

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellant,

vs.

G.K.,

Defendant-Appellee.

Supreme Court Case No. 2021-0124

**On Appeal from the Cuyahoga County
Court of Appeals, Eighth District**

Court of Appeals Case No. 109058

**BRIEF OF AMICI CURIAE
OHIO ASSOCIATION OF MUNICIPAL AND COUNTY COURT CLERKS**

Michael C. O'Malley (005952)
Cuyahoga County Prosecutor
Gregory Ochocki (0063383)
Assistant Prosecuting Attorney
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
(216) 443-7800
gchocki@prosecutor.cuyahogacounty.us
Counsel for Plaintiff-Appellant

Christopher J. Weber (0059270)
Sasa Trivunic (0096722)
Kegler, Brown, Hill + Ritter, Co. LPA
65 E. State Street, Suite 1800
Columbus, Ohio 43215
(614) 462-5400
cweber@keglerbrown.com
*Counsel for the Ohio Association
of Municipal and County Court Clerks,
Amici Curiae in Support of Plaintiff-Appellant*

Larry W. Zukerman (0029498)
Brian a. Murray (0079741)
Adam M. Brown (0092209)
Zukerman, Lear & Murray Co. LPA
3912 Prospect Avenue
Cleveland, Ohio 44115
(216) 696-0900
lwz@zukerman-law.com
bam@zukerman-law.com
amb@zukerman-law.com
Counsel for Defendant-Appellee

TABLE OF CONTENTS

Statement of Facts	1
A. Interest of Amici	1
B. Incorporation of State's Factual Statement	1
 Argument	 2
A. R.C. 2953.52(A)(1) Precludes Applicants from having a Partially Dismissed Complaint, Indictment or Information Sealed	2
B. R.C. 2953.61 Precludes Applicant from Having the Partially Dismissed Indictment Sealed	4
C. R.C. 2953.61's Application is not Limited to Convictions Exempt from Sealing Under R.C. 2953.36.....	5
D. Permitting a Partially Dismissed Complaint or Indictment to be Sealed Would be Impossible	6
 Conclusion	 8

TABLE OF AUTHORITIES

CASES

<i>Hulsmeyer v. Hospice of Southwest Ohio, Inc.</i> , 142 Ohio St.3d 236, 2014-Ohio-5511, 29 N.E.3d 903	3
<i>In re K.J.</i> , 2014-Ohio-3472	7
<i>State ex rel. Cable News Network, Inc. v. Bellbrook-Sugarcreek Local Sch.</i> , Ohio St.2d, 2020-Ohio-5149, N.E.3d	3
<i>State ex rel. Lewis v. Lawrence County</i> , 95 Ohio App.3d 565, 642 N.E.2d 1166 (4th Dist. 1994)	3
<i>State ex rel. Tritt v. State Emp. Relations Bd.</i> , 97 Ohio St.3d 280, 2002-Ohio-6437, 779 N.E.2d 226	7
<i>State v. C.K.J.</i> , 2016-Ohio-5637, 70 N.E.3d 1087 (10 th Dist.)	7
<i>State v. Capone</i> , 2004-Ohio-4679, 2 nd Dist. Montgomery No. 20134, 2004-Ohio-4679	5
<i>State v. Futrall</i> , 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497	1, 2, 6, 7
<i>State v. G.K.</i> , 2020-Ohio-5083, 161 N.E.3d 824 (8 th Dist.)	2, 3, 4, 5
<i>State v. LaSalle</i> , 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172	4
<i>State v. Pariag</i> , 137 Ohio St.3d 81, 2013-Ohio-4010	1, 4, 5, 6, 7
<i>State v. Selesky</i> , 11 th Dist. Portage No. 2008-P-0029, 2009-Ohio-1145	5

STATUTES

R.C. 2953.32	4, 6
R.C. 2953.36	4, 5, 6
R.C. 2953.52	2, 3, 7
R.C. 2953.52(A)(1)	2, 3
R.C. 2953.61	2, 3, 4, 5, 6, 7
R.C. 2953.61(A)(1)	3

