
Before the Supreme Court of the State of Ohio
Case No.

On Appeal from the Court of Appeals of Ohio for the Eleventh District
Case No. 2021-G-0022

The State of Ohio

Plaintiff-Appellee

-vs-

Gary Hetrick

Defendant-Appellant

Memorandum in Support of Jurisdiction

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Proof of Service

I sent a copy of this brief to opposing counsel at the address below on July 27, 2022.

Certified,

s/ Rhys Cartwright-Jones

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Jurisdictional Statement
This is a Case of Great Public and/or General Interest that Involves a Substantial Constitutional Question

This cause asks this Court to re-examine its decision in *State v. Futrall* concerning sealing of criminal records to allow a movant to segregate and seal criminal records that are eligible for sealing while leaving unsealed a traffic offense that cannot be sealed. In 2009, this Court held in *Futrall* that "[w]hen an applicant with multiple convictions under one case number moves to seal his or her criminal record in that case pursuant to R.C. 2953.32 and one of those convictions is exempt from sealing pursuant to R.C. 2953.36, the trial court may not seal the remaining convictions." *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, at syl. That being said, since 2009, the criminal records statute endured near annual revisions, in 2012 by SB 337, in 2014 by SB 143 in 2016 by SB 227 in 2017 by 2017 HB 49, in 2018 by SB 66 and HB 425 in 2020 by SB 10, and as of 2021 in HB 431. Mainly, the changes expanded the number of offenses one could seal, finally in 2021 opening the statute to any number of misdemeanors and an expanded number of felonies. The trend has been toward sealing records rather than leaving them open.

This case is one of public interest along the lines of the trend toward sealing more criminal records. Gary Hetrick had a DUI charge and a failure to comply charge. The records sealing statute forbids sealing traffic offenses, but it would

allow sealing a failure to comply charge. To analogize by way of an obvious policy consideration, much of the trend toward liberalization of record sealing has come in the wake of the opiate epidemic. And it would not be too outlandish to guess that a fair number of salable drug possession charges would come along with a driving under the influence charge, providing a driver under the influence also possessed drugs. Nevertheless, the rather noble policy of sealing records of persons who have reformed their lives takes a rifle shot mid flight simply because of a misdemeanor traffic offense—one that, by the way, if it were independent of a sealable charge, would not prevent sealing.

Though not as large as the public interest issue, this cause also invites substantive equal protection review. Effectively, the *Futrall* approach treats offender "A" who had a separate DUI and sealable felony offense differently than offender "B" who did not have separate offenses. One might even see offender "A" as more of a social problem that "B" insofar as "B" appears to have had one bad day where "A" had an ongoing pattern of conduct over time.

Given the foregoing and the points this brief raises below, the defense prays this Court assume jurisdiction over this cause and hear it on its merits.

Statement of the Case and Facts

On January 30, 2006 Mr. Hetrick was convicted of Failure to Comply, in conjunction with an OVI, in case number 05 C 00016. Mr. Hertick's probation period ended on January 30, 2010. Mr. Hetrick has no other criminal record, and no cases pending against him. On February 24, 2021 Mr. Hetrick filed an Application to Seal Criminal Record under R.C. 2953.32 with the Geauga County Court of Common Pleas. On March 5, 2021 the State filed a Response to Mr. Hetrick's Application and a supplemental response on May 6, 2021. On August 11, 2021 a hearing was held. On August 12, 2021 the Court ultimately denied Mr. Hetrick's Application.

Law and Discussion

> **Proposition of Law No. 1:** When applicants with multiple convictions under single case numbers move to seal their criminal records in those cases under R.C. 2953.32, and one of those convictions is exempt from sealing under R.C. 2953.36, the trial court *may* seal the remaining convictions.

