[Cite as *State v. Talameh*, 2012-Ohio-4205.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-P-0074**
- vs -	:	
SAM J. TALAMEH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. R2003 CRB 65.

Judgment: Reversed and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Theresa M. Scahill*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

David A. Freeburg, and *Katheryn J. McFadden*, McFadden & Freeburg Co., L.P.A., 1370 Ontario Street, Suite 600, Cleveland, OH 44113 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Sam J. Talameh appeals from a judgment of the Portage County Municipal Court, Ravenna Division, which denied his application for a sealing of the record pursuant to R.C. 2953.32. For the following reasons, we reverse the trial court's judgment and remand the matter for further proceedings consistent with this opinion.

{¶2} On January 6, 2003, Mr. Talameh, under 21 years of age at the time, was charged with purchasing beer for himself and for a 17-year-old, in violation of R.C. 4301.69(A).

{¶3} Eight years after his conviction, on April 27, 2011, Mr. Talameh filed an application to expunge or seal the record of his misdemeanor conviction.[1] In his application form, he indicated he was eligible because (1) he was a first-time offender, (2) there are no pending criminal proceedings against him, and (3) all fines and costs assessed against him have been paid in full.

{¶4} The prosecutor did not file a response; the record, however, contains a letter from the county probation department, which stated that the defendant is ineligible for sealing/expungement of the record because his misdemeanor conviction involved a juvenile. The trial court, without a hearing, denied the expungement request, solely on the ground that his conviction involved a juvenile.

{¶5} Mr. Talameh now appeals, assigning the following error for our review:

{¶6} "The trial court erred in denying the application for expungement."

The Statute for Sealing the Record

{¶7} R.C. 2953.31 et seq., sets forth the statutory scheme for sealing the record of conviction. R.C. 2953.32(1)(A) provides the following, in relevant part:

{¶8} "* * * [A] first offender may apply to the sentencing court * * * 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."

1. "Expungement" is the term used to describe the process to seal a record of conviction. *See State v. Lasalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, fn. 2.

{¶9} R.C. 2953.32(B) and (C) set forth the procedure for the trial court to follow upon an application to seal the record. They provide as follows:

{¶10} "(B) 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. 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 for believing a denial of the application is justified. The court shall direct its regular probation officer, a state probation officer, or the department of probation of the county in which the applicant resides to make inquiries and written reports as the court requires concerning the applicant.

{¶11} "(C) (1) The court shall do each of the following:

{¶12} "(a) Determine whether the applicant is a first offender * * *.

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

{¶14} "(c) If the applicant is a first offender who applies pursuant to division (A)(1) of this section, determine whether the applicant has been rehabilitated to the satisfaction of the court;

{¶15} "(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;

{¶16} "(e) Weigh the interests of the applicant in having the records pertaining to the applicant's conviction sealed against the legitimate needs, if any, of the government to maintain those records."

{¶17} Furthermore, R.C. 2953.36 enumerates certain offenses exempt from a sealing of the record. Relevant to this appeal is the exception enumerated in division (F), which provides, "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.)

{¶18} "To invoke the jurisdiction of the trial court in proceedings brought under R.C. 2953.31 et seq., the applicant must be eligible for expungement and the offense must be one that is subject to expungement. To be eligible, an applicant must be a 'first offender' as defined in R.C. 2953.31(A). Moreover, the offense must be subject to expungement and not excluded by R.C. 2953.36. Additionally, the application must not be filed until the time set by R.C. 2953.32(A)(1) has expired. Unless the application meets all of these requirements, the trial court lacks jurisdiction to grant an expungement." *State v. Rybak*, 11th Dist. No. 2011-L-084, 2012-Ohio-1791, ¶13, citing *State v. Reed*, 10th Dist. No. 05AP-335, 2005-Ohio-6251, ¶8.

