
In the Supreme Court of Ohio

**APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. CA-18-107050**

B. J.,

Appellant,

v.

STATE OF OHIO,

Appellee.

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT B.J.**

Diane M. Smilanick, Esq.
Assistant Prosecutor
Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
Email:
dsmilanick@prosecutor.cuyahogacounty.us

Attorney for Appellee

Michael P. Harvey, Esq. (0039369)
Michael P. Harvey Co., L.P.A.
311 Northcliff Drive
Rocky River, Ohio 44116
Tel: (440) 356-9108
Email: MPH Harvey Co@aol.com

Attorney for Appellant

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST.....	1
II. STATEMENT OF FACTS AND CASE	1
III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	2
Proposition of Law No. 1: Revised Code § 2953.36 Provides That Certain Felony Convictions in Revised Code § 2903.13 May Be Expunged.....	2
Proposition of Law No. 2: Ohio’s Expungement Statutes Must Be Construed Liberally for the Remedial Purpose Intended by the General Assembly	4
Proposition of Law No. 3: This Court is Free to Construe the Statute Liberally to Give Effect to the Legislative Purpose	5
Proposition of Law No. 4: Ohio Courts are in Conflict on the Interpretation of R.C. § 2953.36(A)(3)	8
IV. CONCLUSION.....	9
CERTIFICATE OF SERVICE	10
APPENDIX.....	11

TABLE OF AUTHORITIES

Cases

<i>Cincinnati School Dist. Bd. of Ed. v. Hamilton Cty. Bd. of Revision</i> (12 Dist. 1996), 74 Ohio St.3d 639.....	6
<i>Clark v. Scarpelli</i> (2001), 91 Ohio St.3d 271	5, 6
<i>Cockrell v. Robinson</i> (1925), 113 Ohio St. 526.....	5
<i>Curran v. State Auto Mutual Ins. Co.</i> (1971), 25 Ohio St.2d 33	5
<i>In re Yoder</i> (12 th Dist. 2016), 2016-Ohio-7190	5
<i>State of Ohio v. R.M.</i> (8 th Dist. 2017), 2017 WL 3822410	9
<i>State v. Gordon</i> (2010), 161 Ohio Misc.2d 1.....	6
<i>State v. Jordan</i> (2000), 89 Ohio St.3d 488	5
<i>State v. K.T.</i> (10 th Dist. 2017), 2017 WL 5904773	8
<i>State v. LaSalle</i> (2002), 96 Ohio St.3d 178.....	3
<i>State v. Marcus</i> (8 th Dist. 2002), Cuyahoga Cty. App. No. 79768	3
<i>State v. Myer</i> (8 th Dist. 2001), Cuyahoga Cty. Case No. 79513	3
<i>State v. Paxton</i> (6 th Dist. 1985), 110 Ohio App.3d 305	6
<i>State v. Salim</i> (8 th Dist. 2003), Cuyahoga Cty. App. No. 82204	3
<i>State v. V.M.D.</i> (2016), 148 Ohio St.3d 450	8
<i>State v. Ventura</i> (12 th Dist. 2005), 2005-Ohio-5048.....	8

Statutes

R.C. § 1.11	5
R.C. § 1.47(C).....	6
R.C. § 1.49(A) and (E).....	5
R.C. § 2903.11	3
R.C. § 2903.12	3
R.C. § 2917.01	4
R.C. § 2917.03	2, 4
R.C. § 2953.32	2
R.C. § 2953.36(A)(3)	8
R.C. § 3937.18	5

I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

The Ohio General Assembly has been systematically loosening the requirements for expungement and sealing of criminal records in Ohio over the past twenty years. It has never seen fit to revise, alter, clarify or interpret the language of the statute which we believe that the Eighth District Court of Appeals misapplied in concluding that Mr. Jackim's felony conviction should not be expunged. Trial Courts and Courts of Appeals across the State have been reaching conflicting results.

