

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO, TOWNSHIP OF BOARDMAN,

Plaintiff-Appellee,

v.

AMBER JONES,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0078

Criminal Appeal from the
Mahoning County Court No. 2 of Mahoning County, Ohio
Case No. 04 CRB 486, 04 CRB 956, 08 CRA 1045, 08 CRA 1047

BEFORE:

Gene Donofrio, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:

Affirmed

Atty. Paul Gains, Prosecutor, *Atty. Ralph Rivera*, Assistant Prosecutor, Mahoning County Prosecutor's Office, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503 for Plaintiff-Appellee, and

Atty. James Lanzo, 4126 Youngstown-Poland Road, Youngstown, Ohio 44512, for Defendant-Appellant.

Dated:
July 13, 2021

Donofrio, J.

{¶1} Defendant-appellant, Amber Jones, appeals from a judgment entry issued by Mahoning County Court #2 denying her applications to seal records in five of her Mahoning County Court cases.

{¶2} On April 10, 2020, appellant filed an application under R.C. 2953.31, et. seq. to seal her records in Mahoning County Court #2 case number 04 CRB 956, a conviction based on a guilty plea to misdemeanor unauthorized use of a motor vehicle. After she violated community control in that case, Mahoning County Court #2 sentenced appellant to 180 days in jail, to run concurrent with the sentence of the Mahoning County Common Pleas Court in case number 08 CR 1076.

{¶3} Appellant also filed applications to seal records of dismissals in a number of cases. She moved to seal records in Mahoning County Court #2 case number 04 CRB 486, which were charges of misdemeanor domestic violence and conversion that were dismissed pursuant to a Crim. R. 11 agreement upon appellant moving back to Seattle. She also moved to seal records in Mahoning County Court #2 case number 08 CR 1047, which were charges of misdemeanor domestic violence and obstructing official business that were dismissed due to a bind-over to the Mahoning County Court of Common Pleas in case number 08 CRA 1045. She further moved to seal records in Mahoning County Court #2 case number 05 CRB 830 for obstructing official business, which was bound over to Mahoning County Common Pleas Court in case number 05 CR 733. Appellant further moved to seal records in Mahoning County Court #2 case number 08 CRA 1045, which was an aggravated robbery charge that appellant consented to be bound over to Mahoning County Common Pleas Court in case number 08 CR 1076. Mahoning County Common Pleas Court case number 08 CR 1076 resulted in appellant pleading not guilty by reason of insanity and she was confined to Northcoast Behavioral Healthcare upon a finding of not guilty by reason of insanity in 2009. Her maximum commitment expired in 2019 and on March 19, 2019, the court terminated the commitment of appellant.

{¶4} In an additional and unrelated case that was not part of her applications to seal, appellant was placed on community control in Mahoning County Common Pleas Court. On July 30, 2019, appellant was placed on community control in Mahoning County Common Pleas Court case number 19 CRB 947 after pleading guilty to domestic violence under R.C. 2919.25(B), a misdemeanor of the first degree. She is still serving community control in that case.¹

{¶5} On June 9, 2020, the trial court issued the same judgment entry in each of appellant's cases, finding that she was "currently on community control" and "not eligible for sealing her record until one year after her community control is completed." Appellant filed motions to reconsider the decision in each of her cases, but the court did not rule on the motions. Appellant then filed the instant appeal on July 8, 2020.

{¶6} Appellant's sole assignment of error on appeal states:

TRIAL COURT ERRED IN DENYING THE DEFENDANT-APPELLANT'S APPLICATIONS TO SEAL RECORDS HEREIN AS BEING ON COMMUNITY CONTROL DOES NOT EQUATE TO PENDING CRIMINAL PROCEEDINGS.

{¶7} Appellant asserts that she is as an "eligible offender" under R.C. 2953.31 and R.C. 2953.32 for sealing her conviction and she qualifies for sealing her dismissed cases under R.C. 2953.52. She contends that the trial court erred by confusing the criteria required to file the sealing applications with the criteria that a court must review to determine whether her cases qualify for sealing. She requests that this Court reverse the trial court's rulings and seal the records in all of the requested cases.

