[Cite as *State v. Pollard*, 2016-Ohio-4744.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2016-A-0004**
- vs -	:	
BRYSON POLLARD,	:	
Defendant-Appellant.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2002 CR 00320.

Judgment: Affirmed.

Nicholas A. Iarocci, Ashtabula County Prosecutor, and *Shelley M. Pratt,* Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Jane Timonere, Timonere Law Offices, L.L.C., 4 Lawyers Row, Jefferson, OH 44047-1099 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, P.J.

{¶1} Appellant, Bryson Pollard, appeals the judgment of the Ashtabula County Court of Common Pleas denying his motion to expunge his conviction of attempted burglary. At issue is whether the trial court abused its discretion in denying the motion. For the reasons that follow, we affirm.

{¶2} On January 9, 2003, appellant was indicted for burglary, a felony of the second degree, in violation of R.C. 2911.12(A)(2) (count one) and theft, a felony of the fifth degree, in violation of R.C. 2913.02(A)(1) (count two). Appellant pled not guilty.

{¶3} On May 5, 2003, appellant withdrew his not guilty plea and pled guilty to attempted burglary, in violation of R.C. 2923.02 and R.C. 2911.12(A)(2), which, according to the court's judgment entry of that date, is a felony of the third degree and a lesser included offense of count one. In exchange for his plea, count two was dismissed. Appellant was sentenced to two years of community control.

{¶4} On June 10, 2005, due to a violation of appellant's community control, the court extended his community control for one year, for a total of three years.

{¶5} On April 4, 2006, due to appellant's failure to comply with his supervision orders, the court issued a capias for his arrest.

{¶6} On March 30, 2007, a complaint for violation of community control was filed against appellant. Appellant subsequently admitted he was guilty of violating conditions of his community control. He was convicted of the violation and sentenced to four years in prison on amended count one of the indictment, attempted burglary.

{¶7} On February 25, 2015, appellant filed a motion to seal the record of his conviction. The state filed a brief in opposition. Following an oral hearing, the trial court denied the motion, finding that appellant was not eligible for expungement in that the offense to which he pled guilty, attempted burglary, is an offense of violence, which is not eligible for expungement.

{¶8} Appellant appeals the trial court's judgment, asserting the following as his sole assignment of error:

{¶9} "At the hearing to determine whether Mr. Pollard's motion to seal record of criminal conviction should be granted, the trial court abused its discretion by failing to make a factual determination of whether the circumstances of Mr. Pollard's conviction for attempted burglary fit under either Ohio Revised Code Sec. 2911.12(A)(1), (2), or (3)."

{¶10} Pursuant to R.C. 2953.32(A)(1), a first offender may request that the record of his conviction be sealed. Upon filing such request, R.C. 2953.32(C)(1) requires the trial court to determine: (1) whether the applicant is a first offender; (2) whether criminal proceedings are pending against the applicant; (3) whether the applicant has been rehabilitated to the satisfaction of the court; and (4) whether the prosecutor has filed an objection and, if so, to consider the prosecutor's reasons for the objection.

{¶11} "'Expungement is an act of grace created by the state' and so is a privilege, not a right." *State v. Simon*, 87 Ohio St.3d 531, 533 (2000), quoting *State v. Hamilton*, 75 Ohio St.3d 636, 639 (1996). In *State v. Mahaney*, 11th Dist. Lake No. 12-208, 1988 Ohio App. LEXIS 3314 (Aug. 12, 1988), this court stated:

> **{¶12}** "Because expungement is a matter of privilege rather than of right, the requirements of the expungement statute must be adhered to strictly." *State v. Thomas*, 64 Ohio App.2d 141, 145 ([8th Dist.]1979). "When exercising this power, the court should use a balancing test which weighs the privacy interest of the defendant against the government's legitimate need to maintain records of criminal proceedings." *Pepper Pike v. Doe*, 66 Ohio St.2d 374 (1981), paragraph two of the syllabus. "Typically, the public interest in retaining records of criminal proceedings, and making them available for legitimate purposes, outweighs any privacy interest the defendant may assert." *Chase v. King*, 267 Pa. Super. 498 (1979); *Pepper Pike, supra*, at 377. *Mahaney, supra*, at *4-*5.

{¶13} We review a trial court's decision to grant or deny an application to seal a record of conviction for an abuse of discretion. *State v. Selesky*, 11th Dist. Portage No. 2008-P-0029, 2009-Ohio-1145, ¶17, citing *State v. Hilbert*, 145 Ohio App.3d 824, 827-828 ([8th Dist.]2001). This court has stated that the term "abuse of discretion" is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *State v. Underwood*, 11th Dist. Lake No. 2008-L-113, 2009-Ohio-2089, ¶30. However, "whether a provision in R.C. 2953.36 operates to preclude [appellant's] conviction from eligibility for the expungement proceedings is a question of law that we review de novo." *State v. D.G.*, 10th Dist. Franklin No. 14AP-476, 2015-Ohio-846, ¶16.

{¶14} R.C. 2953.36 lists various convictions which are not eligible for expungement. R.C. 2953.36(C) provides that the expungement statutes do not apply to "[c]onvictions of an offense of violence when the offense is a * * * felony." Further, R.C. 2901.01(A)(9) provides that the term "offense of violence" includes "[a] violation * * * of division (A)(1), (2), or (3) of section 2911.12" (burglary) and also includes an "attempt to commit" such offense. R.C. 2901.01(A)(9)(a) and (d). As a result, an attempt to commit burglary, as defined in R.C. 2911.12(A)(1), (2), or (3), is an offense of violence and, thus, non-expungeable. Appellant tacitly concedes that if the underlying felony is an offense of violence, an attempt to commit that offense is itself an offense of violence.

