

[Cite as *In re Esson*, 2011-Ohio-5770.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of: : No. 11AP-208
Cor[e]y J. A. Esson, : (C.P.C. No. 10EP-648)
(Defendant-Appellant). : (REGULAR CALENDAR)

D E C I S I O N

Rendered on November 8, 2011

David L. Kentner, for appellant.

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Corey J. A. Esson ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which denied his application to seal the records of a criminal matter in which he was found not guilty. Having concluded that the trial court erred by failing to give appellant the opportunity to speak before it made its decision at the hearing R.C. 2753.52 requires, and also issued an entry that refers to the wrong statute, we reverse.

I. BACKGROUND

{¶2} On September 17, 2010, appellant filed in the trial court a court-provided form "Application for Order Sealing Record of Dismissal, Finding of Not Guilty or No Bill [R.C. 2953.52(A)]." In it, appellant stated that a jury in Franklin County had found him not guilty in case No. 08-CR-000872 in December 2008. He signed the following printed "Memorandum in Support of Application for Order Sealing Record":

No criminal proceedings are pending against applicant. A dismissal of the former complaint or a finding of not guilty has been journalized by the court in the prior case; or if this application is based upon a no bill having been returned against applicant, more than two years have passed since the foreman or deputy foreman of the grand jury reported the no bill to the court. All other factors listed in R.C. 2953.52(B)(2) support granting this application.

{¶3} Plaintiff-appellee, the state of Ohio ("the state"), objected to appellant's application. In its objection, the state contended that appellant had been indicted on one count of murder for the death of Colten Groves. At trial, appellant asserted that he had acted in self-defense. The jury found appellant not guilty.

{¶4} In objecting to appellant's application, the state noted that appellant had not provided any reasons in support of sealing the record. The state also argued that the public's interest in having access to the information about appellant's case outweighed any interest appellant might have in sealing it. As to appellant's case, the state argued that the public record should include the circumstances surrounding Groves' death.

{¶5} The trial court held a hearing on February 1, 2011, beginning at 9:46 a.m. Appellant appeared without counsel. The following is a complete transcript of that hearing, following initial introductions:

THE COURT: * * * Mr. Esson, you have filed for an expungement, the State has filed an objection.

Mr. Rogers [the prosecutor].

MR. ROGERS: Yes, Your Honor.

The facts on this case were, it was a murder case, where the Defendant was acquitted by the jury. As we all know, that doesn't mean he didn't do it, that just means they did not find
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THE COURT: Right.

MR. ROGERS: - - sufficient cause. The State objects to this sealing or expungement. It showed that the victim in this case was shot eight times and the Defendant was let off on a self-defense argument, won his case on self-defense. However, we feel that we took it to trial, our office did, and we felt that there was more there than merited what the jury found, and we think that public safety would mean that we do not want this sealed.

THE COURT: Well, Mr. Esson, let me explain something to you, that you are not entitled to have your record sealed, rather, you have a burden to establish a particularized need for the expungement, which you have not done.

At this time, the Court is going to deny your expungement. That will be all. That's it.

(Tr. 2-3.)

{¶6} The hearing concluded at 9:48 a.m. The court thereafter filed a journal entry denying the application.

II. ASSIGNMENTS OF ERROR

{¶7} Appellant filed a timely appeal, and he asserts the following assignments of error:

[I.] THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT'S APPLICATION TO SEAL THE OFFICAL RECORDS OF A CASE WITHOUT FIRST GIVING THE APPELLANT AN OPPORTUNITY TO SET FORTH HIS INTERESTS AND REASONS FOR HAVING THE RECORDS SEALED AS REQUIRED BY R.C. 2953.52.

