

[Cite as *State v. M.R.*, 2010-Ohio-6025.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94591

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

M.R.

DEFENDANT-APPELLEE

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-498405

BEFORE: Rocco, P.J., Stewart, J., and Cooney, J.

RELEASED AND JOURNALIZED: December 9, 2010

ATTORNEYS FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor

BY: Diane Smilanick
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE

Michael J. Goldberg
Goldberg & Murner LLP
323 Lakeside Avenue, West
450 Lakeside Place
Cleveland, Ohio 44113

KENNETH A ROCCO, P.J.:

{¶ 1} Plaintiff-appellant the state of Ohio appeals from the trial court order that granted an application to seal the record of his convictions filed by defendant-appellee M.R.¹

{¶ 2} The state presents one assignment of error, arguing that the trial court erred in granting M.R.'s application. Upon a review of the record, this court must agree. Consequently, the trial court's order is reversed, and this matter is

¹This court's policy is to refer to defendants who have had their criminal records sealed pursuant to R.C. 2953.32 by only their initials.

remanded with instructions to deny the application and to unseal the record of M.R.'s convictions.

{¶ 3} The record reflects on July 6, 2007, M.R. was charged by information in the Cuyahoga County Court of Common Pleas with five counts of attempted pandering of obscenity in violation of R.C. 2923.02/2907.32. Six days later, he pleaded guilty to these first-degree misdemeanor charges.

{¶ 4} The trial court sentenced M.R. to six months in jail, but suspended the sentence and placed him on one year of community control. He successfully completed his term.

{¶ 5} On October 2, 2009, M.R. filed an application pursuant to R.C. 2953.32(A) to seal the official record of his convictions, often referred to as expungement.² In his brief in support of his application, he argued that he had been convicted of an offense³ that did not “involve a minor” and did not “fall under any of the exceptions for convictions that may not be sealed under R.C. 2953.36.”

²R.C. 2953.32(A)(1) provides in pertinent part: “[A] first offender may apply to the sentencing court if convicted in this state * * * for the sealing of the conviction record. Application may be made at the expiration of three years after the offender’s final discharge if convicted of a felony, or at the expiration of one year after the offender’s final discharge if convicted of a misdemeanor.”

³The record reflects M.R. used the singular throughout the application process, suggesting that he had only one conviction, rather than five.

{¶ 6} The state filed an opposition brief, arguing that M.R. did not meet the status of “first offender,” and, further, that the nature of the crime he committed weighed against granting his application.

{¶ 7} The trial court conducted a hearing on M.R.’s application. In addressing the court, M.R.’s attorney stated the circumstances that led to the charges against his client as follows:

{¶ 8} “[M.R.] had taken a picture of his child, a three-year old child in a silly pose after a bath. * * * He shouldn’t have showed [sic] it to a stranger, and that’s what he did. The police were called and he was prosecuted. * * *

{¶ 9} “The original contemplated charge * * * was pandering obscenity involving a minor, and, obviously, through the negotiation process it was determined that this child was not a victim and it would not be an appropriate charge and, therefore, that was dropped. So there is no child/victim in this case.”

{¶ 10} The prosecutor argued in response that M.R.’s record was exempt from sealing pursuant to R.C. 2953.36(F), since defense counsel had just “confirmed” the obscene material involved a person under the age of eighteen. The prosecutor additionally argued that the state had an interest in keeping the record open due to the nature of the crimes.

{¶ 11} The trial court granted M.R.'s application without explaining its reasons. The state appeals from that decision with the following assignment of error.

{¶ 12} **“I. A trial court errs in granting a motion to seal the record of conviction when it is without jurisdiction to grant said motion to an applicant who was convicted of a crime in which the victim of the offense was under eighteen years of age, which is not permitted pursuant to R.C. [Sec.] 2953.36.”**

{¶ 13} Distilled to its essence, the state argues the trial court lacked statutory authority to grant M.R.'s application. This court agrees.

{¶ 14} The expungement procedure set forth in R.C. 2953.31 et seq. creates a civil remedy. *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, ¶19. Since expungement is an act of grace created by the state, it is a privilege, not a right. *State v. Simon* (2000), 87 Ohio St.3d 531, 533, 721 N.E.2d 1041, citing *State v. Hamilton* (1996), 75 Ohio St.3d 636, 639, 665 N.E.2d 669. Expungement thus may be granted only “when all requirements for eligibility are met.” *Simon* at 533.