MISCELLANEOUS

Municipal County Court Statistics	8
---	---

STATEMENT OF FACTS

A. Interest of Amici

Since its formation in 1958, the Ohio Association of Municipal and County Court Clerks (“OAMCCC”) has been working to achieve its objective of providing valuable knowledge and information to its members to help improve Municipal and County Court administration throughout Ohio. The OAMCCC currently has 152 Municipal/County/Mayor’s Court clerk members (and 11 vendor members), comprised primarily of appointed and elected Municipal and County Court Clerks of the State of Ohio. The OAMCCC submits this Brief in support of the position of Appellant the State of Ohio to address the Eighth District Court of Appeals’ erroneous decision permitting a court to partially seal dismissed charges in an indictment even though one charge resulted in a conviction that was not eligible for sealing.

Unless reversed in its entirety, the Eighth District’s decision will impose an administrative burden on Ohio’s clerks of courts charged with partially sealing court records which this Court previously recognized as “impossible.” “Partial sealing would have to be attempted for everything from arrest records to written statements to transcripts to journal entries. How this task would be accomplished and who would have the authority to attempt it are questions that underscore the impractical reality of an attempt to seal certain convictions in one case while revealing others.”

State v. Futrall, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, ¶¶19-20. See also *State v. Pariag*, 137 Ohio St.3d 81, 2013-Ohio-4010, 998 N.E.2d 401, ¶18 (“We . . . recognize the inherent difficulty of partially sealing records.”).

B. Incorporation of State’s Factual Statement

OAMCCC adopts and incorporates the Statement of Facts contained in the State’s Merit Brief.

ARGUMENT

A divided Eighth District Court of Appeals held that R.C. 2953.52 and R.C. 2953.61 permit a court to partially seal dismissed charges in an indictment even though one charge resulted in a conviction that was not eligible for sealing. *State v. G.K.*, 2020-Ohio-5083, 161 N.E.3d 824, ¶¶27, 44 (8th Dist.). In so doing, the court found that R.C. 2953.52 was ambiguous and that the General Assembly “did not intend to prohibit the sealing of individually dismissed charges.” *Id.* at ¶¶ 32-43. The Eighth District’s ruling must be reversed in its entirety because it ignores the plain language of R.C. 2953.52 and R.C. 2953.61, and is contrary to this Court’s decision in *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, and decisions of other Ohio courts of appeals.

A. R.C. 2953.52(A)(1) Precludes Applicants From Having A Partially Dismissed Complaint, Indictment or Information Sealed.

R.C. 2953.52(A)(1) reads in its entirety as follows:

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 the person’s 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. (Emphasis added)

The General Assembly made it clear in the words it chose that to be eligible to have a person’s “official records *in the case*” sealed under R.C. 2953.52, the applicant must either be “found not guilty of an offense by a jury or a court” or “the defendant named in a dismissed complaint, indictment, or information.” *Id.* (Emphasis added.) Here, G.K. was neither “found not guilty of an offense by a jury or a court” nor “named in a dismissed complaint, indictment, or information.” The dismissal of the charges in the indictment under Case No. CR-09-526944 did not dismiss the “complaint, indictment, or information” because G.K. pled guilty to an obstruction

of justice charge in the same case, which G.K. concedes cannot be sealed. *State v. G.K., supra* at ¶¶13, 35.

The plain language of R.C. 2953.52 requires that a “complaint, indictment, or information” be dismissed, not merely a count or counts within a complaint, indictment, or information. *State ex rel. Lewis v. Lawrence County*, 95 Ohio App.3d 565, 642 N.E.2d 1166 (4th Dist. 1994) (“[a]lthough several counts in the indictment against appellant were either dismissed or nolle prosequi, neither a complaint nor an indictment was dismissed against appellant. **In other words, the statute requires that an indictment against the appellant be dismissed, not merely a count in the indictment.**”) (Emphasis added.)