{¶8} Appellee has filed no appellate brief, but did file a confession of judgment in this Court "in favor of Defendant-Appellant Amber Jones in the above Mahoning County

¹ The docket of that case shows that on July 30, 2019 when she entered her guilty plea, the court sentenced appellant to 180 days in jail, with 180 days suspended, 12 months of reporting probation, and an alcohol assessment. She stipulated to a number of community control violations and was ordered to complete treatment. She also had compliance periods. On October 15, 2020, appellant stipulated to a community control violation. The court warned appellant that this was her last chance to complete treatment or an arrest warrant would issue and she would spend the remainder of her sentence in jail. On November 17, 2020, a bench warrant was issued. The last docket entry in that case is that a motion for continuance was filed.

appellate case, and Remand for a Hearing pursuant to R.C. 2953.32, because appellant is an ‘eligible offender’ pursuant to R.C. 2953.31.”

{¶9} Like expunging a record, the sealing of a record “‘is an act of grace created by the state,’ and so is a privilege, not a right.” *State v. Tauch*, 10th Dist. Franklin No. 13AP, 2013-Ohio-5796, quoting *State v. Dominy*, 10th Dist. Franklin No. 13AP-124, 2013-Ohio-3744, ¶ 5, citing *State v. Simon*, 87 Ohio St.3d 531, 533 (2000). In *State v. Singh*, we held that generally, an appellate court reviews a trial court’s disposition on an application to seal a record under the abuse of discretion standard. 7th Dist. Mahoning No. 19 MA 0141, 2020-Ohio-5604, ¶ 11, citing *State v. Burnside*, 7th Dist. Mahoning No. 08 MA 172, 2009-Ohio-2653, ¶ 12. We further held that a dispute over whether an applicant is an “eligible offender” is an issue of law that we review de novo. *Singh* at ¶ 11, citing *State v. A.L.M.*, 10th Dist. Franklin No. 16AP-722, 2017-Ohio-2772, ¶ 9.

{¶10} Moreover, “[a] court may seal an offender's conviction record ‘only when all requirements for eligibility are met.’” *State v. Aguirre*, 144 Ohio St.3d 179, 2014-Ohio-4603, 41 N.E.3d 1178, ¶ 16, quoting *State v. Boykin*, 138 Ohio St.3d 97, 2013-Ohio-4582, 4 N.E.3d 980, ¶ 11, citing *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, ¶ 6. Determining if conviction records should be sealed is a two-step process in Ohio. *State v. D.M.C.*, 10th Dist. Franklin No. 19AP-694, 2020-Ohio-3556, ¶ 7. The first step is the legal determination of whether the applicant is an “eligible offender” as defined in R.C. 2953.31. *Id.* If the court finds that the applicant is not an “eligible offender,” then the trial court lacks jurisdiction to grant the application to seal. *Id.* at ¶ 8, citing *Dominy*, 10th Dist. Franklin No. 13AP-124, 2013-Ohio-3744, ¶ 6.

{¶11} R.C. 2953.32² governs the sealing of records for convictions and provides in relevant part:

(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

² R.C. 2953.32 has been modified to add language to (A)(1) that an eligible offender may apply for sealing of a conviction, “except for convictions listed under section 2953.36 of the Revised Code.” 2020 Ohio Laws File 93 (Am.Sub.H.B.1)(passed 12/22/20, signed 1/7/21, eff. 4/12/21. That does not apply in this case. It also modified the time when application may be made for sealing and added language that an amount of the fee for sealing be credited into the attorney general reimbursement fund created by R.C. 109.11. *Id.* We apply the version of the statute in effect at the time of the filing of the application to seal the conviction.

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. Application may be made at one of the following times***:

(c) At the expiration of one year after the offender's final discharge if convicted of a misdemeanor.

R.C. 2953.32(A)(1) and (A)(1)(c).

{¶12} Before considering an application to seal a conviction, “a court must consider whether an applicant is an eligible offender, as defined under R.C. 2953.31(A)(1), not whether a conviction for a particular offense is, in and of itself, eligible to be sealed.” *State v. D.M.C.*, 10th Dist. Franklin No. 19AP-694, 2020-Ohio-3556, ¶ 8. R.C. 2953.31³ defines “eligible offender” as “either of the following:”

(a) Anyone who has been convicted of one or more offenses, but not more than five felonies, 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 or a felony sex offense and all of the offenses in another jurisdiction, if committed in this state, would be felonies of the fourth or fifth degree or misdemeanors and none of those offenses would be an offense of violence or a felony sex offense;

(b) Anyone who has been convicted of an offense in this state or another jurisdiction, to whom division (A)(1)(a) of this section does not apply, and who has not more than one felony conviction, not more than two misdemeanor convictions, or not more than one felony conviction and one misdemeanor conviction in this state or any other jurisdiction.

