[Cite as *In re S.F.M.*, 2014-Ohio-5860.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re Application of:	:	
S.F.M.,	:	No. 14AP-408 (C.P.C. No. 13EP-925)
(State of Ohio,	:	(REGULAR CALENDAR)
Appellant).	:	

D E C I S I O N

Rendered on December 9, 2014

Ron O'Brien, Prosecuting Attorney, and *Barbara F. Farnbacher*, for appellant.

Michael H. Siewert, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶ 1} State of Ohio, plaintiff-appellant ("the state"), appeals the judgment of the Franklin County Court of Common Pleas, in which the court granted the application for sealing of record filed by S.F.M., defendant-appellee.

{¶ 2} In 2004, appellee was convicted of one misdemeanor count of unauthorized use of property, the record of which was subsequently sealed pursuant to court order. In 2007, appellee was convicted of one misdemeanor count of operating a vehicle while under the influence ("OVI").

{¶ 3} In April 2010, appellee was found guilty of receiving stolen property and attempted identity fraud, both of which are first-degree misdemeanors. On November 25,

2013, appellee filed an application to seal her convictions. The state objected, arguing that R.C. 2953.32 permits the sealing of a record when a defendant has no more than two misdemeanors, but appellee had more than two.

{¶ 4} On April 17, 2014, the trial court held a hearing on appellee's application. Appellee argued that she was eligible for the sealing of her record because her prior sealed misdemeanor conviction was not usable to bar her application. On April 21, 2014, the trial court granted appellee's application to seal her record. The state appeals the judgment of the trial court, asserting the following assignment of error:

> THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S APPLICATION TO SEAL HER CONVICTION, BECAUSE SHE DID NOT QUALIFY AS AN "ELIGIBLE OFFENDER."

{¶ 5} In its sole assignment of error, the state argues that the trial court erred when it granted appellee's application to seal her record because she was not an "eligible offender" under R.C. 2953.31(A). " 'Expungement is a post-conviction relief proceeding which grants a limited number of convicted persons the privilege of having record of their * * * 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. Expungement " ' "is an act of grace created by the state" and so is a privilege, not a right.' " *Id.* at ¶ 14, quoting *State v. Simon*, 87 Ohio St.3d 531, 533 (2000), quoting *State v. Hamilton*, 75 Ohio St.3d 636, 639 (1996). In Ohio, "expungement" remains a common colloquialism used to describe the process of sealing criminal records pursuant to statutory authority. *State v. Pariag*, 137 Ohio St.3d 81, 2013-Ohio-4010, ¶ 11.

{¶ 6} Pursuant to R.C. 2953.32(A)(1), only an "eligible offender" may apply to have the records of a conviction sealed. As of the date relevant to the present case, R.C. 2953.31(A) defined the term "eligible offender" as anyone who has "not more than one felony conviction, not more than two misdemeanor convictions if the convictions are not of the same offense, or not more than one felony conviction and one misdemeanor conviction." R.C. 2953.31(A) further provides 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." Whether an applicant is considered an

eligible offender is an issue of law for a reviewing court to decide de novo. *See State v. Hoyles*, 10th Dist. No. 08AP-946, 2009-Ohio-4483, ¶ 4.

{¶ 7} In the present case, the state contends that appellee was not an "eligible offender" under R.C. 2953.31(A) because she had more than two misdemeanor convictions: the April 2010 receiving stolen property and attempted identity fraud misdemeanor convictions which count as one conviction under R.C. 2953.31(A); the 2007 misdemeanor conviction for OVI; and the sealed 2004 misdemeanor conviction for unauthorized use of property. Appellee counters that, although the trial court had discretion to consider the sealed 2004 misdemeanor conviction, the trial court in the present case chose not to consider the sealed record.

{¶ 8} In support of its argument that the trial court was required to consider appellee's sealed 2004 misdemeanor conviction, the state cites our decision in *Hoyles*. In *Hoyles*, the defendant was convicted of theft, and the conviction was later sealed. The defendant was then convicted of falsification, which he sought to have sealed. The trial court denied the application because it found that he was not a "first offender," the term used in former R.C. 2953.31 instead of "eligible offender." On appeal to this court, the defendant argued that his sealed theft conviction did not disqualify him from being considered a first offender for purposes of sealing his subsequent falsification conviction. We rejected the defendant's argument that R.C. 2953.33 permitted an offender to qualify as a first offender multiple times for multiple convictions, so long as each and every prior conviction is sealed, citing *State v. Cantrell*, 5th Dist. No. 06CA105, 2007-Ohio-3671; *State v. Vann*, 5th Dist. No. 03CA6, 2003-Ohio-7275; *State v. Easterday*, 5th Dist. No. 92-CA-123 (July 19, 1993); and *State v. Johnson*, 7th Dist. No. 06 MA 188, 2008-Ohio-1183. We cited the reasoning in *Cantrell* that "to adopt [appellant's] position would create a string of expunged cases and a crime spree of expunged convictions where the applicant is determined to be a first offender only by virtue of each expungement." *Id*. at ¶ 27. We concluded that R.C. 2953.32 affords the court the authority to consider a prior sealed conviction in those circumstances, and the trial court could consider the defendant's prior conviction in finding he was not a first offender. We added that, according to the plain language of the statute, and in accordance with established case law, R.C. 2953.32 may only be used once. *Id*. at ¶ 7, citing *Johnson* at ¶ 13.

{¶ 9} We disagree that *Hoyles* requires reversal in the present case. The effects of the sealing of a record under R.C. 2953.32(C)(2) are clear. R.C. 2953.32(C)(2) provides, in pertinent part, that if a court seals a defendant's record of conviction, "[t]he proceedings in the case that pertain to the conviction or bail forfeiture shall be considered not to have occurred and the conviction or bail forfeiture of the person who is the subject of the proceedings shall be sealed, *except that upon conviction of a subsequent offense, the sealed record of prior conviction or bail forfeiture may be considered by the court in determining the sentence or other appropriate disposition, including the relief provided for in sections 2953.31 to 2953.33 of the Revised Code*." (Emphasis added.)

{¶ 10} Therefore, the statutory language is clear and unambiguous that a court "may" consider a prior sealed record in determining whether to seal a record under R.C. 2953.32. "The statutory use of the word 'may' is generally construed to make the provision in which it is contained optional, permissive, or discretionary." *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 107 (1971). Here, the General Assembly has written a discretionary statute. R.C. 2953.32 allows, but does not require, the court to consider a prior sealed record in determining whether to seal a record under R.C. 2953.32. In the present case, the trial court decided, in its discretion, that it was not going to consider appellee's prior sealed record in determining appellee's eligibility under R.C. 2953.32. Once the trial court determined that it was not going to consider the prior sealed record, the issue of whether appellee fit the definition of "eligible offender" became a question of law. There can be no dispute that appellee fits the definition of "eligible offender" if the prior sealed record is not considered.

{¶ 11} *Hoyles* is not inconsistent with our determination. In fact, in *Hoyles*, we acknowledged the trial court had discretion to consider a prior sealed conviction. We noted with approval the state's reliance on the language in R.C. 2953.32(C)(2) that provides a court "may" consider a sealed record when determining relief pursuant to R.C. 2953.31 to 2953.33. *Id*. at ¶ 6. Also, some of our language in *Hoyles* suggests a trial court has discretion in deciding whether to consider a prior sealed record rather than being required to consider the prior sealed record. *See id*. at ¶ 7 (R.C. 2953.32 "affords the court with the authority to consider" a prior sealed conviction; the trial court "could consider" the prior conviction). Also, although the cases we cited in *Hoyles* are more definite in

their conclusion that a defendant can avail herself of R.C. 2953.32 only once, none of those cases address or acknowledge the discretionary "may" language in R.C. 2953.32(C)(2), and none of those cases specifically cites any language in R.C. 2953.31 to 2953.33 that limits a party to using R.C. 2953.32 only once. Thus, in addition to the fact that *Hoyles* addressed a former version of R.C. 2953.31 and 2953.32 that used the term "first offender" instead of "eligible offender," *Hoyles* and the cases cited therein are distinguishable from the present case for these reasons. Therefore, we find the trial court did not err when it granted appellee's application for sealing of record. The state's assignment of error is overruled.

{¶ 12} Accordingly, the state's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK and LUPER SCHUSTER, JJ., concur.
