

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	<b>OPINION</b>
Plaintiff-Appellee,	:	
- vs -	:	<b>CASE NO. 2011-T-0054</b>
REGGIE L. POTTS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 93 CR 360.

Judgment: Affirmed.

*Dennis Watkins*, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

*Michael D. Rossi*, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Reggie L. Potts, appeals the decision of the Trumbull County Court of Common Pleas denying his Motion to Seal Record of Convictions. For the reasons that follow, we affirm.

{¶2} In 1993, appellant was convicted of theft in office, a third-degree felony in violation of R.C. 2921.41(A)(2), and falsification, a first-degree misdemeanor in violation of R.C. 2921.13(A)(5). The charges stemmed from misconduct in appellant's capacity as the Bazetta Township Chief of Police. Appellant's jail sentence was suspended.

{¶3} This court affirmed appellant's 1993 conviction in *State v. Potts*, 11th Dist. No. 95-T-5182, 1996 Ohio App. LEXIS 1984 (May 10, 1996).

{¶4} In 1994, appellant pled guilty to an amended indictment charging him with tampering with records, a first-degree misdemeanor. These charges also stemmed from appellant's employment as the chief of police. Appellant's jail sentence was again suspended.

{¶5} In 2001, appellant moved to have his criminal record sealed under R.C. 2953.32(A)(1), which allows for a "first offender" to apply for expungement. A person can nonetheless be a "first offender" even with multiple convictions, provided, for example, the convictions stemmed from the same act or resulted from offenses committed at the same time. R.C. 2953.31(A). The trial court granted appellant's motion, finding him to be a "first offender" eligible to have his records sealed. The state appealed and this court reversed the trial court's judgment in *State v. Potts*, 11th Dist. Nos. 2001-T-0016 & 2001-T-0017, 2001 Ohio App. LEXIS 5843 (Dec. 21, 2001). We concluded that appellant's convictions were not related enough to constitute the same offense, thus appellant was not a first offender eligible to have his records sealed:

{¶6} The three convictions in this case are not related enough to be considered the same offense. The only connection between these crimes is that they were all committed in relation to Potts' employment. The crimes Potts committed occurred first in 1987, then in 1989, and finally over a period of time in 1991-1992. There [are] nearly five years separating these offenses. The first offense [theft in office] involved lending a loaned car, with undercover license plates issued to the police department, to a friend for an

out-of-state trip. This offense is in no way related to the second offense, falsifying a document, by asserting an individual worked at the Bazetta Police Department, which was an untrue statement. Neither of these first two offenses have anything to do with the final conviction, tampering with the drug unit records. *Id.* at \*8.

{¶7} In 2011, appellant again filed a “Motion to Seal Record of Convictions,” this time under the authority of the court’s inherent judicial power to seal a conviction record in “unusual and exceptional circumstances,” pursuant to *Pepper Pike v. Doe*, 66 Ohio St.2d 374 (1981). Appellant, in his motion before the trial court, listed five “exceptional” circumstances that would allegedly allow the court to expunge his record, even absent statutory authorization: (1) he was “uncounseled” in his 1994 plea as it pertained to expungement; (2) he is innocent of the 1994 charge he pled guilty to; (3) his part in two of the convictions was not direct but “vicarious”; (4) the criminal investigation of all three convictions was singular; (5) his ability to earn a living has been impaired. The trial court denied appellant’s motion without evaluating these circumstances. Instead, the court concluded that appellant simply was not eligible for consideration.

{¶8} Appellant appeals from this denial and asserts a sole assignment of error:

{¶9} “The trial court erred by denying the Defendant’s Motion to Seal Record of Convictions without reaching its merits.”

{¶10} Where a defendant is eligible, a trial court’s treatment of an application to seal a conviction record is reviewed under an abuse of discretion standard. *State v. Shaffer*, 11th Dist. No. 2009-G-2929, 2010-Ohio-6565, ¶15. (Citations omitted.) However, in this case, the trial court determined that appellant was ineligible as a matter

of law for expungement. We therefore proceed under a de novo standard of review. *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, ¶6-7.

{¶11} Expungement, an “act of grace” created by the state, may be granted either by statute (R.C. 2953.32) or judicial authority (trial court’s expunging of record in unusual and exceptional circumstances). *State v. Kidd*, 11th Dist. No. 2004-P-0047, 2005-Ohio-2079, ¶11. (Citations omitted.) However, only those persons *not* convicted of an offense are eligible for judicial expungement. *Id.* at ¶12, citing *State v. Brewer*, 11th Dist. No. 2001-L-186, 2003-Ohio-701, ¶18. Thus, statutory expungement (via R.C. 2953.32) remains the exclusive remedy for convicted defendants. *Id.*

{¶12} Here, appellant relies on the Ohio Supreme Court’s holding in *Pepper Pike*, *supra*, to argue that the lower court had inherent judicial power to grant the expungement in his case. However, such an argument expands the holding of that case, as we have explained before.

{¶13} In *State v. Brewer*, 11th Dist. No. 2001-L-186, 2003-Ohio-701, ¶18, the defendant cited *Pepper Pike* to support his contention that it was within the trial court’s sound discretion to grant his motion for expungement, despite his multiple convictions. We noted that *Pepper Pike* merely stands for the proposition that judicial expungement is available to those charged, but not convicted, of an offense. *Id.* We concluded: “Brewer was convicted of the charges after entering a guilty plea, thus, his only remedy was statutory. Accordingly the trial court did not have discretion or the inherent power to grant judicial expungement in this case.” *Id.*

{¶14} Similarly, in *State v. Kidd*, 11th Dist. No. 2004-P-0047, 2005-Ohio-2079, ¶2, the defendant was not considered a first offender as defined by R.C. 2953.31 and was therefore ineligible for expungement under R.C. 2953.32. *Kidd* argued, just as

appellant now does, that the *Pepper Pike* holding allows for judicial expungement of any case when unusual and exceptional circumstances make it appropriate to exercise jurisdiction. *Id.* at ¶10. In response, we noted that appellate courts have uniformly limited the remedy in *Pepper Pike* “to cases where the person seeking expungement was not convicted of an offense.” *Id.* at ¶12. (Citations omitted.) We also noted that any other reading of that case would result in frustration of the statute. *Id.*, quoting *State v. Netter*, 64 Ohio App.3d 322, 324 (1989).

{¶15} In this case, appellant simply ignores the following foundational premise of *Pepper Pike*: “Defendant does not fit within the meaning of ‘first offender,’ since she has never been convicted of any crime. Therefore she is not within the purview of the expungement statute.” *Pepper Pike v. Doe*, 66 Ohio St.2d 377, fn. 4. Appellant, having been convicted of three crimes, clearly *does* fall within the purview of the statute.

{¶16} Appellant’s only available remedy—as a convicted defendant—is statutory expungement through R.C. 2953.32. As explained above, this remedy was exhausted in *State v. Potts*, 2001 Ohio App. LEXIS 5843. The trial court, therefore, did not err in denying appellant’s motion without reaching its merits. Appellant’s sole assignment of error is without merit.

{¶17} The decision of the Trumbull County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.