

[Cite as *State v. H.M.*, 2018-Ohio-2946.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106513

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

H.M.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-580051-A

BEFORE: Celebrezze, J., Stewart, P.J., and Keough, J.

RELEASED AND JOURNALIZED: July 26, 2018

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FRANK D. CELEBREZZE, JR., J.:

{¶1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Plaintiff-appellant, the state of Ohio, seeks to overturn the trial court's decision to grant defendant-appellee, H.M.'s (hereinafter "appellee") application for the sealing of his conviction record. The state argues that the trial court abused its discretion when it granted appellee's application because that decision failed to properly weigh the competing interests involved. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} Appellee, an attorney, was indicted on one count of attempted bribery, a fourth-degree felony, in violation of R.C. 2921.02 and 2923.02. The charge stems from appellee's involvement with the communication of bribes by a criminal defendant's attorney to a female rape victim. Appellee represented the female victim in obtaining a civil protection order against the defendant. After the defendant pled guilty in the criminal matter, his attorney communicated to appellee, who had terminated his representation with the female victim, bribe offers to the victim if she would write a favorable letter to the trial court judge at the defendant's sentencing.

{¶3} On November 13, 2013, as part of a plea agreement,¹ appellee pled no contest to obstructing official business, a second-degree misdemeanor, in violation of R.C. 2921.31(A). On November 22, 2013, appellee was sentenced as follows: 10-day jail sentence, that was suspended, 3 months community control sanctions, 25 hours community service, and a fine of

¹ Appellee had agreed to testify before a grand jury as part of an investigation into charges of bribery and corruption against the defendant's attorney, and other attorneys involved in the same investigation.

\$750.²

{¶4} On November 20, 2015, appellee filed an application to seal all official records of his conviction in this matter. The state filed a response brief in opposition to appellee's application. Appellee had previously completed all of his sentencing orders, including payment of his fine and court costs as of November 25, 2013. Appellee also completed his community service orders prior to the termination of his three-month community control period. Appellee was also terminated from community control on January 31, 2014.

{¶5} Having filed his application to seal on November 20, 2015, the trial court held a hearing on appellee's motion on November 1, 2017. At the hearing, the trial court heard arguments by appellee in support of his motion and arguments in opposition by the state. The court ultimately granted the application and sealed appellee's record of the conviction. The state then filed the instant appeal raising two assignments of error for review:

- I. The trial court abused its discretion when it granted H.M.'s application to seal all official records because that decision failed to properly weigh the competing interests involved and is not supported in the record.
- II. The trial court failed to articulate and create a record for this court to engage in a meaningful appellate review.

II. Law and Analysis

{¶6} In the state's first assignment of error, the state argues that the trial court abused its discretion when it granted appellee's application. In particular, the state argues that the trial court failed to properly weigh the competing interests involved and thus the trial court's decision

² In our review of the record, we note that a formal disciplinary complaint was filed against appellee by the Cuyahoga County Prosecutor's Office. Appellee agreed to a recommended "consent to discipline agreement" resulting in a six-month suspension. On October 5, 2015, the Board of Professional Conduct filed its certified report and recommendation with the Ohio Supreme Court adopting the findings of fact, conclusions of law, and recommendations of the panel, adopting the six-month suspension, which was stayed in its entirety.

to grant appellee's application is not supported by the record. In its second assignment of error, the state argues that the trial court failed to articulate and create a record for this court to conduct a meaningful appellate review.

A. Weighing Competing Interests

{¶7} In *State v. A.S.*, 8th Dist. Cuyahoga No. 100358, 2014-Ohio-2187, this court explained the standard of review of a ruling on an application to seal a conviction as follows:

Generally, a trial court's decision to grant or deny a motion to seal records filed pursuant to R.C. 2953.52 is reviewed for an abuse of discretion. *State v. C.K.*, 8th Dist. Cuyahoga No. 99886, 2013-Ohio-5135, ¶ 10, citing *In re Fuller*, 10th Dist. Franklin No. 11AP-579, 2011-Ohio-6673, ¶ 7. * * * However, the applicability of R.C. 2953.36 to an applicant's conviction is a question of law that this court reviews de novo. *State v. M.R.*, 8th Dist. Cuyahoga No. 94591, 2010-Ohio-6025, ¶ 15, citing *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, ¶ 6.

Id. at ¶ 7. Thus, as the state contests the trial court's decision to grant appellee's application, we review the trial court's decision for an abuse of discretion.

{¶8} Under R.C. 2953.32, the trial court must determine: whether the applicant is an "eligible offender"; whether criminal proceedings are pending against the applicant; and whether the applicant has been rehabilitated to the satisfaction of the court. The applicant must meet all of the statutory criteria for eligibility in order to invoke the jurisdiction of the court to grant an expungement. *A.S.* at ¶ 9. The trial court must then "consider the reasons against granting the application specified by the prosecutor" and weigh the applicant's interests in having the records sealed versus the government's needs, if any, for maintaining those records. R.C. 2953.32(C). More specifically, pursuant to R.C. 2953.32, the trial court "must weigh the interest of the public's need to know as against the individual's interest in having the record sealed, and must liberally construe the statute so as to promote the legislative purpose of allowing expungements."