Mr. Jackim has led an exemplary life but for this situation. He is a decorated military veteran of many years along with his wife, who is also a decorated military veteran. They run a successful business, and have for many decades. Mr. Jackim was convicted of an F-3 for an unfortunate situation. He paid his penalties long ago. He has never had another problem. He falls within the statutory scheme as liberally construed.

II. STATEMENT OF FACTS AND CASE

In May 2003, Jackim and his wife, Nina Jackim, were shopping at Sam's Club in Brooklyn, Ohio. After the cashier finished processing their order, Jackim noticed that the tax-exempt status of his business account was not appearing on the receipt. He had been erroneously charged sales tax on his purchase. The clerk checked the account and did not find the couple's tax exempt status. Bruce Jackim became upset. The clerk contacted her Store Manager. The Store Manager was unable to immediately assist the Jackims because she was with another customer. Mr. Jackim began to complain loudly.

Dan Meadows, a uniformed Brooklyn police officer, who was working off duty at Sam's Club, approached Jackim. Officer Meadows asked Jackim to calm down and twice asked for his identification despite being a store customer. Jackim and Officer Meadows engaged in an

altercation, and the two men fell to the ground. Officer Meadows attempted to handcuff Jackim, who resisted. Meadows used his police-issued pepper spray on Jackim, who bit Meadows' arm. Two other police officers and store employee assisted Meadows.

Officer Meadows was treated for his injuries at Deaconess Hospital. Another officer was also treated at Deaconess for a cut he sustained during the incident. Both Jackim and his wife were arrested at the store.

At the police station, Jackim told Officer Meadows that he fought him because he did not think the officer had the authority to arrest him, and he had military training, and if he wanted to get free he would have broken Meadows' nose and crushed his throat (which did not happen).

The jury convicted Bruce Jackim of both counts, the trial court sentenced him to a ninety (90) day suspended jail sentence, one (1) year of community control, four hundred (400) hours of community service, anger management and mental health assessment, and fines and court costs. The Court further found that Jackim served his community control under his first case and ordered community control sanctions terminated. All terms of community service were met years ago.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Revised Code § 2953.36 Provides That Certain Felony Convictions in Revised Code § 2903.13 May Be Expunged

The lower courts denied the Motion to Seal Appellant's Record because the offense of assault on a police officer under Rev. Code § 2903.13(A) was precluded from being sealed by Rev. Code § 2953.36(C).

Rev. Code § 2953.36 provides that certain offenders are eligible for sealing of records as provided by Rev. Code § 2953.32. Specifically, Rev. Code § 2953.36(C) excludes:

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 § 2917.03 of the

Revised Code [riot] and is not a violation of § 2903.13 [assault], 2917.01 [inciting violence] or 2917.31 [inducing panic] of the Revised Code that is a misdemeanor of the first degree.

The Appellant believes that all offenses of violence defined by Rev. Code § 2901.01(A)(9)(a) that are not listed as an exception are precluded from being sealed. See State v. LaSalle (2002), 96 Ohio St.3d 178 (Defendant was ineligible to expunge a conviction of domestic violence); *State v. Myer* (8th Dist. 2001), Cuyahoga Cty. Case No. 79513 unreported; *State v. Marcus* (8th Dist. 2002), Cuyahoga Cty. App. No. 79768; *State v. Baker* (10th Dist. 2001), Hamilton Cty. App. No. C-010115 (Defendants were ineligible to expunge convictions of aggravated assault pursuant to Rev. Code § 2903.12); and *State v. Salim* (8th Dist. 2003), Cuyahoga Cty. App. No. 82204 (holding that Defendant is ineligible to expunge a conviction of felonious assault under Rev. Code § 2903.11).

Misdemeanor assault is an offense that is not excluded from being sealed under Rev. Code § 2953.36(C). See Euclid v. El-Zant (8th Dist. 2001), 143 Ohio App.3d 545. Some Ohio Courts have stated that felony offenses of violence that are specifically excepted from Rev. Code § 2953.36(C) are not eligible for expungement. The offense of riot may be only a misdemeanor offense. Therefore, first offender convicted of riot would generally be eligible to expunge that offense.

