

Appellant objected to appellee's application. In the objection, appellant argued that even though appellee was eligible as a first offender to have his record sealed, the government had a legitimate interest in maintaining access to his criminal history because the underlying offense involved an assault on a police officer. Therefore, appellant requested that the trial court deny appellee's application to seal his records.

{¶3} A hearing was held on June 17, 2011. Neither evidence nor arguments were presented at the hearing, and the transcript states in its entirety:

THE COURT: I have Fuller right now. I am going to grant Mr. Fuller's expungement. He had an assault, and the prosecutor agrees that he is eligible for expungement, but they disagree with expungement because it was an assault with a police officer. But they agree, though, I can still grant it, so I am.

So, your expungement is granted, sir. All right?

[APPELLEE]: All right.

THE COURT: Don't hit any more cops. You get in trouble that way.

[PROSECUTOR]: Judge, I would note the State's written objection to that.

THE COURT: I know. It is in the record.

(Tr. 2.)

{¶4} A judgment entry granting appellee's application for expungement was filed on June 21, 2011. This appeal followed, and appellant brings the following assignment of error for our review:

THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEE'S EXPUNGEMENT APPLICATION, WITHOUT FIRST DETERMINING THAT APPELLEE WAS SATISFACTORILY REHABILITATED.

{¶5} Governing this matter is R.C. 2953.32, which provides a means by which a "first offender" may apply to have his or her record of conviction sealed. Upon the filing of such an application, the court must set a hearing date and notify the prosecutor of the hearing pursuant to R.C. 2953.32(B). The prosecutor then has the opportunity to file an objection to the application prior to the hearing date. The court shall direct a probation officer to make inquiries and written reports concerning the applicant as the court determines is appropriate. R.C. 2953.32(B).

{¶6} In considering the sealing of the record of a conviction, the trial court must do all 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. * * *
- (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.

R.C. 2953.32(C)(1).

{¶7} It is well-settled that " 'Expungement 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* (1996), 75 Ohio St.3d 636, 639. R.C. 2953.32 "requires a court to hold a hearing, gather information, and consider certain interests before ruling on the application." *In re Esson*, 10th Dist. No. 11AP-208, 2011-Ohio-5770, ¶15. In light of its nature, "[e]xpungement should be granted only when all requirements for eligibility are met." *Simon* at 533. A trial court's decision to grant or deny a request to seal records is typically reviewed under an abuse of discretion standard. *State v. Hillman*, 10th Dist. No. 09AP-478, 2010-Ohio-256, ¶11. An abuse of discretion implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶8} In the case before us, it was conceded appellee was a first offender. Additionally, the journal entry states that the trial court found there were no criminal proceedings pending against appellee and that the sealing of his record of conviction was "consistent with the public interest." (Entry, 1.) Thus, the remaining issue before the trial court was the determination that appellee has been rehabilitated to the court's satisfaction as required by R.C. 2953.32(C)(1)(d). While appellant contends the record is lacking in both findings and evidence with respect to this factor, appellee contends the findings are implicit in the trial court's decision granting the application for expungement. Given the state of the record, we agree with appellant.

{¶9} In *Esson*, this court reviewed the trial court's denial of an application to seal the records of a criminal matter in which the defendant was found not guilty after his trial. The defendant's application to seal indicated that in his criminal case the jury found him not guilty, and, therefore, he was seeking to have the records expunged pursuant to R.C.

2953.52.¹ The state objected to the application asserting the government's need in preserving the record outweighed the defendant's interests in having the record sealed. At the expungement hearing, after hearing comments from the prosecutor, the trial court stated, "let me explain something to you, that you are not entitled to have your record sealed, rather, you have a burden to establish a particularized need for the expungement, which you have not done. At this time, the Court is going to deny your expungement. That will be all. That's it." *Esson* at ¶5. Thereafter, the matter concluded and the trial court filed a journal entry denying the application.

