

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	W. Scott Gwin, P.J.
Plaintiff-Appellee	:	John W. Wise, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. 2008-CA-0072
GLENN F. MOOREHART	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal Appeal From Fairfield County
Court Of Common Pleas Case No. 1987-
CR-064

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 8, 2009

APPEARANCES:

For Plaintiff-Appellee For Defendant-Appellant

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Edwards, J.

{¶1} Appellant, Glenn F. Moorehart, appeals the trial court's denial of his motion to expunge his felony conviction for one count of felonious assault. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On May 15, 1987, appellant pleaded guilty to one count of felonious assault in violation of R.C. 2903.11, a first degree felony. Appellant was sentenced to serve an indefinite sentence of not less than eight (8) and not more than fifteen (15) years in prison. On December 22, 1987, the court granted appellant's motion for shock probation.

{¶3} On December 2, 1991, the State filed a motion to revoke appellant's probation. On December 8, 1992, the State dismissed the motion for revocation. On December 22, 1992, the court by judgment entry terminated appellant's probation and restored appellant's civil rights.

{¶4} On December 6, 2002, the appellant filed a motion to expunge his felonious assault conviction. The State filed a motion in opposition. The court set the matter for hearing on March 3, 2003. On February 28, 2003, appellant voluntarily dismissed his motion for expungement otherwise than on the merits.

{¶5} More than five (5) years later, on July 8, 2008, appellant re-filed his motion to expunge his felonious assault conviction. The court held an oral hearing on the issue of whether the court had authority to hear the motion to expunge, but did not hold an evidentiary hearing at that time. On September 29, 2008, the trial court denied appellant's motion for lack of jurisdiction. The court found that because appellant's

petition was filed after the March 23, 2000, amendment to R.C. 2953.36, which eliminated persons convicted of an offense of violence from eligibility for expungement, and appellant was convicted of felonious assault which is an offense of violence, the court did not have jurisdiction to consider his motion for expungement. The trial court further found that appellant's constitutional arguments regarding the application of the expungement statute lacked merit.

{¶6} It is from this judgment that appellant now seeks to appeal setting forth the following assignment of error:

{¶7} "IS THE AMENDMENT TO R.C. § 2953.36 UNCONSTITUTIONAL AS APPLIED TO A MOTION FILED ON 7/8/08 WHICH IS AFTER ITS ENACTMENT DATE OF 3/23/00, TO EXPUNGE A CONVICTION DATED 5/15/87, WHICH IS BEFORE ITS ENACTMENT, WHEN THE RESULT IS THAT THE CONVICTION, WHICH WAS EXPUNGABLE AT THE TIME OF THE PLEA, IS NOT EXPUNGABLE AT THE TIME OF APPLICATION AND WHEN THE CONVICTION DIRECTLY AFFECTS EMPLOYMENT?"

{¶8} In this sole assignment of error, appellant argues that the trial court erred in applying R.C. 2953.36 as amended on March 23, 2000, to exclude violent offenders from eligibility for expungement because the statute did not become effective until after appellant's conviction for felonious assault on May 15, 1987. Specifically, appellant argues that R.C. 2953.36 is unconstitutional as applied because it affects appellant's substantive right to obtain employment because he is a truck driver and cannot get a special license to carry hazardous materials if he has a felony conviction. Appellant argues that the statute is unconstitutionally retroactive. He further argues that the

statute violates his right to due process, the right to contract (i.e. enter a plea agreement) and equal protection, and violates the constitutional safeguards against cruel and unusual punishment, ex post facto laws and bills of attainder.

