

[Cite as *State v. S.E.J.*, 2018-Ohio-2060.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105883

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

S.E.J.

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-11-552626-A

BEFORE: Laster Mays, J., Kilbane, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: May 24, 2018

ATTORNEYS FOR APPELLANT

Mark A. Stanton
Cuyahoga County Public Defender

By: Erika B. Cunliffe
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor

By: Diane Smilanick
Assistant County Prosecutor
Justice Center, 9th Floor
1200 Ontario Avenue
Cleveland, Ohio, 44113

ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant S.E.J. appeals the trial court's decision to deny her application to expunge and seal her criminal record. After a thorough review, we reverse and remand.

{¶2} In 2010, S.E.J. pleaded guilty to improperly handling firearms in a motor vehicle, a first-degree misdemeanor, in violation of R.C. 2923.16(E)(1)(a); and carrying concealed weapons, a minor misdemeanor, in violation of R.C. 2923.12(A)(2). She was sentenced to pay \$850 in fines and court costs. In 2011, S.E.J. was found guilty of carrying concealed weapons with forfeiture specifications, a fifth-degree felony, in violation of R.C. 2923.12(A)(2). S.E.J. was sentenced to one-year of community control sanctions.

{¶3} In 2016, S.E.J. filed an application for sealing the record of conviction pursuant to R.C. 2953.32(A)(1). She requested the expungement of her felony conviction because, after obtaining the education needed to work in the nursing field, she could not obtain full-time employment at a licensed nursing facility. It is important to note that S.E.J. cannot continue her education, obtain full-time employment as a nurse, or increase her salary because of this conviction. At the trial court expungement hearing, S.E.J. described the circumstances surrounding the 2011 incident. She stated,

That was when I just had moved on 149th and Kinsman. At that time I was working. I got a third shift job working and I was getting off real late. And I guess the police said it was a call from a surrounding area, I guess, that someone was shooting in the neighborhood and they were just — you know, as people were walking they was just checking suspects to make sure that everything was all right. And I happened to be walking down my street so they pulled — they had stopped me and asked me my name and identification. And I let them know that I had a CCLW and then I gave them my driver's license. And that's when they said, well, you know, they have to search my person and whatever and that's when they found the gun in my bag. And instead of charging me for the surrounding gun they just said, "Well, we have to take you down for an improper use of a handgun. The gun has to be on your person because somebody could come run along and take your purse and they can — you know, you can get mugged while your gun is in your purse."

(Tr. 13-14.)

{¶4} The state objected to the expungement request. The trial court held its decision in abeyance. Several months later the trial court issued an order stating,

The court finds that the legitimate needs of the government to maintain [this record] outweighs the defendant's interest in sealing her record. Therefore, after weighing the interest of sealing the defendant's records against the legitimate need of the government to maintain those records, the defendant's application for sealing of the record of conviction is hereby denied.

{¶5} S.E.J. filed this appeal asserting two assignment of errors for our review. However, we will only address the first assignment of error. Pursuant to App.R. 12(A)(1)(c),

the second assignment of error is moot.

- I. The trial court abused its discretion when it denied S.E.J.'s motion for expungement because that decision failed to properly weigh the competing interests involved and is not supported by the record; and
- II. The trial court failed to articulate and create a record so that this Court could meaningfully review its decision.

I. Expungement

A. Standard of Review

{¶6} “An appellate court generally reviews a trial court’s disposition of an application to seal a record of conviction under an abuse of discretion standard. *State v. Black*, 10th Dist. Franklin No. 14AP-338, 2014-Ohio-4827, ¶ 6.” *State v. R.M.*, 8th Dist. Cuyahoga No. 104327, 2017-Ohio-7396, ¶ 5. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

B. Law and Analysis

{¶7} In S.E.J.'s first assignment of error, she argues that the trial court abused its discretion when it denied her motion for expungement.

R.C. 2953.31 et seq. set forth the procedures for sealing a record of 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. A.S.*, 8th Dist. Cuyahoga No. 100358, 2014-Ohio-2187, ¶ 10, citing *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, paragraph two of the syllabus. Under R.C. 2953.32, the trial court must determine: whether the applicant is an “eligible

offender”; whether criminal proceedings are pending against the applicant; and whether the applicant has been rehabilitated to the satisfaction of the court. The court must then “consider the reasons against granting the application specified by the prosecutor” and weigh the applicant’s interests in having the records sealed versus the government’s needs, if any, for maintaining those records. R.C. 2953.32(C). The applicant must meet all of the statutory criteria for eligibility in order to invoke the jurisdiction of the court to grant an expungement.

A.S. at ¶ 9.

State v. T.S., 8th Dist. Cuyahoga No. 102648, 2017-Ohio-7395, ¶ 8.

{¶8} Accordingly,

[t]he purpose of expungement, or sealing a record of conviction, is to recognize that people may be rehabilitated. *State v. Petrou*, 13 Ohio App.3d 456, 456, 469 N.E.2d 974 (9th Dist.1984). In enacting the expungement provisions, the legislature recognized that “[p]eople make mistakes, but that afterwards they regret their conduct and are older, wiser, and sadder. The enactment and amendment of R.C. 2953.31 and 2953.32 is, in a way, a manifestation of the traditional Western civilization concepts of sin, punishment, atonement, and forgiveness.” *State v. M.D.*, 8th Dist. Cuyahoga No. 92534, 2009-Ohio-5694, ¶ 8, quoting *State v. Boddie*, 170 Ohio App.3d 590, 2007-Ohio-626, 868 N.E.2d 699, ¶ 8 (8th Dist.).

State v. M.H., 8th Dist. Cuyahoga No. 105589, 2018-Ohio-582, ¶ 10.

{¶9} Also,

“[e]xpungement 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, 721 N.E.2d 1041 (8th Dist.2000), quoting *State v. Hamilton*, 75 Ohio St.3d 636, 665 N.E.2d 669 (2d Dist.1996). Nonetheless, the Ohio Supreme Court has made clear that “[t]he expungement provisions are remedial in nature and ‘must be liberally construed to promote their purposes.’” *M.D.* at ¶ 9, quoting *State ex rel. Gains v. Rossi*, 86 Ohio St.3d 620, 716 N.E.2d 204 (7th Dist.1999).

Id. at ¶ 11.

{¶10} First, S.E.J. is an eligible offender and did not have any criminal proceedings pending against her. “Under R.C. 2953.31(A), an ‘eligible offender’ is defined to include those convicted of ‘not more than one felony conviction, not more than two misdemeanor convictions if the convictions are not of the same offense, or not more than one felony conviction and one misdemeanor conviction in this state or any other jurisdiction.’” *State v. J.S.*, 8th Dist. Cuyahoga No. 101329, 2015-Ohio-177, ¶ 9. “A conviction for a minor misdemeanor is not considered a conviction. R.C. 2953.31(A).” *Id.* Second, it is clear from the trial court’s findings that it failed to weigh any of S.E.J.’s interests in sealing her convictions against the state’s interest in maintaining them. At the hearing, the state stated,

Even though carrying a concealed weapon being a felony case here is statutorily expungable, the [s]tate is objecting because of Ms. Johnson’s record in this case. And the [s]tate is given pause; it’s concerned that Ms. Johnson decides to settle arguments and that and have a weapon involved. There is just so many shootings out in our community that result in death the [s]tate is just given — very troubled by having weapons to settle arguments and containing them. Ms. Johnson, though, is — has progressed since this and she’s trying to better herself, but upon the weighing and balancing test that this court has to do under the statute the [s]tate argues that the [s]tate and the community’s interests outweigh her interest in having this sealed. Thank you, your Honor.

(Tr. 10.)

{¶11} At the end of the hearing, the trial court stated, “[h]aving a firearm is so dangerous, especially with someone who has children and not being so cautious in how you carry it or use it when you had a license. And that’s concerning that you have two separate gun cases.” (Tr. 15.)

This court and others, however, have rejected this reasoning. *See M.D.*, 8th Dist. Cuyahoga No. 92534, 2009-Ohio-5694, at ¶ 22, quoting *State v. Haas*, 6th Dist. Lucas No. L-04-1315, 2005-Ohio-4350 (the nature of the offense “‘cannot provide the sole basis to deny an application’”); *State v. Hilbert*, 145 Ohio App.3d 824, 827, 764 N.E.2d 1064 (8th Dist.2001) (this court reversed where state argued application should be denied solely because of the nature of the crime, aggravated

arson for act of cross-burning); *State v. Bates*, 5th Dist. Ashland No. 03-COA-057, 2004-Ohio-2260 (reversed where gambling addiction was the sole basis for denying expungement of theft offense).

M.H., 8th Dist. Cuyahoga No. 105589, 2018-Ohio-582, ¶ 16.

