[Cite as *State v. B.J.*, 2020-Ohio-5089.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	No. 109428
v.	:	
B.J.,	:	
Defendant-Appellee.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: October 29, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CR-09-519939 and CR-12-569494

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anthony T. Miranda, Assistant Prosecuting Attorney, *for appellant*.

Mark A. Stanton, Cuyahoga County Public Defender, and Noelle A. Powell, Assistant Public Defender, *for appellee*.

MARY EILEEN KILBANE, J.:

{¶ 1} The state of Ohio ("the state"), appeals the decision of the trial court to expunge B.J.'s six felony convictions. The state argues that the trial court misapplied the law in granting B.J.'s expungement application. Regretfully, we

must find that the trial court erred; we reverse the decision of the trial court granting the expungement.

Background

{¶ 2} B.J. was convicted of seven offenses in the two underlying cases. In CR-09-519939, she was convicted of: one count of receiving stolen property pursuant to R.C. 2913.51, a fifth-degree felony; four counts of forging ID cards pursuant to R.C. 2913.31, fifth-degree felonies; and one count of misuse of credit cards pursuant to R.C. 2913.21, a fifth-degree felony. In CR-12-569494, B.J. was convicted of theft pursuant to R.C. 2913.02, a first-degree misdemeanor.

{¶ 3} In October 2019, B.J. moved to expunge her six felony convictions in CR-09-519939 and to expunge her misdemeanor conviction in CR-12-569494. The expungement investigation showed that B.J. was also convicted of three other misdemeanors: contributing to the delinquency of a child, a first-degree misdemeanor, in 2008; falsification, a first-degree misdemeanor, in 2011; and theft, a first-degree misdemeanor, in 2018.

{¶ 4} The trial court held a hearing on January 20, 2020. During the hearing, trial counsel informed the court that B.J., now 29 years old, has been offered a promotion at work if she can get her felonies expunged. Her company knows about the felonies and they trust B.J. to be an excellent employee, but for insurance reasons, can only promote her if they are expunged.

{¶ 5} The majority of B.J.'s convictions are the result of poor decisions she made when she was 18 years old. B.J. turned 18 in July 2008. Shortly after her

birthday, she and her friends, who were not yet 18 years old, cut school in September 2008. Her friends, all just a few months younger than B.J., were returned to their parents while B.J. received a ticket for contributing to the delinquency of a child resulting in a misdemeanor conviction. B.J. did not even realize that she could be charged for driving her friends when they all decided to cut school together.

{¶ 6} On December 10, 2008, she used a forged credit card several times. Though the state has admitted that she could only have been convicted once, B.J. was convicted six times for six separate uses of the credit card. Nevertheless, B.J. took full responsibility for her actions.

{¶ 7} B.J.'s counsel argued that despite the six felony convictions and four misdemeanor convictions, B.J. met the statutory requirements to have her felony convictions sealed. The state argued in opposition that B.J. was not eligible because she had too many convictions. The trial court disagreed with the state, and granted the expungement, finding her eligible under R.C. 2953.31(A)(1)(a). The state appealed and presents a single assignment of error.

Assignment of error

> The trial court erred in granting B.J.'s application to seal her criminal record because she is not an eligible offender as defined by R.C. 2953.31(A)(1).

{¶ 8} We review the trial court's decision to seal B.J.'s record for an abuse of discretion. *State v. M.H.*, 8th Dist. Cuyahoga No. 105589, 2018-Ohio-582, ¶ 11, citing *State v. Smith*, 8th Dist. Cuyahoga No. 91853, 2009-Ohio-2380. An abuse of discretion occurs where the trial court's decision is arbitrary, unreasonable, or

unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). However, whether an applicant is considered an eligible offender is an issue of law for a reviewing court to decide de novo. *State v. M.E.*, 8th Dist. Cuyahoga No. 106298, 2018-Ohio-4715, ¶ 6, citing *State v. M.R.*, 8th Dist. Cuyahoga No. 94591, 2010-Ohio-6025. Because the trial court found B.J. was an eligible offender, we review the trial courts' decisions de novo.

