ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	**Case No. 2011-1070**
	)	
Plaintiff-Appellee,	)	
	)	**On Appeal from the Warren**
-vs-	)	**County Court of Appeals,**
	)	**Twelfth Appellate District**
REGINA NIESEN-PENNYCUFF,	)	
	)	**Court of Appeals**
Defendant-Appellant.	)	**Case No. CA2010-11-112**

MERIT BRIEF OF APPELLANT REGINA NIESEN-PENNYCUFF

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STATEMENT OF THE CASE AND FACTS

On April 21, 2009, Appellant Regina Niesen-Pennycuff was indicted on twelve counts of Deception to Obtain a Dangerous Drug, a felony of the fifth degree in violation of Ohio Revised Code § 2925.22(A). She entered not guilty pleas and subsequently filed a Motion for Intervention in Lieu of Conviction pursuant to Ohio Revised Code § 2951.041 on April 23, 2009. The trial court found that she was eligible and granted her motion on May 28, 2009. Appellant then entered guilty pleas and was placed on community control for three years.

On August 24, 2010, the trial court determined that Appellant had successfully completed and complied with her intervention in lieu of conviction and dismissed her case. No finding of guilt was ever entered. Appellant then filed an Application for Sealing of Record After Dismissal of Proceedings on September 23, 2010. The trial court denied Appellant's motion on October 26, 2010, stating Appellant was not eligible pursuant to Ohio Revised Code §§ 2953.31-2953.36 as three years had not yet passed since the dismissal.

Appellant appealed this decision to the Twelfth District Court of Appeals which on June 6, 2011 affirmed the trial court's ruling. It also *sua sponte* certified its decision as in conflict with the Ninth District Court of Appeals' decision in *State v. Fortado* (1996), 108 Ohio App.3d 706. Appellant filed her Notice of Certification of Conflict and, on September 21, 2011, the Court determined a conflict exists and accepted Appellant's case.

ARGUMENT

Proposition of Law No. I

> ~~Must a trial court order the sealing of records in the manner provided in R.C.~~ 2953.32, which requires a one-year waiting period for misdemeanors and a three-year waiting period for felonies, or may the trial court employ R.C. 2953.52(A)(1) and determine that a defendant who has successfully completed the intervention in lieu of conviction program is eligible to have their record sealed immediately upon successful completion of the program?

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The Ohio Revised Code outlines Treatment in Lieu of Conviction (hereinafter "ILC") in § 2951.041. ILC was recently summarized by the Court in *State v. Massien* (2010), 125 Ohio St.3d 204, as follows:

> ILC is a statutory creation that allows a trial court to stay a criminal proceeding and order an offender to a period of rehabilitation if the court has reason to believe that drug or alcohol usage was a factor leading to the offense. R.C. 2951.041(A)(1). If, after a hearing, the trial court determines that an offender is eligible for ILC, then it shall accept the offender's guilty plea, place the offender under the general control and supervision of the appropriate probation or other qualified agency, and establish an intervention plan for the offender. R.C. 2951.041(C) and (D). The intervention plan shall last at least one year, during which the offender is ordered to abstain from alcohol and illegal drug use, to participate in treatment and recovery-support services, and to submit to regular random testing for drug and alcohol use. R.C. 2951.041(D). ***If the offender successfully completes the intervention plan, the trial court shall dismiss proceedings against the offender without an adjudication of guilt and may order the sealing of records related to the offense***. R.C. 2951.041(E). If the offender fails to comply with any term or condition imposed as part of the intervention plan, the court shall enter a finding of guilt and impose the appropriate sanction. R.C. 2951.041(F).

Id. at ¶ 9 (emphasis added).

The ILC statute also addresses the sealing of one's record after his or her case has been dismissed following successful completion of ILC. It states, in pertinent part, that:

> Successful completion of the intervention plan and period of abstinence under this section shall be without adjudication of guilt and is not a criminal conviction for purposes of any disqualification or disability imposed by law and upon conviction of a crime, and ***the court may order the sealing of records related to the offense in question in the manner provided in sections 2953.31 to 2953.36 of the Revised Code.***

Rev. Code § 2951.041(E) (emphasis added).

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Sections 2953.31 to 2953.36 of the Revised Code govern the sealing[1] of an individual's record following the conviction of a crime. The ILC statute does not mention Revised Code § 2953.52, which governs the sealing of one's record after the dismissal of a case. The most significant procedural distinction between the two sections is that an individual must wait a specified time period[2] until the matter can be sealed following a conviction, whereas a defendant in a dismissed complaint, indictment, or information may have his or her record sealed immediately following the dismissal.

Whether Appellant is eligible to have her record sealed immediately or whether she has to wait a specified time hinges on the Court's interpretation of the phrase in § 2951.041(E) that the court "may order the sealing of records related to the offense in question in the manner provided in sections 2953.31 to 2953.36 of the Revised Code."

A. *The Legislature's Rationale Behind Treatment in Lieu of Conviction*

ILC was enacted as a way to assist those with an underlying drug or chemical dependency and help them avoid a felony conviction. It is not designed as punishment, but rather as an opportunity for first-time offenders to receive help for their dependence without the ramifications of a felony conviction. *Massien*, 125 Ohio St.3d 204, at ¶ 10; *citing State v. Ingram* (April 28, 2005), Cuyahoga App. No. 84925, 2005 WL 977820, 2005-Ohio-1967 at ¶ 13. "In enacting R.C. 2951.041, the legislature made a determination that when chemical

[1] Although the Ohio Revised Code uses the phrase "sealing of record of conviction", the case law often uses "expunge" interchangeably with "seal". For ease of reference, Appellant's Merit Brief will not substitute "seal" for "expunge" when quoting case law as using the phrases interchangeably does not alter the analysis.

[2] Pursuant to Ohio Revised Code § 2953.32, that time is one year from final discharge for misdemeanors and three years from final discharge for felonies.

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abuse is the cause or at least a precipitating factor in the commission of a crime, it may be more beneficial to the individual and the community as a whole to treat the cause rather than punish the crime." *State v. Shoaf* (2000), 140 Ohio App.3d 75, 77, 746 N.E.2d 674 (referring to a previous, but similar, version of R.C. 2951.041).

Further, the Court has stated that ILC is designed as an opportunity for first-time offenders to receive help without the ramifications of a felony conviction. *Massien,* 125 Ohio St.3d 204, at ¶ 10. Clearly, the legislative intent behind ILC is rehabilitative, not punitive. The recent amendments to the ILC statute further evidence this intent. *See* H.B. 86 amendments to § 2951.041(effective Sept. 30, 2011)[3]. These amendments expand the types of felony charges that are ILC eligible, authorize intervention when non-substance abuse problems involving mental illness and "intellectual disabilities" led to criminal behavior, and allow certain repeat felony offenders to be eligible for ILC. Through these amendments the legislature has demonstrated a renewed commitment to helping certain individuals avoid the consequences of a felony conviction.

It is illogical to burden Appellant with a criminal record for three years, albeit one of a dismissal, when she utilized a program that resulted in the charges against her being dismissed. It is simply counterintuitive to treat Appellant or any ILC defendant as though they were convicted of a crime when their charges were dismissed pursuant to a program designed to avoid the ramifications of a conviction.

As the legislature intended ILC as a rehabilitative means to avoid a felony conviction, the Court should begin its interpretation of § 2951.041(E) in the context of the legislature's intention to use ILC as a rehabilitative means to avoid a conviction.

[3] Although these amendments changed many facets of the ILC statute, § 2951.041(E) remained the same. Thus, the amendments do not affect Appellant's Proposition of Law.

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B. *Interpreting Ohio Revised Code § 2951.041(E)*

The Court previously stated that "in cases of statutory construction, 'our paramount concern is the legislative intent in enacting the statute.'" *Boley v. Goodyear Tire & Rubber Co.* (2010), 125 Ohio St.3d 510, 929 N.E.2d 448, 2010–Ohio–2550, ¶ 20–21; *quoting State v. Buehler* (2007), 113 Ohio St.3d 114, 863 N.E.2d 124, 2007-Ohio-1246, ¶ 29. To determine intent, the Court looks to the language of the statute and the purpose that is to be accomplished by the statute and "when its meaning is clear and unambiguous," the Court applies the statute "as written." *Rice v. CertainTeed Corp.* (1999), 84 Ohio St.3d 417, 419, 704 N.E.2d 1217; *Cheap Escape Co., Inc. v. Haddox, L.L.C.* (2008), 120 Ohio St.3d 493, 900 N.E.2d 601, 2008-Ohio-6323, ¶ 9.

The Court's role is to evaluate a statute "as a whole and giv[e] such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.* (1917), 95 Ohio St. 367, 373, 116 N.E. 516. Statutes "may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act." *Weaver v. Edwin Shaw Hosp.* (2004), 104 Ohio St.3d 390, 819 N.E.2d 1079, 2004-Ohio-6549, Id. at ¶ 13, quoting *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 36 O.O. 554, 78 N.E.2d 370, paragraph five of the syllabus (internal quotations omitted).

