

IN THE SUPREME COURT OF OHIO

STATE OF OHIO)	
Plaintiff-Appellee)	On Appeal from the Cuyahoga
)	County Court of Appeals,
)	Eighth Appellate District
vs.)	
B.K.)	Court of Appeals
)	Case No. 109067
Defendant-Appellant)	

APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTERST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL
QUESTION**

This case is of great public interest, as the purposes of the expungement statutes is clearly to enable those who have been successfully rehabilitated through the criminal justice system and who have maintained that rehabilitation to clear their record and go on to build a successful, law abiding lives absent the stigma that accompanies felony convictions. As such, it is clear that the public has a great interest in Ohio Revised Code (ORC) 2953.41(A)(2)(b) being interpreted as liberally as possible. However, despite the rules of construction pursuant to ORC 2901.04(A) requiring that the statute of ORC 2953.41(A)(2)(b) be construed liberally in favor of the Defendant, the Cuyahoga County Prosecutor's Office along with the Eighth District have been successful to this point thwarted many meaningful expungements by arguing for and affirming strict interpretation of the expungement statute.

The public has a great interest in the liberal granting of expungements, and that was made very clear when the Ohio State Legislature extended the girth of the expungement statute in 2018. The promise of expungement, and thereby the ability to live a law-abiding life free of the stigma of felony convictions goes extremely far in the rehabilitation of those convicted of crimes, specifically felonies.

This Honorable Court should accept jurisdiction of the instant matter in effort to define the scope of the eligible offender statute throughout the State of Ohio and to permit those successfully rehabilitated to live without the ghosts of their pasts haunting their future.

STATEMENT OF THE CASE AND FACTS

On November 16, 2012, B.K. was indicted in a twenty-seven (27) count indictment. B.K. was arraigned and the matter proceeded to the pretrial process. On January 14, 2014, B.K. plead guilty to an amended indictment; specifically, B.K. plead guilty to one (1) count of burglary, a felony of the fourth degree, in violation of Ohio Revised Code (ORC) 2911.12(B), one (1) count of assembly / possession of chemical manufacture drug with the intent to manufacture, a felony of the third degree, in violation of ORC 2925.041(A), one (1) count of attempted illegal cultivation of marijuana, in violation of ORC 2923.02 / 2925.04(A), and one (1) count of possession of criminal tools, a felony the fifth degree, in violation of ORC 2923.24(A).

On February 13, 2014, B.K. was again before the Trial Court and was sentenced to a term of incarceration of nine (9) months. B.K. served said sentence, and on April 1, 2019, Appellant filed a Motion to Seal and/or Expunge. A hearing was held and on September 4, 2019, the Motion was denied. The matter was appealed to the Eighth District Court of Appeals, and the judgment of the Trial Court was affirmed.

This case relates to a 2012 plot between the Appellant and his co-defendants to manufacture and distribute MDMA throughout the campus at Baldwin Wallace College. It is noteworthy that in the sentencing hearing the State of Ohio indicated a number of times that the counts were connected and part of a major plot. Specifically, the State said indicated that this was a “plot,” and that it “started with the break-in.” The State’s summary of the facts and circumstances of the case continue to indicate that this was a full and complete course of conduct, which could not possibly be confused with independent acts.

After B.K. was sentenced to his term of incarceration, the Motion to Seal was properly filed. The State objected to said motion, and made the argument that through the offenses B.K. plead guilty to were part of one (1) indictment, the constituted separate felonies for the purposes of expungement. After the expungement hearing, the Trial Court denied said motion, finding that B.K. was not an eligible offender:

Controlling case law indicates a defendant fails to meet the “eligible offender” threshold under the “same act” exception where the offenses were a part of a single enterprise when the offenses took place at a separate time and each involved a different set of circumstances. *State v. Krantz*, 2003-Ohio-4569, (8th Dist.), citing *State v. Bradford* (1998) 129 Ohio App. 3d 128 (8th Dist.).

See Docket Entry 9/4/19.

ARGUMENT

Proposition of Law I:

A course of conduct, in the furtherance of the same goal, are not independent crimes for the purposes of determining whether or not one is an eligible offender for expungement pursuant to Ohio Revised Code (ORC) 2953.31(A)(2)(b).

In order to be considered for the sealing or expungement of a criminal record, one must first be determined to be an eligible offender. Pursuant to ORC 2953.31(A)(2)(b), an eligible offender includes:

Anyone who has been convicted of an offense in this state or any other jurisdiction, to whom division (A)(1)(a) of this section does not apply, and who has not more than one felony conviction, not more than two misdemeanor

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

Generally, a trial court's decision regarding a motion to seal or expunge a record is reviewed for abuse of discretion. *State v. CN*, 2019-Ohio-4673, at *P4 (internal citations omitted). However, the Eighth District has held that determinations of whether or not one is an eligible offender is a question of law, which requires a de novo review. *Id.* citing to *State v. AS*, 8th Dist., 2014-Ohio 2187., at ¶ 7 (internal citations omitted); see also *State v J.M.* 148 Ohio St. 3d 113, at **P9.¹ In the instant matter, the Trial Court erred when finding that B.K. was not an eligible offender under the above outlined code section.

At the Trial Court, the State of Ohio rested the bulk of their argument on *State v. Helfich*, 2018-Ohio-638 (3rd Dist). However, that case is highly distinguishable from the instant matter as it deals with convictions of multiple misdemeanors, taking place separately, and charged under a series of case numbers. The instant matter, clearly deals

¹ The Appellant recognizes that *State v. CN* dealt with the eligibility of an offender when evaluated under ORC 2953.36, but argues respectfully that the same analysis should apply to eligibility pursuant to ORC 2953.31(A) (1) (b) as the ultimate question of law, whether or not the Appellant is an eligible offender, exists.

with a “plot” and a continuous course of conduct. As such, this authority, which is persuasive authority at best, is inapplicable in the instant analysis.

