[Cite as *State v. Fedor,* 2011-Ohio-5485.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 11AP-188
v.	:	(C.P.C. No. 94CR-10-5652)
Stephen A. Fedor,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on October 27, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Appellant, State of Ohio ("the state"), appeals from the judgment of the Franklin County Court of Common Pleas, which issued an order sealing the conviction record of defendant-appellee, Stephen A. Fedor ("appellee"). For the following reasons, we reverse and remand the matter to the trial court.

{¶2} On June 15, 2010, pursuant to R.C. 2953.32(A), appellee filed an application to seal the record of his 1995 convictions for theft, receiving stolen property, and attempted possession of criminal tools, all misdemeanors of the first degree, in Franklin County Court of Common Pleas case No. 94CR-10-5652. On June 23, 2010,

the state filed objections to the sealing of appellee's record of conviction. In support of its objections, the state argued that appellee does not qualify as a first offender because he had previously been convicted for operating a vehicle while intoxicated ("OVI").[1]

{¶3} The application was set for hearing on August 9, 2010. That same day the application was continued for hearing on October 25, 2010 and again continued until November 22, 2010. It appears that, on November 22, 2010, the hearing was continued until January 11, 2011, then again until February 7, 2011. On February 7, 2011, the court granted appellee's application, and on February 15, 2011, the court filed an "Entry Sealing Record of Conviction Pursuant to R.C. 2953.32." With this entry, the trial court issued an order sealing the record of appellee's 1995 convictions in case No. 94CR-10-5652.

{¶4} Appellant filed a timely notice of appeal and raises the following assignment of error:

> THE TRIAL COURT ERRED BY GRANTING APPELLANT'S [SIC] APPLICATION FOR EXPUNGEMENT BECAUSE APPELLANT [SIC] WAS NOT A FIRST OFFENDER UNDER R.C. 2953.32(A).

{¶5} This assignment of error raises a jurisdictional issue. " '[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, 2000-Ohio-474, quoting *State v. Hamilton*, 75 Ohio St.3d 636, 639, 1996-Ohio-440. In light of its nature, "[e]xpungement should be granted only when all requirements for eligibility are met." *Simon* at 533.

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[1] The offense of operating a vehicle while intoxicated may also be referred to as operating a motor vehicle while intoxicated ("OMVI") or driving under the influence ("DUI"). See *State v. Hoover*, 123 Ohio St.3d 418, 2009-Ohio-4993, ¶1.

{¶6} R.C. 2953.32 permits a "first offender" to apply to the sentencing court for sealing of a conviction record. R.C. 2953.31(A) defines a "first offender" as:

> [A]nyone who has been convicted of an offense in this state or any other jurisdiction and who previously or subsequently has not been convicted of the same or a different offense in this state or any other jurisdiction.

{¶7} R.C. 2953.31(A) also mandates that "a conviction for a violation of section 4511.19 * * * for a violation of a substantially equivalent municipal ordinance * * * or for a violation of a substantially equivalent former law of this state or former municipal ordinance shall be considered a previous or subsequent conviction." R.C. 4511.19 prohibits driving under the influence of drugs or alcohol. "[A] conviction of DUI always bars expungement of the record of a conviction for another criminal offense." *State v. Sandlin*, 86 Ohio St.3d 165, 168, 1999-Ohio-147. See also *In re White*, 10th Dist. No. 05AP-529, 2006-Ohio-1346, ¶6.

{¶8} It appears that appellee is not a "first offender" as defined under R.C. 2953.31(A). Parenthetical 4 of the trial court's own "Criteria for Sealing: Conviction / Nolle Prosequi / Dismissal / No Bill / Bond Forfeitures / Not Guilty Finding" checklist indicates that appellee is a first offender. However, the Bureau of Criminal Identification & Investigation Law Enforcement Automated Database Search ("LEADS") report attached to the same checklist indicates otherwise. The LEADS report reflects a December 16, 1997 conviction for an offense of "OVI-Alcohol &/or Drug."

{¶9} This court has held that an order granting an expungement to an applicant subsequently determined not to be a first offender "constitutes an error in the court's exercise of jurisdiction over a particular case," and therefore is voidable. *State v. Smith*,

10th Dist. No. 06AP-1059, 2007-Ohio-2873, ¶15; *In re Bowers*, 10th Dist. No. 07AP-49, 2007-Ohio-5969, ¶9.

{¶10} We reject the argument, made by appellee's counsel at the expungement hearing and accepted by the trial court, that appellee's uncounseled plea to the OVI in 1997 should not be held against him as a conviction for purposes of determining whether appellee is a first offender under R.C. 2953.31(A). (Tr. 3, 5, 6, 8.) Although appellee did not file an appellate brief, before the trial court he argued that, just as an uncounseled prior conviction is not held against an individual for purposes of enhancing a new offense, an uncounseled prior OVI conviction should not be held against an individual who seeks an expungement.

{¶11} Indeed, "[a]n uncounseled conviction cannot be used to enhance the penalty for a later conviction if the earlier conviction resulted in a sentence of confinement." *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, ¶12, citing *Nichols v. United States* (1994), 511 U.S. 738, 114 S.Ct. 1921. However, we cannot extend this principle to the context of determining whether an applicant for expungement is a first offender.