“The intent of the General Assembly ‘is primarily determined from the language of the statute itself.’” *State ex rel. Cable News Network, Inc. v. Bellbrook-Sugarcreek Local Sch.*, Ohio St.3d, 2020-Ohio-5149, N.E.3d., ¶11. “This court will not insert language to modify an unambiguous statute under the guise of statutory interpretation.” *Id.* If the General Assembly intended to permit partial sealing of dismissed counts within a complaint, indictment or information, then the General Assembly would have expressed its desire by inserting those words in R.C. 2953.52. But the General Assembly did not. Courts must give effect to the words used in a statute, “making neither additions nor deletions from words chosen by the General Assembly.” *Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, 29 N.E.3d 903, ¶23.

G.K. is not eligible under R.C. 2953.52 to apply to the court for an order to seal his official records in the case.¹

¹ Even if G.K. was “found not guilty of an offense by a jury or a court” his application to seal would be subject to R.C. 2953.61(A)(1). *See* R.C. 2953.52(A)(1) (“*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 . . .*”).

B. R.C. 2953.61 Precludes Applicant From Having The Partially Dismissed Indictment Sealed.

R.C.2953.61 does not permit partial sealing either. The statutory law in effect at the time of the filing of an application to seal a record of dismissal is controlling. *See e.g. State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, ¶19 (“the statutory law in effect at the time of the filing of an R.C. 2953.32 application to seal a record of conviction is controlling.”) G.K. filed his application to seal on August 15, 2014. The version of R.C. 2953.61 in effect at that time read in its entirety as follows:

When a person is charged with two or more offenses as a result of or in connection with the same act and at least one of the charges has a final disposition that is different than the final disposition of the other charges, the person may not apply to the court for the sealing of his record in any of the cases until such time as he would be able to apply to the court and have all of the records in all of the cases pertaining to those charges sealed pursuant to divisions (A)(1) and (2) of section 2953.32 and divisions (A)(1) and (2) of section 2953.52 of the Revised Code.²

Here, G.K. was “charged with two or more offenses as a result of or in connection with the same act and at least one of the charges has a final disposition that is different than the final disposition of the other charges.” The obstruction of justice charge resulted in a conviction, a final disposition different than the dismissed charges. As expressly acknowledged by the Eighth District, the obstruction of justice and tampering with evidence charges “arose from the same conduct,” namely, G.K.’s delay in providing the police with a computer in G.K.’s house. *State v.*

² The Eighth District erroneously applied the version of R.C. 2953.61 that went into effect on September 19, 2014, and in so doing, analyzed the Legislative Service Commission’s Final Analysis of 2013 S.B. 143 which amended R.C. 2953.32, 2953.321, 2953.36 and 2953.61, and concluded that “[l]egislative history demonstrates that the legislature did not intend to prohibit applications like G.K.’s.” *State v. G.K.*, *supra* at ¶37. Because the version of R.C. 2953.61 in effect prior to the amendments added by 2013 S.B. 143 controls, which this Court in *Pariag* held was “unambiguous” (at ¶21), there is no need to address Eighth District’s analysis of the Legislative Service Commission’s Final Analysis of 2013 S.B. 143 (or any other legislative history). But if this Court were to look beyond the language of the statutes to determine intent, and review the legislative history concerning subsequent amendments to the sealing statutes, it would conclude that the General Assembly does not permit partial sealing.

