

[Cite as *State v. V.S.*, 2017-Ohio-1565.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105264

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

V.S., JR.

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-12-559095-A

BEFORE: Laster Mays, J., E.T. Gallagher, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: April 27, 2017

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ANITA LASTER MAYS, J.:

{¶1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Plaintiff-appellant, V.S., Jr. (“appellant”), appeals the trial court’s denial of his application to seal a record of conviction without holding an expungement hearing. The state concedes the error. We reverse and remand.

I. BACKGROUND AND FACTS

{¶2} On January 28, 2011, appellant and two friends were stopped by the Westlake police for weaving. Appellant attempted to flee the scene and was pursued by police until he crashed into a ditch. The appellant and his two friends were “highly intoxicated” and charged with multiple municipal and state violations. A number of the charges were dismissed or amended to minor misdemeanors. Appellant resolved the resisting arrest¹ and OVI² charges in the municipal court.

{¶3} On June 21, 2012, in Cuyahoga County Common Pleas Court, appellant entered a guilty plea to failure to comply with an order or signal of a police officer, R.C. 2921.331(B), a third-degree felony. He was sentenced to a three-day jail term, one year of community control sanctions, and a three-year, class-two driver’s license suspension under R.C. 4510.02(a)(2) that expired on January 27, 2015. Appellant was

¹ Westlake Ordinances No. 525.09A, a second-degree misdemeanor.

² R.C. 4511.19(A)(1)(a), operating a vehicle under the influence, a first-degree misdemeanor.

also required to pay fines and fees and received a six point assessment against his driver's license. Appellant completed his sentence without event.

{¶4} On October 27, 2016, appellant petitioned to seal the common pleas criminal case. The state filed a brief in opposition on the ground that appellant was ineligible due to municipal court cases. On December 13, 2016, the trial court denied the petition without a hearing, finding that appellant was not an “eligible offender” under R.C. 2953.31(A). Appellant appeals.

II. ASSIGNMENT OF ERROR

{¶5} Appellant asserts in his single assigned error that the trial court improperly concluded that appellant is ineligible to have his record sealed, and for making such a ruling without holding a hearing.

A. Standard of Review

{¶6} We apply an abuse of discretion standard in reviewing the denial of a petition to seal a record under R.C. 2953.32. *Bedford v. Bradberry*, 8th Dist. Cuyahoga No. 100285, 2014-Ohio-2058, ¶ 5, citing *State v. Hilbert*, 145 Ohio App.3d 824, 827, 764 N.E.2d 1064 (8th Dist.2001). However, “the application of [R.C. 2953.31(A)]” and “whether an offender is ‘eligible’ to have a conviction expunged are issues of law that we review de novo.” *Bradberry* at ¶ 5, citing *State v. Ushery*, 1st Dist. Hamilton No. C-120515, 2013-Ohio-2509, ¶ 6.

B. Analysis

{¶7} Upon the filing of an application to seal a record of conviction, a trial court is required to set a hearing date and notify the prosecutor. R.C. 2953.32(B). Notwithstanding the state's concession as to the failure to hold a hearing, the state maintains that appellant is ineligible because he does not meet the requirements of R.C. 2953.31(A):

(A) "Eligible offender" means anyone who has been convicted of an offense in this state or any other jurisdiction and who has not more than one felony conviction, not more than two misdemeanor convictions, or not more than one felony conviction and one misdemeanor conviction in this state or any other jurisdiction. When two or more convictions result from or are connected with the same act or result from offenses committed at the same time, they shall be counted as one conviction. When two or three convictions result from the same indictment, information, or complaint, from the same plea of guilty, or from the same official proceeding, and result from related criminal acts that were committed within a three-month period but do not result from the same act or from offenses committed at the same time, they shall be counted as one conviction, provided that a court may decide as provided in division (C)(1)(a) of section 2953.32 of the Revised Code that it is not in the public interest for the two or three convictions to be counted as one conviction.