{¶10} On appeal, the defendant argued it was error for the trial court to deny his application without giving him an opportunity to speak. Agreeing with appellant's contention, this court found that "while the trial court held a hearing, there is no indication from the hearing transcript that the court gave appellant the opportunity to speak or offer evidence before it made its decision." *Id.* at ¶14. By doing so, we held that the trial court effectively precluded appellant from being heard before it made its decision and thereby denied him the full and fair hearing R.C. 2953.52 requires. *Id.* See also *State v. Calderon*, 9th Dist. No. 09CA0088-M, 2010-Ohio-2807 (reversing the trial court's denial of an R.C. 2953.32 expungement application for failure to provide "full and fair hearing" where the court did not give the defendant opportunity to explain reasons for application). Accordingly, we reversed the judgment of the trial court and remanded the matter to the

¹ R.C. 2953.32 governs the sealing of records of convictions, while R.C. 2953.52 governs the sealing of official records for persons found not guilty of an offense or who have had a criminal complaint dismissed.

trial court with instruction to conduct a hearing, weigh the interests of the parties, and make express findings on the record in some manner. *Id.* at ¶19.²

{¶11} In the case sub judice, the expungement hearing was more limited than that with which this court was presented in *Esson*. Here, the hearing consisted solely of the trial court calling the case on the record and then, without more, summarily announcing its decision to grant the application for expungement prior to giving either party an opportunity to speak. Essentially, it appears that, instead of considering the statutory requirements of R.C. 2953.32, the trial court categorically granted the expungement solely on the basis that appellant was eligible for expungement because he was a first offender.

{¶12} Just as a trial court cannot categorically deny an application for expungement based solely on the nature of the offense, neither can a trial court categorically grant an application for expungement under R.C. 2953.32 solely on the basis that the applicant is a first offender. *State v. Bates*, 5th Dist. No. 03-COA-057, 2004-Ohio-2260, ¶26 (cannot deny an application for expungement pursuant to R.C. 2953.32 because of the nature of the offense); *State v. Dumas*, 10th Dist. No. 06AP-1162, 2007-Ohio-3621 (reversing court's denial of R.C. 2953.52 expungement application where court categorically denied expungement involving first and second degree felonies); *State v. Poole*, 5th Dist. No. 10-CA-21, 2011-Ohio-2956 (a trial court cannot summarily and categorically deny an application for expungement based on the nature of

² We recognize that *Esson* reviewed R.C. 2953.52, instead of R.C. 2953.32, which is present before us. However, the statutes have been found to be analogous. *State v. Poole*, 5th Dist. No. 10-CA-21, 2011-Ohio-2956, ¶21, citing *State v. Bates*, 5th Dist. No. 03-COA-057, 2004-Ohio-2260, ¶24.

the offense). Rather, a trial court must make the required findings required by R.C. 2953.32. *Bates* at ¶26.

{¶13} Indeed, the remedial expungement provisions of R.C. 2953.32 and 2953.33 must be liberally construed to promote their purposes. *State ex rel. Gains v. Rossi*, 86 Ohio St.3d 620, 622, 1999-Ohio-213. However, such does not equate with a premise that expungements are to be categorically granted under R.C. 2953.32 on the sole basis that the applicant is a first offender. It is clear that in addition to requiring that the applicant be a first offender and have no criminal proceedings pending, R.C. 2953.32 "requires that the trial court determine if this specific defendant has been rehabilitated to the satisfaction of the court." *Bates* at ¶26.

{¶14} In *Bates*, the defendant sought the expungement of a theft conviction, and at the expungement hearing, the applicant stated the offense was committed as a result of a gambling addiction. The trial court denied the application based on the nature of the offense and the nature of the addiction. Concluding that such a categorical denial was improper in light of the findings required under R.C. 2953.32, including satisfactory rehabilitation and weighing of the applicable interests, the judgment of the trial court was reversed and the matter was remanded for further proceedings.

{¶15} Similarly, the record before us indicates the trial court failed to conduct a full and fair hearing as required by R.C. 2953.32, and, instead, categorically granted the application for expungement on the basis that the applicant was a first offender. Therefore, we conclude the trial court abused its discretion in granting the application for expungement and that this matter must be remanded to the trial court. Our holding does not imply that the trial court must reach a specific conclusion after conducting the

appropriate hearing and analysis. Rather, the purpose of our remand is to ensure statutory compliance and proper consideration of the requisite statutory factors.

{¶16} Accordingly, appellant's sole assignment of error is sustained. The judgment of the Franklin County Court of Common Pleas is reversed and this matter is remanded to that court with instructions to conduct a hearing, make the necessary findings, and express those findings in some manner on the record. *Esson* at ¶19; *Hillman* at ¶18 (remand with instructions to conduct a hearing, make necessary findings, and express those findings on the record).

*Judgment reversed;
cause remanded with instructions.*

BROWN and CONNOR, JJ., concur.