[II.] THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT'S APPLICATION TO SEAL HIS RECORD AFTER A JURY UNANIMOUSLY DETERMINED, BY THE GREATER WEIGHT OF THE EVIDENCE, THAT HIS USE OF FORCE WAS JUSTIFIED AND LAWFUL WITHOUT FIRST ENGAGING IN THE PROPER WEIGHING AND REASONING AS REQUIRED BY STATUTE AND BY FURTHER FAILING TO SET FORTH IN THE RECORD OR IN THE ENTRY ANY EVIDENCE TO DEMONSTRATE THAT THE COURT PROPERLY WEIGHED THE REQUIRED FACTORS BEFORE DENYING THE APPELLANT'S APPLICATION.

[III.] WHEN A JURY UNANIMOUSLY FINDS, BY THE GREATER WEIGHT OF THE EVIDENCE, THAT THE APPELANT ACTED IN SELF-DEFENSE AND THAT HIS ACTIONS WERE JUSTIFIED AND NOT CRIMINAL AND THAT HE HAD LAWFULLY DEFENDED HIMSELF FROM THE UNLAWFUL THREAT OF DEATH OR GREAT BODILY HARM AGAINST AN ASSAILANT, A COURT ERRS WHEN IT DENIES THE APPELLANT THE RIGHT TO HAVE HIS RECORD SEALED IN THE ABSENCE OF ANY ARGUABLE MERIT ADVANCED BY THE STATE TO THE CONTRARY.

III. DISCUSSION: R.C. 2953.52

{¶8} In his first assignment of error, appellant contends that the trial court did not give him an opportunity to speak on his own behalf and, in essence, failed to provide a hearing. We agree.

{¶9} R.C. 2953.52 provides that any person found not guilty of an offense by a jury "may apply to the court for an order to seal his official records in the case." R.C. 2953.52(A)(1). Upon the filing of an application, the court shall set a date for a hearing and notify the prosecutor. The prosecutor may file an objection that specifies the reasons justifying denial of the application. R.C. 2953.52(B)(1).

{¶10} Following a hearing, the court must do each of the following:

- (a) Determine whether the person was found not guilty in the case, or the complaint, indictment, or information in the case was dismissed, or a no bill was returned in the case and a period of two years or a longer period as required by section 2953.61 of the Revised Code has expired from the date of the report to the court of that no bill by the foreman or deputy foreman of the grand jury;
- (b) Determine whether criminal proceedings are pending against the person;
- (c) If the prosecutor has filed an objection in accordance with division (B)(1) of this section, consider the reasons against granting the application specified by the prosecutor in the objection;
- (d) Weigh the interests of the person in having the official records pertaining to the case sealed against the legitimate needs, if any, of the government to maintain those records.

R.C. 2953.52(B)(2).

{¶11} If, after a hearing and notification to the prosecutor, the court determines that (1) the applicant was found not guilty or the complaint against the applicant was dismissed, (2) the appropriate time period has passed, (3) no criminal proceedings are pending against the applicant, and (4) the legitimate governmental needs to maintain the records do not outweigh the interests of the applicant in having the records sealed,

then "the court shall issue an order directing that all official records pertaining to the case be sealed and that, except as provided in [R.C. 2953.53], the proceedings in the case be deemed not to have occurred." R.C. 2953.52(B)(3).

{¶12} Generally, we will not reverse a trial court's decision concerning an application filed under R.C. 2953.52 absent an abuse of the court's discretion. *In re Dumas*, 10th Dist. No. 06AP-1162, 2007-Ohio-3621, ¶7. And where, as here, the applicant does not raise objections in the trial court, we will notice only plain errors or defects that affect appellant's substantial rights. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68; Crim.R. 52. Nevertheless, if a trial court's decision is based on "an erroneous interpretation or application of the law," we will review the matter de novo. *State v. Hillman*, 10th Dist. No. 09AP-478, 2010-Ohio-256, ¶11, citing *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, ¶6-7.

