has been sealed."

{¶ 4} The same day the trial court received this information from BCI, it sua sponte vacated the order sealing N.K.'s record of conviction. The court noted, "pursuant to the directive from the Attorney General of the state of Ohio, this defendant is not eligible to have this record of conviction sealed as defendant was not a first offender."

{¶ 5} It is from this order that N.K. appeals, raising three assignments of error for our review:

{¶ 6} "[1.] The entry of the trial court vacating the expungement was improper since it was a voidable judgment not void.

{¶ 7} "[2.] The appellant was entitled to a hearing in order to afford due process of law.

{¶ 8} "[3.] A prior sealed conviction does not preclude a subsequent expungement."

Void versus Voidable

{¶ 9} The crux of this appeal, as N.K. clearly sets forth in her first assignment of error, is whether the trial court's December 2008 order (sealing

N.K.'s record of conviction) was void, or merely voidable. If it was the former, then the trial court had full authority to vacate the order sua sponte. *In re Guardianship of Kinney* (June 14, 2000), 7th Dist. No. 99-BA-19, unreported, at p. 2, citing *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 70, 518 N.E.2d 941. But if it was the latter, then absent a Civ.R. 60(B) motion filed by the state, the trial court had no authority to vacate its prior final order.

{¶ 10} N.K. urges this court to adopt the Tenth District's holding in *State v. Smith*, 10th Dist. No. 06AP-1059, 2007-Ohio-2873, finding that a trial court's order sealing a record of conviction was voidable when it was later discovered that the petitioner was not a "first offender" as defined in R.C. 2953.31(A).[1] Relying on *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, and *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851, the *Smith* court reasoned that "[a] subsequent finding that an applicant is not a first offender *** does not divest the court of subject matter jurisdiction so that the expungement order is void ab initio. *** Instead, it constitutes an error in the court's *exercise of jurisdiction* over a particular case, which is voidable either by way of direct appeal or pursuant to the provisions of Civ.R. 60(B)." (Emphasis added.) *Smith* at ¶15, citing *Pratts* at ¶24.

[1]"(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." R.C. 2953.31(A).

{¶ 11} The city correctly points out that N.K.'s "position in this first assignment of error is based upon the relatively newly adopted position of the Tenth District Court of Appeals concerning these particular type of cases, which position was announced in [*Smith*], and followed in *State v. Bowers*, 10th Dist. No. 07AP-49, 2007-Ohio-5969." The city asserts, however, that "the *Smith-Bowers* position is contrary to the well settled law of this court, which was first announced in *State v. Thomas* (1979), 64 Ohio App.2d 141, 411 N.E.2d 845, and which holds that such judgments are 'void and must be vacated, the court having lacked jurisdiction to grant the expungement in the first place.'"

{¶ 12} We agree with the city that "the *Thomas* rule" has consistently been followed by this court, as well as several other districts, for 30 years. Indeed, as the city points out, even the Tenth District followed *Thomas* until its decision in *Smith*, "wherein it began to view the issue in a new and different light." We disagree with the city, however, that "there is no good reason to abandon the thirty year history of *Thomas* and adopt the new *Smith-Bowers* position."

{¶ 13} As the *Smith* court aptly reasons, "the *Thomas* court's jurisdictional interpretation of R.C. 2953.32 was without the benefit of the recently announced Supreme Court cases explaining the difference between subject matter jurisdiction and jurisdiction over a particular case." *Smith* at ¶14, citing *Pratts*, 102 Ohio St.3d 81; *In re J.J.*, 111 Ohio St.3d 205. We further agree with *Smith* that "[t]he Supreme Court cases control resolution of this case." We find that the

30-year-old analysis in *Thomas* has been superseded by the reasoning set forth in these cases.

{¶ 14} When *Thomas* was decided, the "expungement statutes, R.C. 2953.31-.36," were "relatively new." Id. at 846. The "precise issue in [*Thomas* was] whether an applicant's status as a first offender [was] a jurisdictional requirement to a proceeding for the expungement of record of conviction." Id. In *Thomas*, two years after the court sealed the applicant's record of conviction, the prosecutor moved to vacate that order because the prosecutor discovered that the applicant was not a first offender. This court held:

{¶ 15} "It is clear to this court, having reviewed R.C. 2953.32, that prior to invoking the jurisdiction of the court under R.C. 2953.32, the applicant must in fact be a 'first offender' as defined in R.C. 2953.31. If, at any time subsequent to the granting of the 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." Id. at 848.