The lower courts should have determined whether Rev. Code § 2953.36(C) allowed sealing of felony offenses of Rev. Code § 2903.13 (assault) or Rev. Code § 2917.01 (inciting violence). The words “that is a misdemeanor of the first degree” come directly after Rev. Code § 2917.31 (inducing panic). There is no doubt that a conviction of inciting violence must be a first degree misdemeanor to be expunged, as the words “that is a misdemeanor of the first degree” modify that offense. The words “that is a misdemeanor of the first degree” were not intended to

modify the references to Rev. Code § 2903.13 (assault) or Rev. Code § 2917.01 (inciting violence).

If the Ohio General Assembly had wished to make felony assault and inciting violence offenses ineligible for expungement, it would have structured the sentence differently. First, the General Assembly could have chosen a list format to state which offenses, and to what degrees, are expungable and which are not. Second, the General Assembly could have chosen to use semi-colons to clearly list the offenses that were precluded from sealing. Third, if the General Assembly had intended for Rev. Code § 2903.13 (assault) or § 2917.01 (inciting violence) to only encompass misdemeanor offenses, as well as Rev. Code § 2917.31 (inciting panic), they would have structured the pertinent part of the sentence as follows: "...and are not violations of § 2903.13, 2917.01 or 2917.31 of the Revised Code that are misdemeanors of the first degree, ..."

Instead, the General Assembly chose to use the singular modifier instead of the plural. The only reason for this that makes any sense is that the phrase, "that is a misdemeanor of the first degree" only modifies Rev. Code § 2917.31 (the singular offense) and not Rev. Code § 2903.13 or Rev. Code § 2917.01 (the tense would be plural if that was the intent).

It is clear from the sentence structure chosen by the General Assembly that they meant to preclude expungement of offenses of violence generally when they are first degree misdemeanors or the following felonies: Rev. Code § 2917.03 (riot), 2903.13 (assault), 2917.01 (inciting violence) and first degree misdemeanor 2917.31 (inducing panic).

Proposition of Law No. 2: Ohio's Expungement Statutes Must Be Construed Liberally for the Remedial Purpose Intended by the General Assembly

Ohio's expungement laws are remedial and intended for the benefit of the limited number of convicted individuals who wish to seal their records. Ohio's expungement laws are to be

construed liberally to serve that remedial purpose. See *In re Yoder* (12th Dist. 2016), 2016-Ohio-7190 citing Revised Code § 1.11 which states:

Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice. The rule of the common law that statutes in derogation of the common law must be strictly construed has no application to remedial laws; but this section does not require a liberal construction of laws affecting personal liberty, relating to amercement, or of a penal nature.

See *Clark v. Scarpelli* (2001), 91 Ohio St.3d 271. “We, therefore, must construe the statute liberally to give effect to its legislative purpose”. *Clark*, Id. citing Rev. Code § 1.11; *Curran v. State Auto Mutual Ins. Co.* (1971), 25 Ohio St.2d 33, 38.

Proposition of Law No. 3: This Court is Free to Construe the Statute Liberally to Give Effect to the Legislative Purpose

The Supreme Court of Ohio in *Clark v. Scarpelli* stated that when looking beyond the words of the statute and construing the statute as amended, it must be done in a manner that affects the purpose of the General Assembly. See *Clark v. Scarpelli* (2001), 91 Ohio St.3d 271 citing *State v. Jordan* (2000), 89 Ohio St.3d 488, 492; see also *Cockrell v. Robinson* (1925), 113 Ohio St. 526 ¶ 4 of the syllabus. “We are guiding by the rule that when a statute is ambiguous, the Court, in determining the intent of the General Assembly, may consider the objective of the statute and the consequences of any particular construction.” *Clark*, Id. citing Rev. Code § 1.49(A) and (E). The Court also found that in construing 3937.18 that it is remedial much like the statutes involved in this case, and the Ohio Supreme Court stated that the court must construe the statute liberally to give effect to its legislative purpose. *Clark*, Id. citing Rev. Code § 1.11 and *Curran v. State Auto Mutual Ins. Co.* (1971), 25 Ohio St.2d 33, 38.