R.C. 2953.31 and the trial court's decision

{¶ 9} To be "eligible" for sealing, an offender must qualify under either subsection (a) or (b) of R.C. 2953.31(A)(1), which read as follows:

> (1) "Eligible offender" means either of the following:
>
> (a) Anyone who has been convicted of one or more offenses, but not more than five felonies, in this state or any other jurisdiction, if all of the offenses in this state are felonies of the fourth or fifth degree or misdemeanors and none of those offenses are an offense of violence or a felony sex offense and all of the offenses in another jurisdiction, if committed in this state, would be felonies of the fourth or fifth degree or misdemeanors and none of those offenses would be an offense of violence or a felony sex offense;
>
> (b) Anyone who has been convicted of an offense in this state or any other jurisdiction, to whom division (A)(1)(a) of this section does not apply, and who has not more than one felony conviction, not more than two misdemeanor convictions, or not more than one felony conviction and one misdemeanor conviction in this state or any other jurisdiction. *When 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.* When two or three convictions result from the same indictment, information, or complaint, from the same plea of guilty, or from the same official proceeding, and result from related criminal acts that were committed within a three-month period but do not result from the same act or from offenses committed at the same time, they shall be counted as one conviction, provided that a court may decide as provided in division (C)(1)(a) of section 2953.32

> of the Revised Code that it is not in the public interest for the two or three convictions to be counted as one conviction.

(Emphasis added.)

{¶ 10} According to the statute, B.J. is not eligible under R.C. 2953.31(A)(1)(a) because she has more than five felony convictions. B.J. is also not eligible under R.C. 2953.31(A)(1)(b) because she has four misdemeanor convictions.

{¶ 11} R.C. 2953.31(A)(1)(b) makes clear that if a person's felony convictions result from offenses committed at the "same time" then they count as one conviction. The state acknowledged in its brief and during the expungement hearing that the felony offenses were committed on the same evening, the "same time," and therefore count as one conviction pursuant to R.C. 2953.31(A)(1)(b). However, the state argues that B.J.'s four misdemeanor convictions, none of which were committed at the same time, disqualify her pursuant to subsection (b). Even though B.J.'s six felony convictions count as one, she is still not eligible because she has more than "one felony conviction and one misdemeanor conviction."

{¶ 12} The trial court did not reach whether B.J. was eligible under R.C. 2953.31(A)(1)(b). Instead, the trial court found that the language in subsection (b) merging B.J.'s six felony convictions into one also applied to subsection (a). Based on this reading of the statute, B.J. only had five total convictions — four misdemeanor convictions and one felony conviction — none of which are offenses of violence. Accordingly, the court found that B.J. was an "eligible offender" under subsection (a).

{¶ 13} The trial court found that not applying the merger provision to both subsections would lead to unfair and inconsistent results. The court stated that "[i]t's my understanding that the legislative intent of these changes was to expand the possibility for people to have expungements * * *."

{¶ 14} In its brief, the state argued that the court had misinterpreted the statute and that the merger provision in R.C. 2953.31(A)(1)(b) did not apply to 2953.31(A)(1)(a). According to the state, the court must first determine whether a person is an "eligible offender" according to subsection (a). Subsection (a) states that a person may not have more than five felonies and misdemeanors, that none of the felonies are to be fourth- or fifth-degree felonies, and that none of the convictions may be offenses of violence. There is no merger provision in subsection (a). Therefore, according to the state, merger only applies to subsection (b).

{¶ 15} In her appellate brief, B.J. argued that this merger provision in R.C. R.C. 2953.31(A)(1)(b) was ambiguous as to whether it also applied to 2953.31(A)(1)(a). B.J. also argued that the result in this case is inconsistent with the language of the old expungement statute.

{¶ 16} First, we will examine whether the statutory language is ambiguous.

