[Cite as *State v. Severino*, 2010-Ohio-2674.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2009-A-0045**
- vs -	:	
ERICKA H. SEVERINO,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Ashtabula Municipal Court, Case No. 08 CRB 01717.

Judgment: Reversed and remanded.

Lori B. Lamer, Special Prosecutor, Conneaut Law Director, City Hall Building, 294 Main Street, Conneaut, OH 44030 (For Plaintiff-Appellant).

William P. Bobulsky, William P. Bobulsky Co., L.P.A., 1612 East Prospect Road, Ashtabula, OH 44004 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, State of Ohio, appeals the judgment of the Ashtabula Municipal Court in which the court granted appellee Ericka H. Severino's motion to seal the record of her criminal case without first holding a hearing on the motion. At issue is whether the court was required to hold a hearing prior to sealing all arrest and other official records in this case. For the reasons that follow, we reverse and remand.

{¶2} On September 10, 2008, appellee was charged in a complaint filed in the trial court with one count of obstructing official business, in violation of R.C. 2921.31(A), a misdemeanor of the second degree, and one count of aggravated disorderly conduct,

in violation of R.C. 2917.11(B)(1), a misdemeanor of the fourth degree. Appellee pled not guilty and the case was set for jury trial. On the day of trial, May 27, 2009, the parties entered a written stipulation of dismissal, which provided that, in light of appellee's performance of 100 hours of community service, which she had already completed, the charges against appellee would be dismissed. On August 21, 2009, the stipulation of dismissal was filed.

{¶3} Thereafter, on August 27, 2009, appellee filed a "motion for sealing of record," pursuant to R.C. 2953.52. On September 3, 2009, without conducting a hearing and without notice to the state, the trial court granted appellee's motion and ordered that all arrest and official records in this case be sealed. Also, on September 3, 2009, the trial court filed a separate entry dismissing this case based on the parties' stipulation of dismissal.

{¶4} The state appeals the trial court's judgment granting appellee's motion to seal the record, asserting the following for its sole assignment of error:

{¶5} "The Trial Court erred in ruling on a Motion to Seal the Record pursuant to R.C. Section 2953.32 [sic] without first holding a hearing."

{¶6} As a preliminary matter, we note that, since appellee's motion to seal the records was filed pursuant to R.C. 2953.52, which applies to defendants whose criminal charges have been dismissed, the state's reference in its assignment of error to R.C. 2953.32, which applies to defendants who have been convicted of crimes, is incorrect. However, because the state's argument is based on R.C. 2953.52, it is obvious it meant to refer to that section in its assignment of error. R.C. 2953.52 provides in pertinent part, as follows:

{¶7} "(A) (1) Any person, who is *** the defendant named in a dismissed complaint, *** may apply to the court for an order to seal his official records in the case. *** [T]he application may be filed at any time after the *** dismissal of the complaint *** is entered upon the minutes of the court or the journal, whichever entry occurs first.

{¶8} "***

{¶9} "(B) (1) Upon the filing of an application pursuant to division (A) of this section, the court *shall set a date for a hearing* and *shall notify the prosecutor in 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 the hearing. The prosecutor shall specify in the objection the reasons he believes justify a denial of the application.

{¶10} "(2) The court *shall* do each of the following:

{¶11} "(a) Determine whether the *** complaint *** in the case was dismissed ***;

{¶12} "(b) Determine whether criminal proceedings are pending against the person;

{¶13} "(c) If the prosecutor has filed an objection in accordance with division (B)(1) of this section, consider the reasons against granting the application specified by the prosecutor in the objection;

{¶14} "(d) Weigh the interests of the person in having the official records pertaining to the case sealed against the legitimate needs, if any, of the government to maintain those records.

{¶15} "(3) If the court determines, after complying with division (B)(2) of this section, that the *** complaint *** in the case was dismissed ***; that no criminal

proceedings are pending against the person; and the interests of the person in having the records pertaining to the case sealed are not outweighed by any legitimate governmental needs to maintain such records, *** the court shall issue an order directing that all official records pertaining to the case be sealed ***." (Emphasis added.)

{¶16} This court has held that the standard of review of an appellate court in reviewing the grant or denial of an application for expungement is abuse of discretion. *State v. Selesky*, 11th Dist. No. 2008-P-0029, 2009-Ohio-1145, at ¶17. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Desellems* (Feb. 12, 1999), 11th Dist. No. 98-L-053, 1999 Ohio App. LEXIS 458, at *8, citing *State v. Montgomery* (1991), 61 Ohio St.3d 410, 413.

{¶17} In Ohio, a defendant seeking expungement following the dismissal of the charges must follow the procedures set forth in R.C. 2953.52. *State v. Brown*, 10th Dist. No. 07AP-255, 2007-Ohio-5016, at ¶3. Regardless of whether the application for expungement is opposed or unopposed by the state, the statute places the burden on the applicant to demonstrate a need for sealing the record. Id. at ¶4.

{¶18} In *Selesky*, supra, this court held:

{¶19} "*** [U]pon the filing of an application to seal a record either following a conviction pursuant to R.C. 2953.32 or after the dismissal of a proceeding based on R.C. 2953.52, the trial court is required to set a date for a hearing and notify the prosecutor in the case of the hearing on the application. ***

{¶20} "*** [T]he record reflects that the prosecutor was not given notice of the motion hearing scheduled for January 15, 2008. The trial court docket reflects that

notice was sent to the Adult Probation Department, Selesky, and his attorney. Thus, the prosecutor had no opportunity to prepare objections before the hearing. The trial court had no statutory authority to grant Selesky's application." Id. at ¶24-25.