{¶12} "Neither the United States Constitution nor the Ohio Constitution endows one convicted of a crime with a substantive right to have the record of a conviction expunged." *Hamilton* at 639, citing *Bird v. Summit Cty.* (C.A.6, 1984), 730 F.2d 442, 444. As noted previously, "expungement is an act of grace created by the state," and so is a privilege, not a right. *Hamilton* at 639. Expungement should be granted only when all requirements for eligibility are met. Id. at 640. Specific statutory provisions govern the sealing of a record of conviction. See R.C. 2953.31 through 2953.36. In particular,

R.C. 2953.36 provides that records of certain categories of convictions may not be sealed. *Simon* at 533. As noted above, R.C. 2953.31 provides that the conviction records of those offenders who are not first offenders cannot be sealed. Pursuant to R.C. 2953.32, a person who has a conviction for OVI is not a first offender. Therefore, the records of his or her conviction cannot be sealed. These statutory restrictions and exceptions to expungement are an appropriate exercise of the General Assembly's authority to define a legislatively-created privilege. See, e.g., *Johns v. Univ. of Cincinnati Med. Assoc., Inc.*, 101 Ohio St.3d 234, 2004-Ohio-824, ¶37 (explaining that the defense of immunity enjoyed by state employees is statutory and, therefore, the General Assembly may define the parameters of the defense).

{¶13} In *State v. Sandlin*, 86 Ohio St. 3d 165, 1999-Ohio-147, the Supreme Court of Ohio considered whether an OVI conviction precludes an applicant for expungement from qualifying as a first offender, pursuant to R.C. 2953.31(A), even if the conviction sought to be expunged resulted from or was connected with the OVI conviction. Although not the same as the issue pending here, the Supreme Court's discussion of R.C. 2953.31(A) is relevant. The court noted that a conviction of OVI *always* bars expungement of the record of a conviction for another criminal offense and that there is no reason for a distinction between cases in which the two convictions result from the same act and cases in which the two convictions result from separate acts, as long as one of the convictions is for OVI. Id. at 168. In so holding, the court noted that "[t]his interpretation of R.C. 2953.31 is consistent with the General Assembly's intent as expressed through the expungement statutes." Id. The Supreme Court noted that, prior to 1984, a relatively minor traffic violation could prevent expungement of another

conviction. Id. When the General Assembly amended the statute, it exempted minor traffic offenses but provided that an OVI conviction would continue to bar expungement of another offense. "The exemption found in R.C. 2953.31(A) and the specific bar to expungement of any convictions of DUI contained in R.C. 2953.36 show how seriously the General Assembly considers the offense of driving while under the influence of alcohol." Id. We likewise are bound by the statutes governing the expungement process and the General Assembly's intent behind the same. As such, we cannot create an exception to R.C. 2953.31(A) for uncounseled convictions where one does not exist.

{¶14} Moreover, "[s]ealing of a record of conviction pursuant to R.C. 2953.32 is a postconviction remedy that is civil in nature." *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, ¶19, citing *State v. Bissantz* (1987), 30 Ohio St.3d 120, 121. An application to seal a record of conviction is a separate remedy, existing apart from the criminal action. *LaSalle* at ¶19, citing *State v. Wilfong* (Mar. 16, 2001), 2d Dist. No. 2000-CA-75. Thus, expungement differs from a scenario where a prior conviction is used to enhance the penalty for conviction of a subsequent offense.

{¶15} In a series of cases, the Eighth District Court of Appeals recognized this difference and emphasized the statutory nature of expungement when it held that an uncounseled prior or subsequent conviction prevented an individual from qualifying as a first offender for purposes of expungement. See *State v. Ware* (Dec. 27, 1990), 8th Dist. No. 59867; *State v. Alaeldin* (Feb. 11, 1993), 8th Dist. No. 64100; *State v. Whitehead* (Oct. 14, 1993), 8th Dist. No. 65265; *State v. Oskay* (Feb. 10, 1994), 8th Dist. No. 65679. Notably, in *Whitehead*, the court reversed a grant of expungement where the trial court accepted the applicant's argument, citing *Baldesar v. Illinois* (1980),

446 U.S. 222, 100 S.Ct. 1585, that an uncounseled conviction of a crime is not the same as a previous conviction for purposes of R.C. 2953.31. The court concluded that "the purposes behind not permitting an uncounseled conviction to enhance a subsequent crime [are] quite different constitutionally from the instant case, where the applicant defendant is applying as a matter of statutory prerogative to have his previous crime expunged." *Whitehead*.

{¶16} Recently, the Eighth District confirmed this line of cases in *State v. Kraushaar*, 8th Dist. No. 91765, 2009-Ohio-3072. In *Kraushaar*, the trial court granted a motion to seal the record of the applicant's convictions for drug possession, despite her two prior convictions for fourth-degree misdemeanor offenses. Id. at ¶6. The trial court found compelling Kraushaar's argument that, because the two fourth-degree misdemeanor convictions occurred without counsel, she still qualified for expungement. Id. The appellate court reversed the grant of expungement, citing its earlier decisions and noting that "[w]hile there are a series of cases that hold certain uncounseled prior convictions cannot be used for enhancing purposes and the trial court may have relied upon these cases in good faith, these cases are not applicable to expungement proceedings." Id. at ¶13.

{¶17} We agree with the reasoning of these decisions from the Eighth District and reach the same conclusion here. Appellee's subsequent uncounseled OVI conviction constitutes a subsequent offense under R.C. 2953.31(A) and, therefore, appellee does not qualify as a first offender eligible for expungement.

{¶18} For the foregoing reasons, we sustain the state's assignment of error. Accordingly, we reverse the judgment of the Franklin County Court of Common Pleas and

remand this matter to that court for it to enter judgment denying appellee's application for expungement because it lacks jurisdiction to do otherwise.

Judgment reversed and cause remanded with instructions.

BROWN and FRENCH, JJ., concur.

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