{¶13} It is well-established that R.C. 2953.52 requires a trial court to hold a hearing before deciding an application for sealing a criminal record. This hearing requirement "is obviously predicated upon the fact that, under normal circumstances, a trial court would be required to hear evidence prior to rendering its decision in order to make several determinations pursuant to R.C. 2953.52(B)(2)(a) through (d)." *State v. Haney* (Nov. 23, 1999), 10th Dist. No. 99AP-159. Where a trial court has refused to hear evidence before making its decision, this court has reversed a trial court's denial of an application for expungement. See *Dumas* (reversing trial court's denial of application under R.C. 2953.52 where court categorically denied expungement of record involving first- and second-degree felonies); *In re Davidson*, 10th Dist. No. 01AP-1270, 2002-

Ohio-1444 (reversing trial court's denial of application under R.C. 2953.52 and 2953.32 where court indicated, prior to allowing defendant to speak or offer evidence, that evidence was not necessary). See also *State v. Calderon*, 9th Dist. No. 09CA0088-M, 2010-Ohio-2807, ¶10 (reversing trial court's denial of expungement under R.C. 2953.32 for failure to provide "full and fair hearing" where court did not give defendant opportunity to explain her reasons for application); *State v. Smith*, 9th Dist. No. 23717, 2007-Ohio-7055, ¶10 (construing R.C. 2953.32 and stating that "implicit in the requirement to hold a hearing is the requirement to afford [the defendant] the opportunity to be *heard*"). (Emphasis sic.)

{¶14} Here, while the trial court held a hearing, there is no indication from the hearing transcript that the court gave appellant the opportunity to speak or offer evidence before it made its decision. While the court spoke directly to the prosecutor and gave him an opportunity to speak, the court did not extend the same courtesy to appellant. Instead, following the prosecutor's explanation of the state's objection, the court immediately told appellant that he was not entitled to have the record sealed because he had not met his burden and then promptly ended the hearing. By doing so, the court effectively precluded appellant from being heard before it made its decision, thereby denying him the full and fair hearing R.C. 2953.52 requires.

{¶15} Equally troubling, given our precedent, is the confusion concerning the applicable statute. Because a jury found him not guilty of the charge against him, appellant filed an application under R.C. 2953.52 to have the record of his criminal case sealed. The trial court's journal entry, however, states that the "cause came to be heard

upon the application, pursuant to Section 2953.32, Ohio Revised Code, for an order sealing the record" in appellant's criminal case. R.C. 2953.32 provides that a first-time offender may apply to expunge his or her criminal record and requires a court to hold a hearing, gather information, and consider certain interests before ruling on the application.

{¶16} This court has previously considered a decision by a trial court that issued a journal entry containing the same language we have before us here, i.e., the "'cause came to be heard upon the application, pursuant to Section 2953.32, Ohio Revised Code, for an order sealing the record' " in the appellant's criminal case. *Hillman* at ¶12. Despite the absence of a transcript, which we recognized might have shed light on the trial court's reasoning, we relied upon the well-established rule that a court speaks through its journal entries and reversed the trial court's decision to deny an application to seal a record under R.C. 2953.52. We remanded the matter to the trial court for a hearing, consideration of the applicable statute, consideration of the appropriate factors, and expression of the court's findings on the record in some manner.

{¶17} Here, while we have a transcript of the hearing below, it offers no basis for concluding that the court considered and weighed the appropriate factors under R.C. 2953.52. See *Dumas* at ¶8 (stating that R.C. 2953.52 "contains a balancing test in which the trial court must engage"). Rather, the court simply stated that appellant had failed to meet his burden to show a particularized need to support his request.

{¶18} For all these reasons, we conclude that the trial court committed plain error by not providing the full and fair hearing and consideration of interests R.C.

2953.52 requires. Accordingly, we sustain appellant's first assignment of error. Our resolution of the first assignment renders the second and third assignments of error moot.

IV. CONCLUSION

{¶19} In conclusion, we sustain appellant's first assignment of error and render moot appellant's second and third assignments. We reverse the judgment of the Franklin County Court of Common Pleas. We remand this matter to that court with instructions to conduct a hearing as required by R.C. 2953.52, weigh the interests of the parties, make the necessary findings, and express those findings on the record in some manner.

*Judgment reversed;
cause remanded with instructions.*

KLATT and DORRIAN, JJ., concur.