{¶12} The trial court never considered whether S.E.J. has been rehabilitated. Likewise, in *M.H.*, we determined that the appellant successfully established his rehabilitation because he had not been convicted of any other crimes since his conviction, he was very committed to his community, and obtained full custody of his grandson. *Id.* at ¶ 17. However the trial court in *M.H.* failed to establish and address the appellant’s rehabilitation, and our court remanded for the limited purpose of ordering the appellant’s record of conviction be sealed. *Id.* at ¶ 20. Similarly, we believe that S.E.J. has established rehabilitation. At the hearing, she stated,

I would like to say thank you for taking this time and moment. Please grant me this because it’s very hard out here for me to find employment for my two daughters. I did have help with the help of my mother but she passed [in] 2014 of just sudden death; nothing planned, she wasn’t sick or anything and she was my biggest supporter. Now I’m just out here by myself trying to establish some type of career for me and my two girls. I have learned that — in the past I was young. I have overcome my mistakes and learned from my mistakes. That will not happen again; I am more mature. At that time I was just young and not understanding, so now I’m fully mature and aware of my mistakes; that this cannot happen because there are consequences behind every action. And I have learned that and I’m more responsible now that I have two beautiful daughters, a 10-year-old and a 4-year-old who I have to raise as young ladies.

(Tr. 7-8.) The state echoed this point when it stated, “Ms. Johnson, though, is—has progressed since this and she’s trying to better herself * * *.” (Tr. 10.) The record reflects that S.E.J. enrolled in college, obtained employment in nursing, and, like the appellant in *M.H.*, has not been convicted of a crime since her conviction at issue in this case.

{¶13} Also, the trial court made its decision based upon the state’s interest being preserved. The state’s interest that “there are so many shootings in our community” is not a

viable one because S.E.J. has never been involved in a shooting. There is also nothing in the record that S.E.J. settles arguments with violence or guns. In addition, S.E.J. is not arguing that she should be able to carry a weapon. The state's interest is preserved in the fact that S.E.J. is not allowed to carry a weapon. However the trial court's statement, "[h]aving a firearm is so dangerous, especially with someone who has children," is not applicable. As stated above, S.E.J.'s purpose for the expungement is so that she can obtain full-time employment, not to own a gun. The state nor the trial court weighed the interests of S.E.J. in having the records pertaining to her conviction sealed against the legitimate needs, if any, of the government to maintain those records.

The court's authority to seal conviction records is derived from the defendant's constitutional right to privacy. *Pepper Pike v. Doe*, 66 Ohio St.2d 374, 421 N.E.2d 1303 (1981), superseded by statute on other grounds; *State v. Hilbert*, 145 Ohio App.3d 824, 826, 764 N.E.2d 1064 (8th Dist.2001). Thus, when trial courts exercise expungement powers, they use "a balancing test, which weighs the interest of the accused in his good name and right to be free from unwarranted punishment against the legitimate need of government to maintain records." *Id.*

Mayfield Hts. v. M.T.S., 2014-Ohio-4088, 19 N.E.3d 600, ¶ 11 (8th Dist.).

{¶14} After review, we conclude that the trial court abused its discretion by failing to consider whether or not S.E.J. had been rehabilitated. *M.H.*, 8th Dist. Cuyahoga No. 105589, 2018-Ohio-582, ¶ 20. We further find that the trial court abused its discretion when it denied S.E.J.'s application simply based on the fact of having guns around children is dangerous. Consistent with our decision in *M.H.*, we find that there is no need to remand this case to the trial court to state additional findings on the record. We find that the information provided was sufficient for our determination. Because the trial court gave no other reason to deny S.E.J.'s application to seal her record of convictions, we reverse the decision of the trial court and remand for the limited purpose of ordering S.E.J.'s record of conviction be sealed.

{¶15} Judgment reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

ANITA LASTER MAYS, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS;

SEAN C. GALLAGHER, J., CONCURS IN JUDGMENT ONLY WITH SEPARATE OPINION

SEAN C. GALLAGHER, J., CONCURRING IN JUDGMENT ONLY:

{¶16} I respectfully concur with the decision to reverse and remand the case but do so on other grounds.

{¶17} I disagree with the majority's decision to sua sponte order the sealing of the record of conviction, although I agree that the government's interest in maintaining the record has not been demonstrated from the arguments presented by the state. The trial court provided no analysis for its conclusion that the "legitimate needs of the government to maintain those records outweigh the defendant's interest in sealing her record." The majority presumes that the trial court's conclusion was premised on the nature of the crime based on the trial court's closing remarks at the hearing. The court voiced a concern about possessing firearms in general:

“Having a firearm is so dangerous, especially with someone who has children and not being so cautious in how you carry it or use it when you had a license. And that’s concerning that you have two separate gun cases.” Tr. 15:11-16. “A court of record speaks only [through] its journal and not by oral pronouncement or mere written minute or memorandum.” *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, 16 N.E.3d 588, ¶ 83, citing *Schenley v. Kauth*, 160 Ohio St. 109, 113 N.E.2d 625 (1953), paragraph one of the syllabus. The majority’s conclusion regarding the basis of the trial court’s decision is merely speculation based on the court’s closing remarks.

