

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 13AP-124 (C.P.C. No. 12EP10-796)
Scott D. Dominy,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on August 29, 2013

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

Shawn R. Dominy, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, P.J.

{¶ 1} Plaintiff-appellant, the State of Ohio, appeals from a judgment entered by the Franklin County Court of Common Pleas sealing the records of conviction of defendant-appellee, Scott D. Dominy. For the following reasons, we affirm that judgment.

I. Factual and Procedural Background

{¶ 2} In 1998, Dominy entered a guilty plea to one count of attempted trafficking in cocaine, a fourth-degree felony. The trial court found him guilty and sentenced him to a two-year period of community control. In 2012, Dominy filed a motion in the trial court, pursuant to R.C. 2953.32, seeking to have the records of that conviction sealed. The state objected, arguing that Dominy was not eligible to have the records sealed because he had more than one felony and more than one misdemeanor conviction. R.C.

2953.31(A). Specifically, the state noted that, in addition to the felony drug conviction, Dominy also had a disorderly conduct conviction, a fourth-degree misdemeanor, and multiple violations of R.C. 5577.04(A), which regulate the weights of vehicles on public highways (hereinafter referred to as "weight convictions"). Relying on case law from this court, Dominy argued that the weight convictions were traffic-related offenses that do not count as convictions for purposes of determining whether he is eligible to have his records sealed.

{¶ 3} After a hearing, the trial court agreed with Dominy that the weight convictions do not count as convictions to determine his eligibility to have his records sealed. Absent those convictions, the trial court found Dominy to be eligible and granted his request to seal the records of his felony drug conviction.

II. The Appeal

{¶ 4} The state appeals and assigns the following error:

THE TRIAL COURT ERRED WHEN IT GRANTED
DEFENDANT'S APPLICATION FOR SEALING, AS HE WAS
NOT AN "ELIGIBLE OFFENDER."

A. Is Dominy an Eligible Offender to have his Conviction Records Sealed?

{¶ 5} The sealing of records of conviction, like expungment, is an act of grace created by the state, and so is a privilege, not a right. See *State v. Simon*, 87 Ohio St.3d 531, 533 (2000), quoting *State v. Hamilton*, 75 Ohio St.3d 636, 639 (1996). In light of its nature, sealing should be granted only when all requirements for eligibility are met. *Simon* at 533. The state argues that Dominy does not meet the statutory requirements to have his records sealed because he is not an eligible offender.¹ We disagree.

{¶ 6} If an applicant is not an eligible offender, the trial court lacks jurisdiction to grant the application. See *In re Barnes*, 10th Dist. No. 05AP-355, 2005-Ohio-6891, ¶ 12.

¹ Effective September 28, 2012, weeks before Dominy filed his application, various portions of the statutes regarding the sealing of records of conviction were changed. Relevant to this matter is the change effecting who may apply to have records sealed. Former R.C. 2953.32 permitted only a "first offender" to apply to the sentencing court for sealing of a conviction record. The current version of R.C. 2953.32, which applies to Dominy's application, allows an "eligible offender" to apply for the sealing of criminal records. Due to this recent change, most of this court's cases dealing with sealing of records address whether the applicant is a first offender, not an eligible offender. Because the concept, if not the definition, is the same, we will apply those cases to the current version of the statute where appropriate.

As a result, an order sealing the record of one who is not an eligible offender is void for lack of jurisdiction and may be vacated at any time. *Id.* at ¶ 13; *State v. McCoy*, 10th Dist. No. 04AP-121, 2004-Ohio-6726, ¶ 11. Whether an applicant is an eligible offender is an issue of law that we review de novo. *State v. Hoyles*, 10th Dist. No. 08AP-946, 2009-Ohio-4483, ¶ 4.

{¶ 7} As relevant here, an "eligible offender" is "anyone who has been convicted of an offense in this state or any other jurisdiction and who has * * * not more than one felony conviction and one misdemeanor conviction in this state or any other jurisdiction." R.C. 2953.31(A). Dominy concedes that he has one felony conviction and one misdemeanor conviction. Thus, Dominy can have no other convictions in order to qualify as an eligible offender. The state argues that Dominy's weight convictions are additional misdemeanor convictions that disqualify him from being an eligible offender.² We disagree.