G.K., supra at ¶46. As alleged in the Indictment, the dates of these two offenses occurred “on or about July 22, 2009 through August 6, 2009.” *Id.*

Thus, because G.K. was “charged with two or more offenses as a result of or in connection with the same act and at least one of the charges has a final disposition that is different than the final disposition of the other charges,” G.K. may not apply to the court for the sealing of his record until such time as he would be eligible to apply to have “**all of the records**” sealed.³ G.K.’s obstruction of justice charge cannot be sealed. Thus, none of the dismissed charges qualify to be sealed under R.C. 2953.61. *See State v. Pariag, supra* at ¶17 (“if the record of one charge cannot be sealed, any charges filed as a result of or in connection with the act that resulted in the unsealable charge cannot be sealed.”); *State v. Capone*, 2nd Dist. Montgomery No. 20134, 2004-Ohio-4679, ¶8 (“because Capone’s case was not dismissed, his records could not be [sealed]. **Therefore, under R.C. 2953.61, [the defendant’s] records could not be sealed because all of the charges in the case did not qualify to be sealed.**”) (Emphasis added); *State v. Selesky*, 11th Dist. Portage No. 2008-P-0029, 2009-Ohio-1145, ¶22 (an applicant who had a charge that could not be sealed could not have others parts of the case sealed because he could not “satisfy the requirements of R.C. 2953.61, ‘to apply to the court and have all of the records in all of the cases pertaining to those charges sealed.’”)

C. R.C. 2953.61’s Application Is Not Limited To Convictions Exempt From Sealing Under R.C. 2953.36.

The Eighth District held that “because the obstructing justice conviction is not exempt from sealing *under R.C. 2953.36*, we ultimately find the trial court erred in relying on R.C. 2953.61 to deny G.K.’s application to seal the dismissed charges.” *State v. G.K., supra* at ¶45 (Emphasis

³ Furthermore, the obstruction of justice charge likewise is “as a result of” and/or “in connection with” the dismissed rape, gross sexual imposition and kidnapping charges. G.K. would not have been charged with obstruction of justice (or tampering with evidence) but for the rape, gross sexual imposition and kidnapping charges.

added.) In other words, the Eighth District, relying upon *Pariag*, suggests that R.C. 2953.61 only applies if the charge is exempt from sealing under R.C. 2953.36. But that is not what R.C. 2953.61 says. Nowhere in R.C. 2953.61 does it state, suggest, or imply that a conviction must be exempt from sealing *under R.C. 2953.36* in order for R.C. 2953.61 to apply. Again, had the General Assembly intended such a result, it would have expressly stated so, but it did not.

Thus, the fact that R.C. 2953.32 makes the obstruction of justice charge exempt from sealing rather than R.C. 2953.36 is of no consequence. Because the obstruction of justice charge cannot be sealed, none of the dismissed charges qualify to be sealed under R.C. 2953.61.

D. Permitting A Partially Dismissed Complaint or Indictment To Be Sealed Would Be Impossible.

As this Court in *Futrall* held, partial sealing “would be impossible.”

Meeting the requirements of *Futrall*’s position – parsing out those convictions that can be sealed from those cannot – would be impossible: a trial court is unable to order *all* index references to the case deleted while at the same time ordering that index references in one conviction in that case be maintained because the case cannot be lawfully sealed.

In enacting these provisions, the General Assembly appears to have recognized the *inherent difficulty* in sealing only some convictions in one case. **Partial sealing would have to be attempted for everything from arrest records to written statements to transcripts to journal entries. How this task would be accomplished and who would have the authority to attempt it are questions that underscore the impractical reality of an attempt to seal certain convictions in one case while revealing others. If the General Assembly had intended only partial sealing, it would have chosen phrases other than ‘all official records’ or ‘all index cards’ in order to give guidance on how to seal a partial expungement.** We therefore conclude that R.C. 2953.31 (definitions), 2953.61 (sealing of records in cases of multiple charges), and 2953.32(C)(2) (sealing of record of conviction) illustrate the General Assembly’s intent to authorize the sealing of cases, not the sealing of individual convictions within cases.

Futrall, supra at ¶¶19-20 (Emphasis added).