State v. Hilbert, 145 Ohio App.3d 824, 827, 764 N.E.2d 1064 (8th Dist.2001).

{¶9} The Ohio Supreme Court has held that an “[e]xpungement is an act of grace created by the state,’ and so [it] is a privilege, not a right.” *State v. Simon*, 87 Ohio St.3d 531, 533, 721 N.E.2d 1041 (2000), quoting *State v. Hamilton*, 75 Ohio St.3d 636, 639, 665 N.E.2d 669 (1996). “Moreover, the government possesses a substantial interest in ensuring that expungement is granted only to those who are eligible.” *Hamilton* at 640.

{¶10} To protect that substantial interest, the statute authorizing expungement mandates that there first be a hearing with notice to the state. R.C. 2953.32(B) states,

[u]pon the filing of the application, the court shall set a date for a hearing and shall notify the prosecutor for the case of the hearing on the application. The prosecutor may object to the granting of the application by filing an objection with the court prior to the date set for hearing.

{¶11} A trial court commits error by ruling on a motion for expungement filed pursuant to R.C. 2953.32 without first holding a hearing. R.C. 2953.32(B); *Hamilton*; *State v. Saltzer*, 14 Ohio App.3d 394, 471 N.E.2d 872 (8th Dist.1984), followed. This court has repeatedly held that “an oral hearing on an expungement motion is mandatory, and failure to hold one is cause for reversal and remand.” *State v. J.K.*, 8th Dist. Cuyahoga No. 96574, 2011-Ohio-5675, ¶ 15, citing *State v. Hann*, 173 Ohio App.3d 716, 2007-Ohio-6201, 880 N.E.2d 148, ¶ 9 (8th Dist.).

{¶12} Pursuant to R.C. 2953.32(C), a court must hold a hearing to determine if an applicant is an eligible offender as well as whether any other exception bars the sealing of records as set forth in R.C. 2953.36. The rationale that a trial court must first hold a hearing is “‘obviously predicated upon the fact that, under normal circumstances, a trial court would be required to hear evidence prior to rendering its decision in order to make several determinations pursuant to [R.C. 2953.32(C)(1)(a) through (e)].” *J.K.* at ¶ 15, quoting *State v. Haney*, 10th

Dist. Franklin No. 99AP-159, 1999 Ohio App. LEXIS 5524 (Nov. 23, 1999).

{¶13} As this court has previously noted, the expungement “hearing is not adversarial and the objective of the expungement hearing is to gather information.” *State v. T.S.*, 8th Dist. Cuyahoga No. 102648, 2017-Ohio-7395, ¶ 15, citing *Simon*, 87 Ohio St.3d at 533, 721 N.E.2d 1041.

{¶14} As noted above, we review a trial court’s decision to grant or deny an expungement motion pursuant to R.C. 2953.32 for an abuse of discretion. *C.K.*, 8th Dist. Cuyahoga No. 99886, 2013-Ohio-5135, at ¶ 10. An abuse of discretion implies that the trial court ruling was “unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶15} In the instant case, the state argues that the needs of the government to maintain appellee’s record outweighed his interest in having his record sealed. The state further argues that the trial court did not articulate its reasons for granting appellee’s application to seal. We note that in making its determination whether to grant or deny the application, the trial court shall “[i]f the prosecutor has filed an objection in accordance with division (B) of this section, *consider* the reasons against granting the application specified by the prosecutor in the objection.” (Emphasis added.) R.C. 2953.32(C)(1)(d).

{¶16} First, the state assumes that the trial court is mandated to articulate its specific reasons for granting the expungement either on the record or within the journal entry. In our review of the relevant statutes and applicable case law, we note that if the prosecutor has filed an objection, the trial court is required to *consider* the reasons against granting the application. *See* R.C. 2953.32(C)(1)(d). Therefore, contrary to the state’s argument, the trial court is not required to explicitly make a finding pursuant to R.C. 2953.32. Nevertheless, in our review of the record,

we note that the trial court did consider the reasons against granting the application specified by the state in opposing appellee's application. After hearing arguments by appellee and the state, the trial court stated:

[a]nd the [c]ourt does take seriously this offense. That's why I didn't grant [appellee's application] in the first place. And it's been held here and continued in abeyance. But I think — I think the time has come * * * it's been almost three years that it's been on the board.

(Tr. 5.)

