

[Cite as *State v. Knapp*, 2011-Ohio-3792.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-32 (C.P.C. No. 10EP09-649)
William Knapp,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on August 2, 2011

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiff-appellant, the State of Ohio, appeals from an order of the Franklin County Court of Common Pleas that sealed the record of defendant-appellee, William Knapp's, conviction for one count of attempted possession of drugs. Because Knapp did not qualify for expungement, we vacate that judgment and remand the matter with instructions.

Factual and Procedural Background

{¶2} In 2003, Knapp was convicted of one count of attempted possession of drugs, a first-degree misdemeanor. In 2010, Knapp filed a motion to have the records of

that conviction expunged. The state objected to the proposed expungement, claiming that Knapp did not satisfy the "first offender" requirement of R.C. 2953.32, which mandates that only a "first offender," as defined in R.C. 2952.31(A), is eligible for expungement. Specifically, the state argued that Knapp was not a first offender because he had been convicted in 2009 for operating a vehicle while under the influence in violation of R.C. 4511.19.

{¶3} At a hearing on his motion, Knapp admitted that he was convicted of OVI in 2009. The trial court acknowledged that Knapp's drug conviction was not eligible for expungement because of the OVI conviction but, nevertheless, granted Knapp's motion and sealed the records of his 2003 drug conviction.

{¶4} The state appeals and assigns the following error:

THE TRIAL COURT ERRED BY GRANTING DEFENDANT'S APPLICATION FOR EXPUNGEMENT BECAUSE DEFENDANT WAS NOT A FIRST OFFENDER UNDER R.C. 2953.32.

Assignment of Error - Is Knapp a First Offender?

{¶5} " '[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. The state argues that Knapp does not meet the statutory requirements for expungement because he is not a first offender. We agree.

{¶6} R.C. 2953.32 permits a "first offender" to apply to the sentencing court for sealing of a conviction record. If the applicant is not a first offender, the trial court lacks jurisdiction to grant the requested expungement. *In re Barnes*, 10th Dist. No. 05AP-355,

2005-Ohio-6891, ¶12. "As a result, an order expunging the record of one 'who is not a first offender is void for lack of jurisdiction and may be vacated at any time.' " *Id.* at ¶13 (quoting *State v. McCoy*, 10th Dist. No. 04AP-121, 2004-Ohio-6726, ¶11). Whether an applicant is considered a first offender is an issue of law that we review de novo. *State v. Hoyles*, 10th Dist. No. 08AP-946, 2009-Ohio-4483, ¶4.

{¶7} 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." That statute further mandates that "[a] conviction for a violation of section 4511.19 * * * shall be considered a previous or subsequent conviction."

{¶8} As a result, "when a person is convicted for DUI, he or she will have 'previously or subsequently * * * been convicted of the same or a different offense' and cannot meet the definition of a 'first offender' under R.C. 2953.31(A). Thus, 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, ¶8 (reversing expungement of conviction due to subsequent conviction for violation of R.C. 4511.19).

{¶9} Knapp is not a "first offender" under R.C. 2953.31(A) because his record contains a conviction for violation of R.C. 4511.19 in addition to the conviction he seeks to have expunged. *Id.*; *State v. Morris*, 5th Dist. No. 09-CA-128, 2010-Ohio-2403, ¶15 (DUI conviction prevents expungement for previous conviction). Therefore, the trial court did not have jurisdiction to grant his application and its judgment is void.

{¶10} For the foregoing reasons, we sustain the state's assignment or error. Accordingly, we vacate the judgment of the Franklin County Court of Common Pleas and remand this case to that court for it to enter judgment denying Knapp's application for expungement.

Judgment vacated and cause remanded with instructions.

SADLER and CONNOR, JJ., concur.