Beyond the policy reasons that the defense proffers in its jurisdictional statement, one can interpret the relevant statutes to conclude that the trial court should have granted Mr. Hetrick's application to seal criminal record. The record of Mr. Hetrick's failure to comply conviction should be expunged and records should be sealed, regardless of the fact that that charge was in conjunction with an

OVI conviction. Below, the State never contended that Mr. Hetrick was not an eligible offender, nor had there been any particular interest posed in keeping the matter unsealed. The sole objection to Mr. Hetrick's Application is that the charge Mr. Hetrick seeks to seal is intertwined with a charge of OVI.

Otherwise, Mr. Hetrick qualifies as a first time offender as defined in R.C. 2953.31(A)(1)(b), which states in relevant part:

> 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 two felony convictions … 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.

Mr. Hetrick was convicted of failure to comply, a third degree felony, in conjunction with an OVI, a fourth degree felony. Under statute, these two convictions are counted as "one" conviction for purposes of expungement. Mr. Hetrick therefore qualifies as a first time offender.

The only objection raised with regard to Mr. Hetrick's Application to Seal is that the charge that he seeks to seal (failure to comply) is intertwined with the OVI conviction. Ohio law addresses this in R.C. 2953.61(B)(1), directing that:

> When a person is charged with two or more offenses as a result of or in connection with the same act and the final disposition of one, and only one, of the charges is a

> conviction under any section of Chapter … 4511 … other than section 4511.19 … of the Revised Code, …. and if the records pertaining to all the other charges would be eligible for sealing under section 2953.52 of the Revised Code in the absence of that conviction, the court may order that the records pertaining to all the charges be sealed. In such a case, the court shall not order that only a portion of the records be sealed.

The statutes which govern the sealing of records differentiate between offenses which are **committed at the same time** and those which are **committed through the same act**. All statutes relating to the same subject matter must be read *in pari materia*, and construed together, so as to give the proper force and effect to each and all such statutes. *State v. Cook*, 128 Ohio St.3d 120. *See also State v. Moaning*, 76 Ohio St.3d 126 (noting that courts should construe statutory provisions together and read the Revised Code "as an interrelated body of law"); *Santarelli v. Western Reserve Transit Authority*, 1989 Ohio App. LEXIS 533 (Feb. 10, 1989), quoting 85 Ohio Jurisprudence 3d 228, Statutes, Section 225 (noting that "the rule of *in pari materia* is a reflection of the fact that the General Assembly, in enacting a statute, is assumed, or presumed, to have legislated with full knowledge and in the light of all statutory provisions concerning the subject matter of the act").

R.C. 2953.61 provides that when a person is charged with two or more offenses as a result of or in connection with the same act and the final disposition

of one, and only one, of the charges is a conviction under any section of Chapter 4511(other than section 4511.19) and if the records pertaining to all the other charges would be eligible for sealing under section 2953.52 of the Revised Code in the absence of that conviction, the court may order that the records pertaining to all the charges be sealed. Under R.C. 2953.31(A)(1)(b), an "eligible offender" is defined as "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 two felony convictions". An eligible offender may apply to have the records of a conviction sealed. R.C. 2953.31(A) further provides that "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." (Emphasis added.)

Construing R.C. 2953.61 *in pari materia* with R.C. 2953.31(A), it is apparent that under the sealing statutes offenses which are committed through the same act differ from offenses which are committed at the same time. R.C. 2953.31(A) applies to both convictions which result from or are connected with the same act and those which were committed at the same time, while R.C. 2953.61 concerns only offenses which result from or are connected with the same act. If the General Assembly had intended for any offense committed at the same time as another offense to preclude the records of other offenses which the applicant

committed at the same time from being sealed, the General Assembly would have included a phrase similar to that used in R.C. 2953.31(A) in R.C. 2953.61.