Further, all statutes relating to the same general subject matter must be read *in pari materia. Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 29, 697 N.E.2d 610, 615. The Court, when interpreting related and co-existing statutes, must harmonize and accord full application

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to each of these statutes unless they are irreconcilable and in hopeless conflict. *State v. Patterson* (1998), 81 Ohio St.3d 524, 526, 692 N.E.2d 593, 595. Additionally, words and phrases must be read in context and construed according to the rules of grammar and common usage. Ohio Revised Code § 1.42.

Ohio Revised Code § 2951.041(E) states that "the court may order the sealing of records related to the offense in question in the manner provided in sections 2953.31 to 2953.36 of the Revised Code."

There are three ways the Court can construe the phrase at issue: (1) adopt the position of the Ninth District in *Fortado* that, regardless of what is stated in § 2951.041(E), the end result is a dismissal and the sealing statute governing dismissals applies; (2) find that the use of *may* grants trial courts discretion whether to apply the referenced statutory provisions; or (3) adopt the position articulated by the Twelfth District whereby §§ 2953.31 to 2953.36 of the Ohio Revised Code govern the sealing of a defendant's record after his or her case is dismissed following successful completion of ILC. For the reasons discussed herein, the first and second options are the most consistent with the rationale behind ILC and with the principles of statutory interpretation.

C. *Three Interpretations of § 2951.041(E)*

1. Regardless of what is stated in § 2951.041(E), the case was dismissed and will be treated as such—the *Fortado* approach

The Ninth District has previously decided the exact scenario that exists in this case. *State v. Fortado* (1996), 108 Ohio App.3d 706, 671 N.E.2d 622. In *Fortado*, it affirmed the trial court's decision to seal the record of a dismissal following successful completion of ILC and found that the defendant was not required to wait three years to seal his record as the

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charges fell within the purview of Revised Code § 2953.52, the section addressing the sealing of a record following a dismissal.

The defendant in *Fortado* was charged with, among other things, two counts of drug abuse. These two charges were dismissed on May 18, 1995 after successful completion of ILC. On June 16, 1995, the defendant moved the court to seal the record. The trial court granted the motion on August 1, 1995. The State appealed arguing that the defendant was required to wait three years pursuant to Revised Code § 2951.041(H).[4] The Ninth District affirmed the trial court's decision, stating that "the three-year time limit applies in a situation where a conviction occurs. By definition, the present case does not contain a conviction. Therefore, R.C. 2953.52(A)(1) would allow Fortado to file the motion at any time after the court's dismissal." *Id.* at 708-09.

The Ninth District did not address how its conclusion fits within the sealing framework outlined by the ILC statute. The court's approach raises the obvious question of why, if § 2953.52 applies, the legislature would point to different sealing statutes in Ohio Revised Code § 2951.041(E). The Ninth seemingly recognized, however, that operating under the legal fiction that a conviction occurred would render several words and phrases in sections 2953.31 to 2953.36 of the Revised Code superfluous, meaningless, and inoperable.

Sections 2953.31 to 2953.36 make it abundantly clear that a conviction is required before one can proceed with sealing his or her record. Ohio Revised Code § 2953.32(A)(1) states that "a first offender may apply to the sentencing court . . . for the sealing of the ***conviction*** record . . . ~~at the expiration of three years after the offender's final discharge if~~ ***convicted*** of a felony, or at the expiration of one year after the offender's final discharge if

[4] Ohio Rev. Code § 2951.041(H) was later renumbered as, and is substantially similar to, § 2951.041(E).

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convicted of a misdemeanor." (emphasis added). A "first offender" is defined 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". Ohio Revised Code § 2953.31(A)(emphasis added).

The Court has stated that:

> "A 'conviction' is an 'act or process of judicially finding someone guilty of a crime; the state of having been proved guilty.' Black's Law Dictionary (7th Ed.1999) 335. Thus, the ordinary meaning of 'conviction,' which refers exclusively to a finding of 'guilt,' is not only inconsistent with the notion that a defendant is not guilty (by reason of insanity or otherwise), it is antithetical to that notion. Indeed, the notion that a person is *convicted* by virtue of being found *not guilty* is an oxymoron (a 'not guilty conviction')."

State v. Baker (2008), 119 Ohio St.3d 197 at ¶11, 893 N.E.2d 163, 2008 -Ohio- 3330; *quoting State v. Tuomala* (2004), 104 Ohio St.3d 93, 818 N.E.2d 272, 2004-Ohio-6239, ¶ 14.

There is no judicial finding of guilt following successful completion of ILC, nor is a defendant who has successfully completed ILC proven guilty. The ILC statute even notes that "[s]uccessful completion of the intervention plan and period of abstinence under this section shall be without adjudication of guilt and is not a criminal conviction for purposes of any disqualification or disability imposed by law and upon conviction of a crime." Ohio Rev. Code § 2951.041(E). Thus, there is no way that proceedings in this case could be construed as a conviction.

Since there is no conviction, Ohio Revised Code § 2951.041(E) contradicts itself. *See State v. Mills* (Jan. 6, 2011), Ross App. No. 10CA3144, 2011 WL 322637, 2011-Ohio-377 (recognizing this inherent contradiction). It requires a defendant to proceed as though a conviction occurred when the statute plainly states otherwise. Though the statute notes that successful completion of ILC does not result in a conviction, the sealing statutes it references

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are all predicated on a conviction. Therefore, applying sections 2953.31 to 2953.36 renders one of the preceding sentences in § 2951.041(E) meaningless.

Further, in applying the statutes referenced in § 2951.041(E), a trial court would have to: (1) find that a defendant was a first offender in order to be eligible to have the dismissal sealed; (2) find that the non-existent conviction was either for a misdemeanor or a felony; and (3) determine the final discharge date of the defendant for the non-existent conviction.

Not only would applying the sealing statutes referenced in the ILC statute render multiple words and phrases meaningless and inoperative, it would also require courts to either redefine "conviction" to include cases dismissed following ILC or to completely overlook the fact that a conviction did not occur. While the *Fortado* approach may render the phrase "the court may order the sealing of records related to the offense in question in the manner provided in sections 2953.31 to 2953.36 of the Revised Code" superfluous, the counter-approach causes the statute to contradict itself and undoubtedly requires more phrases and words to be ignored as meaningless. Since Appellant was not convicted and her case was dismissed it follows that § 2953.52 applies and she is immediately eligible to have her record sealed.

2. *The use of "may" allows trial courts the discretion of whether to apply the referenced statutory provisions*

The Third District adopted a similar approach and found no error where the trial court *sua sponte* sealed a record of dismissal pursuant to ILC one year after the dismissal was entered. *State v. Smith* (Dec. 13, 2004), Marion App. No. 9-04-05, 2004 WL 2849057, 2004-Ohio-6668. In *Smith*, the defendant was convicted on three misdemeanor charges. He successfully completed ILC for eight theft of drug charges that accompanied the

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misdemeanors. The defendant's treatment and probation were completed on January 10, 2002 and the trial court ordered the eight counts of Theft of Drugs dismissed.

On October 1, 2003, he filed an Application for Expungement of Record pursuant to Revised Code § 2953.32 requesting that his record of conviction on the three misdemeanor counts of Possession of Drugs be sealed. He did not specifically request that the dismissal of the ILC charges be sealed, although Ohio Revised Code § 2953.32(A)(1) requires a first offender to apply to the sentencing court in order to begin the process of sealing one's record of conviction. On February 24, 2004, the trial court granted the defendant's application and ordered the records be sealed all charges—the convictions and the dismissals.

In affirming the trial court's decision, the court noted an important distinction in the language of Revised Code § 2951.041(E). It stated that:

> Based on the language of R.C. 2951.041(E) that the court may order the records sealed in the "manner provided" by the expungement statutes, rather than language such as "pursuant to the procedure" of the statutes, we find that the legislature intended the trial court to have the authority to order the records sealed even without an application by the offender.
>
> *Id* at ¶ 22 (emphasis added).

While Ohio Revised Code § 2953.32(A)(1) requires a first offender to apply to the sentencing court in order to begin the process of sealing one's record of conviction, the court found that an application to seal the record was not necessary as § 2951.041(E) does not mandate the use of the procedures outline in sections 2953.31 to 2953.36.

The court placed great emphasis on the fact that, per the terms of the ILC statute, the dismissal of a case following successful completion of ILC is not a criminal conviction. Recognizing the inherent contradiction in the ILC statute that stems from the directive to apply the provisions relating to the sealing of one's record following a conviction, it noted that the

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defendant would be precluded from even applying for the sealing of his record pursuant to § 2953.32 since there was no conviction.

The *Smith* approach treats § 2951.041(E) as unambiguous and applies the plain meaning of its wording. The statute does not require the trial court to follow the sealing statutes it lists. Instead, trial courts *may* adhere to sections 2953.31 to 2953.36. The word "may" is discretionary. It is not mandatory. The trial court, then, has the option of whether to apply sections 2953.31 to 2953.36. Had the legislature intended to mandate the use of those provisions to seal the record of dismissal following the successful completion of ILC, it could have stated "If a defendant after dismissal of his or her case following successful completion of treatment in lieu of conviction files to seal the records related to the offense in question, then the trial court ***shall*** seal the records in the manner provided in sections 2953.31 to 2953.36 of the Revised Code." *Smith* also recognizes the inherent contradiction in the application of the referenced statutes and operates to avoid it.

This application comports with the purpose that is to be accomplished by the ILC statute. It does not burden a defendant who was not convicted of anything with a criminal record for a mandatory period of time. Further, this reading does not treat the phrase as superfluous nor does it render the provision meaningless or inoperative. It simply offers the trial court guidance on how it may proceed. In the alternative, if the Court finds that this reading does render the provision superfluous and meaningless, then, as is explained throughout Appellant's Merit Brief, this reading is the lesser of a necessary evil as any interpretation of the statute will ultimately result in another statutory provision being rendered meaningless and inoperable. Thus, since this interpretation lends meaning to the most number of words and phrases in the statute and renders the least number of provisions superfluous, it is

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the proper application of the statue. As such, Appellant is immediately eligible to have her record sealed.

3. *Apply the Plain Meaning of the State as Articulated by the Twelfth District Court of Appeals*

The final approach to interpreting § 2951.041(E) was outlined by the Twelfth District in this case. *State v. Niesen-Pennycuff* (June 6, 2011), Warren App. No. CA2010-11-112, 2011 WL 2179250, 2011-Ohio-2704. The court stated that its plain reading of § 2951.041(E) "requires a trial court to follow the provisions within R.C. 2953.31-2953.36, rather than R.C. 2953.52(A)(1)." *Id.* at ¶13.

It tried to justify legislature's use of the word "may" in § 2951.041(E) by stating that it "means that a trial court has the discretion to permit sealing of the record, or may in its discretion deny an application to seal the record." *Id.* at ¶17. The use of "may", per the court, does not permit the trial court to forgo the provisions listed in the statute. This reasoning is disingenuous and misguided. Sealing a record is not an automatic right, even following a dismissal. Discretion is inherent in any sealing statute. There was no need for the legislature to reiterate this point. Had the legislature substituted "shall" for "may" in § 2951.041(E), the trial court would still have discretion whether to grant the application as §§2953.31-2953.36 affords trial courts this ability.

The court also stated that the legislature could have phrased § 2951.041(E) differently so that it included all of the sealing provisions, specifically § 2953.52. Its failure to do so, according to the court, evidenced intent to require a waiting period. Again, though, the entire basis for ILC is to afford an offender the opportunity to avoid a conviction by obtaining treatment. Why then would the legislature want to burden those individuals who successfully

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complete ILC with a dismissal on their record for a mandatory period of time? It flies in the face of the purpose of ILC.

Appellant's guilty plea also factored heavily into the court's decision. The court noted a statutory difference between an individual whose case is dismissed after admitting guilt and completing ILC versus an individual who is found not guilty after a trial. The legislature did not place comparable emphasis on a guilty plea as there is no such requirement for a defendant who has his or her case dismissed following successful completion of a pre-trial diversion program as outlined in Ohio Revised Code § 2935.36. The statute addressing pre-trial diversion does not contain language similar to what is found in the ILC statute concerning the sealing of one's record after the case is dismissed. It remains silent as to sealing one's record after pre-trial diversion. Thus a defendant who pleads guilty but has his or her case dismissed pursuant to a diversion program is eligible to have their record sealed immediately.

The court also cited to *State v. Mills* (Jan. 6, 2011), Ross App. No. 10CA3144, 2011 WL 322637, 2011-Ohio-377 in its decision. In *Mills,* the Fourth District Court of Appeals found that the defendant, who had a prior conviction for OVI, was eligible to have the record of the dismissal of his case sealed following the successful completion of ILC since he was a "first offender". Although the court stated that because § 2951.041(E) expressly states that §2953.31–36 applies to individuals who have completed an intervention in-lieu-of-conviction program, it never explained its justification for reaching this conclusion. It then goes on to find that since the defendant ultimately only had one conviction on his record (the DUI) then he is eligible to have the case that was dismissed pursuant to ILC sealed—implying that if he also had a conviction for disorderly conduct as a fourth degree misdemeanor, thus making him a repeat offender, then he would be ineligible to have the records of the ***dismissed*** case sealed.

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In reaching this holding, the court admitted that "the process for sealing criminal records does not always fit neatly with the treatment-in-lieu-of-conviction statute." *Id.* at ¶10. It also expressly recognized there inherent contradiction between § 2951.041(E) and § 2953.32 since there is no conviction following successful completion of ILC.

As noted in Appellant's Merit Brief, utilizing the Twelfth District's approach renders numerous terms and phrases in §§ 2953.31-2953.36 superfluous, meaningless, and inoperable. It also creates a contradiction within the ILC statute. Although this interpretation may resolve some initial ambiguity in a plain reading of § 2951.041(E), it creates tremendous confusion when applying the provisions of §§ 2953.31-2953.36.

Some statutory provision will ultimately become superfluous regardless of how § 2951.041(E) is interpreted. The statute is poorly worded and cannot be implemented without rendering some word or phrase, either in the statute itself or another code provision, meaningless or inoperable. The approach as outlined by the Twelfth District, though, invites the most ambiguity and requires numerous words and phrases to be ignored. Thus, this interpretation is simply not tenable.

CONCLUSION

Intervention in lieu of conviction was created so that individuals could receive treatment for substance abuse issues and avoid the ramifications of a felony conviction. Unfortunately, the statute outlining the program is poorly worded and is unclear with regards to how one seals his or her record after the case is dismissed following successful completion of ILC. Interpreting the statute in a manner that allows for the record to be sealed immediately is consistent with the principles of statutory interpretation, renders the least number of words

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and phrases meaningless and inoperable, and does not result in an inherent contradiction in the ILC statute. Further, burdening a defendant with a dismissal on his or her record for a mandatory time period runs counter to the legislative intent of ILC and is not required in other statutory programs designed to help a criminal defendant avoid a criminal conviction, such as pre-trial diversion. As such, the Court should interpret Ohio Revised Code § 2951.041(E) so that a defendant whose case is dismissed following successful completion of ILC is eligible to have his or her record sealed immediately.

Respectfully submitted,

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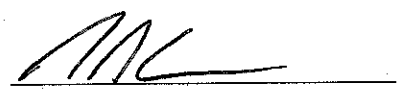

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CERTIFICATE OF SERVICE

The undersigned certifies that she has served a copy of the foregoing upon David Fornshell, Warren County Prosecuting Attorney, and Michael Greer, Assistant Prosecuting Attorney, Attorneys for Appellee, 550 Justice Drive, Lebanon, Ohio 45036, by ordinary mail this 21st day of October, 2011.

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	**Case No. 11-1070**
	)	
Plaintiff-Appellee,	)	**On Notice of a Certified**
	)	**Conflict from the Warren**
-vs-	)	**County Court of Appeals,**
	)	**Twelfth Appellate District**
REGINA NIESEN-PENNYCUFF,	)	
	)	**Court of Appeals**
Defendant-Appellant.	)	**Case No. CA2010-11-112**

NOTICE OF CERTIFICATION OF CONFLICT OF APPELLANT REGINA NIESEN-PENNYCUFF

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A

NOTICE OF CERTIFIED CONFLICT

Pursuant to Article IV, Section3(B)(4) of the Ohio Constitution, Appellant Regina Niesen-Pennycuff hereby gives notice that on June 6, 2011, the Twelfth District Court of Appeals, Warren County, certified this case as in conflict with the decision of the Ninth District Court of Appeals in *State v. Fortado* (1996), 108 Ohio App.3d 706.

More specifically, the Twelfth District certified the following question:

> Must a trial court order the sealing of records in the manner provided in R.C. 2953.32, which requires a one-year waiting period for misdemeanors and a three-year waiting period for felonies, or may the trial court employ R.C. 2953.52(A)(1) and determine that a defendant who has successfully completed the intervention in lieu of conviction program is eligible to have their record sealed immediately upon successful completion of the program?

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon David Fornshell, Warren County Prosecuting Attorney, and Michael Greer, Assistant Prosecuting Attorney, Attorney for Appellee, 550 Justice Drive, Lebanon, Ohio 45036, this 14th day of June, 2011.

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The Supreme Court of Ohio

State of Ohio

v.

Regina Niesen-Pennycuff

Case No. 2011-1070

ENTRY

This cause is pending before the Court on the certification of a conflict by the Court of Appeals for Warren County. On review of the order certifying a conflict, it is determined that a conflict exists. The parties are to brief the issue stated at page 10 of the court of appeals' Opinion filed June 6, 2011, as follows:

"Must a trial court order the sealing of records in the manner provided in R.C. 2953.32, which requires a one-year waiting period for misdemeanors and a three-year waiting period for felonies, or may the trial court employ R.C. 2953.52(A)(1) and determine that a defendant who has successfully completed the intervention in lieu of conviction program is eligible to have their record sealed immediately upon successful completion of the program?"

It is ordered by the Court that the Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Warren County.

(Warren County Court of Appeals; No. CA201011112)

Maureen O'Connor
Chief Justice

B

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-11-112
	:	JUDGMENT ENTRY
- vs -	:	
REGINA NIESEN-PENNYCUFF,	:	
Defendant-Appellant.	:	

The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

Stephen W. Powell, Presiding Judge

Robert P. Ringland, Judge

Robert A. Hendrickson, Judge

C

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-11-112
	:	ENTRY GRANTING CERTIFICATION OF CONFLICT
- vs -	:	
REGINA NIESEN-PENNYCUFF,	:	
Defendant-Appellant.	:	

This matter before the court on the notice of appeal and briefs, we hereby sua sponte certify a conflict between our holding in this case as set forth in the Opinion filed the same date as this Entry, and the Ninth District Court of Appeals in *State v. Fortado* (1996), 108 Ohio App.3d 706. Pursuant to Section 3(B)(4), Article IV, of the Ohio Constitution, we certify the following question to the Supreme Court of Ohio: "Must a trial court order the sealing of records in the manner provided in R.C. 2953.32, which requires a one-year waiting period for misdemeanors and a three-year waiting period for felonies, or may the trial court employ R.C. 2953.52(A)(1) and determine that a defendant who has successfully completed the intervention in lieu of conviction program is eligible to have their record sealed immediately upon successful completion of the program?"

IT IS SO ORDERED.

Stephen W. Powell, Presiding Judge

Robert P. Ringland, Judge

Robert A. Hendrickson, Judge

D

[Cite as *State v. Niesen-Pennycuff*, 2011-Ohio-2704.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-11-112
	:	OPINION
- vs -		6/6/2011
	:	
REGINA NIESEN-PENNYCUFF,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CR25758

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Nicholas D. Graman, 12 East Warren Street, Lebanon, Ohio 45036, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Regina Niesen Pennycuff, appeals the decision of the Warren County Court of Common Pleas denying her application to seal criminal records after dismissal of proceedings. We affirm the trial court's denial, and as a result, sua sponte certify a question to the Ohio Supreme Court regarding the proper application of R.C. 2951.041(E).

E

{¶2} On April 21, 2009, the Warren County prosecutor filed a bill of information, charging Pennycuff with 12 counts of deception to obtain a dangerous drug in violation of R.C. 2925.22(A), a felony of the fifth degree. Pennycuff then filed a motion for intervention in lieu of conviction according to R.C. 2951.041. The trial court granted Pennycuff's motion after determining that she was eligible for intervention according to the statute. The trial court ordered an intervention plan, and Pennycuff entered a guilty plea pending successful completion of her program.

{¶3} On August 24, 2010, the court filed a termination entry in which it recognized Pennycuff's successful completion of the intervention program, and thereby dismissed the 12 pending charges against her. On September 23, 2010, Pennycuff filed an application for sealing of record after dismissal of proceedings. The state opposed the application and argued that Pennycuff was ineligible for sealing until three years after the dismissal of the charges against her, or August 24, 2013. The trial court denied Pennycuff's application, but invited her to reapply in 2013 once she is eligible. Pennycuff now appeals the decision of the trial court, raising the following assignment of error.

{¶4} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING APPELLANT'S APPLICATION TO SEAL HER RECORD AS UNTIMELY FOLLOWING THE DISMISSAL OF HER CASE AFTER SUCCESSFUL COMPLETION OF INTERVENTION IN LIEU OF CONVICTION."

{¶5} Pennycuff argues in her single assignment of error that the trial court misinterpreted R.C. 2951.041 when it denied her application to seal her record. We disagree, and in doing so, recognize that our decision is in direct conflict with one issued by the Ninth District Court of Appeals.

{¶6} Normally, "the decision whether to grant or deny an application to seal

criminal records lies within the sound discretion of the trial court." *State v. Streets*, Franklin App.No. 09AP-453, 2009-Ohio-6123, ¶6. However, because the correct application of R.C. 2951.041 is a matter of statutory interpretation, and therefore a matter of law, we will review the current issue de novo. *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, ¶6-7.

{¶7} According to R.C. 2951.041(A)(1), "if an offender is charged with a criminal offense and the court has reason to believe that drug or alcohol usage by the offender was a factor leading to the offender's criminal behavior, the court may accept, prior to the entry of a guilty plea, the offender's request for intervention in lieu of conviction." R.C. 2951.041 (E) goes on to state, "if the court grants an offender's request for intervention in lieu of conviction and the court finds that the offender has successfully completed the intervention plan for the offender, including the requirement that the offender abstain from using drugs and alcohol for a period of at least one year from the date on which the court granted the order of intervention in lieu of conviction and all other terms and conditions ordered by the court, the court shall dismiss the proceedings against the offender. Successful completion of the intervention plan and period of abstinence under this section shall be without adjudication of guilt and is not a criminal conviction for purposes of any disqualification or disability imposed by law and upon conviction of a crime, and the court may order the sealing of records related to the offense in question in the manner provided in sections 2953.31 to 2953.36 of the Revised Code."

{¶8} R.C. 2953.31 through 2953.36 detail the process by which a record may be sealed. According to R.C. 2953.32(A)(1), "application may be made at the expiration of three years after the offender's final discharge if convicted of a felony, or at the expiration of one year after the offender's final discharge if convicted of a

misdemeanor."

{¶9} Because Pennycuff was charged with 12 counts of a fifth-degree felony, the trial court determined that she would need to wait three years before requesting that her record be sealed. On appeal, Pennycuff relies on *State v. Fortado* (1996), 108 Ohio App.3d 706, for the proposition that she is not required to wait for any amount of time because the charges against her were dismissed once she successfully completed the intervention program.[1]

{¶10} In *Fortado*, the Ninth District considered whether Fortado would have to wait three years before he was eligible to have his record sealed once he successfully completed his intervention program and had the charges against him dismissed.[2] In finding that the trial court did not err in sealing Fortado's record without waiting three years, the Ninth District concluded that "the three-year time limit applies in a situation where a conviction occurs. By definition, the present case does not contain a conviction." Id. at 708-709.

{¶11} Instead, the *Fortado* court applied R.C. 2953.52(A)(1) which provides, "any person, who is found not guilty of an offense by a jury or a court or who is the defendant named in a dismissed complaint, indictment, or information, may apply to the court for an order to seal his official records in the case. * * * the application may be filed at any

---

1. Pennycuff also relies on *State v. Smith*, Marion App. No. 9-04-05, 2004-Ohio-6668. While the *Smith* court did address the last sentence of R.C. 2951.041(E), it did so in reference to whether a trial court can sua sponte order records sealed without application by the offender. However, the court in *Smith* did not interpret R.C. 2951.041(E) specific to whether a three-year waiting period is applicable. Therefore, we will focus on *Fortado* because it is directly on point, and is in direct conflict with our disposition of Pennycuff's appeal.

2. At the time *Fortado* was decided, a slightly different version of R.C. 2951.041 existed. What is now Section (E) was numbered Section (H) and differed from the current version of (E) in that the last sentence of (H) read "and the court may order the expungement of records in the manner provided in sections 2953.31 to 2953.36 of the Revised Code," whereas the current version reads "and the court may order the sealing of records related to the offense in question in the manner provided in sections 2953.31 to 2953.36 of the Revised Code." Because expunge and seal are used interchangeably, the slightly different language between the two version does not impact our analysis or the way in which our interpretation differs from the *Fortado* court.

time after the finding of not guilty or the dismissal of the complaint, indictment, or information is entered upon the minutes of the court or the journal, whichever entry occurs first." We disagree with the Ninth District, and find that the trial court did not err in denying Pennycuff's request to seal her record because she is not eligible until three years have passed once the charges were dismissed against her.

{¶12} Unlike the *Fortado* court, we read the last sentence of R.C. 2951.041(E) and apply its plain meaning to the case at bar. See *Campbell v. City of Carlisle*, 127 Ohio St.3d 275, 2010-Ohio-5707, ¶8, (stating that a court need not interpret a statute "when statutory language is plain and unambiguous and conveys a clear and definite meaning"). According to R.C. 2951.041(E), "the court may order the sealing of records related to the offense in question in the manner provided in sections 2953.31 to 2953.36 of the Revised Code."

{¶13} After applying the plain meaning of the statute to the case at bar, we find that the unambiguous language of R.C. 2951.041(E) requires a court to follow the provisions within R.C. 2953.31-2953.36, rather than R.C. 2953.52(A)(1). Had the legislators intended to permit the sealing of records immediately upon the successful completion of the intervention program and dismissal of the charges, the General Assembly would have said as much, or included section R.C. 2953.52(A)(1) in the last sentence of Section (E). However, it did not.