{¶18} In addition, the trial court focused on one determination under R.C. 2953.32(C)(1)(a)-(e) that the court found in favor of the state. The defendant’s failure to demonstrate any one of the determinations under R.C. 2953.32(C)(1)(a)-(e) is grounds to deny the application. R.C. 2953.32(C)(1). The trial court did render a conclusion with respect to the other four subdivisions that it was required to consider. It may be more efficient for trial courts to issue an alternative discussion under the entirety of subdivision (C)(1) to avoid a piecemeal approach, but the law does not require the court to do so. *See, e.g., State v. M.D.*, 8th Dist. Cuyahoga No. 97300, 2012-Ohio-1545, ¶ 15. We cannot sua sponte order the sealing of S.E.J.’s conviction based on a de novo review of the record. In light of the lack of analysis in the final entry and the failure to consider the remaining statutory requirements, a remand is necessary. *State v. Tauch*, 10th Dist. Franklin No. 13AP-327, 2013-Ohio-5796, ¶ 18.

{¶19} Fortifying this conclusion, S.E.J. has asked us to remand the case for further proceedings if we find error with respect to the weighing of interests under R.C. 2953.32(C)(1)(e). In her own words, we were asked to “sustain both assignments of error and reverse and remand the case to the trial court.” According to S.E.J., the record did not permit

this court to “determine whether the trial court abused its discretion because it cannot ascertain how, whether, and to what extent it was exercised.” S.E.J. has not argued in favor of, let alone asked us for, the sealing of her record. I would accept S.E.J.’s conclusion with respect to the proper disposition of remanding for the purpose of compliance with R.C. 2953.32(C)(1)(c) and not entertain a sua sponte determination that the record must be sealed as a matter of law. *State v. Tate*, 140 Ohio St.3d 442, 2014-Ohio-3667, 19 N.E.3d 888, ¶ 21; *In re S.K.L.*, 2016-Ohio-2826, 64 N.E.3d 413, ¶ 12 (8th Dist.) (additional briefing sought on a dispositive issue in compliance with *Tate*). The state has not been afforded an opportunity to discuss the merits of the majority’s claim that S.E.J. has demonstrated being rehabilitated under the statute.

{¶20} We cannot assume the trial court’s role and make the statutory determinations, which have not been considered by the trial court, for the first time on appeal. Notwithstanding, the majority concludes that S.E.J. has presented evidence satisfying the rehabilitation determination because she has not been convicted of another offense. The absence of additional convictions is not a sufficient basis to determine that the offender is rehabilitated. The absence of additional convictions is a stand-alone requirement in order to be considered an eligible offender. If S.E.J. had been convicted of another misdemeanor or felony offense, she would not be considered an “eligible offender” as defined under the statutory section. R.C. 2953.31(A). Further, the legislature separately delineated additional criminal proceedings and rehabilitation as separate and distinct determinations that the trial court is required to make. R.C. 2953.32(C)(1)(b)-(c). Had the legislature intended the absence of convictions to prove rehabilitation, the separate subdivisions would be redundant and unnecessary. There is a presumption that the legislature intended every part of the statute to be effective. *State v. Polus*, 145 Ohio St.3d 266, 2016-Ohio-655, 48 N.E.3d 553, ¶ 12, citing R.C. 1.47(B).

{¶21} Further, R.C. 2953.32(C)(1)(c) provides that the trial court shall “determine whether the applicant had been rehabilitated *to the satisfaction of the court.*” (Emphasis added.)

All too often courts discuss R.C. 2953.32(C)(1)(c) without the emphasized, deferential language. This creates confusion because the eligible offender must prove to the satisfaction of the trial court that he is rehabilitated. We do not review this determination de novo; we review for an abuse of discretion. *State v. M.H.*, 8th Dist. Cuyahoga No. 105589, 2018-Ohio-582, ¶ 11, citing *State v. Smith*, 8th Dist. Cuyahoga No. 91853, 2009-Ohio-2380, ¶ 5. It defies credulity to conclude that S.E.J. had demonstrated rehabilitation to the satisfaction of the trial court as a matter of law, especially considering the fact that the trial court had not considered the rehabilitation requirement as required by statute. *Tauch*, 10th Dist. Franklin No. 13AP-327, 2013-Ohio-5796, at ¶ 18. In this instance, the appropriate disposition is to remand the matter to the trial court to ensure proper consideration of the statutory factors. *Id.* We cannot consider the issue de novo.

{¶22} For the aforementioned reasons, I respectfully concur in judgment only. It is important to note that remanding for further proceedings is not denying S.E.J. relief under R.C. 2953.32(C); it is merely a reflection of the record presented for our review and S.E.J.’s own request for the trial court to consider all statutory factors. I would remand the case in order for the trial court to satisfy the mandatory provisions of R.C. 2953.32(C)(1) and make the determinations set forth thereunder.