³ R.C. 2953.31’s definition of “eligible offender” has been modified to change the number of felonies and misdemeanors that an applicant may have in order to qualify under this section for sealing records of convictions. It also requires that the conviction requested to be sealed must be eligible for sealing under R.C. 2953.36. 2020 Ohio Laws File 93 (Am.Sub.H.B.1)(passed 12/20/20, signed 1/7/2021, eff. 4/12/21).

R.C. 2953.31(A)(1)(a), (b). R.C. 2953.32 requires the “eligible offender” to have obtained a “final discharge” and meet one of the statute’s three timing requirements before becoming eligible to have her application to seal her conviction considered. An “offender is not permitted even to file the application unless he or she satisfies those two prerequisites.” *State v. Aguirre*, 144 Ohio St.3d 179, 2014-Ohio-4603, 41 N.E.3d 1178, ¶ 18.

{¶13} In the instant case, the trial court’s judgment entry does not address whether appellant was an “eligible offender.” Appellant asserts in her brief before us that she is an “eligible offender” under R.C. 2953.31(A)(1)(a).⁴ Appellee’s confession of judgment also agrees that appellant is an “eligible offender” under R.C. 2953.31.

{¶14} Appellant asserts that the trial court erred by finding that her current community control sentence bars her from filing the application to seal the conviction she requested because the conviction for which she is serving community control is not related to the conviction she seeks to seal. She is correct. “Final discharge” under R.C. 2953.32(A)(1)(c) “occurs where all obligations imposed by the court are completed.” *State v. Chudakoff*, 8th. Dist. Cuyahoga No. 108770, 2020-Ohio-2723 quoting *State v. Alimi*, 8th Dist. Cuyahoga No. 77890, 2000 WL 1753999. R.C. 2953.32(A)(1) provides that “an eligible offender may apply to the sentencing court * * * for the sealing of the record of the case *that pertains to the conviction.*” (Emphasis added). All obligations relating to the conviction that appellant seeks to seal appear to have been completed.

{¶15} Despite the trial court’s failure to discuss appellant’s eligibility to file her application to seal her conviction, the court correctly held that her current community control sentence disqualified her from sealing the conviction. R.C. 2953.32 requires that after determining eligibility for the application, the court must determine, among other factors, “whether criminal proceedings are pending” against the applicant before granting

⁴ The section relied upon by appellant defines an “eligible offender” as anyone who has been convicted of a number of offenses, and “none of those offenses are an offense of violence* * *.” In the case for which she is currently serving community control, it appears that appellant pled guilty to first-degree misdemeanor domestic violence, which is an offense of violence. See Mahoning County Case No. 19 CRB 947; R.C. 2919.25. Thus, R.C. 2953.31(A)(1)(a) may not apply. Appellant may be an “eligible offender” under R.C. 2953.31(A)(1)(b), but appellant does not cite this section, the trial court did not address the issue, and appellee does not specify the statutory section in its confession of judgment. We need not address this issue at this time based upon our ruling in this case.

applications to seal records. R.C. 2953.32(C)(1)(c). Ohio courts differ on whether an applicant's community control in an unrelated case is considered a pending "criminal proceeding" and renders the applicant ineligible for sealing other cases. Compare *State v. J.M.S.*, 2019-Ohio-3383, 142 N.E.3d 142 (10th Dist.) with *State v. Floyd*, 1st Dist. Hamilton Nos. C-170607, C-170608, C-170609, 2018-Ohio-5107.

{¶16} Here, appellant relies on *Floyd* and its holding that once a defendant has been found guilty and sentenced, the criminal proceeding is no longer pending and if a community control violation occurred, this would result in a new proceeding and not a continuation of the original case. 1st. Dist. Hamilton, 2018-Ohio-5107 ¶¶ 8, 11, The *Floyd* court overruled its prior holding in *State v. Blair*, 1st. Dist. Hamilton, No. C-160333, 2016-Ohio-5714, where it had held that a defendant on community control was not entitled to sealing in another case under R.C. 2953.52 because community control constituted a criminal proceeding against her.