{¶9} R.C. 2953.31 et. seq., Ohio's Expungement statutes, allow a first time offender to apply to a sentencing court to seal a record of conviction. *State v. McCrea*, Warren App. No. CA2005-01-001, 2005-Ohio-4918. Expungement is an act of grace created by statute; it is a privilege, not a right. *State v. Simon*, 87 Ohio St.3d 531, 2000-Ohio-474, 721 N.E.2d 1041. The expungement statute is remedial and not substantive in nature. *State v. Bissantz* (1987), 30 Ohio St.3d 120, 121, 507 N.E.2d 1117, 1118. A party does not have a vested right in a remedial remedy. *State v. Hartup* (1998), 126 Ohio App. 3d 768, 711 N.E.2d 315, 318. Accordingly, the court has the discretion to deny a request for expungement even if the applicant meets the statutory prerequisites. *State v. Heaton* (1995), 108 Ohio App.3d 38, 40, 669 N.E.2d 885, 886-887; See also *State v. Rose*, Delaware App. No. 04-CA-C-04-027, 2004-Ohio-4433.

{¶10} R.C. 2953.32(A)(1) sets forth the procedure for applying for expungement proceedings:

{¶11} "Except as provided in section 2953.61 of the Revised Code, a first offender may apply to the sentencing court if convicted in this state, or to a court of common pleas if convicted in another state or in a federal court, for the sealing of the conviction record. Application may be made at the expiration of three years after the offender's final discharge if convicted of a felony, or at the expiration of one year after the offender's final discharge if convicted of a misdemeanor."

{¶12} However, R.C. 2953.36 provides that the Code sections setting forth a procedure for expungement do not apply to offenders convicted of certain crimes, including:

{¶13} “(C) 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;”

{¶14} Appellant was convicted of felonious assault in violation of R.C. 2903.11, a felony of the first degree, which is an offense of violence as defined by R.C. 2901.01(A)(9)(a). While the amendment to R.C. 2953.36, which excluded appellant from the class of persons eligible for expungement, occurred after his conviction, 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. *State v. LaSalle*, 96 Ohio St. 3d 178, 772 N.E. 2d 1172, 2002-Ohio-4009, paragraph 2 of the syllabus. Thus, unless we accept appellant’s arguments concerning the unconstitutionality of the statute, appellant is not eligible for expungement, and the trial court did not err in dismissing his application.

{¶15} Appellant argues that R.C. 2953.36 impinges upon his right to employment, as he is a self-employed truck driver and cannot obtain a license to haul hazardous materials if he has a felony conviction. We disagree.

{¶16} Appellant cites *State v. Williams*, 88 Ohio St. 3d 513, 728 N.E. 2d 342, 2000-Ohio-428, in support of his argument. In *Williams*, the Ohio Supreme Court considered a claim that R.C. Chapter 2950, the sex offender registration law, impinged upon the right to pursue an occupation. The court held that every individual has the

right to pursue a lawful occupation free from government interference unless the public good so requires. *Id.* at 527. However, the court found that there is no express language in the provisions of R.C. Chapter 2950 that prohibits convicted sex offenders from pursuing an occupation. *Id.*¹

{¶17} In *State v. Davenport* (1997), 116 Ohio App.3d 6, 686 N.E.2d 531, the Twelfth District considered a claim that R.C. 2953.36 violated Equal Protection when applied to a teacher who could not obtain a teaching certificate because of a conviction for gross sexual imposition. The court held that any limitation R.C. 2953.36 may impose upon the range of career choices available to a defendant is incidental and does not limit the General Assembly's ability to exercise its legislative power by making certain criminal offenses ineligible for expungement. *Id.* at 12.

{¶18} In the instant case, the language of the expungement statutes, like the language of the sex offender registration law, does not clearly infringe on an offender's right to pursue a chosen occupation. As in *Davenport*, any limitation R.C. 2953.36 may impose on the range of career choices available to appellant is incidental and does not limit the legislature's ability to exercise its power by making certain criminal offenses ineligible for expungement. Further, appellant did not have an absolute right to expungement prior to the amendment. As noted above, the court had discretion to deny a request for expungement even if appellant had met the statutory prerequisites. *Heaton, supra; Rose, supra.* Therefore, the statute did not take away a vested right. *Hartup, supra.*

¹R.C. Chapter 2950 is a remedial law (see *State v. Cook* (1998), 83 Ohio St. 3d 404, 700 N.E. 2d 570), as is the expungement statute (see *Bissantz, supra*).