{¶ 16} But we now know that determining if a judgment is void (i.e., void ad initio) or voidable is not that simple. Even the Ohio Supreme Court recently recognized that it has "not always used these terms as properly and precisely as

possible." *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶10.

"Subject Matter Jurisdiction Compared with Jurisdiction over the Particular Case"[2]

{¶ 17} "Jurisdiction has been described as 'a word of many, too many, meanings.' *** The term is used in various contexts and often is not properly clarified. This has resulted in misinterpretation and confusion." *Pratts*, 102 Ohio St.3d at ¶33.

{¶ 18} In *Pratts*, the Ohio Supreme Court explained that "[t]here is a distinction between a court that lacks subject matter jurisdiction over a case and a court that improperly exercises that subject matter jurisdiction once conferred upon it." *Pratts* at ¶10. Distinguishing between these concepts is important because "'it is only when the trial court lacks subject matter jurisdiction that its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable.'" Id. at ¶12, quoting *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833, 769 N.E.2d 846, ¶22.

{¶ 19} "'Jurisdiction' means 'the courts' statutory or constitutional power to adjudicate the case.' (Emphasis omitted.) The term encompasses jurisdiction over the subject matter and over the person. Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be

[2]See *In re J.J.*, 111 Ohio St.3d 205.

waived and may be challenged at any time. It is a 'condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void.'"

{¶ 20} "The term 'jurisdiction' is also used when referring to a court's exercise of its jurisdiction over a particular case. 'The third category of jurisdiction [i.e., jurisdiction over the particular case] encompasses the trial court's authority to determine a specific case within that class of cases that is within its subject matter jurisdiction. It is only when the trial court lacks subject matter jurisdiction that its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable.' 'Once a tribunal has jurisdiction over both the subject matter of an action and the parties to it, *** the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred ***.'" (Citations omitted.) *Pratts*, 102 Ohio St.3d at ¶11-12.

{¶ 21} The defendant in *Pratts* pleaded guilty to aggravated murder with death-penalty and firearm specifications. He agreed to submit his plea to a single judge rather than to the three-judge panel mandated by statute. The Supreme Court of Ohio held that the court of common pleas lacked the legal authority to sentence the defendant under these circumstances. However, while the court of common pleas exceeded its jurisdiction over the particular case, the Supreme Court held that the failure to convene a three-judge panel did not divest

the trial court of subject matter jurisdiction. Id. at the syllabus. Instead, it represented an error in the exercise of the trial court's subject matter jurisdiction that was, therefore, voidable on direct appeal but not subject to a collateral attack. Id. at ¶32, 36. See, also, *In re J.J.*, 111 Ohio St.3d 205 (relying on its reasoning in *Pratt*s, the Supreme Court concluded that a magistrate's order transferring a permanent custody case to a visiting judge was an error in the court's exercise of jurisdiction rendering it voidable, but did not divest the court of subject matter jurisdiction such that the order would be void).

{¶ 22} In 2001, three years prior to the Ohio Supreme Court's decision in *Pratts*, the Second District Court of Appeals applied the same reasoning employed later in *Pratts*, to the exact issue we are considering in the present case. See *State v. Wilfong* (Mar. 16, 2001), 2d Dist. No. 2000-CA-75. In *Wilfong*, the state had moved to vacate an expungement order almost a year and a half after the trial court issued it, asserting that the applicant was not a first offender and therefore, the trial court lacked jurisdiction to grant it. The state argued that the order was void ab initio and could be vacated at any time without considering the requirements of Civ.R. 60(B).

{¶ 23} The Second District disagreed with courts that had addressed the issue and had held that a trial court did not have jurisdiction to expunge a conviction because the statute precluded the individual (not a first offender) from consideration. The Second District explained, "[w]e believe that there is some

confusion between different types of jurisdiction." Id. It noted how courts in "Indiana, Michigan, Virginia, and now some Ohio appellate courts recognize that there is a distinction between subject matter jurisdiction and jurisdiction of the particular case, otherwise referred to as the 'exercise' of jurisdiction." Id. It cited to *Wright v. Griffin* (July 1, 1999), 8th Dist. No. 76299 as one of the "Ohio appellate courts" recognizing this distinction (although not in the context of an expungement).

{¶ 24} In *Wright*, this court explained, "there are different types of jurisdiction: personal jurisdiction, subject matter jurisdiction, territorial jurisdiction and jurisdiction of the particular case. Subject matter jurisdiction defines the power of the court over classes of cases it may or may not hear. The power to declare a judgment void for lack of subject matter jurisdiction is a function of whether or not the subject case falls within the class of cases over which the court has subject matter jurisdiction." Id. "[J]urisdiction of the particular case *** encompasses compliance with statutory requirements[,] [b]ut unlike subject matter jurisdiction, defects in jurisdiction of the particular case render the judgment merely voidable, not void." Id., citing *State v. Swiger* (1998), 125 Ohio App.3d 456, 708 N.E.2d 1033.

{¶ 25} The Second District in *Wilfong* also quoted a Michigan Court of Appeals opinion to "further demonstrate the distinction between subject matter jurisdiction and exercise of jurisdiction":

{¶ 26} "When there is want of jurisdiction over the parties, or the subject matter, no matter what formalities may have been taken by the trial court, the action thereof is void because of its want of jurisdiction, and consequently its proceedings may be questioned collaterally as well as directly. They are of no more value than as though they did not exist. But, in cases where the court has *undoubted jurisdiction of the subject matter*, and of the parties, the action of the trial court, though involving an erroneous exercise of jurisdiction, which might be taken advantage of by direct appeal, or by direct attack, *** is not void though it might be set aside for the irregular or erroneous exercise of jurisdiction if appealed from.

{¶ 27} "Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, *** and cannot be collaterally attacked. *Error in the determination of questions of law or fact upon which the court's jurisdiction of the particular case depends, the court having general jurisdiction of the cause and the person, is error in the exercise of jurisdiction.* Jurisdiction to make a determination is not dependent on the correctness of the determination made. (Emphasis added in *Waite*.) *In the Matter of Waite* (1991), 188 Mich.App. 189."

{¶ 28} Thus, even prior to *Pratts*, the Second District Court of Appeals held that because the common pleas court had subject matter jurisdiction over criminal

cases, including motions to seal records of conviction, the trial court's order granting an expungement to an ineligible petitioner (i.e., one who was not a first offender) was voidable, not void ab initio. Id. Therefore, the state could only attack the trial court's exercise of jurisdiction through a timely direct appeal and/or a Civ.R. 60(B) motion (although a Civ.R. 60(B) motion must meet the requirements of the rule and it is not a substitute for a timely appeal; see *Wilfong*, citing *Laidley v. St. Luke's Med. Ctr.* (June 3,1999), 8th Dist. No. 73553). Id. The Second District reversed the trial court's order vacating the expungement and reinstated the expungement order. Id.

{¶ 29} After reviewing the relatively recent Ohio Supreme Court's jurisdictional analyses in *Pratts* and *In re J.J.*, as well as the appellate courts' reasoning in *Smith* and *Wilfong*, we find that the 30-year-old rule of *Thomas* has been superseded by a more accurate and thorough understanding of the nuances of "jurisdiction." Thus, we hold that an order granting expungement to an applicant who is later discovered to be ineligible for expungement because he or she is not a first offender is voidable. It is therefore only subject to attack by direct appeal or a Civ.R. 60(B) motion.

{¶ 30} Here, the state did not move to vacate the expungement order. The trial court sua sponte vacated it. Because we find that the judgment was merely voidable, the trial court did not have the authority to vacate it. See *In re A.S.*, 7th Dist. No. 09JE17, 2009-Ohio-6246 ("In the absence of a clerical error, a Civ.R.

60(B) motion or a void order," a trial court has no authority to vacate a final judgment).

{¶ 31} N.K.'s first assignment of error is sustained. Because our disposition of this assignment of error has rendered her other assignments moot, we need not address them except to note that a conviction for a minor misdemeanor is not a "previous or subsequent conviction" for purposes of determining if someone is a "first offender." See R.C. 2953.31(A).[3]

{¶ 32} The judgment vacating the sealing of N.K.'s record of conviction is reversed and the order sealing her record of conviction is reinstated. The clerk of the court of appeals is instructed to reseal the trial court record.

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 Lyndhurst Municipal 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

[3]The information sent to the trial court from the Ohio BCI indicates that N.K. was previously convicted of disorderly conduct. Except for some exceptions, disorderly conduct is a minor misdemeanor. See R.C. 2917.11(E).

MELODY J. STEWART, P.J., CONCURS;
ANN DYKE, J., CONCURS IN JUDGMENT ONLY