

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD JACK BALZER,

Defendant-Appellant.

UNPUBLISHED

April 6, 1999

No. 204564

Clinton Circuit Court

LC No. 90-004918 FH

Before: Jansen, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying his motion to set aside, or "expunge," a misdemeanor conviction pursuant to MCL 780.621; MSA 28.1274(101). We affirm.

Defendant, a school teacher, pleaded nolo contendere in 1990 to a single charge of simple misdemeanor assault pursuant to MCL 750.81; MSA 28.276 after four female students that he coached on a seventh grade girls basketball team accused him of briefly but inappropriately touching them during practices. The prosecutor originally brought four counts of second-degree criminal sexual conduct (CSC II) against defendant. MCL 750.520c; MSA 28.788(3). After the girls' testimony, the district court dismissed the charges involving one girl, but bound defendant over on three counts of CSC II with respect to the other three girls. Pursuant to plea negotiations, defendant pleaded nolo contendere only to one count of assault, and the trial court ordered him to pay a fine of \$100 dollars.

Approximately seven years later, on February 12, 1997, defendant filed a motion to set aside his conviction as authorized by MCL 780.621; MSA 28.1274(101). At the hearing, defense counsel noted that, as the statute requires, defendant had not been convicted of any other offense since the assault conviction. Defendant presented evidence that he had been involved in various community events and organizations, as well as a letter of support from a fellow teacher. Defense counsel argued that expungement was particularly appropriate in this case because, in the time since his conviction, defendant had continued to teach and had been involved in other activities with children, such as 4-H, without any complaints, and had led a fully law-abiding life. The three girls all testified at the motion hearing that they opposed setting aside the conviction. The trial court¹ denied defendant's motion to set

aside the conviction, concluding that the public welfare outweighed defendant's interest in setting aside the conviction.

Defendant argues that the trial court abused its discretion by denying defendant's motion to set aside the assault conviction, *People v Boulding*, 160 Mich App 156, 157; 407 NW2d 613 (1986), because it relied upon improper considerations. The statute authorizing expungement of a conviction, MCL 780.621; MSA 28.1274(101), generally states that a person who has been convicted on not more than one offense may apply after five years to have the court set aside the conviction if the person and the conviction meet certain criteria under the statute. Once these criteria are met, the statute provides:

If the court determines that the circumstances and behavior of the applicant from the date of the applicant's conviction to the filing of the application warrant setting aside the conviction and that setting aside the conviction is consistent with the public welfare, the court may enter an order setting aside the conviction. The setting aside of a conviction under this act is a privilege and conditional and is not a right. [MCL 780.621(9); MSA 28.1274(101)(9).]

This Court has interpreted the statute as establishing a balancing test between a defendant's "circumstances and behavior" subsequent to the conviction and the public welfare. *Boulding, supra* at 158. Under such balancing test, it is improper for a court to find that the nature of an offense alone is sufficient grounds to deny the motion. *Id.*; *People v Rosen*, 201 Mich App 621, 622-23; 506 NW2d 609 (1993).

In the case at hand, it is undisputed that defendant met all of the statutory requirements and was therefore eligible to apply for expungement of his criminal record. Accordingly, we must look to the balancing test to determine if the trial court abused its discretion in denying defendant's motion to set aside his conviction. The trial court stated that although it could not "refuse to set aside a conviction solely because of the nature of the offense. . . it can certainly consider and weigh the circumstances surrounding the offense." In particular, the court stated that it believed that defendant had committed sexual misconduct with children, which it characterized as a "serious" offense even in the circumstances alleged, and that the misconduct had had an ongoing effect on the victims. The court noted that defendant works with children and although "it seems unlikely that [defendant] will re-offend, he does have the opportunity to do so" and the public welfare would be better served if his record were discoverable. Finally, although noting that it was not bound by the victims' opinions, the court gave weight to their statements that they had expected defendant to continue to have a record.

Defendant first argues that by relying upon unproven allegations of criminal sexual conduct in denying expungement, the trial court improperly denied the motion because of the nature of the underlying offenses of CSC II. See *Boulding, supra* at 158. However, the trial court specifically recognized that it could not deny the motion on the basis of the nature of the offense alone. In our judgment, the trial court correctly determined that it could nevertheless consider the circumstances surrounding the offense as part of the public welfare analysis. The specific effect of defendant's crime on his victims and society in general are relevant to this analysis. Not all assaults are committed against

children, nor do they all partake of a sexual element, nor are they all committed by someone in a position of authority such as defendant; thus, these considerations are specific to defendant's crime, and are not necessarily inherent in the offense. In addition, while the victims' allegations of touching by defendant were never proven in a trial, defendant voluntarily chose to plead nolo contendere and allow the trial court to rely upon the allegations in the preliminary examination transcript to obtain the factual basis of the crime. In our judgment, the trial court could also rely upon these allegations in deciding whether this same conviction should be set aside since they were the specific facts upon which the assault conviction was based in the first place.

Defendant's second argument is that the trial court improperly determined that the public welfare demanded that defendant retain a criminal record. We agree that, given defendant's civic activities and continued teaching, it seems unlikely that defendant would commit another similar crime. However, based on defendant's continued position of authority over large numbers of children, we cannot say that the trial court's determination, at this time, that the public would be better served by being able to discover defendant's criminal record is "grossly violative of fact and logic," or that "there was no justification or excuse for the ruling." *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).² However, while we draw this conclusion in light of current circumstances, we do not necessarily believe that the factors considered by the trial court will be a barrier to expungement forever. While, presumably the nature and seriousness of the offense will remain unchanged, the urgency of enabling this offense to be "discoverable" by the community will, in our judgment, likely be attenuated by the passage of time and the continuing exemplary conduct of defendant.³

Finally, defendant argues that the court improperly relied upon the unilateral expectations of the victims in this case that defendant would continue to have a criminal record. The trial court stated that it was not bound by the victims' views, "but they deserve consideration. The Legislature would not have provided for victim notification and commentary unless it intended for their thoughts to be weighed." We agree with the trial court. The impact of crime and judicial proceedings on the victims are clearly relevant to a public welfare analysis. Considering the victims' opinions as one factor among several is not an abuse of discretion, in our judgment, although we acknowledge that care must be taken so that a trial court's discretion is not abdicated in this process.⁴

For these reasons, we conclude that the trial court did not abuse its discretion in denying defendant's motion to set aside his conviction for misdemeanor assault.

Affirmed.

/s/ Kathleen Jansen

/s/ David H. Sawyer

/s/ Stephen J. Markman

¹ The district court judge who had bound defendant over for trial on three counts of CSC II was a circuit court judge by the time of defendant's motion and presided at the hearing.

² We reach this conclusion, although we might not all have reached the same conclusion as the trial court on the substantive merits of expungement.

³ We find nothing in the trial court's opinion itself which is at variance with this judgment. In addition, possible changes over time in the attitudes of the victims toward defendant may also affect the statutory balance.

⁴ While we believe that it was fully appropriate for the trial court to consider the current views of the victims, we do not see evidence from the original criminal proceedings that the plea bargain was entered into pursuant to any particular expectations on the part of any or all of the victims concerning future expungement proceedings. Such expectations, if there were any, were never expressed on the record until the hearings on the expungement motion itself. Nor did the prosecutor indicate anything in that regard at the time of the original proceedings.