

[Cite as *State v. Osborne*, 2003-Ohio-6162.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82577

STATE OF OHIO,

Plaintiff-appellant

vs.

LISA OSBORNE,

Defendant-appellee

ACCELERATED DOCKET

JOURNAL ENTRY

AND

OPINION

DATE OF ANNOUNCEMENT
OF DECISION:

NOVEMBER 20, 2003

CHARACTER OF PROCEEDING:

Criminal appeal from Common
Pleas Court, Case No. CR-376498

JUDGMENT:

REVERSED AND REMANDED.

DATE OF JOURNALIZATION:

APPEARANCES:

For plaintiff-appellant:

WILLIAM D. MASON, ESQ.
CUYAHOGA COUNTY PROSECUTOR
DIANE SMILANICK, ESQ.
Assistant County Prosecutor
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

For defendant-appellee:

LISA OSBORNE, PRO SE
3622 Ellis, N.E.
Canton, Ohio 44705

KARPINSKI, J.

{¶1} This appeal, which is on the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, came to be heard upon the

trial court record and the brief of appellant. Defendant-appellee did not file a brief. Plaintiff-appellant, the State of Ohio, appeals the lower court's granting of Lisa Osborne's pro se motion to seal the record of her conviction.

{¶2} Defendant pleaded guilty to attempted preparation of drugs for sale, a first degree misdemeanor, on August 18, 1999. She later moved for expungement of the record on September 13, 2002. In opposition to this motion, the state filed a brief stating that on April 10, 2002 defendant had been convicted of wrongful entrustment, which conviction precluded her from being eligible for expungement of the prior offense. The record is not clear what the exact nature of this offense was; rather, the prosecutor merely attached to the brief opposing the motion an unauthenticated copy of a docket for the earlier case listing defendant's name and the wrongful entrustment offense.

{¶3} In a judgment entry noting the state's opposition, the trial court stated as follows:

"This matter came to be heard upon Application for Expungement of applicant's conviction.

The Court has given notice to the Prosecutor for the case and the Probation Department and a report has been received from the Probation Department as to the defendant.

The Court has considered the evidence and the reasons against granting the application specified in the objection, if any, filed by the prosecutor."

{¶4} The court then proceeded to grant the expungement without specifically addressing the prosecutor's concerns. Although the entry states that the matter was "heard," the docket and record

give no indication that a formal hearing was ever scheduled or held. Appealing the trial court's ruling granting the expungement, the state presents two assignments of error, the first of which states:

"I. A TRIAL COURT ERRS IN RULING ON A MOTION FOR EXPUNGEMENT FILED PURSUANT TO R.C. 2953.32 WITHOUT FIRST HOLDING A HEARING. (R.C. 2953.32(B); STATE V. HAMILTON (1996), 75 OHIO ST.3D 363 [sic]; STATE V. SALTZER (1984), 14 OHIO APP.3D 394, FOLLOWED."

{¶5} The state argues that the trial court's ruling must be reversed and remanded because the court failed to hold a hearing as required by statute. We agree. Expungement is governed by R.C. 2953.32, which states in pertinent part,

"[e]xcept 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.

(B) Upon the filing of an application under this section, the court shall set a date for a hearing and shall notify the prosecutor for the case of the hearing on the application. The prosecutor may object to the granting of the application by filing an objection with the court prior to the date set for the hearing. The prosecutor shall specify in the objection the reasons for believing a denial of the application is justified. The court shall direct its regular probation officer, a state probation officer, or the department of probation of the county in which the applicant resides to make inquiries and written reports as the court requires concerning the applicant." (Emphasis added.)

{¶6} This court has repeatedly ruled that a hearing on an expungement motion is mandatory and failure to hold one is cause for reversal and remand. *State v. Saltzer* (1984), 14 Ohio App.3d

394, citing *State v. Powell* (Apr. 1, 1982), Cuyahoga App. No. 43784 and *State v. Harris* (Mar. 4, 1982), Cuyahoga App. Nos. 43689, 43690, and 43691; *State v. Davis*, Cuyahoga App. No. 81940, 2003-Ohio-1363; *State v. Rebellos* (May 4, 2000), Cuyahoga App. No. 77076.

{¶7} This case, therefore, is reversed and remanded and shall be set for mandatory hearing with the appropriate notices to all parties. Upon remand, the trial court shall determine whether expungement is proper in this case. The first assignment of error is sustained.

{¶8} The state's second assignment of error is,

"II. A TRIAL COURT ERRED IN GRANTING A MOTION TO SEAL THE RECORD OF CONVICTION WHEN IT IS WITHOUT JURISDICTION TO GRANT SAID MOTION TO AN APPLICANT WHO IS NOT A FIRST OFFENDER DUE TO HER CONVICTION FOR WRONGFUL ENTRUSTMENT."

{¶9} Because it failed to hold a hearing, the trial court's ruling granting expungement is invalid. As a result of our ruling on the first assignment of error, the second assignment of error is moot. At the statutorily required hearing upon remand, the court must revisit the evidence which is the subject of this assignment of error.

{¶10} Reversed and remanded for a hearing consistent with this opinion.

This cause is reversed and remanded.

It is, therefore, ordered that appellant recover of appellee its costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TIMOTHY E. MCMONAGLE, J., AND

SEAN C. GALLAGHER, J., CONCUR.

DIANE KARPINSKI
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).