{¶19} The expungement of the record is "an act of grace created by the state," as such, it is "a privilege, not a right." *State v. Simon*, 87 Ohio St.3d 531, 533 (2000), quoting *State v. Hamilton* (1996), 75 Ohio St.3d 636, 639. "Expungement should be granted only when all requirements for eligibility are met." *Id*. However, "R.C. 2953.32 provides for an emphasis on the individual's interest in having the record sealed." *State v. M.D*., 8th Dist. No. 97300, 2012-Ohio-1545, ¶7, citing *State v. Hilbert*, 145 Ohio App.3d 824 (8th Dist.2001), citing *State v. Bissantz*, 40 Ohio St.3d 112, 114 (1988). "The statute [] acknowledges that the public's interest in being able to review the record is a relevant, legitimate governmental need under the statute." *Id.*, citing *Hilbert*.

"Nonetheless, courts must liberally construe R.C. 2953.32 in favor of promoting the individual's interest in having the records sealed." *Id.*, citing *Hlilbert*.

Standard of Review

{¶20} Generally, we review a trial court's decision to deny an application to seal a record of conviction for an abuse of discretion standard. *State v. Wright*, 191 Ohio App.3d 647, 2010-Ohio-6259, (3d. Dist), ¶7. *See also State v. Selesky*, 11th Dist. No. 2008-P-0029, 2009-Ohio-1145, ¶17. This case, however, as we explain below, requires us to interpret and apply various sections of the Ohio Revised Code; to the extent that we interpret and apply these statutes, our review is de novo. *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, ¶6-7; *State v. Clark*, 4th Dist. No. 11CA8, 2011-Ohio-6354, ¶11; *State v. Sufronko*, 105 Ohio App.3d 504, 506 (1995).

The Conviction

{¶21} In the trial court's judgment entry denying Mr. Talameh's application, the court's analysis consists of one sentence: "Due to the fact that Mr. Talameh['s] conviction involved a juvenile at the time of offense, this expungement is hereby denied." Pursuant to R.C. 2953.36(F), the record of conviction cannot be sealed if "the victim of the offense was under eighteen years of age when the offense is a misdemeanor of the first degree or a felony."

{¶22} We begin our analysis with Mr. Talameh's conviction, as his request for sealing the record turns on the degree of his misdemeanor offense. The complaint charged him with a violation of R.C. 4301.69 ("Offenses involving underage persons"). Two divisions of that statute are pertinent here. Division (A) of R.C. 4301.69 states, in relevant part: "Except as otherwise provided in this chapter, no person * * * shall buy

beer or intoxicating liquor for an underage person * * *." Division (E)(1) of R.C. 4301.69 states, in relevant part: "No underage person shall knowingly order, pay for, share the cost of, attempt to purchase, possess, or consume any beer or intoxicating liquor in any public or private place."[2]

{¶23} We first note that the record in this case reflects that the prosecution of Mr. Talemeh lacks precision. The complaint, a hand-written form, stated that Mr. Talameh, who was under 21, purchased two 12-packs of Coors, one of which was for a 17-year-old. Therefore, Mr. Talameh's conduct potentially implicated both sections of the statute, but the complaint only referenced section (A). Therefore, it would appear he was only charged with a violation of R.C. 4301.69(A), but the "M-1" box on the complaint was also checked.

{¶24} The record also contains a hand-written document titled "Criminal Pre-Trial Report," which was signed by the defendant, his counsel, the prosecutor, and the trial court. The report indicates that the defendant would enter a plea of "guilty to offenses including minors" and the prosecutor would "dismiss balance of charges." The use of the plural form in both "offenses" and "charges" makes it unclear as to what Mr. Talameh would be pleading guilty and what offense was dismissed. It appears, though, that Mr. Talameh was to plead guilty to the R.C. 4301.69(A) offense, since that statutory section, but not R.C. 4301.69(E)(1), was specifically referenced in the document. In the report, "Misdemeanor-1" was circled.

2. R.C. 4301.69(H)(5) defines an "underage person" as a person under the age of 21; R.C. 4301.69(H)(3) defines "minor" as a person under the age of 18; and a "juvenile" is also defined as a person under the age of 18. R.C. 2925.01(N).

