[Cite as *State v. Hillman,* 2010-Ohio-256.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	No. 09AP-478 (C.P.C. No. 08EP11-665)
Plaintiff-Appellee,	:	
		No. 09AP-479
v.	:	(C.P.C. No. 08EP11-669)
Robert L. Hillman,	:	No. 09AP-480 (C.P.C. No. 08EP11-646)
Defendant-Appellant.	:	
		(REGULAR CALENDAR)
	:	

D E C I S I O N

Rendered on January 28, 2010

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellee.

Robert L. Hillman, pro se.

APPEALS from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} In these consolidated appeals, defendant-appellant, Robert L. Hillman ("appellant"), appeals from the judgments of the Franklin County Court of Common Pleas denying his applications for an order sealing the record regarding multiple criminal charges arising out of five separate cases. For the reasons that follow, we vacate the judgments of the trial court and remand for further proceedings.

{¶2} In 1994, appellant was indicted for one count of breaking and entering in case No. 94CR-3584. At the request of the State of Ohio, the court subsequently entered a nolle prosequi, thereby dismissing the charge, due to the non-appearance of the prosecuting witness. In case No. 94CR-4110, a two-count indictment was filed against appellant. On December 20, 1994, appellant pled guilty to the stipulated lesser-included offense of count two (theft). Count one of that indictment was dismissed. In 1995, appellant was indicted on two separate cases. In the first case, No. 95CR-2298, appellant was indicted for aggravated burglary. Following a jury trial in June 1995, appellant was found not guilty. In the second case, No. 95CR-5414, appellant was indicted for possession of drugs. In April 1996, a nolle prosequi was entered as to that charge. Finally, in 2003, appellant was indicted for one count of receiving stolen property. That charge was later dismissed as well.

{¶3} In 2008, appellant filed three separate applications to seal the official records in the cases cited above. The first application was filed November 12, 2008, pursuant to R.C. 2953.52(A), the statute governing records of dismissals and findings of not guilty, and sought to seal the records pertaining to case No. 94CR-3584.[1] The second application was filed November 20, 2008, pursuant to R.C. 2953.52(A), and sought to seal the records pertaining to case Nos. 95CR-2298, 95CR-5414, and 03CR-3447.[2] The third application was also filed on November 20, 2008 and sought to seal the

[1] Appellant's application to seal the records in this case was filed under case No. 08EP-646. His appeal is filed under case No. 09AP-480.
[2] Appellant's application to seal the records in these cases was filed under case No. 08EP-669. That appeal is filed under case No. 09AP-479.

official records pertaining to case No. 94CR-4110.[3] The form filed on that date regarding case No. 94CR-4110 stated the application was filed pursuant to R.C. 2953.32(A), the statute governing convictions and first offenders. As previously noted, in 94CR-4110, appellant pled guilty to the stipulated lesser-included offense of count two, and count one of that indictment was dismissed. Appellee, State of Ohio ("appellee"), filed objections to all three applications. Appellant filed a response to the objections.

{¶4} The record indicates a hearing was scheduled for March 19, 2009. Both parties agree that a hearing was held on that date regarding appellant's applications, although appellant has not provided this court with a transcript of those proceedings. By entry dated April 27, 2009, the trial court denied all three applications for an order sealing the record, pursuant to R.C. 2953.32. Appellant filed a motion for reconsideration on May 5, 2009. The trial court did not issue a ruling on the motion for reconsideration.

{¶5} Appellant then filed a timely appeal in each case, assigning a single error for our review:

ASSIGNMENT OF ERROR NUMBER ONE

> APPELLANT CONTENDS THAT THE TRIAL COURT ABUSED [ITS] DISCRETION, AND DENIED APPELLANT DUE PROCESS, AND EQUAL PROTECTION OF THE LAW UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHEN IT DENIED A[N] APPLICATION FOR EXPUNGEMENT WITHOUT EXPL[A]NATION, AND USED THE WRONG CRITERIA, AND STATUTE.