The purpose of the remedial expungement/sealing enactments is to reduce the number of Ohio individuals who are negatively affected by felonies of a certain nature all the way through

their life precluding employment, firearms, certain types of contracts, government bids and a whole host of other issues.

The Ohio Supreme Court stated that when construing statutory language, the court must proceed under a presumption that in enacting the statute, the General Assembly intended a just and reasonable result pursuant to Rev. Code § 1.47(C). *Clark v. Scarpelli*, Id. Moreover, courts have a right to interpret ambiguous statutes. But, in doing so, courts must strive to ascertain and give effect to the Legislature's intent in enacting the statute. *State v. Gordon* (2010), 161 Ohio Misc.2d 1. Even when criminal statutes are involved, strict construction of criminal provisions must be tempered with common sense and evidence of statutory purpose. See State v. Paxton (6th Dist. 1985), 110 Ohio App.3d 305. If the construction and interpretation of a piece of statutory language reveals facially ambiguous language, it is the function of the courts to construe statutory language to affect a just and reasonable result. *Cincinnati School Dist. Bd. of Ed. v. Hamilton Cty. Bd. of Revision* (12 Dist. 1996), 74 Ohio St.3d 639.

In 1974, Ohio passed its first version of expungement. Rev. Code § 2953.36 as originally enacted permitted first offenders to expunge their convictions unless those convictions were for offenses that were not eligible for probation or were for traffic offenses. Obviously, Mr. Jackim's conviction was eligible for probation, which he finished, and it was not for traffic offense.

In recent times, expungement has been expanded by the General Assembly. In 2000, the General Assembly broadened the definition of first offense to include two or three convictions for the same indictment if the offenses were committed within a three (3) month period. In 2012, Rev. Code § 2953.31 was amended to allow persons with two misdemeanor convictions or one felony and one misdemeanor conviction to expunge both, with restrictions, and two years later in

2014 the statute was amended to remove the restriction and so someone with two misdemeanor theft offenses, for example, could have them expunged.

So, the General Assembly has been trending in the direction of expanding expungement and sealing options once people have been rehabilitated according to the Orders of the Court and have not had any further problems with law enforcement. Their right to a second chance ought not to be impeded by a broad interpretation of “violence” which makes little sense

Some courts have stated that expungement is an act of grace created by the state, see e.g. *State v. Hamilton* (1996), 75 Ohio St.3d 636, 639 and *State v. Simon* (2000), 87 Ohio St.3d 531, 533. Other Ohio courts have stated that there is obviously a remedial purpose to expungement and have noted that Rev. Code § 1.11 states that remedial laws and proceedings under them shall be liberally construed in order to promote their objective. See *State ex rel Gaines v. Rossi* (1999), 86 Ohio St.3d 620, 622 (the remedial expungement provisions of Rev. Code Chapters 2953.32 and 2953.33 must be liberally construed to promote their purposes). The words “act of grace” are not found in the legislative enactment.

In the *State ex rel Gaines* Case, the Ohio Supreme Court not only said that remedial expungement provisions must be liberally construed to promote their purposes consistent with state legislative law, but that in interpreting related and coexisting statutes, “Courts must harmonize in accord full application to each of these statutes unless they are irreconcilable and in hopeless conflict.” Id. citing *State v. Patterson* (1998), 81 Ohio St.3d 524, 526. The Ohio Supreme Court recognized: “In construing these provisions in accordance with the foregoing guidelines, it is evident that expungement of a felony conviction under Rev. Code § 2953.32 and § 2953.33 restores a person’s competency to hold an office of honor, trust or profit.” *State ex rel Gaines v. Rossi* (1999), 86 Ohio St.3d 620, 622. So, in construing Rev. Code §§ 2961.01,

2953.32 and 2953.33 in *pari materia* and liberally construing the expungement provisions of Rev. Code Chapters 2953.32 and 2953.33 pursuant to Rev. Code § 1.11, the statutes are capable of being harmonized so that expungement provisions provide certain convicted felons with an additional avenue to restore their rights and privileges that they may have forfeited by a conviction.