{¶25} In a hand-written judgment entry on the court file jacket, both the plea of "guilty" and "no contest" were circled, inexplicably. The statute number "4301.69" was written on the margin of the judgment form, without an indication of the specific statutory section. The judgment stated Mr. Talameh was sentenced to 180 days in jail, all suspended, and ordered to pay $500 fine, with $300 suspended, plus court cost, on the condition that he did not commit similar offense in two years. There was no designation regarding the degree of the offense he was convicted of in the judgment entry.

{¶26} This is the extent of the record regarding Mr. Talmeh's conviction. As both the complaint and the "pre-trial report" referenced R.C.4301.69(A) only, it appears he was convicted of a violation of that division, even though the judgment entry did not state the specific division. This clarification is necessary because the two offenses do not have the same designated degrees.

The Degree of the Misdemeanor Offense Committed by the Defendant

{¶27} The degree of Mr. Talameh's misdemeanor offense is crucial to his request for sealing the record. Because his offense involved a 17-year-old, whether he would be eligible for sealing the record would depend on whether his misdemeanor offense is of the first degree, pursuant to R.C. 2953.36(F).

{¶28} R.C. 4301.99 specifies the degree and penalty for offenses involving violations of liquor control law. For liquor control offenses involving underage persons proscribed by R.C. 4301.69, the degree of the offenses are expressly set forth in R.C. 4301.99. Notably, division (A) of R.C. 4301.69, under which Mr. Talameh was convicted, has a different degree designation than conduct proscribed by the other divisions in R.C. 4301.69.

{¶29} Regarding offenses proscribed by divisions (B), (C), (D), (E)(1), and (F) of R.C. 4301.69, R.C. 4301.99(C) states: "Whoever violates * * * division (B), (C), (D), (E)(1), or (F) of section 4301.69 * * * is guilty of a *misdemeanor of the first degree*." (Emphasis added.)

{¶30} Regarding division (A) of R.C. 4301.69, the division prohibiting the conduct committed by Mr. Talameh, R.C. 4301.99 (I) states: "Whoever violates division (A) of section 4301.69 * * * *is guilty of a misdemeanor*, shall be fined not less than five hundred and not more than one thousand dollars, and, in addition to the fine, may be imprisoned for a definite term of not more than six months." (Emphasis added.)

{¶31} These two divisions stand in sharp contrast to each other. It appears that the General Assembly singled out division (A) and left it unclassified, while it designated offenses proscribed by the other divisions of R.C. 4301.69 as a misdemeanor of the first degree.

{¶32} We note that misdemeanors began to be classified by degree in 1974. *See State v. Rick*, 194 Ohio App.3d 511, 2011-Ohio-3866, ¶19 (2d Dist.). Various offenses remain unclassified, however. *State v. Williams*, 7th Dist. No. CA 221, 2002-Ohio-5022, ¶17, citing *State v. Quisenberry*, 69 Ohio St.3d 556, 557 (1994). "An unclassified misdemeanor is an offense which is not specifically labeled and for which a penalty of incarceration not exceeding one year may be imposed." *Williams* at ¶16, citing R.C. 2901.02(F).[3] The legislature typically leaves an offense unclassified "when it assigns penalties which vary from those in the general penalty-listing statute." *Williams* at ¶17. While the term of incarceration for misdemeanor of the first degree is "not more

3. R.C. 2901.02(F) states that "[a]ny offense not specifically classified is a misdemeanor if imprisonment for not more than one year may be imposed as a penalty."

than one hundred eighty days," R.C. 2929.24(A)(1), the term for a defendant convicted of an unclassified misdemeanor can be one year of incarceration. R.C. 2901.02(F).

{¶33} Thus, a person convicted of an unclassified misdemeanor potentially faces a more severe penalty, yet, under the expungement statute (R.C. 2953.36 (F)), paradoxically, a person convicted of unclassified misdemeanor will be eligible for expungement, but one of first-degree misdemeanor will not be. This is the issue encountered by the Second District in *Ricks*, *supra*. Interestingly, both parties in this case cited *Ricks* in support of their position.

{¶34} As in this case, the misdemeanor of which the defendant in *Ricks* was convicted – pointing a firearm at another, in violation of former R.C. 3773.04 – does not have a designated degree. The trial court in *Ricks* denied the defendant's application for sealing his record, on the ground that he was not eligible pursuant to the expungement statute, R.C. 2953.36.