{¶21} At the hearing on the motion for expungement, the trial court must "weigh" the interest of the applicant in having his or her records sealed against the legitimate needs of the government to maintain those records. R.C. 2953.52(B)(2)(d). If the trial court determines that the applicant's interest in having these records sealed is not outweighed by the government's interest in maintaining the records, then the trial court shall issue an order sealing the records. R.C. 2953.52(B)(3).

{¶22} "Thus, R.C. 2953.52(B)(2)(d) contains a balancing test in which the trial court must engage." *In re Dumas*, 10th Dist. No. 06AP-1162, 2007-Ohio-3621, at ¶8. A trial court abuses its discretion in ruling on an R.C. 2953.52 application without balancing the requisite factors. Id.

{¶23} In *Dumas*, supra, the Tenth District reversed the trial court's decision denying the application for expungement, holding:

{¶24} "*** [T]he trial court did not weigh appellant's interests against the state's interests, but instead decided, categorically, not to seal first- or second- degree felony cases resulting in an acquittal after a trial. The balancing factors in R.C. 2953.52(B)(2)(d) preclude a trial court from 'summarily and categorically' denying an application in such a manner. See *State v. Berry* (1999), 135 Ohio App.3d 250, 253 (reversing a trial court's decision to deny an R.C. 2953.52 application to seal because the trial court failed to 'weigh the interests of the parties to the expungement rather than summarily and categorically denying the application because the matters investigated were sex offenses'). ***" Id. at ¶9.

{¶25} The Tenth District in *Dumas* further held that the trial court abused its discretion in denying appellant's application on such a categorical basis and without weighing the requisite interests of the defendant and the state. Id.

{¶26} In *State v. Gilchrist* (Dec. 7, 1994), 9th Dist. No. 16800, 1994 Ohio App. LEXIS 5575, the trial court denied the defendant's motion to seal the records. The Ninth District reversed, holding that the trial court abused its discretion in denying Gilchrist's motion because "the record contain[ed] no evidence indicating that the trial court []weighed the parties' competing interests as required by R.C. 2953.52(B)(2)(d). The state never provided evidence of any interests which would be advanced by maintaining the records of the case against Gilchrist, nor did the trial court ever refer to any such interests. In light of these facts, []we find that the trial court abused its discretion in denying Gilchrist's motion. We order that the case be remanded to the trial court for a determination pursuant to R.C. 2953.52(B)(2)." Id. at *4-*5.

{¶27} In *State v. Stoica*, 10th Dist. No. 06AP-176, 2006-Ohio-4990, the Tenth District held:

{¶28} "In view of the language contained in R.C. 2953.52(B), a trial court must hold an oral hearing prior to issuing a decision on an application for sealing of records. See *** *State v. Haney* (Nov. 23, 1999), [10th Dist. No.] 99AP-159, 1999 Ohio App. LEXIS 5524 (finding that the rationale for requiring a hearing 'is obviously predicated upon the fact that *** a trial court would be required to hear evidence prior to rendering its decision in order to make several determinations pursuant to R.C. 2953.52[B][2][a] through [d][sic]')." *Stoica*, supra, at ¶5.

{¶29} Turning to the facts of the instant case, based on our review of the record, upon the filing of appellee's application for expungement, the trial court did not set the

matter for hearing and did not notify the prosecutor of the hearing on the application. Based on this court's holding in *Selesky*, supra, in these circumstances, the trial court had no statutory authority to grant appellee's motion.

{¶30} Further, the judgment granting appellee's motion to expunge does not indicate that the court weighed the interests of the parties as required by the statute. Of course, the court could not have weighed the interests of the parties since the trial court did not hold a hearing before granting appellee's motion. As a result, appellee was not given an opportunity to present evidence in support of her motion, and the state was not given an opportunity to present countervailing evidence. Because no evidence was presented to the court as required by R.C. 2953.52, the court did not engage in the weighing exercise mandated by that statute. *Gilchrist*, supra.

{¶31} The only argument presented by appellee on appeal is that a hearing was not required because the charges were dismissed pursuant to the parties' stipulation of dismissal. She argues the state's present demand for a hearing violates the terms of the stipulated dismissal. Appellee is incorrect for two reasons. First, the stipulation of dismissal does not even refer to expungement. It therefore does not purport to restrict the state from asserting the public's interests in any later hearing on an application to seal the records. Thus, contrary to appellee's argument, the stipulation of dismissal did not amount to an agreement on the part of the state not to oppose a later motion for expungement. Second, even if it did, such agreement could not in effect allow the parties to circumvent R.C. 2953.52, which mandates a hearing at which the state is entitled to present evidence in support of the state's interest in maintaining records of conviction. Contrary to appellee's argument, the fact that the complaint was dismissed, thus making her eligible for expungement, does not mean she is automatically entitled

to expungement without an oral hearing. "[T]he court is not required to grant the application of every defendant who is eligible for expungement, i.e., the court, in accordance with R.C. 2953.52, has discretion." *State v. Grove* (1986), 29 Ohio App.3d 318, at syllabus.

{¶32} Based on the foregoing analysis, we hold that the trial court abused its discretion in granting appellee's motion for expungement without a hearing and without weighing the interests of appellee and the state as required by R.C. 2953.52.

{¶33} The state's assignment of error is sustained.

{¶34} For the reasons stated in the Opinion of this court, it is the order and judgment of this court that the judgment of the Ashtabula Municipal Court is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion.

DIANE V. GRENDELL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.