Proposition of Law No. 4: Ohio Courts are in Conflict on the Interpretation of R.C. § 2953.36(A)(3)

In *State v. V.M.D.* (2016), 148 Ohio St.3d 450 the Ohio Supreme Court held that an attempted robbery was an offense of violence on which the convicted felon was ineligible to have the record expunged. The Ohio Supreme Court reversed the Eighth District Court of Appeals and reinstated the Cuyahoga County Common Pleas judgment.

In *State v. K.T.* (10th Dist. 2017), 2017 WL 5904773 the Tenth District Court of Appeals reversed the trial court that had granted K.T.’s application to seal the record. The Tenth District found that her felony in the second degree for felonious assault was ineligible for expungement or sealing.

In *State v. K.T.*, the Court in footnote No. 1 discussed *State v. Ventura* (12th Dist. 2005), 2005-Ohio-5048 at ¶¶ 11 and 12 where it found the felony conviction was an offense of violence and, therefore, not authorized to expunge, reversing the trial court and consistent with the Eighth District Court of Appeals decision in *City of Euclid v. El-Zant* (2001), 143 Ohio App.3d 545, 547.

In *State v. C.R.* (10th Dist. 2017), 2017 WL 1743865 the Tenth District Court of Appeals reversed the trial court, granting C.R.’s application to seal the record of the conviction of an offense of violence.

In *State of Ohio v. R.M.* (8th Dist. 2017), 2017 WL 3822410 in which the Eighth District Court of Appeals reversed the lower court, finding that because R.M. was convicted of an attempted abduction which is a felony and is defined by the General Assembly as an offense of violence that R.C. 2953.36(A)(3) prohibits the sealing of the record of that conviction.

These cases demonstrate the fundamental difficulty of applying a remedial statute that has remained largely unchanged for many years as it relates to what is or is not expungeable and sealable. The Appellant maintains this Court should consider the actual language employed by the General Assembly that has been unchanged, unaltered and unamended throughout many modifications of the expungement and sealing statutes and apply this implied legislative history to take jurisdiction and allow expungement and sealing in this case.

IV. CONCLUSION

We believe Mr. Jackim's offense allows for expungement and sealing. He has met all the requirements of expungement and sealing. He is a decorated Navy officer. He has never had any problems before or after this situation. The Ohio General Assembly desires to give people a second chance by clearing their records. We ask that the Orders below be reversed in favor of Mr. Jackim and that he be allowed to expunge and seal his one felony offense.

Respectfully submitted,

MICHAEL P. HARVEY CO., L.P.A.

/s/Michael P. Harvey
Michael P. Harvey, Esq. (#0039369)
311 Northcliff Drive
Rocky River, Ohio 44116
Office: (440) 356-9108
Cell: (440) 570-2812
Email: MPH HarveyCo@aol.com
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT BRUCE JACKIM was sent by email, this 25th day of January, 2019 to:

Diane M. Smilanick, Esq.
Assistant Prosecutor
Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
Email: dsmilanick@prosecutor.cuyahogacounty.us
Attorney for Appellee

/s/Michael P. Harvey
Michael P. Harvey, Esq.
Attorney for Appellant

MPH/rlb

APPENDIX

1. Judgment of the Cuyahoga County Court of Appeals December 27, 2018
2. Cuyahoga County Journal Entry dated March 29, 2018

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107050

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

B.J.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-03-439646-ZA

BEFORE: Kilbane, P.J., S. Gallagher, J., and Jones, J.

RELEASED AND JOURNALIZED: December 27, 2018

CR03439646-ZA

106836041



ATTORNEY FOR APPELLANT

Michael P. Harvey
311 Northcliff Drive
Rocky River, Ohio 44116

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
Diane Smilanick
Gregory J. Ochocki
Assistant County Prosecutors
The Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, B.J., appeals from the trial court's judgment denying his expungement motion. For the reasons set forth below, we affirm.

