

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

MICHAEL A. MACEWEN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 23 MA 0072

Criminal Appeal from the
Mahoning County Court #5 of Mahoning County, Ohio
Case No. 2020 CR B 00068

BEFORE:

Cheryl L. Waite, Mark A. Hanni, Judges, and William A. Klatt, Judge of the
Tenth District Court of Appeals, Sitting by Assignment (Retired).

JUDGMENT:

Affirmed.

Atty. Gina DeGenova, Mahoning County Prosecutor and *Atty. Edward A. Czopur*,
Assistant Prosecutor, for Plaintiff-Appellee

Atty. Rhys Brendan Cartwright-Jones, for Defendant-Appellant

Dated: March 21, 2024

WAITE, J.

{¶1} Appellant Michael A. MacEwen appeals the trial court's denial of his application to have his record sealed. Appellant was convicted of fourth degree misdemeanor domestic violence. Based on the statutory law governing expungements that was in effect when he filed his application, domestic violence was classified as a crime of violence and, therefore, Appellant was not an eligible offender under R.C. 2953.31. The judgment of the trial court is affirmed.

Facts and Procedural History

{¶2} On February 26, 2021, Appellant pleaded no contest to domestic violence, R.C. 2919.25(C), a fourth degree misdemeanor. He received a suspended sentence and one year of probation. On March 10, 2022, Appellant filed an application to have his record sealed. The state did not file an objection. The matter was heard on April 18, 2023. The trial court denied the application, finding that the crime of domestic violence was an offense of violence under the expungement statute in effect on the date Appellant filed his application, and that Appellant was not an "eligible offender" pursuant to R.C. 2953.31 and R.C. 2953.32. The court filed its judgment on May 19, 2023, and this timely appeal followed on June 14, 2023. Appellant raises a single assignment of error on appeal.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN FINDING MACEWEN INELIGIBLE FOR
SEALING OF HIS RECORD UNDER R.C. CHAPTER 2953.

{¶3} Appellant contends that he was eligible to have his fourth degree misdemeanor conviction for domestic violence expunged under R.C. 2953.36(A)(1). Appellee responds, however, that the appropriate applicable statute was R.C. 2953.31(A)(1)(a), which excluded offenses of violence from expungement, thereby disqualifying Appellant as an eligible offender by law. Appellee is correct.

{¶4} A person convicted of a crime has no substantive right to have the record of that conviction sealed. *State v. V.M.D.*, 148 Ohio St.3d 450, 2016-Ohio-8090, ¶ 13. Sealing the record of a conviction “is an act of grace created by the state.” *State v. Hamilton*, 75 Ohio St.3d 636, 639, 665 N.E.2d 669 (1996). A trial court may only grant expungement when an applicant meets all of the statutory requirements. *Id.* at 640.

{¶5} The parties agree that the relevant statutes were those in effect on March 10, 2022, when Appellant filed his application to seal his record. *State v. Lasalle*, 96 Ohio St.3d 178, 2002-Ohio-4009. The parties do not dispute the factual circumstances of this case. The parties further agree that the threshold matter under review, whether Appellant was eligible for expungement under the statutes in effect on March 10, 2022, is purely a matter of law and is reviewed *de novo* on appeal. *State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175, ¶ 9.

{¶6} Appellant bases his argument on former R.C. 2953.36(A)(4), which states:

(A) Except as otherwise provided in division (B) of this section, sections 2953.31 to 2953.35 of the Revised Code do not apply to any of the following:

* * * (4) 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[.]

Appellant contends that his conviction is not excluded from expungement because it is only a fourth degree misdemeanor, rather than a first degree misdemeanor or felony.

{¶7} Appellee notes that Appellant’s attempts to apply the exception statute prior to determining whether he was an eligible offender in the first place. Former R.C. 2953.31(A)(1)(a) provides: “(A)(1) ‘Eligible offender’ means either of the following: (a) Anyone who has been convicted of one or more offenses in this state or any other jurisdiction, if all of the offenses in this state are felonies of the fourth or fifth degree or misdemeanors *and none of those offenses are an offense of violence * * **.” (Emphasis added.) Appellee observes that Appellant does not pass the initial test of “eligible offender” because he was convicted of an “offense of violence.” Although “offense of violence” is not defined in R.C. 2953.01 et seq., it is defined in R.C. 2901.01(A)(9)(a) to include all domestic violence convictions under R.C. 2919.25. Appellee, along with the trial court, concluded that Appellant was convicted of fourth degree misdemeanor domestic violence under R.C. 2919.25, which is a crime of violence, and so he was not eligible for expungement under former R.C. 2953.31(A)(1)(a).