As Tenth Appellate District Judge Sadler explained in her dissenting opinion in *In re Application of Pariag*, 10th Dist. Franklin No. 11AP-569, 2012-Ohio-1376, ¶30:

The purpose of R.C. 2953.61 was best explained by the Supreme Court of Ohio in *Futrall*. Although the court found the statute to be inapplicable in *Futrall*'s case (because the statute governs charges receiving different dispositions whereas each of *Futrall*'s charges received a conviction), the court nevertheless recognized that the statute illustrated the 'inherent difficulty' of partially sealing records. *Id.* at ¶20. This is especially true here. When a court grants an application to seal records under R.C. 2953.52, it must seal 'all records that are possessed by any public office or agency that relate to a criminal case, including 'all records and investigative reports' possessed by law enforcement and 'all records of all testimony and evidence presented in all proceedings in the case.' R.C. 2953.51(D). Thus, where a conviction and dismissal are connected with the same act and share many of the same investigative reports and arrest records, it may be impossible to seal 'all official records' in only one of the cases. As noted in a similar context, 'how this task would be accomplished and who would have the authority to attempt it are questions that underscore the impractical reality of an attempt to seal certain convictions in one case while revealing others.' *Id.* at ¶20.

Following *Futrall*, several courts of appeals have read the sealing statutes to preclude partial sealing of records. See *In re K.J.*, 10th Dist. Franklin No. 13AP-1050, 2014-Ohio-3472, ¶31 ("R.C. 2953.52 and 2953.61 demonstrate the General Assembly's intent to authorize the sealing of cases, and not the sealing of individual charges within a case."); *State v. C.K.J.*, 2016-Ohio-5637, 70 N.E.3d 1087, ¶24 (10th Dist.).

The Court's logic in *Futrall* applies equally to applications for partial sealing of dismissals. Although policy reasons may exist to allow partial sealing of dismissed counts within a complaint, indictment, or information, "[b]ecause the General Assembly is the final arbiter of public policy, judicial policy preferences may not be used to override valid legislative enactments." *State ex rel. Tritt v. State Emp. Relations Bd.*, 97 Ohio St.3d 280, 2002-Ohio-6437, 779 N.E.2d 226, ¶17. The General Assembly is in the best position to address and resolve through legislation the difficulties

inherent in partial sealing, and provide guidance on the important questions raised by this Court like “How this task would be accomplished” and “who would have the authority to attempt it.”

According to the statistics maintained by this Court, nearly 416,000 new criminal cases were filed in 2020 in Ohio’s Municipal and County Courts. *See State of Ohio Municipal and County Courts: Caseload and Performance Measures*,

https://analytics.das.ohio.gov/t/SCPUB/views/MunicipalandCountyCourtCourtStatistics/CaseloadandPerformance?iframeSizedToWindow=true&:embed=y&:showAppBanner=false&:display_count=no&:showVizHome=no#5 (Accessed June 25, 2021). The Eighth District’s decision will create a significant administrative burden and cost on the clerk of courts who will be required to somehow redact certain portions of a criminal record, often manually, and without having the benefit of guidance from the General Assembly on the important questions raised by this Court like “How this task would be accomplished” and “who would have the authority to attempt it.”

CONCLUSION

This Court should give effect to the plain meaning in Ohio’s sealing statutes, which prohibit partial sealing and reverse the Eighth District’s decision in its entirety.

Respectfully submitted,

/s/ Christopher J. Weber
Christopher J. Weber (0059270)
Sasa Trivunic (0096722)
Kegler, Brown, Hill + Ritter, LPA
65 E. State Street, Suite 1800
Columbus, Ohio 43215
Telephone: (614) 462-5400
Facsimile: (614) 464-2634
cweber@keglerbrown.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed with the Court's electronic filing system on July 2, 2021, and served via email upon the following:

Michael C. O'Malley, Esq.
Gregory Ochocki, Esq.
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
Counsel for Plaintiff-Appellant

Larry W. Zukerman, Esq.
Brian A. Murray, Esq.
Adam M. Brown, Esq.
Zukerman, Lear & Murray Co. LPA
3912 Prospect Avenue
Cleveland, Ohio 44115
Counsel for Defendant-Appellee

/s/ Christopher J. Weber
Christopher J. Weber (0059270)