

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-09-1177

Appellee

Trial Court No. CR0200703089

v.

Kimberly Pattin

DECISION AND JUDGMENT

Appellant

Decided: June 11, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Claudia A. Ford, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Kimberly Pattin, appeals from a decision of the Lucas County Court of Common Pleas wherein her "motion to seal record" was denied. After thoroughly reviewing the record in this case, we affirm.

{¶ 2} The relevant facts are as follows. On October 5, 2007, appellant was indicted on one count of felonious assault, a violation of R.C. 2903.11(A)(2) and a felony of second degree. It was alleged that on September 7, 2007, appellant fired "at least one round from a * * * .22 caliber handgun, striking [the victim] in the upper, left thigh." This incident allegedly took place on the grounds of appellant's barbershop. On May 30, 2008, appellant was found not guilty of the offense by a jury who found that appellant acted in self defense.

{¶ 3} On June 4, 2008, appellant filed a "motion to seal record." Following a hearing, the motion was denied. On May 14, 2009, appellant filed a "motion to reconsider defendant's motion to seal record." Appellant contended that there had been a change of circumstances warranting another request for the sealing of her records. Specifically, appellant was attempting to expand her business. She was denied a lease for a new shop because of the felony charge on her record. Once again, following a hearing, her request was denied. Appellant now appeals setting forth the following assignment of error:

{¶ 4} "The trial court abused its discretion when it denied Ms. Pattin's motion to seal."

{¶ 5} Appellant contends the trial judge abused her discretion in considering the nature of appellant's offense in denying her motion. Appellant also contends the trial judge failed to consider her interest in denying the motion.

{¶ 6} R.C. 2953.52(A)(1) provides that any person who is found not guilty of an offense, or against whom the charges are dismissed, may apply for an order to seal the applicant's official records in the case. Upon the filing of such a request, R.C. 2953.52(B)(2) requires the trial court to: (1) determine whether the applicant was found not guilty or whether the complaint, indictment, or information was dismissed; (2) determine whether there are pending criminal proceedings against the applicant; and (3) consider any objections filed by the prosecutor in response to the motion to seal. Ultimately, the trial court must weigh the interest of sealing the applicant's records against the legitimate need of the government to maintain those records. R.C. 2953.52(B)(2)(d).

{¶ 7} The determination not to seal an applicant's record is a matter lying within the sound discretion of the trial court. *State v. Haney* (1991), 70 Ohio App.3d 135, 138; *State v. Widder* (2001), 146 Ohio App.3d 445, 447. An abuse of discretion implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Id.*, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 8} The transcript shows the trial judge acknowledged that appellant had been acquitted and that there were no criminal charges pending against her. The trial judge then found that appellant's interests were outweighed by the legitimate need of the government to maintain records. The trial judge specifically stated: "[h]aving heard the evidence, I must tell you that I do have a concern and I think there is a legitimate governmental interest in not sealing this record." The trial judge then stated on the record

that even though appellant was acquitted for using a weapon in self defense, the circumstances of the offense concerned her. In particular, the fact that appellant discharged a weapon in a public parking area with many people around. "I feel strongly that this is a matter wherein it is appropriate to maintain this on her record."

{¶ 9} In denying appellant's second motion, the judge again referred to the circumstances of appellant's felony charge stating: "* * * there were no 911 calls made prior to this incident to try to have this taken care of in what I would say what a good citizen and a good business person would [do]."

{¶ 10} We disagree with appellant's contention that the trial judge denied her motion based solely on the fact that she had been charged with a weapon's crime. The transcript reveals that the judge considered the arguments from both sides but in the end, decided the state's interests outweighed appellant's. The judge cited the police's interest in being able to review an individual's record prior to confronting someone who has a history with weapons and she repeatedly cited to appellant's poor judgment which, she believed, led to the charge in the first place stating: "[I] don't think in good conscience I can permit someone who has this little control over themselves * * * to risk the safety of others."

{¶ 11} Finding no abuse of discretion, appellant's sole assignment of error is found not well-taken.

{¶ 12} On consideration whereof, we find substantial justice has been done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

Keila D. Cosme, J., DISSENTS.

COSME, J., dissenting.

{¶ 13} Appellant, Kimberly Pattin, appeals from a judgment of the Lucas County Court of Common Pleas denying her application to seal the official records of her acquittal on a charge of felonious assault pursuant to R.C. 2953.52. Because the trial court abused its discretion by failing to make the requisite findings prescribed by R.C. 2953.52(B) and balance the parties' competing interests, I dissent.

I. BACKGROUND

{¶ 14} On October 5, 2007, the state charged appellant with felonious assault for her involvement in a shooting that occurred in a public parking lot. Appellant pled not guilty, asserting that she discharged the firearm in self-defense. The jury returned a verdict in appellant's favor finding her not guilty of the charged offense.

{¶ 15} Appellant filed an application to seal the official record of the trial court. The court held a hearing and denied appellant's application. Shortly thereafter, appellant, who owns and manages a barbershop, sought to expand her business by opening a second shop in a regional shopping mall. But the mall rejected her application for tenancy when it discovered the felonious assault charge on her record. The rejection prompted appellant to file a second application to seal her record, which she captioned "Motion to Reconsider Defendant's Motion to Seal Record." The court held a hearing and denied her second application as well.

{¶ 16} On June 26, 2009, appellant filed the instant appeal.

II. DENIAL OF APPLICATION TO SEAL

{¶ 17} In her sole assignment of error, appellant contends that:

{¶ 18} "The trial court abused its discretion when it denied Ms. Pattin's Motion to Seal."