{¶14} Recently, the Fourth District Court of Appeals also considered an appellant's challenge to the trial court's decision denying an application to seal a criminal record after successful completion of the intervention in lieu of conviction program. In *State v. Mills*, Ross App. No. 10CA3144, 2011-Ohio-377, the Fourth District was asked to consider whether Mills was a first time offender, as defined in R.C. 2951.041. Although the court did not directly analyze the correct application of R.C. 2951.041(E),

the court dismissed Mills argument that the trial court should have applied R.C. 2953.52, "because R.C. 2951.041(E) expressly states that R.C. 2953.31-36 applies to individuals who have completed an intervention-in-lieu of conviction program." Id. at ¶5. The court went on to find that Mills was a first time offender, and "eligible to have his theft-of-drugs records sealed in the manner provided in sections 2953.31 to 2953.36 of the Revised Code." Id. at ¶11. Although it was not analyzing the applicability of R.C. 2951.041(E), the court, nevertheless, recognized that the plain language of R.C. 2951.041(E) directs a court to proceed with sealing the record in the manner of R.C. 2953.31-2953.36, rather than R.C. 2953.52.

{¶15} Given the *Fortado* court's contrary reading, we find it prudent to continue our reasoning and engage in statutory interpretation to support our analysis regarding the proper application of R.C. 2951.041. See *Washington Cty. Home v. Ohio Dept. of Health*, 178 Ohio App.3d 78, 2008-Ohio-4342, ¶29, (finding that "when a statute is subject to various interpretations, a court may invoke rules of statutory construction to arrive at legislative intent").

{¶16} "In cases of statutory construction, our paramount concern is the legislative intent in enacting the statute. To determine intent, we look to the language of the statute and the purpose that is to be accomplished by the statute * * *. Our role * * * is to evaluate a statute as a whole and give such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative. [S]tatutes may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act." *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, ¶20-21. (Internal citations omitted.)

{¶17} We find that the legislator's use of the word "may" in section (E), indicating that a court *may* order the sealing of records, means that a trial court has the discretion to permit sealing of the record, or may in its discretion deny an application to seal the record. However, the "may" does not permit the same trial court to forgo the provisions in R.C. 2953.31 to 2953.36 and elect, instead, to apply R.C. 2953.52(A)(1).

{¶18} Instead, the legislators stated specifically that if the trial court sealed the record, it was to proceed "in the manner provided in sections 2953.31 to 2953.36 of the Revised Code." These sections, as discussed above, set forth the procedure for sealing the record. However, no terms within these sections permit the immediate sealing of records upon dismissal of charges. R.C. 2953.31 defines applicable terms, including first offender. R.C. 2953.32, as quoted above, sets forth general provisions for sealing the record of a first time offender, and requires a one-year hold for misdemeanors, and a three-year waiting period for felonies. R.C. 2953.33 describes the restoration of rights upon sealing of a record, while R.C. 2953.34 states that other remedies are not precluded once sealing occurs, such as seeking appeal of the trial court's decision. R.C. 2953.36 lists the convictions for which sealing the record are precluded.

{¶19} We find the last section, R.C. 2953.36, especially helpful in our analysis. Unlike R.C. 2953.52(A)(1), which grants unconditional sealing of the record,[3] R.C. 2953.36 specifically lists several crimes for which sealing the record is prohibited. We therefore conclude that the legislature specifically drafted R.C. 2951.041(E) to direct a court to seal the record in only certain circumstances rather than in every instance in which a defendant is named in a dismissed complaint, indictment, or information. In reviewing the intervention-in-lieu-of-conviction statute in its entirety, we find that the

3. R.C. 2953.52 makes a single exception for instances in which a defendant faced multiple charges that had different dispositions, as stated in R.C. 2953.61.

General Assembly took caution to differentiate between sealing the record specific to the manner prescribed in R.C. 2953.31 to 2953.36 and the immediate and unconditional sealing under R.C. 2953.52(A)(1).

{¶20} If the legislature had intended that R.C. 2953.52(A)(1) apply, it could have referenced that section specifically, or even made a more general statement that a court could seal the record in accordance with any, or all, of the code sections that prescribe sealing the record. However, the legislature specifically directed a court to proceed "in the manner provided in sections 2953.31 to 2953.36 of the Revised Code."

{¶21} If we were to agree with the *Fortado* court that R.C. 2953.52(A)(1) applies, the last section of R.C. 2951.041(E) would become superfluous. According to the principles of intervention in lieu of conviction, the court dismisses the criminal charges against the defendant upon successful completion of the intervention program. If the legislature had intended to permit immediate and unconditional sealing, it would not have directed a court to proceed in the manner provided in R.C. 2953.31 to 2953.36 because a court would automatically apply R.C. 2953.52(A)(1) wherein any defendant named in a dismissed complaint is entitled to sealing upon the immediate dismissal of the complaint. In interpreting the final section of R.C. 2951.041(E) we are reminded that, "no part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, ¶20-21.

{¶22} Had the General Assembly made the last sentence of Section (E) more general to include any sealing section, then we might agree with the *Fortado* court that R.C. 2953.52(A)(1) is applicable to allow sealing without any waiting period. However, we conclude that the legislature specifically excluded R.C. 2953.52(A)(1) by limiting a

court to the manner provided within R.C. 2953.31 to 2953.36.

{¶23} Moreover, we see a statutory difference between a person who asks the court for intervention in lieu of conviction and a person who is found not guilty by a trier of fact, or otherwise has the charges against them dismissed by the state or because of the state's inability to convict. Unlike a defendant who maintains innocence throughout the proceedings until the charges are dismissed, defendants who seek intervention in lieu of conviction admit their guilt at the onset of proceedings. If a court determines that the defendant is eligible to participate in an intervention program, the defendant offers a guilty plea, and according to R.C. 2951.041(C), "the court *shall* accept the offender's plea of guilty," in addition to the defendant's waiver of speedy trial rights, grand jury indictment, and even arraignment. (Emphasis added.) If the court determines that a defendant who has been afforded the opportunity to seek intervention in lieu of conviction fails to comply with the terms and conditions imposed upon him, the court "shall enter a finding of guilty and shall impose an appropriate sanction under Chapter 2929 of the Revised Code." R.C. 2951.041(F).

{¶24} Unlike a person who has been acquitted by a trier of fact, or otherwise has had the charges dismissed because the state no longer seeks to, or cannot, convict them, a participant in the intervention-in-lieu-of-conviction program has acknowledged criminal responsibility for his or her conduct by pleading guilty, and hopes to exchange treatment for punishment. Stated more directly, participants have the pending charges dismissed because they successfully completed a treatment program, not because they were not guilty of the charges against them.

{¶25} By directing a court to apply the provisions in R.C. 2953.31 to 2953.36, the legislature codified the distinction between those who participate in the intervention in lieu of conviction program from those who have the charges against them dismissed for

other reasons. When considering the prospect of sealing a record specific to intervention in lieu of conviction, our conclusion that a court is limited to the manner provided in R.C. 2953.31 to 2953.36, rather than R.C. 2953.52(A)(1), comports with the plain language of the statute, as well as the legislation's purpose.[4]

{¶26} The decision to grant an application to seal records rests within the sound discretion of a trial court that must balance several factors in determining whether sealing the record is proper. Sealing the record "'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, 2000-Ohio-474, quoting *State v. Hamilton*, 75 Ohio St.3d 636, 639, 1996-Ohio-440.

{¶27} Various reasons exist that may cause a trial court to determine that the public interest outweighs a participant's request to have their record sealed, and not every request to seal will be granted. However, should a trial court find that the applicant is eligible for sealing, it must adhere to the statutory provision set forth in R.C. 2951.041(E) and order the sealing of records in the manner provided in R.C. 2953.31 to 2953.36. Because Pennycuff requested that her felony charges be sealed, the trial court was correct in denying her motion because, and according to R.C. 2953.32, three years has not passed since the charges against her were dismissed.

{¶28} As stated throughout our analysis, we recognize that our holding is in direct conflict with the Ninth District. Therefore, we sua sponte certify a conflict between our holding in this case and that of the Ninth District Court of Appeals in *State v. Fortado* (1996), 108 Ohio App.3d 706. Section 3(B)(4), Article IV, of the Ohio Constitution vests in the courts of appeals the power to certify the record of a case to the Supreme Court

4. We also note and agree with the dissent in *Fortado*, in which Judge Quillin stated, "when it comes to sealing criminal records, the legislature, in its wisdom, has determined to treat those who admit their guilt and request treatment in lieu of conviction differently from those who do not. There is simply no other reading of R.C. 2951.041(H). If R.C. 2951.041(H) doesn't apply in this case, it never applies in any case. And, if it never applies in any case, what is the purpose of the statute?" 108 Ohio App.3d at 709.

of Ohio for review and final determination "[w]henever the judges * * * find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state."

{¶29} Specifically, we certify the following question to the Supreme Court of Ohio:

{¶30} Must a trial court order the sealing of records in the manner provided in R.C. 2953.32, which requires a one-year waiting period for misdemeanors and a three-year waiting period for felonies, or may the trial court employ R.C. 2953.52(A)(1) and determine that a defendant who has successfully completed the intervention in lieu of conviction program is eligible to have their record sealed immediately upon successful completion of the program?

{¶31} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.

Westlaw

671 N.E.2d 622
108 Ohio App.3d 706, 671 N.E.2d 622
(Cite as: 108 Ohio App.3d 706, 671 N.E.2d 622)

Court of Appeals of Ohio,
Ninth District, Summit County.