{¶8} Appellee is correct that the issue of whether Appellant is an eligible offender is a separate question from whether the offense is eligible for expungement: “Whether an applicant is an eligible offender under R.C. 2953.31 and whether an offense is precluded from sealing by R.C. 2953.36 are questions of law that are independent of one another * * *.” *State v. Puckett*, 12th Dist. Clermont No. CA2020-11-065, 2021-Ohio-2634, ¶ 7. Not only is Appellant’s eligibility status a separate question, it is the threshold

question when determining eligibility for expungement. As this Court has held: “The first step is the legal determination of whether the applicant is an ‘eligible offender’ as defined in R.C. 2953.31. If the court finds that the applicant is not an ‘eligible offender,’ then the trial court lacks jurisdiction to grant the application to seal.” *State v. Jones*, 7th Dist. Mahoning No. 20 MA 0078, 2021-Ohio-2499, ¶ 10 (citations deleted).

{¶9} Appellant’s mistake is that he assumes R.C. 2953.36(A)(4) provided an additional avenue for expungement rather than an additional exception to expungement. Appellant is not the first to make this error. Howard Waxler raised the identical argument in *State v. Waxler*, 11th Dist. Lake No. 2020-L-109, 2021-Ohio-1017. Waxler was convicted of attempted burglary, a third degree felony under R.C. 2911.12(A)(3) and R.C. 2923.03. The trial court denied his application for expungement because Waxler was not an eligible offender. The Eleventh District Court of Appeals agreed. The court held that R.C. 2953.32(A)(1) only allows an “eligible offender” to apply for expungement: “(A)(1) Except as provided in section 2953.61 of the Revised Code, an eligible 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 record of the case that pertains to the conviction * * *.” *Waxler* at ¶ 13.

{¶10} Through a fairly contorted interpretation of R.C. 2953.36, Waxler argued that his crime was not exempt from expungement, regardless of the meaning of R.C. 2953.31. The Eleventh District disagreed and held that R.C. 2953.36 “provides further constraints on record sealing,” and not additional avenues to allow expungement. *Id.* at ¶ 16. For this reason, the trial court was not permitted to ignore the fact that Waxler must

be found ineligible under R.C. 2953.31 even before applying the exceptions in R.C. 2953.36.

{¶11} This has been the accepted interpretation of former R.C. 2953.31 and R.C. 2953.36 throughout the state. *State v. T.D.*, 8th Dist. Cuyahoga No. 111307, 2022-Ohio-3741, ¶ 13 (“However, just because the offense is eligible for sealing does not end the analysis. In order for an ‘eligible offense’ to be expunged, the applicant, himself, must meet the eligibility requirements defined in R.C. 2953.31(A)(1)(a) and (A)(1)(b). And, as previously explained, T.D.’s domestic violence conviction precludes him from meeting the definition of an ‘eligible offender’ under R.C. 2953.31(A)(1)(a)[.]”); *see also*, *State v. W.H.*, 10th Dist. Franklin No. 19AP-115, 2020-Ohio-3737, 155 N.E.3d 1052, ¶ 14; *Puckett*, *supra* (Twelfth District); and *State v. Cline*, 4th Dist. Washington No. 21CA10, 2022-Ohio-1632, ¶ 26.

{¶12} Based on all of the caselaw cited above, Appellant’s sole assignment of error is overruled and the judgment of the trial court is affirmed.

Conclusion

{¶13} Appellant argues that his fourth degree misdemeanor conviction for domestic violence was eligible for expungement under former R.C. 2953.36, and that the trial court erroneously rejected his application to seal his record. Appellee responds that Appellant does not qualify as an offender eligible for expungement under R.C. 2953.31(A)(1)(a), and the exceptions to expungement under R.C. 2953.36 do not provide an alternate statutory route to obtain expungement. Appellee is correct. The trial court only has jurisdiction to grant expungement to eligible offenders, and because Appellant

is not an eligible offender the trial court correctly rejected his application. Appellant's sole assignment of error is overruled and the judgment of the trial court is affirmed.

Hanni, J. concurs.

Klatt, J. concurs.

For the reasons stated in the Opinion rendered herein, Appellant's assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Mahoning County Court #5 of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.