

[Cite as *State v. M.R.*, 2017-Ohio-973.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104712

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

M.R.

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-05-461412-A

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

RELEASED AND JOURNALIZED: March 9, 2017

ATTORNEYS FOR APPELLANT

Michael C. O'Malley
Cuyahoga County Prosecutor

BY: Gregory J. Ochocki
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Robert L. Tobik
Cuyahoga County Public Defender

BY: Cullen Sweeney
Assistant Public Defender
Courthouse Square, Suite 200
310 Lakeside Avenue
Cleveland, Ohio 44113

EILEEN T. GALLAGHER, P.J.:

{¶1} This cause came to be heard on the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Plaintiff-appellant, the state of Ohio, appeals the decision of the Cuyahoga County Court of Common Pleas granting defendant-appellee, M.R.’s, application for expungement and ordering her records sealed. The state raises the following assignments of error for review:

1. The trial court erred when it failed to hold a hearing on M.R.’s application for sealing records.
2. The trial court erred when it determined M.R. was an “eligible offender.”

{¶2} After careful review of the record and case law, we reverse the trial court’s judgment and remand for proceedings consistent with this opinion.

I. Procedural and Factual History

{¶3} In August 2005, M.R. pleaded guilty in Cuyahoga C.P. No. CR-05-461412-A to drug trafficking in violation of R.C. 2925.03, with a juvenile specification under R.C. 2925.01, a felony of the fourth degree; and drug possession in violation of R.C. 2925.11, a felony of the fifth degree. At sentencing, the trial court imposed a 15-month period of community control sanctions.

{¶4} In December 2013, M.R. filed a pro se application, pursuant to R.C. 2953.32, for an order to seal the record of her felony convictions in Case No. CR-05-461412-A. The state filed a brief in opposition, arguing that M.R. was not an “eligible offender” because, in addition to her felony convictions in Case No. CR-05-461412-A, M.R. had

unrelated misdemeanor convictions in Garfield Heights M. C. No. 04CRB00056, and Cuyahoga C.P. No. CR-05-463849-D.

{¶5} In June 2016, an informal discussion was held in the trial court's chambers regarding the merits of M.R.'s application. Over the state's objection, and without a formal hearing on the record, the trial court granted M.R.'s application to seal the records of her convictions in Case No. CR-05-461412-A. In its journal entry, the court stated, in pertinent part:

The Court finds that the applicant is an eligible offender under R.C. 2953.31(A); that three (3) years have expired after the applicant's final discharge if convicted of a misdemeanor; that no criminal proceedings are pending against the applicant; that the applicant has been rehabilitated to the satisfaction of the Court; that the criminal offense(s) he or she was convicted of is not one described in R.C. 2953.36 for which the sealing of records is precluded; and that the interests of the applicant in having the records pertaining to the applicant's conviction sealed are not outweighed by any legitimate governmental needs to maintain those records.

{¶6} The state now appeals from the trial court's judgment.

II. Law and Analysis

{¶7} In its first assignment of error, the state argues that the trial court committed reversible error by failing to hold a formal hearing on M.R.'s application for expungement.

{¶8} The Ohio Supreme Court has held that “‘expungement is an act of grace created by the state,’ and so is a privilege, not a right.” *State v. Simon*, 87 Ohio St.3d 531, 533, 721 N.E.2d 1041 (2000), quoting, *State v. Hamilton*, 75 Ohio St.3d 636, 639,

665 N.E.2d 669 (1996). “Moreover, the government possesses a substantial interest in ensuring that expungement is granted only to those who are eligible.” *Hamilton* at 640.

{¶9} To protect that substantial interest, the statute authorizing expungement mandates there first be a hearing with notice to the state. R.C. 2953.32(B) states,

[u]pon the filing of the application, the court shall set a date for a hearing and shall notify the prosecutor for the case of the hearing on the application. The prosecutor may object to the granting of the application by filing an objection with the court prior to the date set for hearing.

{¶10} A trial court commits error by ruling on a motion for expungement filed pursuant to R.C. 2953.32 without first holding a hearing. R.C. 2953.32(B); *Hamilton*, 75 Ohio St.3d 636, 665 N.E.2d 669 (1996); *State v. Saltzer*, 14 Ohio App.3d 394, 471 N.E.2d 872 (8th Dist.1984), *followed*. Accordingly, this court has repeatedly held that “an oral hearing on an expungement motion is mandatory, and failure to hold one is cause for reversal and remand.” *State v. J.K.*, 8th Dist. Cuyahoga No. 96574, 2011-Ohio-5675, ¶ 15, citing *State v. Hann*, 173 Ohio App.3d 716, 718, 2007-Ohio-6201, 880 N.E.2d 148 (8th Dist.). *See also State v. Nowden*, 8th Dist. Cuyahoga No. 88605, 2007-Ohio-2914; *State v. Poston*, 8th Dist. Cuyahoga No. 87216, 2006-Ohio-4125; *State v. Powers*, 8th Dist. Cuyahoga No. 84416, 2004-Ohio-7021; *State v. Davis*, 8th Dist. Cuyahoga No. 81940, 2003-Ohio-363; *State v. Rebello*, 8th Dist. Cuyahoga No. 77076, 2000 Ohio App. LEXIS 1924 (May 4, 2000). The rationale that a trial court must first hold a hearing is “obviously predicated upon the fact that, under normal circumstances, a trial court would be required to hear evidence prior to rendering its decision in order to make several determinations pursuant to [R.C. 2953.32(C)(1)(a) through (e)].” *J.K.* at ¶

15, citing *State v. Haney*, 10th Dist. Franklin No. 99AP-159, 1999 Ohio App. LEXIS 5524 (Nov. 23, 1999).