{¶35} The division of R.C. 2953.36 implicated in *Ricks* is (C), which provides, in relevant part, that "[c]onvictions of an offense of violence when the offense is a misdemeanor of the first degree or a felony * * *." The Second District considered whether the offense prohibited by former R.C. 3773.04 was an "offense of violence." Determining that it was, the court then considered whether the offense qualified as a misdemeanor of the first degree. The court concluded that a violation of the former R.C. 3773.04, since repealed, did not qualify as a first-degree misdemeanor under R.C. 2953.36 for two reasons. *Id*. at ¶20

{¶36} First, the court pointed out that misdemeanors were not classified by degree until 1974 whereas Ricks was convicted in 1971, and therefore, his offense on its face is not a first degree misdemeanor.

{¶37} Second, the court reasoned that the penalty for the offense of pointing a firearm at another made it analogous to an unclassified misdemeanor, not a first-degree misdemeanor. This is because the maximum penalty for a first-degree misdemeanor prescribed in R.C 2929.24 is 180 days of confinement while the maximum penalty for an unclassified misdemeanor is one year incarceration. Because the maximum penalty for violation of former R.C. 3773.04 was one year of confinement, the Second District concluded the defendant's offense is "more akin to an unclassified misdemeanor than a first-degree misdemeanor." *Id.* at ¶20.

{¶38} Recognizing the paradoxical effect of a straightforward application of the statutes involved, the Second District reasoned that "[a]lthough the potential penalty for an unclassified misdemeanor is more serious than the penalty for a first-degree misdemeanor, nothing in R.C. 2953.36(C) precludes the sealing of a conviction for an unclassified misdemeanor. The failure to prohibit the sealing of unclassified misdemeanors may have been a legislative oversight, but we are not at liberty to rewrite an unambiguous statute such as R.C. 2953.36(C)." *Id*. at ¶21. The Second District therefore concluded the defendant was statutorily eligible to have his application considered on the merits by the trial court. Consequently, it reversed the trial court and remanded the matter for a further consideration of the matter by the trial court.

{¶39} Similarly here, we will apply the plain language of the pertinent statutory provisions without resort to unnecessary statutory interpretation. First, R.C. 4301.99

designates the offense of R.C. 4301.69(A) as "misdemeanor" as opposed to "misdemeanor of the first degree," in contrast to the other divisions of R.C. 4301.69. On the face of the statute, the offense Mr. Talameh was convicted of is not a misdemeanor of the first degree, subject to exemption under R.C. 2953.36(F).

{¶40} Second, regarding whether the penalty for R.C. 4301.69(A) is more analogous to first-degree misdemeanor or unclassified misdemeanor, the state argues that it is more akin to the former because a violation of that division is punishable by a term of not more than six months, same as first-degree misdemeanor. However, we note that a person convicted of the R.C. 4301.69(A) offense is subject to a *mandatory* fine of not less than $500 (but not more than $1,000) while a person convicted of a first-degree misdemeanor, although subject to a maximum of $1,000 in fine, is not subject to a mandatory fine of not less than $500. In this regard, the penalty for an R.C. 4301.69(A) offense is not analogous to the penalty for a first-degree misdemeanor.

{¶41} Construing the expungement statute liberally to promote the legislative purpose of allowing expungements, *Hilbert*, *supra,* at 827, we reach the conclusion that Mr. Talameh is eligible for sealing of the record of his misdemeanor conviction, because his misdemeanor offense is not of the first degree. Therefore, the trial court does not lack jurisdiction to consider his application, and it should have held a hearing pursuant to the mandate of R.C. 2953.32(B) to consider Mr. Talameh's application. *State v. Saltzer*, 14 Ohio App.3d 394, 395 (8th Dist.1984) (the requirement of a hearing is mandatory and each application for expungement must be set for hearing). *See also State v. Boddie*, 170 Ohio App.3d 590, 2007-Ohio-626, ¶4 (8th Dist.) The assignment of error is sustained.

{¶42} For the foregoing reasons, the judgment of the Portage County Municipal Court, Ravenna Division, is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.