{¶19} Appellant also argues that R.C. 2953.36 is unconstitutionally retroactive. We disagree. R.C. 2953.36 is remedial. *State v. Bissantz*, supra. When a request, such as a request for expungement, is remedial it is “exempt from the constitutional prohibition against retroactivity.” *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St. 3d 354, 356, 533 N.E.2d 743, 745-746. In *Hartup*, supra, the Eighth District considered a claim that the 1994 amendment to R.C. 2953.36, which added crimes to the list of those not eligible for expungement, was unconstitutionally retroactive. The court held that the statute was “constitutional as applied to persons who committed crimes prior to December 9, 1994.” *Hartup* at 773.

{¶20} Additionally, R.C. 2953.36 is not applied retroactively because a motion for expungement is subject to the expungement statute in effect at the time the motion is filed. In *State v. Lasalle*, 96 Ohio St.3d 178, 772 N.E.2d 1172, 2002-Ohio-4009, the court held that “[t]he 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.” *Id.* at paragraph two of syllabus. See also, *State v. Smith*, Stark App. No. 2003CA00415, 2004-Ohio-2388. Therefore, when a defendant applies for expungement after the effective date of an amendment, the application of the amended statute is prospective in nature rather than retroactive. *State v. Bottom*, Licking App. No. 95 CA 101, (Feb. 29, 1996), unreported, 1996 WL 132284; *State v. Poole*, Ashland App. No. 1116, (Feb. 21, 1996), unreported, 1995 WL 809875.

{¶21} In this case, effective March 23, 2000, the General Assembly amended R.C. 2953.36, adding subsection (C), precluding the expungement of convictions of crimes of violence, including felonious assault. Appellant filed his motion for

expungement on July 8, 2008, following the amendment of R.C. 2953.36. Accordingly, the statute was applied prospectively not retroactively.

{¶22} Appellant also argues that R.C. 2953.36 violates due process and the right to contract because, at the time of his plea, appellant relied on the possibility of expungement.² We disagree. In *State v. Davenport*, (1996), 116 Ohio App.3d 6, 686 N.E.2d 531, the court held that a retroactive change in expungement law does not violate due process. The court stated that “[t]he mere fact that appellant chose to accept the state’s plea bargain based upon some unilateral hope that he might be able to expunge his conviction in the future does not render expungement a fundamental right protected by due process.” *Id.* at 11. Furthermore, in *State v. Gaebler*, Geauga App. No. 2001-G-2362, 2002-Ohio-2077, the court stated that “a defendant should never be able to assert that their due process rights were violated because they relied on the possibility of expungement, and then the expungement statute changed. If we were to hold otherwise, it would allow every defendant entering a plea agreement to ‘rely’ on the possibility of expungement. The resulting effect would be that changes in statutory law regarding expungement could not be applied ex post facto. That is not the law of Ohio.” *State v. Gaebler*, Geauga App. No. 2001-G-2362, 2002-Ohio-2077; See also *State v. Davenport*, *supra*.

{¶23} Appellant also argues that R.C. 2953.36 violates equal protection because it creates two classes of defendants similarly situated and treats them unequally. Appellant argues it differentiates between “[t]hose who ran to the courthouse and those

² We note that nothing in the record establishes that appellant was promised at the time of his plea that he would be entitled to an expungement of the conviction.

who did not.” We disagree and find this to be an improper application of equal protection.

{¶24} Equal protection under the law requires that no person or class of persons be denied the protection afforded by the law to other persons or classes in like circumstances. *Huntington Natl. Bank v. Limbach* (1994), 71 Ohio St. 3d 261, 262, 643 N.E.2d 523, 523-524, 1994-Ohio-79. In *Davenport*, the court held that that R.C. 2953.36 did not implicate any suspect classification or fundamental right and therefore need only be rationally related to some legitimate government interest to survive an equal protection challenge. 116 Ohio App.3d at 12. The court held that the General Assembly could have concluded that it is necessary to protect society from sexual offenders by making the criminal records of convicted sex offenders open to the public, and R.C. 2953.36 furthers this legitimate governmental interest by rendering sexual offenders ineligible for expungement. *Id.*