{¶15} Appellant argues that because the General Assembly did not label each division of R.C. 2911.12 as an offense of violence ("trespass in a habitation" under R.C. 2911.12(B) is not an offense of violence) and further because the indictment referenced only R.C. 2911.12, without specifying the division under which he was charged, the trial court was required to determine whether the offense to which he pled guilty fit within division (A)(1), (2), or (3). In support, appellant relies on *State v. Tschen*, 8th Dist.

Cuyahoga No. 83246, 2004-Ohio-991. In *Tschen*, the Eighth District held that because "[t]he facts of [that] case, *as presented through the indictment and bill of particulars,* [did] not establish whether [the defendant] pled guilty to division R.C. 2911.12(A)(1),(2), [or] (3)," it was necessary for the trial court to determine whether the offense to which the defendant pled guilty fell within one of these divisions and was thus non-expungeable. (Emphasis added.) *Tschen, supra*, at ¶7, 11.

{¶16} In opposition, the state argues that *Tschen* is distinguishable and so does not apply here because the indictment in this case used the exact language of division (A)(2) of R.C. 2911.12. Thus, the state argues, it was clear that the form of the offense to which appellant pled guilty was attempted burglary under R.C. 2923.02 and R.C. 2911.12(A)(2), which is an offense of violence and not eligible for expungement.

{¶17} We agree that the language of count one of the indictment, burglary, contains the exact language of R.C. 2911.12(A)(2). Count one of the indictment alleged:

> **{¶18}** On or about the 21st day of October, 2002, in the City of Geneva, Ashtabula County, Ohio, one Bryson Pollard did by force, stealth, or deception trespass in an occupied structure * * * that is a permanent or temporary habitation of Sandra Vasquez, when Sandra Vasquez was present or likely to be present, with purpose to commit in the habitation a criminal offense.

{¶19} R.C. 2911.12(A)(2) provides:

> **{¶20}** No person, by force, stealth, or deception, shall * * * [t]respass in an occupied structure * * * that is a permanent or temporary habitation of any person when any person * * * is present or likely to be present, with purpose to commit in the habitation any criminal offense."

{¶21} Since count one of the indictment used the identical language in R.C. 2911.12(A)(2) to charge appellant, it is clear he was charged under that division. The

fact that the indictment alleged appellant's conduct was in violation of R.C. 2911.12, without mentioning division (A)(2), is irrelevant since the indictment used the exact language of that division. We note that Crim.R. 7(B) provides, in pertinent part: "[O]mission of the numerical designation * * * of the statute that the defendant is alleged to have violated * * * shall not be ground for dismissal of the indictment * * * , or for reversal of a conviction, if the * * * omission did not prejudicially mislead the defendant." Since the exact language of the division with which appellant was charged was included in the indictment, he was not prejudiced by the omission of the statute's numerical designation.

{¶22} Further, the record discloses additional reasons why appellant was convicted of an attempt to commit burglary under R.C. 2911.12(A)(2). First, as noted above, other than R.C. 2911.12(A)(1), (2), and (3) (which are not expungeable), the only remaining offense defined in R.C. 2911.12 is set forth in R.C. 2911.12(B) (which is expungeable). R.C. 2911.12(B) provides: "No person, by force, stealth, or deception, shall trespass in a permanent or temporary habitation of any person when any person * * * is present or likely to be present." The violation of division R.C. 2911.12(A)(2) is a felony of the second degree, while a violation of R.C 2911.12(B) is a felony of the fourth degree. The fact that burglary as charged in the indictment is a second-degree felony and appellant pled guilty to attempted burglary, a felony of the third degree and a lesser included offense of count one, further demonstrates that the offense to which he pled guilty was attempted burglary under R.C. 2923.02 and R.C. 2911.12(A)(2). If he had pled guilty to an attempt to commit a violation of R.C. 2911.12(B), the offense would have been a felony of the fifth degree.

{¶23} Second, division (E) of R.C. 2911.12 provides: "Whoever violates division (B) of this section is guilty of trespass in a habitation when a person is present or likely to be present." Thus, if appellant had pled guilty to an attempt to violate division (B), the offense would have been "attempted trespass in a habitation when a person is present or likely to be present." The fact that appellant pled guilty to attempted burglary further demonstrates that appellant did not plead guilty to a violation of R.C. 2911.12(B).

{¶24} For the foregoing reasons, the offense to which appellant pled guilty was and, in fact, could only have been attempted burglary, in violation of R.C. 2923.02 and R.C. 2911.12(A)(2), which, pursuant to R.C. 2953.36 and R.C. 2901.01(A)(9), is not expungeable. It therefore would be useless to require the trial court to expressly determine whether appellant pled guilty to one of the non-expungeable divisions of R.C. 2911.12.

{¶25} Consequently, we hold the trial court did not err in finding that appellant's conviction of attempted burglary in violation of R.C. 2923.02 and R.C. 2911.12(A)(2) was not eligible for expungement and thus in denying his motion for expungement.

{¶26} For the reasons stated in the opinion of this court, the assignment of error lacks merit and is overruled. It is the order and judgment of this court that the judgment of the Ashtabula County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, J.,

COLLEEN MARY O'TOOLE, J.,

concur.