

[Cite as *State v. Calderon*, 2010-Ohio-2807.]

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 09CA0088-M

Appellee

v.

KEILA CALDERON

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 03CR0080

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 21, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Keila Calderon, appeals from the judgment of the Medina County Court of Common Pleas, denying her motion to seal official records. This Court reverses.

I

{¶2} On March 5, 2003, a grand jury indicted Calderon on one count of theft, a fifth-degree felony in violation of R.C. 2913.02(A)(1). Calderon ultimately pleaded guilty to misdemeanor theft, also a violation of R.C. 2913.02(A)(1). On August 11, 2003, the court sentenced Calderon to 180 days in jail, suspended on the condition that she complete 90 days of home incarceration. Calderon violated the conditions of her sentence in October 2003. The court sentenced Calderon to fifteen days in jail and continued supervision. The court granted Calderon an early termination of probation in April 2005.

{¶3} On September 11, 2009, Calderon filed an application to seal her criminal record. Calderon noted on her application that she qualified for an expungement because her misdemeanor theft conviction was her “first and only conviction.” The court set the matter for a hearing on October 23, 2009. The Medina County Adult Probation Department completed an expungement of conviction investigation report on September 30, 2009. The investigation report recommended that the court deny Calderon’s application because Calderon “had a separate conviction expunged in the past.” On October 13, 2009, the State filed its response to Calderon’s application. The State indicated that it had no objection to the application because “[a] criminal history check shows that [Calderon] has no subsequent convictions or arrests.” At the October 23, 2009 hearing, however, the court informed Calderon that it believed she was ineligible for expungement because she “had an expungement in the past.” Calderon denied that she had received a previous expungement, and the court indicated it would review the matter. On November 12, 2009, the court denied Calderon’s application to seal.

{¶4} Calderon now appeals from the court’s judgment and raises two assignments of error for our review. For ease of analysis, we consolidate her assignments of error.

II

Assignment of Error Number One

“THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO HOLD A FULL AND FAIR HEARING TO REVIEW APPELLANT CALDERON’S APPLICATION FOR EXPUNGEMENT AS REQUIRED BY R.C. §2953.32(B).”

Assignment of Error Number Two

“THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT APPELLANT CALDERON WAS NOT AN ELIGIBLE FIRST OFFENDER AND THEREFORE DENIED HER APPLICATION BASED ON LEGALLY INSUFFICIENT FACTS, PER R.C. §2953.32(C)(1)(a)-(e).”

{¶5} In her first assignment of error, Calderon argues that the trial court abused its discretion by not affording her a full and fair hearing on her application for expungement. In her second assignment of error, Calderon argues that the trial court erred as a matter of law by determining that she was statutorily ineligible for expungement because she was not a first time offender.

{¶6} Depending on the dispute in question, this Court will apply either a de novo standard of review or an abuse of discretion standard of review in appeals from the denial of an application to seal a record of conviction. Compare *State v. Campbell*, 9th Dist. No. 24919, 2010-Ohio-128, at ¶5 (applying de novo standard of review) with *State v. Stringer*, 9th Dist. No. 08CA0038-M, 2009-Ohio-909, at ¶5-7 (applying abuse of discretion standard of review). If “the matter in dispute is purely a question of law,” then a de novo standard applies. *Campbell* at ¶5, quoting *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, at ¶6. If the matter in dispute concerns the court’s discretion, such as its conclusion that the evidence does not weigh in favor of expungement, then an abuse of discretion standard applies. *Stringer* at ¶5-7.

{¶7} R.C. 2953.32 permits a “first offender” to apply for the sealing of her conviction record. R.C. 2953.32(A). The term “[f]irst offender’ means anyone who has been convicted of an offense in this state *** and who previously or subsequently has not been convicted of the same or a different offense in this state[.]” R.C. 2953.31(A). Unless an offender’s conviction is statutorily exempt from sealing as a matter of law, R.C. 2953.32(B) requires that a trial court set the matter for a hearing once an offender files an application for sealing. *Campbell* at ¶8 (holding that court need not afford applicant a hearing before denying application to seal where conviction exempt from sealing under R.C. 2953.36); *Stringer* at ¶5-7 (reversing denial of sealing where court failed to afford applicant a full and fair hearing on a non-exempt conviction).