{¶ 15} The applicant must meet the statutory eligibility criteria in order to invoke the court's jurisdiction to expunge a conviction; the state bears no burden other than, when appropriate, to object to an application. *State v. Menzie*, Franklin App. No. 06AP-384, 2009-Ohio-6990, ¶7. Applicants whose conviction

falls within any category of R.C. 2953.36 are “ineligible” for expungement. *Simon* at 533. The applicability of R.C. 2953.36 categories to the applicant’s convictions is a question of law that this court reviews de novo. *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, ¶6. R.C.

2953.36 states as follows:

{¶ 16} “Sections 2953.31 to 2953.35 of the Revised Code *do not apply* to any of the following:

{¶ 17} “(A) Convictions when the offender is subject to a mandatory prison term;

{¶ 18} “(B) Convictions under section 2907.02, 2907.03, 2907.04, 2907.05, 2907.06, 2907.321, 2907.322, or 2907.323, former section 2907.12, or Chapter 4507., 4510., 4511., or 4549. of the Revised Code, or a conviction for a violation of a municipal ordinance that is substantially similar to any section contained in any of those chapters;

{¶ 19} “(C) Convictions of an offense of violence when the offense is a misdemeanor of the first degree or a felony and when the offense is not a violation of section 2917.03 of the Revised Code and is not a violation of section 2903.13, 2917.01 or 2917.31 of the Revised Code that is a misdemeanor of the first degree;

{¶ 20} “(D) Convictions on or after the effective date of this amendment under section 2907.07 of the Revised Code or a conviction on or after the

effective date of this amendment for a violation of a municipal ordinance that is substantially similar to that section;

{¶ 21} “(E) Convictions on or after the effective date of this amendment under section 2907.08, 2907.09, 2907.21, 2907.22, 2907.23, 2907.31, 2907.311, 2907.32, or 2907.33 of the Revised Code *when the victim of the offense was under eighteen years of age*;

{¶ 22} “(F) Convictions of an offense *in circumstances in which the victim of the offense was under eighteen years of age when the offense is a misdemeanor of the first degree or a felony; * * **” (Emphasis added.)⁴

{¶ 23} From the foregoing, it is apparent that when the victim of an offense is under the age of 18, the crime falls within subsection (F), one of the categories precluded from expungement. The supreme court has stated that “[a]n expungement proceeding is not an adversarial one; the primary purpose of an expungement hearing is to gather information. Because expungement proceedings are not adversarial, the Rules of Evidence do not apply.” (Citations omitted.) *Simon* at 533.

⁴The current version of the statute became effective November 10, 2007, four months after M.R. entered his pleas in this case, and subsection (E) indicates it is to be applied prospectively. However, the current version reflects the intent of the legislature with respect to both crimes of a sexual nature and crimes involving child victims. In resolving the question of law presented in this case, this court also is influenced by the Ohio Supreme Court’s holding in *LaSalle*, at paragraph two of the syllabus, which states that the “statutory law in effect at the time of the filing of an R.C. 2953.32 application to seal a record of conviction is controlling.” See, e.g.,

{¶ 24} The trial court learned at the hearing that M.R.'s five pandering obscenity convictions all involved his three-year old child; M.R.'s attorney acknowledged this fact. *Menzie* at ¶10. Therefore, R.C. 2953.36(F) applied.

{¶ 25} The addition of the attempt statute to the offense did not affect R.C. 2953.36's application because the "main" offense was on list of excepted offenses. *State v. Burnside*, Mahoning App. No. 08 MA 172, 2009-Ohio-2653, ¶¶20-21, citing *State v. Reid*, Greene App. No. 2005CA0028, 2006-Ohio-840, ¶13.

Moreover, M.R.'s convictions were for committing crimes of a sexual nature on the child victim, and the offense specifically is now set forth in R.C. 2953.36(E). The use of a child in obscene material clearly "is harmful to the physiological, emotional and mental health" of that child. *Menzie* at ¶13, citing *Osborne v. Ohio* (1990), 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed2d 98.

{¶ 26} Since the record demonstrates "the very nature of the offense[s] for which [M.R.] was convicted renders the sealing provisions of R.C. 2953.32 inapplicable to him," the trial court lacked authority to seal his record. *State v. Campbell*, Summit App. No. 24919, 2010-Ohio-128, at ¶8.

{¶ 27} The state's assignment of error, accordingly, is sustained.

{¶ 28} The trial court's order is reversed, and this case is remanded to the trial court with instructions to deny M.R.'s application and to unseal the record of his convictions.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court 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.

KENNETH A. ROCCO, PRESIDING JUDGE

MELODY J. STEWART, J., and
COLLEEN CONWAY COONEY, J., CONCUR