A. Resolving Procedural Confusion

{¶ 19} Initially, I am compelled to address a procedural aspect of this case. Appellant captioned her May 14, 2009 filing as a "Motion to Reconsider." A motion for

reconsideration is used "to raise an obvious error in the court's original decision or to raise an issue that the court inadvertently failed to consider." *In re Robinson*, 2d Dist. Nos. 2002-CA-83, 2002-CA-84, 2002-CA-85, 2003-Ohio-5528, ¶ 13. A party cannot use a motion for reconsideration to challenge a final order of a trial court. *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, 381. Such a motion, and any judgment that results from it, is a nullity. *Id.*

{¶ 20} Ordinarily, when determining the nature of a motion, "the name given to a motion is not controlling. Rather, it is the substance, and not the caption which determines a motion's operative effect." *State v. Simpson*, 5th Dist. No. 04CA000032, 2005-Ohio-6768, ¶ 14. See, also, *In re Robinson*, *supra*.

{¶ 21} In this case, appellant's May 14, 2009 filing was in fact a second application to seal the record. First, in substance, appellant's motion does not seek reconsideration of an erroneous ruling, but rather, plainly requests the trial court to order the record sealed, supported by the necessary statutory grounds including new facts and evidence.

{¶ 22} Second, the trial court entertained appellant's otherwise "null" motion as though it were a second application to seal. Pursuant to the expungement statute, the prosecutor had notice of the renewed application, and the court held a hearing on the matter. R.C. 2953.52(B)(1). At the hearing, appellant did not raise errors or omissions in the prior judgment. Rather, new arguments were presented. Similarly, the court did not address its previous order, but offered new reasons justifying its decision in denying

appellant's application. Indeed, the court's judgment entry states: "This matter came to be heard upon the Motion for Sealing the Record filed by Attorney on May 14, 2009. It is ordered, adjudged, and decreed that the motion is found not well taken and denied." (sic.)

{¶ 23} Because appellant's May 14, 2009 application is a second motion to seal the record, this court has jurisdiction to review the trial court's denial of that application. Our review is limited to the trial court's second order and does not extend to the previous order, which is not before the court.

B. June 1, 2009 Order Denying Application to Seal

{¶ 24} R.C. 2953.52(A) allows a defendant who has been acquitted by a jury to apply for an order sealing the official records. R.C. 2953.52(B) provides that the application be granted where it is timely filed, there are no criminal actions pending against the applicant, and the applicant's interests outweigh the legitimate needs, if any, of the government to maintain those records. R.C. 2953.53(B)(2)(b), (c), and (d); *State v. Baker*, 6th Dist. No. OT-09-016, 2010-Ohio-933, ¶ 6.

{¶ 25} The expungement provisions are remedial in nature and must be liberally construed to promote their purposes. *State v. Haas*, 6th Dist. No. L-04-1315, 2005-Ohio-4350, ¶ 8, citing *State ex rel. Gains v. Rossi* (1999), 86 Ohio St.3d 620, 622. As noted by the First District, "[i]n America, people are presumed innocent unless tried and convicted. * * * When people are found not guilty, they have not lost the presumption of innocence." *State v. Garry*, 173 Ohio App.3d 168, 2007-Ohio-4878, ¶ 1, 7. Accordingly,

a court should freely grant expungements in cases where there has been a not guilty finding, and the government must make a strong showing to defeat the sealing of the record. *Id.* at ¶ 5, 7.

{¶ 26} A trial court's judgment on an R.C. 2953.52 application to seal will not be reversed absent an abuse of discretion. *State v. Haney* (1991), 70 Ohio App.3d 135, 138. A trial court abuses its discretion in denying an application to seal records when it fails to make the necessary findings and weigh the interests of the parties pursuant to R.C. 2953.52(B)(2). See *State v. Widder*, 146 Ohio App.3d 445, 2001-Ohio-1521, ¶ 17; *City of Cleveland v. Hogan*, 8th Dist. No. 85214, 2005-Ohio-3167, ¶ 11-12. A trial court also abuses its discretion when it fails to apply the statute in light of its remedial nature and purpose. *State v. Hilbert* (2001), 145 Ohio App.3d 824, 828.

{¶ 27} In the present matter, the trial court summarily denied appellant's application. At the hearing, the court stated that it would be "remiss in granting a motion to seal your record given the fact that you obtained – you had in your possession a loaded weapon, that you fired this loaded weapon into a parking lot wherein not only the alleged suspect and victim was located, but also a number of other people as well; that it did not occur to you to call the police to resolve this in any way and the only time the police were called is after the shooting occurred." The trial court stated this conduct evidenced a lack of control, was not the behavior of a "good citizen and a good business person," and "led the court to seriously question [appellant's] judgment."

{¶ 28} Noticeably absent from the record is any evidence that the trial court made the necessary findings required by R.C. 2953.52(B)(2), or balanced appellant's stated interest against any legitimate governmental need to maintain the records. Indeed, the sole ground supporting the trial court's denial appears to be the judge's view that appellant exercised poor judgment. This is not a competing governmental interest in retaining her record. It is a brand on appellant in spite of her acquittal. Accordingly, the trial court abused its discretion by failing to comply with the mandates of R.C. 2953.52(B) and should be reversed.

{¶ 29} Appellant has twice sought to seal the record of her acquittal. Her applications were timely, there is no evidence of any pending criminal actions against her, and appellant has shown a legitimate reason for her request – the desire to obtain a commercial lease to improve her lot in life. Appellant's possession of the firearm was lawful, and the jury found that her use of her firearm was justified.¹ In light of the not guilty verdict based on self-defense and the statute's remedial nature, the state was required to make a strong showing to defeat the sealing of the record. The record below fails to support such a showing. Accordingly, I would hold that the trial court abused its discretion in denying the application and would reverse.

¹The jury determined that the circumstances of the incident justified appellant's use of the firearm in self-defense, and the court ordered the firearm returned to appellant following acquittal.