{¶17} However, this Court is more persuaded by the Tenth District's rationale in *State v. J.M.S.*, 2019-Ohio-3383, 142 N.E.3d 142 (10th Dist.). There, the trial court set a hearing on the defendant's application to seal records in two cases after they were dismissed upon his completion of treatment in lieu of conviction. The prosecution filed an objection to the application on the basis of a pending criminal proceeding in another case where the defendant was serving community control. *Id.* The trial court held a hearing and found that defendant did not have criminal proceedings pending against him even though he was serving community control. *Id.* The court disagreed with *Blair*, finding that it was not binding authority and pointing out the legislature's differing language in the statutes, with R.C. 2953.32 requiring "final discharge" before the filing of an application to seal a conviction, and R.C. 2953.52, which did not contain this requirement.

{¶18} The state appealed, and the Tenth District reviewed R.C. 2953.52. The court also reviewed the *Floyd* and *Blair* decisions and agreed with the dissent in *Floyd* that a defendant is not eligible to seal dismissal records because "a community control violation results in an additional sentencing hearing in the original case which, therefore, remains pending. The judgment is still being executed. Because the court retains jurisdiction for the duration of the community control sanction, the case remains pending."

State v. J.M.S., 2019-Ohio-3383, 142 N.E.3d 142 (10th Dist.). The appellate court reversed the judgment and remanded the case.

{¶19} We agree with the Tenth District’s holding and rationale in *J.M.S* as to the sealing of both convictions and dismissals. Since a trial court retains jurisdiction over a community control sanction that is currently being served by a defendant, the underlying criminal case upon which that community control is based remains pending. It therefore constitutes a “criminal proceeding” that is “pending against the person” under R.C. 2953.32 and 2953.52.

{¶20} As to sealing appellant’s dismissal records, R.C. 2953.52 provides in part:

(A)(1) Any person, who is found not guilty of an offense by a jury or a court or who is the defendant named in a dismissed complaint, indictment, or information, may apply to the court for an order to seal the person's official records in the case. Except as provided in section 2953.61 of the Revised Code, the application may be filed at any time after the finding of not guilty or the dismissal of the complaint, indictment, or information is entered upon the minutes of the court or the journal, whichever entry occurs first.

R.C. 2953.52(A)(1). The trial court does not mention or refer to this statute in its judgment entry. Nor does appellee refer to this statute in its confession of judgment.

{¶21} Upon review, it appears that appellant meets the eligibility and timing requirements of R.C. 2953.52. This statute does not require an “eligible offender” determination as it provides that “any person” who is found not guilty of a crime or is a defendant in a complaint, indictment or information that was dismissed, may apply for sealing of those records. R.C. 2953.52(A)(1). It further provides that a person may apply for sealing of those records “at any time” after the not guilty or dismissal entry is entered into the minutes or the journal entry. *Id.*

{¶22} Again, however, R.C. 2953.52 requires that after determining eligibility and timing requirements, the court must determine, among other factors, “whether criminal proceedings are pending” against the applicant before granting applications to seal dismissal records. R.C. 2953.52(B)(2)(b). It appears that the trial court denied all of

appellant’s applications to seal because she is currently serving community control in an unrelated case.

{¶23} Based upon our agreement with the holding and rationale in *J.M.S.*, we find that appellant’s current community control sentence in a separate case also disqualifies her from sealing the records of her dismissals. 2019-Ohio-3383, 142 N.E.3d 142 (10th Dist.). Since a trial court retains jurisdiction over her current community control sanction, the underlying criminal case upon which that community control is based remains pending. It therefore is a “criminal proceeding” that is “pending against the person” under R.C. 2953.52.

{¶24} For the foregoing reasons, we find no merit to appellant’s assignment of error. This Court agrees that appellant’s current community control sentence in Mahoning County Common Pleas Court case number 19 CRB 947 bars the sealing of both her conviction and dismissal records at this time.

{¶25} Thus, we hereby affirm the judgment of the trial court.

Waite, J., concurs.

D’Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Mahoning County Court No. 2 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.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.