{¶25} In the instant case, R.C. 2953.36 is rationally related to the legitimate governmental interest of protecting the public from violent offenders by keeping their criminal records open to the public, and the statute furthers this legitimate governmental interest by rendering violent offenders ineligible for expungement. Furthermore, the statute does not create two classes of persons but rather applies equally to all similarly-situated offenders at the time of filing the request for expungement. Accordingly, R.C. 2953.36 does not violate the Equal Protection Clause of the Ohio or United States Constitutions. *Id.* at 12, 13, 686 N.E.2d 531.

{¶26} Appellant also argues that the application of R.C. 2953.36 as amended is cruel and unusual because it increases appellant’s punishment. We disagree. In

Hartup, supra, the court stated that the fact that “the General Assembly saw fit to remove the privilege of seeking expungement from certain offenders does not equate to increasing the punishment for the offense, because removing the privilege does not increase the term of incarceration or affect parole and probation. *State v. Burke* (1991), 109 Ore.App. 7, 11-15, 818 P.2d 511, 514-515; *State v. Comeau* (N.H.1997), 697 A.2d 497, 501; *State v. Greenberg* (Fla. App.1990), 564 So.2d 1176, 1177. Removing the privilege removes the possibility of having a record of conviction sealed.” *Hartup*, supra at 772.

{¶27} We agree with the position of the *Hartup* court. Further, because the statute is remedial rather than punitive, the constitutional prohibition against cruel and unusual punishment is not implicated.

{¶28} Appellant argues that the statute violates the ex post facto clause of Section 10, Article I of the United States Constitution.

{¶29} In *Hartup*, the court found that R.C. 2953.36 was not an impermissible ex post facto law. To fall within the ex post facto prohibition, a law must be retrospective, that is, it must apply to events occurring before its enactment and it must disadvantage the offender affected by it by altering the definition of criminal conduct or increasing the punishment for the crime. *Id.*, citing *Lynce v. Mathis* (1997), 519 U.S. 433, 441. “That the General Assembly saw fit to remove the privilege of seeking expungement from certain offenders does not equate to increasing the punishment for the offense. On its most basic level, R.C. 2953.36 does not increase any ‘punishment’ for the offense . . . It merely removes the possibility of having a record of conviction sealed.” *Id.*

{¶30} We concur with the reasoning of the *Hartup* court and find appellant's claim that R.C. 2953.36 is a prohibited ex post facto law to be without merit.

{¶31} Finally, appellant argues that R.C. 2953.36 as amended violates the constitutional prohibition against bills of attainder in violation of Section 10, Article I of the United States Constitution because it only inflicts additional punishment on a specific class of people, namely first and second degree felons. We disagree.

{¶32} "As defined by the United States Supreme Court, a bill of attainder is 'a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.' *Nixon v. Admr. of General Services* (1977), 433 U.S. 425, 468, citing *United States v. Brown* (1965), 381 U.S. 437, 445, 447; see, also, *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 280. Thus, a bill of attainder is a law that (1) inflicts punishment, (2) without a judicial trial, (3) upon an identifiable individual. See *Nixon*, 433 U.S. at 468." *State v. West*, Auglaize App. No. 2-06-04, 2006-Ohio-5834.

{¶33} As previously discussed, R.C. 2953.36 does not inflict punishment and, therefore, fails to meet the first element for bill of attainder. Therefore, R.C. 2953.36 as amended is not a violation of the constitutional prohibition against bills of attainder.

{¶34} For these reasons, we do not find that the trial court erred in finding that appellant's constitutional arguments lacked merit.

{¶35} Accordingly, appellant's assignment of error is not well taken and is hereby overruled.

{¶36} The judgment of the Fairfield County Court of Common Pleas is hereby affirmed.

By: Edwards, J.

Gwin, P.J. and

Wise, J. concur

JUDGES

JAE/r0416