“[T]he essential purpose of an expungement hearing is to provide a reviewing court with all relevant information bearing on an applicant’s eligibility for expungement.” *State v. Hamilton* (1996), 75 Ohio St.3d 636, 640. A court’s failure to hold a full and fair hearing on an application to seal is a basis for reversible error. *Stringer* at ¶6-7.

{¶8} A misdemeanor conviction under R.C. 2913.02(A)(1) is not an offense that is statutorily exempt from sealing. See *Campbell* at ¶8. Therefore, the trial court was obligated to hold a hearing on Calderon’s application to seal in order to consider whether she was a “first offender” for purposes of R.C. 2953.32. *Stringer* at ¶5-7. Calderon’s entire hearing before the trial court on October 23, 2009 consisted of the following exchange:

“THE COURT: Keila Calderon. She did violate probation but we took care of that. This is the only crime that she has on her record. She’s been in school for the past three years, but she was kicked out because of medical clinical -- what were you trying to take?

“MS. CALDERON: My echo cardio clinicals.

“THE COURT: Okay. Oh, unfortunately, you -- well, wait a minute. You had an expungement in the past. Do you believe that makes her ineligible?

“MS. CALDERON: Those are not expungements.

“THE COURT: No. You had an expungement in Cuyahoga County, didn’t you? I’m going to -- we need to look in to this a little bit further. I’m not sure what’s going on here. She may be ineligible because she’s had an expungement but she could be ineligible, I believe, because she’s had, you know, a former charge, you know. Could you look in to that and then we’ll send her a letter?

“MS. CONLEY: Sure.¹

“THE COURT: I don’t think you’re going to be eligible, but I’ll look in to it. Thank you.

“MS. CALDERON: Thank you.

“THE COURT: Sorry about that.”

¹ The identity of “Ms. Conley” is unclear from the record, as the transcript only lists the judge, Calderon, and Matthew Razavi (the assistant prosecutor) as appearing at the hearing.

Subsequently, the court denied Calderon's application by way of the following journal entry: "Upon the motion of [Calderon] to seal official records, motion is hereby denied."

{¶9} Calderon did not have an opportunity to explain why she never received a past expungement. The court apparently relied upon the investigation report from the Adult Probation Department to reach its conclusion. The investigation report indicates that, in addition to her misdemeanor theft conviction in 2003, Calderon faced charges in 2003 and 2007. In 2003, she was charged with forgery, obstructing justice, and tampering with records in Cuyahoga County. The notation on the investigative report next to those charges indicates that "[t]he record of this case has been [e]xpunged per Cuyahoga County Common Pleas Court." In 2007, Calderon was charged with failure to display an operator's license and speeding in Cuyahoga County. The notation on the investigative report next to those charges indicates that Calderon was found guilty and paid a fine.

{¶10} One cannot discern from the record whether Calderon actually received a previous expungement or whether she is a "first offender." On appeal, Calderon argues that she never received an expungement in Cuyahoga County. She argues that she was charged in Cuyahoga County in 2003, but never convicted because the charges were dismissed pursuant to a pre-trial diversion program. She further argues that, per R.C. 2953.31(A), her 2007 convictions do not constitute "subsequent convictions" for purposes of an application to seal. See R.C. 2953.31(A) (providing that certain minor misdemeanor convictions are not subsequent convictions for purposes of expungement). The trial court never afforded Calderon an opportunity to explain these matters. The record only reflects that: (1) the State filed a response to Calderon's application to seal, indicating that it had no objection because "[a] criminal history check shows that [Calderon] has no subsequent convictions or arrests"; (2) the State remained

silent throughout Calderon's brief expungement hearing; (3) Calderon told the court at the hearing that she had never received an expungement; and (4) the investigation report indicated, without supporting documentation, that the record from Calderon's 2003 case was "[e]xpunged per Cuyahoga County Common Pleas Court." Upon our review of the record, we must conclude that the trial court erred by denying Calderon's application without a full and fair hearing. Calderon's assignments of error have merit.

III

{¶11} Calderon's assignments of error are sustained. The judgment of the Medina County Court of Common Pleas is reversed, and the cause is remanded for further proceedings consistent with the foregoing opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

BETH WHITMORE
FOR THE COURT

MOORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

J. DEAN CARRO, Appellate Review Office, School of Law, The University of Akron, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and MICHAEL P. MCNAMARA, Assistant Prosecuting Attorney, for Appellee.