{¶ 17} In cases of statutory interpretation, "our paramount concern is the legislative intent in enacting the statute." *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, 815 N.E.2d 1107, ¶ 21, citing *State ex rel. United States Steel Corp. v. Zaleski*, 98 Ohio St.3d 395, 2003-Ohio-1630, 786 N.E.2d 39, ¶ 12. "In determining this intent, we first review the statutory language, reading words and

phrases in context and construing them according to the rules of grammar and common usage." *Id.*, citing *State ex rel. Rose v. Lorain Cty. Bd. of Elections*, 90 Ohio St.3d 229, 231, 736 N.E.2d 886 (2000), and R.C. 1.42. *See also Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 9, quoting *Black-Clawson Co. v. Evatt*, 139 Ohio St. 100, 104, 38 N.E.2d 403 (1941) (stating that a court, in determining legislative intent, must take care "not to 'pick out one sentence and disassociate it from the context'").

{¶ 18} When a statute's meaning is clear and unambiguous, a court must apply the statute as written. *State v. Gonzales*, 150 Ohio St.3d 276, 2017-Ohio-777, 81 N.E.3d 419, ¶ 4. We only invoke statutory-construction principles when legislative intent is unclear. *State v. Thomas*, 148 Ohio St.3d 248, 2016-Ohio-5567, 70 N.E.3d 496, ¶ 7, citing *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 97, 573 N.E.2d 77 (1991). Here the meaning of the statute is clear.

{¶ 19} R.C. 2953.31(A)(1)(b) states that it applies "to whom division (A)(1)(a) of this section does not apply." Put differently, the provisions in subsection (b) are only applicable once the court has determined a person is not eligible under subsection (a). The Tenth District court came to the same conclusion when examining a similar case. *State v. T.M.R.*, 10th Dist. Franklin No. 19AP-434, 2020-Ohio-3555, ¶ 17 (finding "the statute's meaning is clear and unambiguous.") There is no ambiguity; the merger provisions in subsection (b) are not meant to be considered when determining eligibility under subsection (a).

{¶ 20} Appellee also argues that the differences between the old expungement statute and the new expungement statute create inconsistent results. As the old statute has no bearing on the new statute in this context we will not consider the old statute in interpreting the new statute.

{¶ 21} Sadly, we find that B.J. is not an eligible offender and that the trial court erred in granting her expungement. However, while we are bound by the law as written, we note here that this was a case where the state could have exercised its discretion.

{¶ 22} The court's authority to seal conviction records is derived from the defendant's constitutional right to privacy. *Pepper Pike v. Doe*, 66 Ohio St.2d 374, 421 N.E.2d 1303 (1981); *State v. Hilbert*, 145 Ohio App.3d 824, 826, 764 N.E.2d 1064 (8th Dist.2001). Therefore, when trial courts exercise expungement powers, they use a balancing test, and weigh whether the applicant's interest in their privacy outweighs a legitimate need of the government to maintain the records. *Mayfield Hts. v. M.T.S.*, 8th Dist. Cuyahoga No. 100842, 2014-Ohio-4088, ¶ 11, citing *Hilbert*.

{¶ 23} In this case, the state admitted that they had no interest in maintaining B.J.'s records; the state's sole objection is that B.J. was not statutorily eligible. And, absent a careful examination of whether B.J. deserves expungement, statutory ineligibility may seem like a sufficient reason to oppose someone's application. The state has discretion for a reason; the state may choose to not oppose an expungement where a careful examination of the record reveals that the applicant

deserves mercy. This is one such case. The state should have exercised its discretion to not appeal rather than force the hand of this court to deny a deserving applicant.

{¶ 24} Much of what makes B.J. ineligible can be traced to a single day, where she made the poor decision to use a forged credit card. B.J. also has a misdemeanor charge for cutting school simply because her friends were juveniles, just a few months younger than she was. But just as we accept the reality of her charges, B.J. has accepted responsibility for her actions. Now, she throws herself at the mercy of the state, not in order to rewrite her history or deny responsibility, but simply so that she can be promoted and receive the benefits of a new employment position she has earned. To this court, that is exceptional. A young woman is attempting to improve her lot in life; she has already been punished by the state for her crimes. She should not continue to be punished especially where the state has admitted it has no real interest in maintaining her record.

{¶ 25} In the absence of discretion by the state, and with regret, we find B.J. ineligible for expungement pursuant to R.C. 2953.31(A)(1)(a) and (b). We reverse the decision of the trial court and remand consistent with this opinion.

{¶ 26} Judgment reversed and remanded.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue 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.

MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR