**[Cite as *State v. Yorde*, 2011-Ohio-6671.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| | | No. 11AP-404 |
| v. | : | (C.P.C. No. 11 EP 20) |
| Ronald Yorde, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on December 22, 2011

*Ron O'Brien,* Prosecuting Attorney, and *Susan M. Suriano,* for appellee.

*Jeremy Dodgion,* for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

**{¶1}** Defendant-appellant, Ronald Yorde, appeals from a judgment of the Franklin County Court of Common Pleas denying his application to seal the record of his prior convictions. Defendant assigns a single error:

> THE TRIAL COURT ERRED IN DENYING APPELLANT'S APPLICATION FOR AN ORDER SEALING THE RECORD WHERE APPELLANT'S CONVICTIONS WERE CONNECTED ACTS THUS QUALIFYING HIM AS A FIRST OFFENDER UNDER R.C. § 2953.31(A) AND THUS MAKING

> HIM ELIGIBLE FOR AN ORDER SEALING THE RECORD UNDER R.C. § 2953.32.

Because the trial court correctly applied the statutory provision and concluded defendant is not a first offender, we affirm.

**I. Facts and Procedural History**

**{¶2}** On January 10, 2011, defendant filed an "Application for Order Sealing Record of Conviction" in case Nos. 05CR-3805 and 06CR-1860. In the first case, defendant was charged with one count of receiving stolen property, a felony of the fifth degree that occurred on May 23, 2005. The case was resolved on August 25, 2005 when defendant entered a guilty plea to the stipulated lesser-included offense of receiving stolen property, a misdemeanor of the first degree. The court sentenced defendant to six months in the Franklin County correctional system, a fine of $800, and costs. The court, however, suspended the confinement contingent on defendant's paying the costs and fine by November 30, 2005 and having no new convictions for two years.

**{¶3}** The indictment in case No. 06CR-1860 charged defendant with one count of possession of cocaine, a felony of the fifth degree, arising from an incident on June 10, 2005. On June 15, 2006, defendant entered a guilty plea to the stipulated lesser-included offense of attempted possession of cocaine, a misdemeanor of the first degree. The trial court sentenced defendant to four days in the Franklin County correctional system, plus costs, but the court suspended the incarceration for time served and imposed no fine.

**{¶4}** Recognizing that only a "first offender" under R.C. 2953.31(A) may seek to have his or her record sealed, defendant's application asserted he is a first offender because his convictions were only 18 days apart and " 'result from or are connected with

the same act, or result from offenses committed at the same time.' " (Defendant's application, 2, quoting *State v. McGinnis* (1993), 90 Ohio App.3d 479, 481.) Defendant explained that at the time of his arrest, his fiancée had just left him, he was "depressed and heartbroken," and, as a result, he did "irresponsible and reckless things." (Defendant's application, 3.) Acknowledging his new friends were involved in drugs and other illicit activities, defendant said he began to engage in their activities, leading to the two acts that resulted in his convictions. Defendant asserted "the two acts were 'linked together coherently or logically' because they both stemmed from [defendant's] drug abuse caused by being 'upset and disturbed' by his fiancée's sudden abandonment and coupled with the illicit activities of his new friends." Accordingly, he argues, he qualifies as a first offender. (Defendant's application, 3-4, quoting *McGinnis*.) Attached to defendant's application were letters, not only from defendant but others, explaining the turnaround in defendant's life and the reasons for his request to seal his record.

**{¶5}** On January 31, 2011, the state filed an objection, asserting defendant is not a first offender under R.C. 2953.31(A) because his criminal history does not constitute "one conviction" under that statute. With the agreement of counsel, the court conducted an expungement hearing off the record in chambers. The court subsequently denied defendant's application, and the parties agree the court's decision turned on whether defendant is a first offender.

**II. Assignment of Error**

**{¶6}** Defendant's single assignment of error asserts the trial court erred in concluding he is not a first offender as that term is defined in R.C. 2953.31(A).