The STATE of Ohio, Appellant,
v.
FORTADO, Appellee.

No. 17393.
Decided Jan. 24, 1996.

After charges of drug abuse had been dismissed pursuant to statute providing for treatment in lieu of conviction, the Common Pleas Court, Summit County, granted defendant's motion to seal records. State appealed. The Court of Appeals, Reece, J., held that defendant was not required to wait three years after dismissal of charges to move for sealing of records.

Affirmed.

Quillin, J., dissented and filed opinion.

West Headnotes

Criminal Law 110 ⇐1226(2)

110 Criminal Law
110XXVIII Criminal Records
110k1226 In General
110k1226(2) k. Access and Dissemination, and Limitations Thereon. Most Cited Cases

Defendant, against whom charges of drug abuse had been dismissed pursuant to statute providing for treatment in lieu of conviction, was not required to wait three years after dismissal of charges to move for sealing of records, since trial court had dismissed indictments against him, and he thus fell within purview of statute providing that person found not guilty of an offense could apply at any time after such finding for order sealing records; because defendant had not been convicted, he did not fall within purview of section of statute governing treatment in lieu of conviction which provided that expungement could be ordered in accordance with statute requiring defendant to wait three years after final discharge of conviction to move for sealing of records. R.C. §§ 2951.041(H), 2953.32(A)(1), 2953.52(A)(1).

**622 Maureen O'Connor, Summit County Prosecuting Attorney, and William D. Wellemeyer, Assistant Prosecuting Attorney, Akron, for appellant.

Matthew Fortado, Sun Valley, pro se.

REECE, Judge.

Appellant, the state of Ohio, appeals the trial court's judgment ordering the sealing of the records of appellee, Matthew Fortado. We affirm.

The Summit County Grand Jury indicted Matthew Fortado for aggravated trafficking in drugs, conspiracy to commit aggravated trafficking, drug abuse and receiving stolen property. The trial court dismissed the aggravated trafficking charge. The conspiracy charge was amended to a charge of drug abuse. A jury found Fortado not guilty of the charge of receiving stolen property. The trial court ordered treatment in lieu of conviction for the two charges of drug abuse. Fortado successfully completed the treatment. Accordingly, the trial court dismissed the two charges of drug abuse on May 18, 1995. On June 16, 1995, Fortado moved the trial court to seal all his records pursuant to R.C. 2953.52(A)(1). The trial court ordered the records sealed on August 1, 1995. The state now appeals.

The state raises two assignments of error, which essentially argue that the trial court improperly ordered the sealing of Fortado's records.

R.C. 2951.041 states:

*708 "(A) If the court has reason to believe that an offender charged with a felony or misdemeanor is a drug dependent person or is in danger

F

of becoming a drug dependent person, the court shall accept, prior to the entry of a plea, that offender's request for treatment in lieu of conviction. If the offender requests treatment in lieu of conviction, the court shall stay all criminal proceedings pending the outcome of the hearing to determine whether the offender is a person eligible for treatment in lieu of conviction. At the conclusion of the hearing, the court shall ****623** enter its findings and accept the offender's plea.

"(B) * * *

"Upon such a finding and if the offender enters a plea of guilty or no contest, the court may stay all criminal proceedings and order the offender to a period of rehabilitation. * * *

" * * *

"(H) If, on the offender's motion, the court finds that the offender has successfully completed the period of rehabilitation ordered by the court, is rehabilitated, is no longer drug dependent or in danger of becoming drug dependent, and has completed all other conditions, the court shall dismiss the proceeding against him. Successful completion of a period of rehabilitation under this section shall be without adjudication of guilt and is not a criminal conviction for purposes of disqualifications or disabilities imposed by law and upon conviction of a crime, and the court may order the expungement of records in the manner provided in sections 2953.31 to 2953.36 of the Revised Code."

Pursuant to R.C. 2953.32(A)(1), a defendant must wait three years after final discharge of his conviction for a felony to move for sealing of his or her records. The state contends that the trial court erred because it granted Fortado's motion only approximately two months after the dismissal of the charges.

R.C. 2953.52(A)(1) provides:

"Any person, who is found not guilty of an offense by a jury or a court or who is the defendant named in a dismissed complaint, indictment, or information, may apply to the court for an order to seal his official records in the case. Except as provided in section 2953.61 of the Revised Code, the application may be filed at any time after the finding of not guilty or the dismissal of the complaint, indictment, or information is entered upon the minutes of the court or the journal, whichever entry occurs first."

The trial court found that Fortado fell within the purview of R.C. 2953.52(A)(1) because it had dismissed the indictments against him. We cannot say that the court erred in that decision. The three-year time limit applies in a situation where a conviction occurs. By definition, the present case does not contain a ***709** conviction. Therefore, R.C. 2953.52(A)(1) would allow Fortado to file the motion at any time after the court's dismissal.

Accordingly, all of the appellant's assignments of error are overruled. The judgment of the trial court is affirmed.

Judgment accordingly.

BAIRD, P.J., concurs.
QUILLIN, J., dissents.

QUILLIN, Judge, dissenting.

When it comes to sealing criminal records, the legislature, in its wisdom, has determined to treat those who admit their guilt and request treatment in lieu of conviction differently from those who do not. There is simply no other reading of R.C. 2951.041(H). If R.C. 2951.041(H) doesn't apply in this case, it never applies in any case. And, if it never applies in any case, what is the purpose of the statute?

Ohio App. 9 Dist.,1996.
State v. Fortado
108 Ohio App.3d 706, 671 N.E.2d 622

END OF DOCUMENT

2951.041 Intervention in lieu of conviction.

(A)(1) If an offender is charged with a criminal offense, including but not limited to a violation of section 2913.02, 2913.03, 2913.11, 2913.21, 2913.31, or 2919.21 of the Revised Code, and the court has reason to believe that drug or alcohol usage by the offender was a factor leading to the criminal offense with which the offender is charged or that, at the time of committing that offense, the offender had a mental illness or was a person with intellectual disability and that the mental illness or status as a person with intellectual disability was a factor leading to the offender's criminal behavior, the court may accept, prior to the entry of a guilty plea, the offender's request for intervention in lieu of conviction. The request shall include a statement from the offender as to whether the offender is alleging that drug or alcohol usage by the offender was a factor leading to the criminal offense with which the offender is charged or is alleging that, at the time of committing that offense, the offender had a mental illness or was a person with intellectual disability and that the mental illness or status as a person with intellectual disability was a factor leading to the criminal offense with which the offender is charged. The request also shall include a waiver of the defendant's right to a speedy trial, the preliminary hearing, the time period within which the grand jury may consider an indictment against the offender, and arraignment, unless the hearing, indictment, or arraignment has already occurred. The court may reject an offender's request without a hearing. If the court elects to consider an offender's request, the court shall conduct a hearing to determine whether the offender is eligible under this section for intervention in lieu of conviction and shall stay all criminal proceedings pending the outcome of the hearing. If the court schedules a hearing, the court shall order an assessment of the offender for the purpose of determining the offender's eligibility for intervention in lieu of conviction and recommending an appropriate intervention plan.

If the offender alleges that drug or alcohol usage by the offender was a factor leading to the criminal offense with which the offender is charged, the court may order that the offender be assessed by a program certified pursuant to section 3793.06 of the Revised Code or a properly credentialed professional for the purpose of determining the offender's eligibility for intervention in lieu of conviction and recommending an appropriate intervention plan. The program or the properly credentialed professional shall provide a written assessment of the offender to the court.

(2) The victim notification provisions of division (C) of section 2930.08 of the Revised Code apply in relation to any hearing held under division (A)(1) of this section.

(B) An offender is eligible for intervention in lieu of conviction if the court finds all of the following:

(1) The offender previously has not been convicted of or pleaded guilty to a felony offense of violence or previously has been convicted of or pleaded guilty to any felony that is not an offense of violence and the prosecuting attorney recommends that the offender be found eligible for participation in intervention in lieu of treatment under this section, previously has not been through intervention in lieu of conviction under this section or any similar regimen, and is charged with a felony for which the court, upon conviction, would impose sentence under division (B)(2)(b) of section 2929.13 of the Revised Code or with a misdemeanor.

(2) The offense is not a felony of the first, second, or third degree, is not an offense of violence, is not a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code, is not a violation of division (A)(1) of section 2903.08 of the Revised Code, is not a violation of division (A) of section 4511.19 of the Revised Code or a municipal ordinance that is substantially similar to that division, and is not an

offense for which a sentencing court is required to impose a mandatory prison term, a mandatory term of local incarceration, or a mandatory term of imprisonment in a jail.

(3) The offender is not charged with a violation of section 2925.02, 2925.04, or 2925.06 of the Revised Code, is not charged with a violation of section 2925.03 of the Revised Code that is a felony of the first, second, third, or fourth degree, and is not charged with a violation of section 2925.11 of the Revised Code that is a felony of the first, second, or third degree.