{¶ 8} The definition of an eligible offender in R.C. 2953.31(A) also provides that:

For purposes of, and except as otherwise provided in, this division, a conviction for a minor misdemeanor, for a violation of any section in Chapter 4507., 4510., 4511., 4513., or 4549. of the Revised Code, or for a violation of a municipal ordinance that is substantially similar to any section in those chapters is not a conviction. However, a conviction for a violation of section 4511.19, 4511.251, 4549.02, 4549.021, 4549.03, 4549.042, or 4549.62 or sections 4549.41 to 4549.46 of the Revised Code, for a violation of section 4510.11 or 4510.14 of the Revised Code that is based upon the offender's operation of a vehicle during a suspension imposed under section 4511.191 or 4511.196 of the Revised Code, for a violation of a substantially equivalent municipal ordinance, for a felony violation of Title XLV of the Revised Code, or for a violation of a substantially equivalent former law of this state or former municipal ordinance shall be considered a conviction.

{¶ 9} Pursuant to this portion of the statute, certain convictions do not count as convictions for purposes of determining whether an offender is eligible for the sealing of

² We reject the state's argument that Dominy's weight convictions are misdemeanors of the fourth degree pursuant to R.C. 5577.99(C). Dominy violated the weight prohibitions found in R.C. 5577.04(A). Such violations are punished pursuant to R.C. 5577.99(A), not 5577.99(C) as the state contends.

convictions. While convictions under R.C. 5577.04 are not expressly listed, this court in *State v. Black*, 10th Dist. No. 03AP-862, 2004-Ohio-5258, concluded that certain traffic-related convictions, even if not set forth in the statute, do not count as a conviction if they "relate[] better to the Ohio Revised Code chapters representing the excluded convictions than it does to the provisions which count against expungment." *Black* at ¶ 14, quoting *State v. Ellis*, 8th Dist. No. 83207, 2004-Ohio-3108, ¶ 19.

{¶ 10} Convictions that do not count as convictions under the statute include: (1) violations of R.C. Chapters 4507 and 4510, which relate to administrative drivers license concerns; (2) R.C. Chapter 4511, which relates to traffic controls and signs; (3) R.C. Chapter 4513, which relates to vehicle equipment requirements and load limitations; and (4) R.C. Chapter 4549, which generally relates to motor vehicle crimes. On the other hand, the offenses that do count as convictions under the statute are more serious traffic offenses, including: (1) violations of R.C. 4511.19, operation of a vehicle while intoxicated; (2) R.C. 4511.251, street racing; and (3) R.C. 4549.02, 4549.021 and 4549.03, stopping after an accident. They also include serious crimes like: (1) R.C. 4549.042, involving the sale or possession of master car keys for illegal purposes; (2) R.C. 4549.62, vehicle identification number fraud; (3) R.C. 4549.41 through 4549.46, odometer fraud; and (4) R.C. 4510.11 and 4510.14, driving under suspension.

{¶ 11} In *Black*, we concluded that a conviction for driving under a Financial Responsibility Act suspension in violation of R.C. 4507.02 did not count as a conviction because that conviction was "analogous to a traffic offense" and not similar to the convictions listed in the statute that do count as convictions. *Black* at ¶ 12-14. In *In re Mooney*, 10th Dist. No. 12AP-376, 2012-Ohio-5904, we similarly concluded that a conviction for failing to register a vehicle in violation of R.C. 4503.11 did not count as a conviction for purposes of eligibility for sealing. We noted that such conviction was even more administrative in nature than the conviction in *Black*. *Mooney* at ¶ 9.

{¶ 12} Dominy argues that his weight convictions are similar to the convictions that did not count as convictions in *Black* and *Mooney*. We agree, as Dominy's weight convictions have more in common with the convictions that do not count towards eligibility. Those are generally less serious traffic offenses or more administrative types of offenses. The offenses that do count as convictions are much more serious traffic offenses

and more serious crimes involving vehicle fraud. Because Dominy's weight convictions relate better to the Ohio Revised Code chapters representing excluded convictions than they do to the more serious offenses that count as convictions, the trial court did not err when it found that Dominy was an eligible offender.

III. Conclusion

{¶ 13} Dominy is an eligible offender for purposes of the sealing of his records of convictions. Accordingly, we overrule the state's assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and O'GRADY, JJ., concur.