{¶2} The facts and procedural history were set forth by this court in B.J.'s first appeal, *State v. [B.J.]*, 8th Dist Cuyahoga Nos. 87012 and 87400, 2006-Ohio-4756 ("B.J. I").

On May 25, 2003, [B.J.] and his wife, [N.J.], were shopping at Sam's Club in the city of Brooklyn, Ohio. After the cashier finished ringing their order, [B.J.] questioned her as to why the tax-exempt status of his Sam's Club business account was not appearing because the receipt showed a charge of \$3.01 for sales tax. The cashier called Supervisor Ann Cefus for assistance. Ms. Cefus escorted [B.J. and N.J.] to the Customer Service Counter, where she referred them to Amy Valentine, Customer Service Clerk. Ms. Valentine took [B.J. and N.J.'s] business account card and sales receipt and proceeded to check the account status.

When Ms. Valentine was unable to find any proof of tax-exempt status, she referred [B.J. and N.J.] to manager Suzanne Kellar, who was unable to immediately assist them because she was with another customer. Apparently unwilling to wait for Ms. Kellar to finish with the other customer, [B.J.] vocalized his agitation.

When [B.J.] allegedly began to complain loudly, Dan Meadows, a Brooklyn police officer and Sam's Club security guard, approached [B.J.]. Officer Meadows asked him several times to calm down and twice asked for his identification. The acts that followed this conversation are disputed; however, the record indicates that [B.J.] and Officer Meadows engaged in a struggle. An altercation ensued, during which the pair fell on the ground. Officer Meadows attempted to handcuff [B.J.], who was resisting, and used pepper spray to force [B.J.'s] cooperation. Two other off-duty officers and one store employee helped subdue [B.J.] so Officer Meadows could restrain him. After the altercation, it was apparent to several witnesses that Officer Meadows' arm was bleeding; these same

witnesses heard the officer say that [B.J.] bit him. Officer Meadows was briefly treated for his injuries at the store and was then taken to Deaconess Hospital for further treatment. He was later released.

On July 11, 2003, [B.J.] was indicted on one count of felonious assault of a police officer, in violation of R.C. 2903.11; assault on a police officer, in violation of R.C. 2903.13; and resisting arrest, in violation of R.C. 2921.33. On July 25, 2003, [B.J.] pleaded not guilty.

On July 18, 2005, the State filed a motion in limine to exclude the surveillance videotape, which was granted the following day.

On July 20, 2005, a jury trial began. [B.J.] was found not guilty of felonious assault, in violation of R.C. 2903.11; guilty of the lesser included offense of assault, with a police officer specification, in violation of R.C. 2935.01; and guilty of resisting arrest. [B.J.] was sentenced to one year of community control sanctions.

Id. at ¶ 2-7.

{¶3} On appeal, B.J. claimed error in the trial court's denial of his motion for acquittal, the court's failure to enforce subpoenas to material witnesses, suppression of the surveillance videotape, and denial of his motion for a new trial. This court reversed his conviction, finding that the trial court had erred in granting the motion in limine excluding the surveillance videotape as well as reference to it at trial. *Id.* at ¶ 19. We remanded the case for a new trial and ruled that B.J.'s other claims were moot because of the court's ruling. *Id.* at ¶ 21.

{¶4} Following our remand, the trial court amended the indictment to reflect the verdict rendered by the jury in the first trial — one count of assault

on a peace officer and one count of resisting arrest. The matter then proceeded to a second trial before a jury. The jury convicted B.J. of both counts, and the trial court sentenced him to a 90-day suspended jail sentence, one year of community control, 400 hours of community service, anger management, a mental health assessment, and fines and court costs. The court further found that B.J. had already served his community control sanctions under his first case and ordered community control sanctions terminated. B.J. then appealed in *State v. [B.J.]*, 8th Dist. Cuyahoga No. 92617, 2009-Ohio-6640 (“*B.J. II*”). In *B.J. II*, this court affirmed his convictions.