In *Pariag*, this Court specifically stated that "R.C. 2953.61 thus focuses not on *when* separate offenses occurred, but on whether they arose from the same conduct of the applicant." (*Emphasis added*) *State v. Pariag,* 137 Ohio St. 3d 81,¶ 20. Thus, simply because multiple charges result from a single traffic stop does not mean that the applicant committed the multiple charges through the same act. In *Pariag*, this Court held that, under R.C. 2953.61, "same act plainly refers to the same conduct." *Id.* at ¶ 16. Thus, it is the conduct of the accused which courts must consider under R.C. 2953.61, and not merely whether the offenses at issue arose from the same incident.

Determining whether a defendant committed multiple offenses through the same conduct is a familiar legal concept, as courts routinely determine whether a defendant committed multiple offenses through the same conduct when determining whether multiple convictions must merge into one conviction for purposes of sentencing. *See* R.C. 2941.25(A) ("Where the same conduct by the defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one"); *State v. Johnson,* 128 Ohio St.3d 153 (when determining whether offenses are allied offenses of similar import "the

conduct of the accused must be considered," and in analyzing defendant's conduct, courts ask "whether it is possible to commit one offense *and* commit the other with the same conduct") *Id*. at ¶ 48 (*Emphasis*).

Where the record does not contain facts regarding the events which led to the multiple charges at issue under R.C. 2953.61, the trial court will have to hold a hearing to ascertain those facts. *In re K. J.*, 2014-Ohio-3472. The trial court thus assumes the role of the trier of fact, and must evaluate the credibility of the witnesses and resolve any factual questions presented by the evidence. After resolving any factual issues, the court must apply the facts to R.C. 2953.61, to determine whether the multiple charges at issue arose as a result of or in connection with the same act. *Id.* As the trial court must make factual findings, but then must apply those facts to the law, a hybrid standard of review is appropriate. *Id.* Accordingly, in analyzing a trial court's ruling under R.C. 2953.61, a reviewing court should accord deference to the trial court's findings of fact, but engage in a *de novo* review of the trial court's application of those facts to the law. *Id.*

Under R.C. 2953.61, a trial court must analyze the acts of conduct of the accused, and not merely the temporal proximity between the charges. A Court should therefore review the acts which supported each charge and determine

whether the failure to comply charge arose as a result of or in connection with the same act that supports Mr. Hetrick's OVI conviction.

R.C. 2921.331(B), failure to comply with order of signal of police officer provides that: "no person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop". R.C. 4511.19(A)(1) provides that: "no person shall operate any vehicle, if, at the time of the operation the person is under the influence of alcohol, a drug of abuse, or a combination of them".

The act which supports Mr. Hetrick's OVI conviction was his operation of a motor vehicle, while under the influence of alcohol. The act which supports the failure to comply was Mr. Hetrick's failure to comply with an order or signal of a police officer and eluding/fleeing an officer's command. Thus, there is no commonality of acts between the failure to comply charge and the OVI conviction. Accordingly, the failure to comply charge did not arise as a result of, or in connection with, the same act which supports the OVI conviction. Therefore, R.C. 2953.61 does not preclude the court from sealing the failure to comply conviction. Thus, pursuant to R.C. 2953.31 and 2953.61, the trial court was entitled to seal the records of the failure to comply.

The interest of the applicant in having the records pertaining to the applicant's conviction of failure to comply sealed outweighs any legitimate needs

of the government in maintaining this record of conviction. While Mr. Hetrick acknowledges and concedes that when it comes to the particular investigative reports underlying a criminal offense, segregating the OVI portions may be impracticable. But for purposes of these proceedings, the only relief Mr. Hetrick seeks is for the felony charge (failure to comply) to be deindexed from BCI and taken off the public docket. Mr. Hetrick wishes to become a productive and employed member of society. As a result of this conviction he has been unable to become gainfully employed. Despite his best efforts, and despite applying for a very wide range of jobs, upon a background check Mr. Hetrick's felony charge (failure to comply) prohibits him from getting any type of job. The record of Mr. Hetrick's conviction of failure to comply should be expunged and all records should be sealed.

Conclusion

Wherefore, the defense prays this Court take well of its proposition of law and hear this cause on its full merits.

Respectfully Submitted,

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