{¶6} R.C. 2953.32 governs the sealing of records of convictions. It provides that only a "first offender" is eligible to have his or her record of conviction sealed. It also

[3] Appellant's application to seal the records in this case was filed under case No. 08EP-665. His appeal is filed under case No. 09AP-478.

provides that, in the case of felony convictions, application may be made three years after the offender's final discharge. Upon the filing of such an application to seal, the court must set a hearing date and notify the prosecutor of the hearing, pursuant to R.C. 2953.32(B). The prosecutor then has the opportunity to file an objection to the application prior to the hearing date. Id. The court shall direct a probation officer to make inquiries and written reports concerning the applicant as the court determines is appropriate. Id.

{¶7} In considering the sealing of the record of a conviction, the trial court must do all of the following: (1) determine whether the applicant is a "first offender"; (2) determine whether there are criminal proceedings pending against the applicant; (3) if the applicant is a first offender, determine whether the applicant has been rehabilitated to the court's satisfaction; (4) if the prosecutor has filed an objection, consider the reasons against granting the application as specified in the objection; and (5) weigh the interests of the applicant in having the official records sealed against the legitimate needs of the government to maintain those records, if any. R.C. 2953.32 (C)(1).

{¶8} R.C. 2953.52, on the other hand, governs the sealing of official records for a person who is found not guilty of an offense or who has had a criminal complaint dismissed. Upon the filing of this type of application to seal, the court must also set a hearing date and notify the prosecutor of the hearing, pursuant to R.C. 2953.52(B)(1). The prosecutor then has the opportunity to file an objection to the application prior to the hearing date. Id. Prior to ruling on the application, the court must do all of the following: (1) determine whether the applicant was found not guilty in the case or whether the complaint was dismissed; (2) determine whether there are criminal proceedings pending against the applicant; (3) if an objection was filed by the prosecutor, consider the reasons

against granting the application as noted in the objection; and (4) weigh the interests of the applicant in having the official records sealed against the legitimate needs of the government to maintain those records, if any. R.C. 2953.52 (B)(2).

{¶9} Appellant argues the trial court erred in denying his applications because the court failed to cite to the proper statute in its judgment entries, used the wrong criteria in considering the applications, and failed to provide an explanation for its decisions. Appellant contends the trial court treated all of his applications as applications for sealing the record pursuant to R.C. 2953.32, rather than as applications filed pursuant to R.C. 2953.52.[4]

{¶10} Appellee argues that because appellant has failed to provide this court with a transcript of the proceedings in this matter, appellant has failed to demonstrate an abuse of discretion. Appellee submits that without a transcript, this court must presume the regularity of the proceedings in the trial court and presume the trial court acted within its discretion. Appellee also argues that appellant is ineligible to seal part of the record in case No. 94CR-4110, since he pled guilty to one of the two offenses for which he was indicted under that case number.

{¶11} A trial court's decision to grant or deny a request to seal records is typically reviewed under an abuse of discretion standard. However, when a court's judgment is based upon an erroneous interpretation or application of the law, an abuse of discretion

[4] Although appellant's application in case No. 94CR-4110 was filed using a form for applications to seal records of conviction pursuant to R.C. 2953.32, appellant seems to argue in other filings that all cases were filed pursuant to R.C. 2953.52. Additionally, with respect to case No. 94CR-4110, appellant seems to argue for the sealing of the offense listed in count one, the count that was dismissed, rather than for the sealing of the charge to which he pled guilty. This seems to support appellant's belief (although incorrect) that all applications were filed pursuant to R.C. 2953.52.

standard is not appropriate. Instead, the matter is reviewed applying a de novo standard. *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, ¶6-7.

{¶12} In the cases sub judice, the trial court filed three separate entries (one for each application) denying appellant's requests for an order sealing the records. In expungement case No. 08EP-669, which addresses criminal cases 95CR-2298, 95CR-5414, and 03CR-3447, the trial court's entry, in its entirety, reads as follows:

> This cause came to be heard upon the application, pursuant to Section 2953.32, Ohio Revised Code, for an order sealing the record in Case no: **95CR-2298**.
>
> Said application is hereby Denied.

{¶13} The entry does not address the other two cases filed under that application (Nos. 95CR-5414 and 03CR-3447). The remaining two entries involving the applications filed in case Nos. 94CR-4110 and 94CR-3584 contained identical language denying the applications, with the exception of the case number.