{¶5} After our decision in *B.J. II*, B.J. filed a motion for expungement. The state filed an opposition, and the trial court denied B.J.’s motion without a hearing. B.J. appealed from the trial court’s denial in *State v. B.J.*, 8th Dist. Cuyahoga No. 105764, 2018-Ohio-177 (“*B.J. III*”). In *B.J. III*, the state of Ohio conceded that the trial court should have held a hearing prior to denying B.J.’s expungement motion. *Id.* at ¶ 5. We found that “the record demonstrates that no hearing was held on B.J.’s motion for expungement as required by R.C. 2953.32(B).” *Id.* at ¶ 7. As a result, we reversed the trial court’s denial and remanded the matter for a hearing. *Id.* at ¶ 9.

{¶6} Following our last remand, the trial court held a hearing on B.J.’s expungement motion. At the conclusion of the hearing, the trial court denied B.J.’s motion, finding that it did not have jurisdiction to order an expungement

because B.J. was convicted of an offense of violence that does not qualify for an expungement.

{¶7} It is from this order that B.J. now appeals, raising the following single assignment of error for review.

Assignment of Error

The trial court committed reversible error by finding [B.J.] ineligible for the expungement and/or sealing of his felony conviction arising out of a misunderstanding with an off-duty police officer working security at a Sam's Club.

{¶8} B.J. first argues that the trial court erred when it found that he was ineligible for the sealing of his conviction for assault on a police officer in violation of R.C. 2903.13.

{¶9} In *State v. A.S.*, 8th Dist. Cuyahoga No. 100358, 2014-Ohio-2187, this court explained the standard of review of a ruling on a motion to seal a record of conviction as follows:

Generally, a trial court's decision to grant or deny a motion to seal records filed pursuant to R.C. 2953.52 is reviewed for an abuse of discretion. *State v. C.K.*, 8th Dist. Cuyahoga No. 99886, 2013-Ohio-5135, ¶ 10, citing *In re Fuller*, 10th Dist. Franklin No. 11AP-579, 2011-Ohio-6673, ¶ 7. * * * However, the applicability of R.C. 2953.36 to an applicant's conviction is a question of law that this court reviews de novo. *State v. M.R.*, 8th Dist. Cuyahoga No. 94591, 2010-Ohio-6025, ¶ 15, citing *State v. Futral*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, ¶ 6.

Id. at ¶ 7. In this matter, the question presented herein is whether B.J. was eligible for an expungement under R.C. 2953.36. This inquiry is a matter of

statutory interpretation, which is a question of law. Accordingly, we apply the de novo standard of review.

{¶10} We recognize that a person convicted of a crime has no substantive right to have the record of that conviction sealed. The sealing of the record of a conviction “is an act of grace created by the state.” *State v. Hamilton*, 75 Ohio St.3d 636, 639, 1996-Ohio-440, 665 N.E.2d 669. Before the trial court can make its determination whether to seal an applicant’s record of conviction, the applicant must first cross the threshold of statutory eligibility. R.C. 2953.32(C)(1)(c); R.C. 2953.36. R.C. 2953.36 precludes the sealing of records of certain convictions, and states in pertinent part:

(A) Except as otherwise provided in division (B) of this section, sections 2953.31 to 2953.35 of the Revised Code do not apply to any of the following:

* * *

(3) 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[.]

Thus, according to R.C. 2953.36(A), in order for B.J. to qualify for expungement, his conviction must be a first-degree misdemeanor that is not a violation of R.C. 2903.13.

{¶11} Here, B.J. was convicted of assault of a peace officer in violation of R.C. 2903.13. Assault, as used in R.C. 2903.13, is listed as an offense of violence

in R.C. 2901.01(A)(9)(a). As applicable to the instant case, an assault on a peace officer under R.C. 2903.13(C) is a fourth-degree felony. Because an assault on a peace officer is a violation of R.C. 2903.13, and is not a misdemeanor, the exceptions set forth in R.C. 2953.36(A) do not apply to B.J. *State v. Derison*, 8th Dist. Cuyahoga No. 95225, 2011-Ohio-1570, ¶9-11 (where this court found that appellant was not eligible for expungement when the appellant was convicted of assault on a police officer — a fourth-degree felony). Consequently, B.J. is not eligible for expungement, and the trial court did not err when it found that he cannot have his record sealed under R.C. 2953.36.