{¶17} We further note that the trial court held the expungement application in abeyance, for nearly two years, thus demonstrating that it diligently and thoroughly considered the reasons against granting the application. Appellee's expungement application was filed on November 20, 2015. The Cuyahoga County Probation Department drafted an expungement investigation report on December 17, 2015. The state then filed its opposition on January 8, 2016. The trial court then held the expungement application in abeyance and held a hearing on November 1, 2017. Undeniably, holding the application in abeyance for such a lengthy amount of time allowed the trial court to further collect information and consider the state's objections against granting the application. *T.S.*, 8th Dist. Cuyahoga No. 102648, 2017-Ohio-7395, at ¶ 15. We find that this is not the case where the trial court failed to offer any reason in support of its ruling. *See State v. M.D.*, 8th Dist. Cuyahoga No. 92534, 2009-Ohio-5694, ¶ 21 (where this court noted that since the trial court offered no reasons for its denial we found that the trial court abused its discretion and reversed the trial court's denial of the expungement motion).

{¶18} Accordingly, the trial court did not abuse its discretion in granting appellee's application to seal his conviction. The state's first assignment of error is overruled.

B. Creating a Record for Appellate Review

{¶19} In the state’s second assignment of error, the state argues that the trial court failed to articulate and create a record for this court to conduct a meaningful appellate review of the judgment granting appellee’s application to seal. We find this argument without merit.

{¶20} We first note that to the extent the state argues the trial court was required to make specific findings pursuant to R.C. 2953.52, the state fails to cite any authority in support of this argument. *See* App.R. 16(A)(7). Nevertheless, we note in particular, R.C. 2953.32 which states, in relevant part;

- (1) The court shall do each of the following:
 - (a) Determine whether the applicant is an eligible offender * * *;
 - (b) Determine whether criminal proceedings are pending against the applicant;
 - (c) If the applicant is an eligible offender who applies pursuant to division (A)(1) of this section, determine whether the applicant has been rehabilitated to the satisfaction of the court;
 - (d) If the prosecutor has filed an objection in accordance with division (B) of this section, consider the reasons against granting the application specified by the prosecutor in the objection;
 - (e) Weigh the interests of the applicant in having the records pertaining to the applicant’s conviction or bail forfeiture sealed against the legitimate needs, if any, of the government to maintain those records.

{¶21} In our review of appellee’s application hearing transcript, and giving due consideration that trial courts are “to promote the legislative purpose of allowing expungements,” we find that the trial court gave the requisite consideration to the above statutory factors. *See State v. M.H.*, 8th Dist. Cuyahoga No. 105589, 2018-Ohio-582, ¶ 22 (where we reversed a trial court’s denial of an expungement motion because the trial court only gave consideration to the “nature of the offense” and did not consider the other statutory factors within R.C. 2953.32(C)(1)(a) through (e)). Moreover, the trial court is not required to make specific

findings relative to R.C. 2953.32 contrary to the state's arguments.

{¶22} Accordingly, the state's second assignment of error is overruled.

III. Conclusion

{¶23} In our review of the record in its entirety, we find that the trial court did not abuse its discretion in granting appellee's application to seal. Appellee is an eligible offender, and the trial court did not abuse its discretion in granting his application to seal the records of his criminal conviction.

{¶24} Judgment affirmed.

It is ordered that appellee recover of said 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.

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., CONCURS;

KATHLEEN ANN KEOUGH, J., CONCURS IN JUDGMENT ONLY WITH SEPARATE OPINION

KATHLEEN ANN KEOUGH, J., CONCURRING IN JUDGMENT ONLY:

{¶25} I write separately to express that if the state does not offer the trial court any legitimate reasons to deny the application, the trial court cannot make any findings when weighing the interests of the applicant and the state.

{¶26} Pursuant to R.C. 2953.32(C)(1)(d), the trial court is required to consider the reasons against granting the application specified by the state in its objection. Then under R.C. 2953.32(C)(1)(e), the trial court should weigh the interests of the applicant in having the records sealed against *the legitimate needs, if any, of the government* to maintain those records. (Emphasis added.)

{¶27} In this case, the state has failed to set forth any legitimate government need to maintain these records. The state objected to the applicant's request because (1) the nature and circumstances of the case, (2) sealing of the records will not aid the applicant because his conduct is still discoverable by other means, (3) a disciplinary case was still pending, and (4) a permanent record of his "disgraceful conduct" must be maintained.

{¶28} By the time the evidentiary hearing was conducted, the applicant's disciplinary case was resolved. Moreover, the nature of the case cannot provide the sole basis to deny an application to seal the record of conviction. *State v. Reiner*, 8th Dist. Cuyahoga No. 103775, 2016-Ohio-5520, ¶ 15. Finally, whether or not the sealing of the record of conviction will aid the applicant in the future is not of the state's concern. As pointed out by the state and recognized by the trial court, whether or not appellee's record is sealed, copious records with the Ohio Supreme Court and other unsealed and discoverable records exist revealing appellee's conduct. Accordingly, a permanent record exists regardless if the trial court granted the motion to seal the record of conviction.

{¶29} Contrary to the state's assertion, the record provides meaningful appellate review. The state did not set forth any legitimate government need or reasons to deny the application and maintain the records, other than the nature of the case. Accordingly, the trial court cannot be required to make any findings when the state offers no legitimate reasons for the trial court to

consider. Because no reasons were offered, the trial court did not abuse its discretion in concluding that the applicant's interests were not outweighed by any legitimate government need to maintain those records.