{¶14} Appellant's applications to seal the official records in four of the five cases were filed pursuant to R.C. 2953.52, the statute governing the sealing of official records for a person who is found not guilty of an offense or who has had a criminal complaint dismissed. With the possible exception of case No. 94CR-4110, all of the records appellant seeks to seal involve charges that were either dismissed or for which appellant was found not guilty. Yet, the trial court's judgment entries all state the requests for an order sealing the record came on for hearing pursuant to R.C. 2953.32, which is the statute governing the sealing of records of conviction. Thus, the entries indicate the trial court applied the wrong criteria and the wrong statute in making its determination.

{¶15} It is well-settled law that a court speaks through its journal entries. See *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 1995-Ohio-278; *Gaskins v. Shiplevy*, 76 Ohio St.3d 380, 1996-Ohio-387; *State ex rel. Leadingham v. Schisler*, 4th Dist. No. 02CA2827, 2003-Ohio-7293; *State v. Ellington* (1987), 36 Ohio App.3d 76. Without the transcript, we don't know whether the trial court actually did conduct the appropriate analysis or make the appropriate findings under the correct statute. However, even assuming, arguendo, that the trial court did conduct an analysis on the record using the correct statute, this is still problematic. If a journal entry and the trial judge's opinion are in conflict, the journal entry controls. *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275. Furthermore, where a journalized order and the trial judge's comments from the bench are contradictory, the journalized order controls. *State v. Burnett* (Sept. 18, 1997), 8th Dist. No. 72373, citing *Economy Fire & Cas. Co. v. Craft Gen. Contractors, Inc*. (1982), 7 Ohio App.3d 335. See also *Scarbrough v. Scarbrough* (July 18, 2001), 9th Dist. No. 00CA007743 (a trial court speaks through its journal entry and an oral pronouncement of judgment is not binding).

{¶16} Despite the lack of a transcript, which potentially *could* (but may not) reveal that the trial court based its denial of the applications upon the correct statute, we find the journal entries, which are controlling and which reference the incorrect statute, to be error that is recognizable on appeal. Based upon those citations to the incorrect statute, we cannot simply presume the regularity of the proceedings below, despite appellee's urgings. In *State v. Gilchrist* (Dec. 7, 1994), 9th Dist. No. C.A. 16800, the court of appeals found the trial court had erred in denying the defendant's motion for expungement under R.C. 2953.52 where the judgment entry contained two major errors,

one of which was that it referred to the wrong section of the Ohio Revised Code, claiming that R.C. 2953.32 applied, rather than the correct statute, R.C. 2953.52. This is strikingly similar to the instant case.

{¶17} We further note that several appellate courts have reversed a trial court's decision to deny an application to seal records due to a failure to place the required findings on the record for review. Some have even required those findings to be placed in the journalized judgment entry. In *State v. Haas*, 6th Dist. No. L-04-1315, 2005-Ohio-4350, the appellate court reversed the trial court's denial of the defendant's motion to seal a record of conviction where it could not determine, based upon the record, the trial court's findings or grounds for denying the application. The appellate court ordered the trial court to conduct another hearing, to determine the facts as required by statute, and to also express the facts and reasons for its determination in a judgment entry. See also *City of Youngstown v. Sims* (Oct. 31, 1996), 7th Dist. No. 96 C.A. 26 (After a hearing, the trial judge signed a journal entry which stated "motion for expungement denied." The trial court's judgment was reversed, and the court was ordered to conduct a hearing and determine the facts as required under R.C. 2953.32(C)(1) and (2). The trial court was further ordered to place its findings in a judgment entry.). But see *State v. Smith*, 8th Dist. No. 91853, 2009-Ohio-2380 (trial court's use of a simple entry denying a motion to seal record of conviction not an abuse of discretion where court's reasoning clearly appeared in the transcript of the hearing).

{¶18} Based upon the foregoing, we sustain appellant's single assignment of error. The judgments of the Franklin County Court of Common Pleas are hereby vacated, and these matters are remanded to the trial court with instructions to conduct a hearing

pursuant to the proper statute applicable to each application, to address all cases referenced in each of the applications, to weigh the interests of the parties and make the necessary findings, and to express those findings on the record.

Judgments vacated; causes remanded.

BROWN and SADLER, JJ., concur.

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