{¶12} B.J. next argues that R.C. 2953.36 is ambiguous. In *Derison*, this court recognized,

[w]hile this statutory provision [R.C. 2953.36] is not the paragon of clarity as this court has previously recognized, [*Euclid v. El-Zant*, 143 Ohio App.3d 545, 758 N.E.2d 700 (8th Dist.2001)], we are bound by the rules of statutory construction to give the words used their full effect. *State v. Wilson*, 77 Ohio St.3d 334, 336-337, 1997-Ohio-35, 673 N.E.2d 1347. As we noted in *El-Zant*, “subsection (C) * * * conjunctively excepts four specific violent offenses from the general preclusion: riot (R.C. 2917.03), and misdemeanor violations of assault (R.C. 2903.13), inciting violence (R.C. 2917.01), and inducing panic (R.C. 2917.31).” *Id.* at 547.

* * *

In *State v. Ventura*, Butler App. No. CA2005-03-079, 2005-Ohio-5048, ¶12, the Twelfth District, agreed with this interpretation. Further, if this interpretation were incorrect, then the legislature is free to amend this section to clarify its meaning. The fact that it has amended R.C. 2953.36(C) after the decisions in *El-Zant* and

Ventura, but left it as is, bolsters this court's interpretation. *See* former R.C. 2953.36; Am.S.B. No. 18.

Id. at ¶ 9-10.

{¶13} Based on the foregoing, we find B.J.'s argument unpersuasive.

{¶14} B.J. further argues that R.C. 2953.36 is inapplicable because it violates the constitutional prohibition against retroactive legislation. We note that the statutory law in effect at the time of the filing of an application to seal a record of conviction is controlling. *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E. 2d 1172, ¶ 19. Moreover, this court has previously found that expungement provisions are remedial in nature and the retroactive application of R.C. 2953.36 does not violate the constitutional prohibition against ex post facto laws. *S. Euclid v. Drago*, 8th Dist. Cuyahoga No. 79030, 2001 Ohio App. LEXIS 1783, *12-*13 (Apr. 19, 2001); *State v. Hartup*, 126 Ohio App.3d 768, 773, 711 N.E.2d 315 (8th Dist.1998).

{¶15} Therefore, the sole assignment of error is overruled.

{¶16} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to
Rule 27 of the Rules of Appellate Procedure.

Mary Eileen Kilbane
MARY EILEEN KILBANE, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
LARRY A. JONES, SR., J., CONCUR

FILED AND JOURNALIZED
PER APP.R. 22(C)

DEC 27 2016

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By B. J. Wesley Deputy



103143752

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

STATE OF OHIO
Plaintiff

BRUCE JACKIM
Defendant

Case No: CR-03-439646-ZA

Judge: DICK AMBROSE

INDICT: 2903.11 FELONIOUS ASSAULT WITH PEACE
OFFICER SPECIFICATION
2903.13 ASSAULT ON A POLICE OFFICER
2921.33 RESISTING ARREST

JOURNAL ENTRY

DEFENDANT IN COURT. COUNSEL MICHAEL HARVEY PRESENT.

PROSECUTOR(S) DIANE SMILANICK PRESENT.

COURT REPORTER PRESENT.

CASE IS CLOSED.

EXPUNGEMENT HEARING HELD 03/28/2018.

DEFENDANT'S MOTION MOTION FOR EXPUNGEMENT IS DENIED.

03/28/2018
CPSJO 03/28/2018 14:04:55

Judge Signature

03/29/2018

HEAR
03/28/2018

RECEIVED FOR FILING
03/29/2018 09:34:02
NAILAH K. BYRD, CLERK