{¶11} In this case, the trial court’s journal entry granting M.R.’s application to seal records, states, in relevant part:

This matter came to be heard upon the application for expungement of applicant’s conviction under R.C. 2953.32.

The court has given notice of this hearing to the prosecutor for the case and the probation department and a report has been received from the probation department as to the defendant.

{¶12} Although the entry states that the matter was “heard,” the record before this court provides no indication that the parties were in court and a formal hearing held. *See State v. Kasulaitis*, 8th Dist. Cuyahoga No. 95423, 2011-Ohio-852, ¶ 13. The record does reflect that the trial court scheduled a formal hearing for May 9, 2016. However, that hearing never took place. Instead, the discussion of M.R.’s eligibility for expungement occurred off the record in the trial court’s chambers in June 2016. We note that the court docket is silent as to why the May 9, 2016 hearing did not take place as scheduled.

{¶13} Despite the trial court’s failure to comply with its statutory obligation to hold a hearing, M.R. relies on this court’s decision in *State v. Rogers*, 8th Dist Cuyahoga No. 88755, 2007-Ohio-4058, for the proposition that the state’s participation in the

off-the-record conversation constituted invited error that can not be raised on appeal.¹ After careful review, we do not find *Rogers* to be persuasive.

{¶14} In *Rogers*, the trial court’s journal entry granting the plaintiff’s application to seal records clearly reflected that “the parties waived an oral hearing.” In contrast to the circumstances presented in *Rogers*, no such waiver is apparent on this record. In fact, the state’s brief in opposition in this case expressly requested “an evidentiary hearing be conducted for purposes of appellate review.” Thus, we find nothing in this record to suggest the state “acquiesced” to an off-the-record hearing in the court’s chambers or otherwise waived the mandatory requirements placed on the trial court under R.C. 2953.32(B). Accordingly, the application of the doctrine of invited error is not applicable in this case.

{¶15} We certainly agree with M.R. that the obligation to hold a formal hearing may be waived upon the agreement of the parties. However, absent clear language of such a waiver in the trial court’s journal entry, we find a trial court is not relieved of its obligation to hold a formal hearing before ruling on a motion for expungement filed pursuant to R.C. 2953.32.

{¶16} Moreover, we find no merit to M.R.’s contention that the discussion in the trial court’s chambers constituted a “hearing” as contemplated under R.C. 2953.32. The Ohio Supreme Court has recognized that “the essential purpose of an expungement

¹ The invited error doctrine prohibits a party who induces error in the trial court from taking advantage of such error on appeal. *State v. Armstrong*, 8th Dist. Cuyahoga No. 103088, 2016-Ohio-2627, ¶ 69.

hearing is to provide a reviewing court with all relevant information bearing on an applicant's eligibility for expungement.” *Hamilton*, 75 Ohio St.3d 636, 640, 665 N.E.2d 669 (1996). In this case, the informal discussion held in the trial court's chambers failed to provide this court with an opportunity to review the trial court's judgment. Thus, the June 2016 discussion did not comport with the essential purposes of an expungement hearing and did not constitute a valid hearing under R.C. 2953.32 absent an express waiver from the parties. Our holding is consistent with this court's prior discussion concerning the difference between express statutory language requiring a court to hold a formal hearing and language requiring a court to “hear the parties.” *See Panzica Constr. Co. v. Zaremba, Inc.*, 8th Dist. Cuyahoga No. 95103, 2011-Ohio-620, ¶ 31-34 (“A final example of the legislature's expressly requiring the court to hold a formal hearing concerns sealing the criminal records of first-time offenders. R.C. 2953.32(B).”).

{¶17} Having determined that the trial court failed to hold a formal hearing pursuant to R.C. 2953.32(B) , we find the trial court's judgment granting M.R.'s expungement is invalid. *See Kasulaitis*, 8th Dist. Cuyahoga No. 95423, 2011-Ohio-852; *Hann*, 173 Ohio App.3d 716, 718, 2007-Ohio-6201, 880 N.E.2d 148. The state's first assignment of error is sustained. Based on our resolution of the state's first assignment of error, the second assignment of error is deemed moot. *See Hann* at 719.

{¶18} The judgment is reversed and the cause remanded with instructions to the trial court to schedule a hearing on the matter, provide notice to all parties, and hold the hearing to determine whether expungement is proper in this case.

{¶19} Judgment reversed and remanded.

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 be sent to 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.

EILEEN T. GALLAGHER, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
ANITA LASTER MAYS, J., CONCUR