For purposes of, and except as otherwise provided in, this division, a conviction for a minor misdemeanor, for a violation of any section in Chapter 4507., 4510., 4511., 4513., or 4549. of the Revised Code, or for a violation of a municipal ordinance that is substantially similar to any section in those chapters is not a conviction. However, a conviction for a violation of section 4511.19, 4511.251, 4549.02, 4549.021, 4549.03, 4549.042, or 4549.62 or sections 4549.41 to 4549.46 of the Revised Code, for a violation of section 4510.11 or 4510.14 of the Revised Code that is based upon the offender's operation of a vehicle during a suspension imposed under section 4511.191 or 4511.196 of the Revised Code, for a violation of a substantially equivalent municipal ordinance, for a felony violation of Title XLV of the Revised Code, or for a violation of a substantially equivalent former law of this state or former municipal ordinance shall be considered a conviction.

Id.

{¶8} Appellant argues that the convictions satisfy the statute’s requirement that they arise from the same act or offenses committed concurrently as part of an unbroken course of conduct. “A court may, if certain circumstances are satisfied, consider two or three convictions as one.” *In re Sealing of the Record of A.H.*, 2016-Ohio-5530, 60 N.E.3d 60, ¶ 17 (10th Dist.), citing *State v. Sanders*, 10th Dist. Franklin No. 14AP-916, 2015-Ohio-2050, ¶ 7.

{¶9} We recognize that, as an “act of grace created by the state,” the sealing of a criminal record is a “privilege, not a right.” *State v. Boykin*, 138 Ohio St.3d 97, 2013-Ohio-4582, 4 N.E.3d 980, ¶ 11, citing *State v. Hamilton*, 75 Ohio St.3d 636, 639, 665 N.E.2d 669 (1996). Therefore, appellant is entitled to such relief “only when all requirements for eligibility are met.” *Boykin* at ¶ 11, citing *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, ¶ 6.

{¶10} We recently recognized in *State v E.A.*, 8th Dist. Cuyahoga No. 103829, 2017-Ohio-180, that certain crimes are excluded from R.C. 2953.31 to 2953.35, the statutes governing the sealing of records of conviction. E.A.’s attempted robbery conviction constituted an offense of violence specifically excluded by R.C. 2953.36(A)(2)-(3). *Id.* at ¶ 6. As a result, we determined that there was no need to hold a hearing because E.A. was an ineligible offender. *Id.* at ¶ 13.

{¶11} Appellant’s OVI conviction is excluded by R.C. 2953.36(A)(2), excepting Chapter 4511 convictions, and may not be sealed. Therefore, when a conviction an

applicant is attempting to seal is for one of these crimes, the court need not hold a hearing because the statutory provisions do not apply. However, where the conviction or convictions sought to be sealed do not relate to these crimes, the statutory provisions do apply and the court must hold a hearing pursuant to R.C. 2953.32(B) and 2953.32(C)(1). In this case, the trial court was required to hold a hearing because the failure to obey the order or signal of a police officer is not an offense listed in R.C. 2953.36. The trial court is likely correct that the applicant is not an eligible offender, and this remand will result in the same outcome. *See State v. C.K.J.*, 10th Dist. Franklin Nos. 15AP-580 and 15AP-582, 2016-Ohio-5637 (where a failure to obey conviction resulted in one case and an OVI conviction in another that arose from the same incident, the OVI charge made the other conviction ineligible for sealing).

{¶12} Therefore, because R.C. 2953.31 *et seq.* applies, we reverse and remand this case to the trial court to conduct a hearing on the conviction that is the subject of appellant's motion to determine whether appellant is an eligible offender entitled to the petitioned relief, considering all applicable factors as required by R.C. 2953.31, *et seq.*

{¶13} Judgment is reversed and remanded.

It is ordered that the appellant recover from 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.

ANITA LASTER MAYS, JUDGE

EILEEN T. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR