

[Cite as *State v. Dean*, 2002-Ohio-4088.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO.80396

STATE OF OHIO, :
 :
 Plaintiff-Appellant : JOURNAL ENTRY
 :
 vs. : AND
 :
 THEODORA DEAN, : OPINION
 :
 Defendant-Appellee :
 :

DATE OF ANNOUNCEMENT : AUGUST 8, 2002
OF DECISION :

CHARACTER OF PROCEEDING : Civil appeal from
Common Pleas Court
Case No. CR-058697

JUDGMENT : REVERSED AND REMANDED

DATE OF JOURNALIZATION :

APPEARANCES:

For Plaintiff-Appellant: WILLIAM D. MASON
Cuyahoga County Prosecutor
DIANE SMILANICK
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Cleveland, Ohio 44113

For Defendant-Appellee: SHARON L. MCDOWELL
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Bay Village, Ohio 44140-0103

ANNE L. KILBANE, J.:

{¶1} This is an appeal from an order of Judge Christine T. McMonagle that sealed conviction records of appellee Theodora Dean pursuant to R.C. 2953.32. The appellant State of Ohio claims it was error to grant the motion without holding a hearing, and that Dean was not a first offender and did not qualify for expungement. We reverse and remand.

{¶2} On March 1, 2001, Dean filed an application to seal the records of her 1980 convictions for theft¹ and attempted possession of criminal tools.² The judge referred the application to the probation department for investigation and, on August 9, 2001, the prosecutor filed objections to the application because Dean had failed to pay the outstanding fines and court costs stemming from the convictions and was ineligible for relief under R.C. 2953.32. On August 30, 2001, without scheduling or holding a hearing, the judge granted the application, finding that the prosecutor had been notified and that Dean had paid the fines and court costs. The State's first assignment of error states:

{¶3} "I. A Trial Court Errs in Ruling on a Motion for Expungement Filed Pursuant to R.C. 2953.32 Without First Holding a Hearing."

{¶4} R.C. 2953.32(B) states:

¹R.C. 2913.02.

²R.C. 2923.02, 2923.24.

{¶5} "Upon the filing of an application under this section, the court shall set a date for a hearing and shall notify the prosecutor for the case of the hearing on the application. * * *."

{¶6} The relevant language has not changed substantially since the decision in *State v. Saltzer*,³ which held that the statute required a judge to set a hearing on applications to seal conviction records.⁴ Although Dean argues that the definition of "hearing" can include the consideration of written memoranda without oral argument, this cannot be the meaning intended by R.C. 2953.32(B), for there would be no need to "set a date" for a judge to consider memoranda. This court continues to follow the holding in *Saltzer*⁵ and finds it is error to grant such an application without holding a hearing. The first assignment of error is sustained.

{¶7} The second assignment states:

{¶8} "II. A Trial Court Erred [sic] in Granting a Motion to Seal the Record of Conviction When it Is Without Jurisdiction to Grant Said Motion to an Applicant Who Is Not a First Offender."

{¶9} Unless the record shows a lack of jurisdiction over the defendant's application, the failure to hold a hearing requires

³(1984), 14 Ohio App.3d 394, 14 OBR 500, 471 N.E.2d 872.

⁴*Id.* at 395.

⁵See *State v. Houston*, Cuyahoga App. No. 80015, 2002-Ohio-329, and cases cited therein.

remand for further proceedings.⁶ The record here does not show a lack of jurisdiction, and remand is therefore appropriate.

Judgment reversed and remanded.

It is ordered that the appellant recover from appellee costs herein taxed.

It is ordered that a special mandate issue out of this court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

⁶*Houston*; cf. *State v. Meyer* (Nov. 29, 2001), Cuyahoga App. No. 79513.

PATRICIA A. BLACKMON, J., CONCURS

JAMES D. SWEENEY, P.J., CONCURS IN JUDGMENT ONLY WITH SEPARATE
OPINION.

ANNE L. KILBANE
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

SWEENEY, JAMES D., P.J., CONCURRING IN JUDGMENT ONLY:

{¶10} I concur in judgment only and cite to concurring opinions in *State v. Thomas* (May 13, 1999), Cuyahoga App. Nos. 72536 and 72537, and *Garnett v. Garnett* (Sept. 16, 1999), Cuyahoga App. No. 75225, at 3-4, and Loc.App.R. 22(C) of this Court which states that:

{¶11} "Opinions of the Court will not identify or make reference by proper name to the trial judge, magistrate *** unless such reference is essential to clarify or explain the role of such person in the course of said proceedings." (Eff. July 25, 2000).