A. *Applicable Law*

**{¶7}** " 'Expungement is a post-conviction relief proceeding which grants a limited number of convicted persons the privilege of having record of their first conviction sealed.' " *Koehler v. State,* 10th Dist. No. 07AP-913, 2008-Ohio-3472, ¶12, quoting *State v. Smith,* 3d Dist. No. 9-04-05, 2004-Ohio-6668, ¶9. R.C. 2953.31, 2953.32, and 2953.36 govern expungement proceedings, though not all apply to defendant's application, they acknowledge that individuals with a single criminal conviction may be rehabilitated. Id.

**{¶8}** R.C. 2953.32(A)(1) permits a first offender to apply to the sentencing court for an order sealing the record of conviction. Once the application is filed under R.C. 2953.32(A)(1), the court must set a hearing date and notify the prosecutor of the hearing on the application. R.C. 2953.32(B). The same statute permits the prosecutor to object to the application, but the objection must specify the reason for believing the application appropriately should be denied.

**{¶9}** Before ruling on the application, the trial court must ascertain whether the applicant is a first offender, criminal proceedings are pending against the applicant, and, if the court finds the applicant to be a first offender, the applicant has been rehabilitated to the satisfaction of the court. *Koehler* at ¶13. The court also must determine if the prosecutor filed an objection pursuant to R.C. 2953.32(B) and, if so, consider the prosecutor's reasons for the objection. Id. Lastly, the court must weigh the applicant's interests in having the records sealed against the legitimate needs, if any, of the government to maintain the records. Id., citing R.C. 2953.32(C)(1). If the applicant fails to satisfy any one of the requirements, the court must deny the application. Id., citing *State v. Krantz,* 8th Dist. No. 82439, 2003-Ohio-4568, ¶23.

**{¶10}** Central to determining an application for expungement is the court's determining whether the applicant is a first offender. R.C. 2953.31(A) defines a first offender as "anyone 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." Thus, as a general rule, only a person with a single conviction is eligible for expungement. *Koehler* at ¶17, citing *State v. Brewer,* 10th Dist. No. 06AP-464, 2006-Ohio-6991, ¶8.

**{¶11}** The statute creates two exceptions to the general rule, the first exception providing that " '[w]hen two or more convictions result from or are connected with the same act or result from offenses committed at the same time, they shall be counted as one conviction.' " Id., quoting R.C. 2953.31(A). Included in that exception are " 'two distinct concepts—either of which qualify the applicant for expungement: (1) when two or more convictions result from or are connected with the same act; or (2) when two or more convictions result from offenses committed at the same time.' " Id., quoting *Brewer* at ¶9.

**{¶12}** The second exception addresses "[w]hen two or three convictions result from the same indictment, information, or complaint, from the same plea of guilty, or from the same official proceeding. R.C. 2953.31(A). If, then, those convictions "result from related criminal acts that were committed within a three-month period but do not result from the same act or from offenses committed at the same time, they shall be counted as one," provided that the court may decide under R.C. 2953.32(C)(1)(a) "that it is not in the public interest for the two or three convictions to be counted as one conviction." R.C. 2953.31(A).

**{¶13}** As a result, different acts committed at different times resulting in separate convictions generally mean a defendant is not a first offender. *Koehler* at ¶28, citing *Smith* at ¶14. "Whether an individual is a first offender is reviewed de novo by the appellate court." *Brewer* at ¶10, citing *In re M.B.* (June 29, 2000), 10th Dist. No. 99AP-922.

B. *Applicant is not a First Offender*

**{¶14}** Here, because defendant has two convictions, he is not a first offender unless he were to come within one of the two exceptions set forth in R.C. 2953.31(A). The second exception does not apply because defendant undisputedly was indicted under two separate indictments and entered two separate guilty pleas in two separate proceedings. The issue then resolves to whether defendant is a first offender under the first exception of R.C. 2953.31(A). Even though the first exception requires defendant's convictions result from or be connected with the same act, or result from offenses committed at the same time, defendant contends his two convictions arising from his actions on May 23, 2005 and on June 10, 2005 qualify under the analysis employed in *McGinnis*, cited in his application.

**{¶15}** In *McGinnis*, the applicant learned of his wife's infidelity and went on a drinking binge. He then went to the residence of wife's liaison in Scioto County and, on learning she was there, threw a cinder block through a window of the residence. Approximately 12 hours later, after continuing to drink throughout the day, the applicant was pulled over in Brown County for operating a motor vehicle while under the influence of alcohol. He ultimately was convicted of each offense in the appropriate county. Noting that the issue was whether the acts were "connected," and hampered by the lack of a transcript of the expungement hearing in the trial court, the court of appeals determined

the offenses were "logically connected" because the applicant "was upset and disturbed, he had been provoked, and although his actions were illegal, they were the result of his anguish." Id. at 482. The court further pointed to a portion of the expungement report stating the two offenses were related.

**{¶16}** Defendant asserts he is similarly situated, given that his fiancée abandoned him. Defendant contends that, under the influence of the anguish resulting from the split, he began to use drugs and alcohol and to associate with those involved in theft and drugs, leading, in turn, to his arrest and conviction for the two offenses on his record.

**{¶17}** Although defendant attempts to apply a *McGinnis*-type connection to his two convictions by asserting they all arose out of defendant's anguish over his personal life, his circumstances do not parallel those in *McGinnis*. Defendant's convictions, unlike those in *McGinnis*, were not hours apart. Instead, they were based on distinct acts separated by more than two weeks. Moreover, while McGinnis' personal life led to a single drinking binge that resulted in his two offenses, defendant's personal life led to a change in lifestyle that brought about the two convictions. Defendant's two convictions do not merge into a single offense under R.C. 2953.31(A). See *State v. Derugen* (1996), 110 Ohio App.3d 408, 411, appeal not allowed, 77 Ohio St.3d 1419 (concluding an offender with six convictions arising out of acts occurring over a four-day period was not a first offender under R.C. 2953.31(A)); see also cases cited in *Brewer*, including *State v. Bradford* (1998), 129 Ohio App.3d 128 (concluding credit card theft and forgery of credit card slips the next day precluded first offender status even though arising from single customer's credit card); *State v. Alandi* (Nov. 15, 1990), 8th Dist. No. 59735 (determining theft and forgery that occurred three weeks apart were not one offense under R.C.

2953.31(A)); *State v. Vann,* 5th Dist. No. 03-CA-6, 2003-Ohio-7275 (deciding check theft and forgery of the same victim occurring two days apart did not have the requisite connection under R.C. 2953.31(A)); *State v. Cresie* (1993), 93 Ohio App.3d 67 (deciding attempted theft one day and forgery the next lacked the necessary connection).

**{¶18}** Defendant nonetheless contends such a restrictive interpretation of first offender under the first exception clashes with the second exception under R.C. 2953.32(A), providing that separate acts charged in a single indictment may nonetheless permit the offender to be considered a first offender. Defendant suggests such a scenario permits the prosecution, in its discretion, to preclude or permit first offender status depending on how it indicts the offender.

**{¶19}** Nothing in the record suggests any arbitrariness in the method used to indict defendant. Moreover, our task is to apply the language of the statute as written. Under the statute, defendant does not qualify for the second exception because his convictions do not arise out of the same indictment. Defendant fails to meet the definition of a first offender under the first exception because the acts committed were not connected, other than by a lifestyle defendant assumed during his emotional upheaval. Accordingly, we overrule defendant's single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas denying defendant's application for sealing his record of convictions.

*Judgment affirmed.*

BROWN and TYACK, JJ., concur.

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