(4)

If an offender alleges that drug or alcohol usage by the offender was a factor leading to the criminal offense with which the offender is charged, the court has ordered that the offender be assessed by a program certified pursuant to section 3793.06 of the Revised Code or a properly credentialed professional for the purpose of determining the offender's eligibility for intervention in lieu of conviction and recommending an appropriate intervention plan, the offender has been assessed by a program of that nature or a properly credentialed professional in accordance with the court's order, and the program or properly credentialed professional has filed the written assessment of the offender with the court.

(5) If an offender alleges that, at the time of committing the criminal offense with which the offender is charged, the offender had a mental illness or was a person with intellectual disability and that the mental illness or status as a person with intellectual disability was a factor leading to that offense, the offender has been assessed by a psychiatrist, psychologist, independent social worker, or professional clinical counselor for the purpose of determining the offender's eligibility for intervention in lieu of conviction and recommending an appropriate intervention plan.

(6) The offender's drug usage, alcohol usage, mental illness, or intellectual disability, whichever is applicable, was a factor leading to the criminal offense with which the offender is charged, intervention in lieu of conviction would not demean the seriousness of the offense, and intervention would substantially reduce the likelihood of any future criminal activity.

(7) The alleged victim of the offense was not sixty-five years of age or older, permanently and totally disabled, under thirteen years of age, or a peace officer engaged in the officer's official duties at the time of the alleged offense.

(8) If the offender is charged with a violation of section 2925.24 of the Revised Code, the alleged violation did not result in physical harm to any person, and the offender previously has not been treated for drug abuse.

(9) The offender is willing to comply with all terms and conditions imposed by the court pursuant to division (D) of this section.

(C) At the conclusion of a hearing held pursuant to division (A) of this section, the court shall enter its determination as to whether the offender is eligible for intervention in lieu of conviction and as to whether to grant the offender's request. If the court finds under division (B) of this section that the offender is eligible for intervention in lieu of conviction and grants the offender's request, the court shall accept the offender's plea of guilty and waiver of the defendant's right to a speedy trial, the preliminary hearing, the time period within which the grand jury may consider an indictment against the offender, and arraignment, unless the hearing, indictment, or arraignment has already occurred. In addition, the court then may stay all criminal proceedings and order the offender to comply with all

terms and conditions imposed by the court pursuant to division (D) of this section. If the court finds that the offender is not eligible or does not grant the offender's request, the criminal proceedings against the offender shall proceed as if the offender's request for intervention in lieu of conviction had not been made.

(D) If the court grants an offender's request for intervention in lieu of conviction, the court shall place the offender under the general control and supervision of the county probation department, the adult parole authority, or another appropriate local probation or court services agency, if one exists, as if the offender was subject to a community control sanction imposed under section 2929.15, 2929.18, or 2929.25 of the Revised Code. The court shall establish an intervention plan for the offender. The terms and conditions of the intervention plan shall require the offender, for at least one year from the date on which the court grants the order of intervention in lieu of conviction, to abstain from the use of illegal drugs and alcohol, to participate in treatment and recovery support services, and to submit to regular random testing for drug and alcohol use and may include any other treatment terms and conditions, or terms and conditions similar to community control sanctions, which may include community service or restitution, that are ordered by the court.

(E) If the court grants an offender's request for intervention in lieu of conviction and the court finds that the offender has successfully completed the intervention plan for the offender, including the requirement that the offender abstain from using illegal drugs and alcohol for a period of at least one year from the date on which the court granted the order of intervention in lieu of conviction, the requirement that the offender participate in treatment and recovery support services, and all other terms and conditions ordered by the court, the court shall dismiss the proceedings against the offender. Successful completion of the intervention plan and period of abstinence under this section shall be without adjudication of guilt and is not a criminal conviction for purposes of any disqualification or disability imposed by law and upon conviction of a crime, and the court may order the sealing of records related to the offense in question in the manner provided in sections 2953.31 to 2953.36 of the Revised Code.

(F) If the court grants an offender's request for intervention in lieu of conviction and the offender fails to comply with any term or condition imposed as part of the intervention plan for the offender, the supervising authority for the offender promptly shall advise the court of this failure, and the court shall hold a hearing to determine whether the offender failed to comply with any term or condition imposed as part of the plan. If the court determines that the offender has failed to comply with any of those terms and conditions, it shall enter a finding of guilty and shall impose an appropriate sanction under Chapter 2929. of the Revised Code. If the court sentences the offender to a prison term, the court, after consulting with the department of rehabilitation and correction regarding the availability of services, may order continued court-supervised activity and treatment of the offender during the prison term and, upon consideration of reports received from the department concerning the offender's progress in the program of activity and treatment, may consider judicial release under section 2929.20 of the Revised Code.

(G) As used in this section:

(1) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(2) "Intervention in lieu of conviction" means any court-supervised activity that complies with this section.

(3) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(4) "Mental illness" and "psychiatrist" have the same meanings as in section 5122.01 of the Revised Code.

(5) "Person with intellectual disability" means a person having significantly subaverage general intellectual functioning existing concurrently with deficiencies in adaptive behavior, manifested during the developmental period.

(6) "Psychologist" has the same meaning as in section 4732.01 of the Revised Code.

(H) Whenever the term "mentally retarded person" is used in any statute, rule, contract, grant, or other document, the reference shall be deemed to include a "person with intellectual disability," as defined in this section.

Amended by 129th General Assembly File No. 29, HB 86, § 1, eff. 9/30/2011.

Effective Date: 01-01-2004; 2008 HB130 04-07-2009

2953.31 Sealing of record of conviction definitions.

As used in sections 2953.31 to 2953.36 of the Revised Code:

(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. 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 previous or subsequent 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 previous or subsequent conviction.

(B) "Prosecutor" means the county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer, who has the authority to prosecute a criminal case in the court in which the case is filed.

(C) "Bail forfeiture" means the forfeiture of bail by a defendant who is arrested for the commission of a misdemeanor, other than a defendant in a traffic case as defined in Traffic Rule 2, if the forfeiture is pursuant to an agreement with the court and prosecutor in the case.

(D) "Official records" has the same meaning as in division (D) of section 2953.51 of the Revised Code.

(E) "Official proceeding" has the same meaning as in section 2921.01 of the Revised Code.

(F) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(G) "Post-release control" and "post-release control sanction" have the same meanings as in section 2967.01 of the Revised Code.

(H) "DNA database," "DNA record," and "law enforcement agency" have the same meanings as in section 109.573 of the Revised Code.

H

(I) "Fingerprints filed for record" means any fingerprints obtained by the superintendent of the bureau of criminal identification and investigation pursuant to sections 109.57 and 109.571 of the Revised Code.

Amended by 128th General Assembly File No. 30, SB 77, § 1, eff. 7/6/2010.

Effective Date: 01-01-2004

2953.32 Sealing of conviction record or bail forfeiture record.

(A)(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, or to a court of common pleas if convicted in another state or in a federal court, 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, or at the expiration of one year after the offender's final discharge if convicted of a misdemeanor.

(2) Any person who has been arrested for any misdemeanor offense and who has effected a bail forfeiture may apply to the court in which the misdemeanor criminal case was pending when bail was forfeited for the sealing of the record of the case. Except as provided in section 2953.61 of the Revised Code, the application may be filed at any time after the expiration of one year from the date on which the bail forfeiture was entered upon the minutes of the court or the journal, whichever entry occurs first.

(B) Upon the filing of an application under this section, 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 the hearing. The prosecutor shall specify in the objection the reasons for believing a denial of the application is justified. The court shall direct its regular probation officer, a state probation officer, or the department of probation of the county in which the applicant resides to make inquiries and written reports as the court requires concerning the applicant.

(C)(1) The court shall do each of the following:

(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. If the applicant applies as a first offender pursuant to division (A)(1) of this section and has two or three convictions that 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, in making its determination under this division, the court initially shall determine whether it is not in the public interest for the two or three convictions to be counted as one conviction. If the court determines that it is not in the public interest for the two or three convictions to be counted as one conviction, the court shall determine that the applicant is not a first offender; if the court does not make that determination, the court shall determine that the offender is a first offender.

(b) Determine whether criminal proceedings are pending against the applicant;

(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;

(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;

(e) Weigh the interests 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.

(2) If the court determines, after complying with division (C)(1) of this section, that the applicant is a first offender or the subject of a bail forfeiture, that no criminal proceeding is pending against the applicant, and that the interests of the applicant in having the records pertaining to the applicant's conviction or bail forfeiture sealed are not outweighed by any legitimate governmental needs to maintain those records, and that the rehabilitation of an applicant who is a first offender applying pursuant to division (A)(1) of this section has been attained to the satisfaction of the court, the court, except as provided in divisions (G) and (H) of this section, shall order all official records pertaining to the case sealed and, except as provided in division (F) of this section, all index references to the case deleted and, in the case of bail forfeitures, shall dismiss the charges in the case. The proceedings in the case shall be considered not to have occurred and the conviction or bail forfeiture of the person who is the subject of the proceedings shall be sealed, except that upon conviction of a subsequent offense, the sealed record of prior conviction or bail forfeiture may be considered by the court in determining the sentence or other appropriate disposition, including the relief provided for in sections 2953.31 to 2953.33 of the Revised Code.