The Trial Court indicated that she was prohibited from granting B.K.’s motion to expunge, as he was not an eligible offender, stating:

controlling case law indicates a defendant fails to meet the “eligible offender” threshold under the same act exception where the offenses were part of a single enterprise when the offenses took place at a separate time and each involved a different set of circumstances. *State v. Krantz*, Ohio-4569 at ¶ 19 (8th Dist), citing *State v. Bradford* (1998) 129 Ohio App. 3d 128 (8th Dist.).

See Docket Entry, 9/4/19. The Trial Court’s reliance on *Krantz* was in error. First, *Krantz* was an issue regarding financial crimes, with multiple victims. The instances in *Krantz* took place over a nine (9) month period. *Id.* at *P15. In its analysis of *Krantz*, this Honorable Court took great care to evaluate the presence of multiple victims, and further looked at a series of other cases in which the defendants were not found to be eligible offenders. In none of the other cases, were the defendants convicted of a scheme or a plot as B.K. in the instant matter was:

Our review of the record compels the conclusion that defendant is not a first offender because he was convicted of separate and unrelated offenses which occurred over a nine month period and involved numerous victims.

Accord *State v. Londrico* (Dec. 8, 1978), Cuyahoga App. No. 38174, 1978 Ohio App. LEXIS 8543 (defendant was not a first offender where he was convicted of receiving stolen goods for offenses occurring four months apart and involving two different owners); *State v. Patino* (March 2, 1989), Cuyahoga App. No. 55681, 1989 Ohio App. LEXIS 698 [**7] (defendant was not a first offender where he was convicted of two felonious assault convictions which occurred one week apart from each other); *State v. Alandi* (Nov. 15, 1990), Cuyahoga App. No. 59735, 1990 Ohio App. LEXIS 5001 (defendant was not a first offender where he reported his traveler’s checks as lost then used the

checks twenty-one days later to buy merchandise at three different locations); *State v. Burks* (Aug. 22, 1991), Cuyahoga App. No. 59040, 1991 Ohio App. LEXIS 4217 (defendant was not a first offender where she plead guilty to five separate acts of receiving stolen property over one month which involved different victims); *State v. Radey* (Aug. 17, 1994), Medina App. No. 2293-M, 1994 Ohio App. LEXIS 3631 (defendant was not a first offender where he was convicted of six counts of passing bad checks and the offenses occurred over a seven month period and involved different victims); *State v. Bauknight* (Feb. 1, 1990), Cuyahoga App. No. 58209, 1990 Ohio App. LEXIS 289 (defendant was not a first offender where he plead guilty to three separate counts of petty theft which occurred over a approximately eighteen months and involved different victims); *State v. Derugen, supra* (defendant was not a first offender where she was convicted [**8] of theft and drug offenses over a one year period).

*Id. at *P15.* In every single one of the cases that the *Krantz* court relied upon in its determination that *Krantz* was not an eligible offender, the offender in question committed multiple, independent crimes, with only an appearance of commonality between them. In the instant matter, it is the State's own words which demonstrate that the none of the crimes B.K. was convicted of were independent; he was engaged in a “plot” to manufacture and distribute MDMA throughout his college campus. As such, the Trial Court's reliance upon *Krantz* is in error.

In contrast, *State v. CN* is directly on point. 2019-Ohio-4673. In this case, the Eighth District specifically stated that the plain reading of ORC 2953.31(A)(1)(b) indicates that “when two (2) 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 (1) conviction.” *Id. at *P10.* The Eighth District further specifically said that “the state's contention that each felony count in each case is counted as a felony conviction is

misplaced.” *Id.* *P11. This clearly shows that “plots” or “schemes” within one (1) indictment are considered one (1) felony for the purpose of ORC 2953.31(A)(1)(b). B.K. recognizes that defendant in *CN* was ultimately not found to be an eligible offender. This Honorable Court must make the time to analyze the relevant statute in an effort to ensure there is not a district conflict and that the matter is being interpreted correctly by the Trial Courts.

The State of Ohio does not have the ability to have this case both ways. They cannot argue that it was a callous plot for the purposes of imprisoning a young college student in 2014, and turn around and argue that the events as convicted were not a scheme or plot, or connected with the same act in 2019. To litigate in such a manner is contrary to the purpose of expungement, which is to say, to recognize that people can be rehabilitated. *State v. Petrou*, 13 Ohio App. 3d 456 (9th Dist. 1984). The Appellant was convicted of four (4) felony counts. All of which relate directly to the same act, which is to manufacture and distribute drugs on the campus of Baldwin Wallace. As such, the determination that he was not an eligible offender was in error.

CONCLUSION

Pursuant to the preceding Propositions of Laws, the Defendant-Appellant respectfully requests that this Honorable Court accept jurisdiction of this case and decide the issue on its merits.

Respectfully Submitted,

/s/ Mary Catherine Corrigan
MARY CATHERINE CORRIGAN
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction has been served upon Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, this 12th day of October, 2020, via ordinary USPS mail to his offices located at 1200 Ontario Street, Cleveland, Ohio 44113.

/s/ Mary Catherine Corrigan

Mary Catherine Corrigan
Counsel for Appellant

APPENDIX A- Eighth District Court of Appeals Dismissal