(3) Upon the filing of an application under this section, the applicant, unless indigent, shall pay a fee of fifty dollars. The court shall pay thirty dollars of the fee into the state treasury. It shall pay twenty dollars of the fee into the county general revenue fund if the sealed conviction or bail forfeiture was pursuant to a state statute, or into the general revenue fund of the municipal corporation involved if the sealed conviction or bail forfeiture was pursuant to a municipal ordinance.

(D) Inspection of the sealed records included in the order may be made only by the following persons or for the following purposes:

(1) By a law enforcement officer or prosecutor, or the assistants of either, to determine whether the nature and character of the offense with which a person is to be charged would be affected by virtue of the person's previously having been convicted of a crime;

(2) By the parole or probation officer of the person who is the subject of the records, for the exclusive use of the officer in supervising the person while on parole or under a community control sanction or a post-release control sanction, and in making inquiries and written reports as requested by the court or adult parole authority;

(3) Upon application by the person who is the subject of the records, by the persons named in the application;

(4) By a law enforcement officer who was involved in the case, for use in the officer's defense of a civil action arising out of the officer's involvement in that case;

(5) By a prosecuting attorney or the prosecuting attorney's assistants, to determine a defendant's eligibility to enter a pre-trial diversion program established pursuant to section 2935.36 of the Revised Code;

(6) By any law enforcement agency or any authorized employee of a law enforcement agency or by the department of rehabilitation and correction as part of a background investigation of a person who applies for employment with the agency as a law enforcement officer or with the department as a corrections officer;

(7) By any law enforcement agency or any authorized employee of a law enforcement agency, for the purposes set forth in, and in the manner provided in, section 2953.321 of the Revised Code;

(8) By the bureau of criminal identification and investigation or any authorized employee of the bureau for the purpose of providing information to a board or person pursuant to division (F) or (G) of section 109.57 of the Revised Code;

(9) By the bureau of criminal identification and investigation or any authorized employee of the bureau for the purpose of performing a criminal history records check on a person to whom a certificate as prescribed in section 109.77 of the Revised Code is to be awarded;

(10) By the bureau of criminal identification and investigation or any authorized employee of the bureau for the purpose of conducting a criminal records check of an individual pursuant to division (B) of section 109.572 of the Revised Code that was requested pursuant to any of the sections identified in division (B)(1) of that section;

(11) By the bureau of criminal identification and investigation, an authorized employee of the bureau, a sheriff, or an authorized employee of a sheriff in connection with a criminal records check described in section 311.41 of the Revised Code;

(12) By the attorney general or an authorized employee of the attorney general or a court for purposes of determining a person's classification pursuant to Chapter 2950. of the Revised Code.

When the nature and character of the offense with which a person is to be charged would be affected by the information, it may be used for the purpose of charging the person with an offense.

(E) In any criminal proceeding, proof of any otherwise admissible prior conviction may be introduced and proved, notwithstanding the fact that for any such prior conviction an order of sealing previously was issued pursuant to sections 2953.31 to 2953.36 of the Revised Code.

(F) The person or governmental agency, office, or department that maintains sealed records pertaining to convictions or bail forfeitures that have been sealed pursuant to this section may maintain a manual or computerized index to the sealed records. The index shall contain only the name of, and alphanumeric identifiers that relate to, the persons who are the subject of the sealed records, the word "sealed," and the name of the person, agency, office, or department that has custody of the sealed records, and shall not contain the name of the crime committed. The index shall be made available by the person who has custody of the sealed records only for the purposes set forth in divisions (C), (D), and (E) of this section.

(G) Notwithstanding any provision of this section or section 2953.33 of the Revised Code that requires otherwise, a board of education of a city, local, exempted village, or joint vocational school district that maintains records of an individual who has been permanently excluded under sections 3301.121 and 3313.662 of the Revised Code is permitted to maintain records regarding a conviction that was used as the basis for the individual's permanent exclusion, regardless of a court order to seal the record. An order issued under this section to seal the record of a conviction does not revoke the adjudication order of the superintendent of public instruction to permanently exclude the individual who is the subject of the sealing order. An order issued under this section to seal the record of a conviction of an individual may be presented to a district superintendent as evidence to support the contention that the superintendent should recommend that the permanent exclusion of the individual who is the subject of the sealing order be revoked. Except as otherwise authorized by this division and sections 3301.121 and 3313.662 of the Revised Code, any school employee in possession of or having access to the

sealed conviction records of an individual that were the basis of a permanent exclusion of the individual is subject to section 2953.35 of the Revised Code.

(H) For purposes of sections 2953.31 to 2953.36 of the Revised Code, DNA records collected in the DNA database and fingerprints filed for record by the superintendent of the bureau of criminal identification and investigation shall not be sealed unless the superintendent receives a certified copy of a final court order establishing that the offender's conviction has been overturned. For purposes of this section, a court order is not "final" if time remains for an appeal or application for discretionary review with respect to the order.

Amended by 128th General Assembly File No. 30, SB 77, § 1, eff. 7/6/2010.

Effective Date: 04-08-2004; 2007 SB10 07-01-2007; 2007 HB104 03-24-2008; 2008 HB195 09-30-2008

2953.36 Sealing of record of conviction exceptions.

Sections 2953.31 to 2953.35 of the Revised Code do not apply to any of the following:

(A) Convictions when the offender is subject to a mandatory prison term;

(B) Convictions under section 2907.02, 2907.03, 2907.04, 2907.05, 2907.06, 2907.321, 2907.322, or 2907.323, former section 2907.12, or Chapter 4507., 4510., 4511., or 4549. of the Revised Code, or a conviction for a violation of a municipal ordinance that is substantially similar to any section contained in any of those chapters;

(C) Convictions of an offense of violence when the offense is a misdemeanor of the first degree or a felony and when the offense is not a violation of section 2917.03 of the Revised Code and is not a violation of section 2903.13, 2917.01 or 2917.31 of the Revised Code that is a misdemeanor of the first degree;

(D) Convictions on or after the effective date of this amendment under section 2907.07 of the Revised Code or a conviction on or after the effective date of this amendment for a violation of a municipal ordinance that is substantially similar to that section;

(E) Convictions on or after the effective date of this amendment under section 2907.08, 2907.09, 2907.21, 2907.22, 2907.23, 2907.31, 2907.311, 2907.32, or 2907.33 of the Revised Code when the victim of the offense was under eighteen years of age;

(F) Convictions of an offense in circumstances in which the victim of the offense was under eighteen years of age when the offense is a misdemeanor of the first degree or a felony;

(G) Convictions of a felony of the first or second degree;

(H) Bail forfeitures in a traffic case as defined in Traffic Rule 2.

Effective Date: 01-01-2004; 2007 SB18 10-10-2007

J

2953.52 Sealing of records after not guilty finding, dismissal of proceedings or no bill by grand jury.

(A)(1) Any person, who is found not guilty of an offense by a jury or a court or who is the defendant named in a dismissed complaint, indictment, or information, may apply to the court for an order to seal his official records in the case. Except as provided in section 2953.61 of the Revised Code, the application may be filed at any time after the finding of not guilty or the dismissal of the complaint, indictment, or information is entered upon the minutes of the court or the journal, whichever entry occurs first.

(2) Any person, against whom a no bill is entered by a grand jury, may apply to the court for an order to seal his official records in the case. Except as provided in section 2953.61 of the Revised Code, the application may be filed at any time after the expiration of two years after the date on which the foreman or deputy foreman of the grand jury reports to the court that the grand jury has reported a no bill.

(B)(1) Upon the filing of an application pursuant to division (A) of this section, the court shall set a date for a hearing and shall notify the prosecutor in 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 the hearing. The prosecutor shall specify in the objection the reasons he believes justify a denial of the application.

(2) The court shall do each of the following:

(a) Determine whether the person was found not guilty in the case, or the complaint, indictment, or information in the case was dismissed, or a no bill was returned in the case and a period of two years or a longer period as required by section 2953.61 of the Revised Code has expired from the date of the report to the court of that no bill by the foreman or deputy foreman of the grand jury;

(b) Determine whether criminal proceedings are pending against the person;

(c) If the prosecutor has filed an objection in accordance with division (B)(1) of this section, consider the reasons against granting the application specified by the prosecutor in the objection;

(d) Weigh the interests of the person in having the official records pertaining to the case sealed against the legitimate needs, if any, of the government to maintain those records.

(3) If the court determines, after complying with division (B)(2) of this section, that the person was found not guilty in the case, that the complaint, indictment, or information in the case was dismissed, or that a no bill was returned in the case and that the appropriate period of time has expired from the date of the report to the court of the no bill by the foreman or deputy foreman of the grand jury; that no criminal proceedings are pending against the person; and the interests of the person in having the records pertaining to the case sealed are not outweighed by any legitimate governmental needs to maintain such records, or if division (E)(2)(b) of section 4301.69 of the Revised Code applies, the court shall issue an order directing that all official records pertaining to the case be sealed and that, except as provided in section 2953.53 of the Revised Code, the proceedings in the case be deemed not to have occurred.

Effective Date: 10-11-2002

K