

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 15AP-77
 : (C.P.C. No. 14EP-18)
 [J.M.], : (ACCELERATED CALENDAR)
 :
 Defendant-Appellee. :

D E C I S I O N

Rendered on June 30, 2015

Ron O'Brien, Prosecuting Attorney, and *Michael P. Walton*,
for appellant.

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} Plaintiff-appellant, State of Ohio, appeals from a decision of the Franklin County Court of Common Pleas that granted J.M.'s application to seal the record of his 1989 felony conviction for receiving stolen property. The state contends that a failure to timely apply to register a motor vehicle, pursuant to R.C. 4503.11, counts as a conviction for the purposes of determining eligibility to seal records of convictions under R.C. 2953.31. Because we have previously decided the exact issue presented by this case and concluded that a violation of R.C. 4503.11 does not count as a conviction for purposes of R.C. 2953.31, we adhere to the principle of *stare decisis* and affirm the decision of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On January 10, 2014, J.M. filed an application with the Franklin County Court of Common Pleas seeking to seal the records of his felony conviction for receiving

stolen property. J.M. pled guilty to that charge on July 19, 1989 and was sentenced to 18 months in prison, all of which were suspended pending J.M.'s cooperation with the terms of probation for a three-year period. In addition to this conviction, J.M. pled guilty to negligent assault, a third-degree misdemeanor, in 1998 and to a failure to timely apply to renew his vehicle registration in 2013, a fourth-degree misdemeanor.

{¶ 3} The state objected to the application and argued that J.M. was not eligible to have the records sealed because he had too many convictions on his record. The trial court held hearings on the matter on May 29 and October 2, 2014. It granted J.M.'s application by written entry on February 4, 2015. The state now appeals.

II. ASSIGNMENT OF ERROR

{¶ 4} The state advances a single assignment of error for our review:

THE TRIAL COURT LACKED JURISDICTION TO GRANT DEFENDANT'S APPLICATION FOR SEALING, AS HE WAS NOT QUALIFIED AS AN "ELIGIBLE OFFENDER" WITHIN THE MEANING OF R.C. 2953.31(A).

III. DISCUSSION

{¶ 5} Sealing records in Ohio is a two-step process. In the first step, a trial court is called on to determine if a person is eligible. The specific requirements for eligibility vary depending on whether a person is seeking to seal records of convictions and bail forfeitures or seeking to seal records relating to arrests and cases ending in "not guilty" findings, dismissals, and "no bill" verdicts. *Compare* R.C. 2953.32 *with* 2953.52. When an applicant for expungement seeks to seal records of a conviction, he or she must first be determined to be an "eligible offender"; that is, a court must determine whether his or her criminal record reflects a permissible number of convictions, that the conviction(s) sought to be sealed is/are currently eligible to be sealed (based on the time elapsed since the time of final discharge and the nature of the conviction), and that no criminal proceedings are then currently pending against the applicant. *See* R.C. 2953.31(A); 2953.32(A) and (C)(1)(a) and (b).

{¶ 6} R.C. 2953.31(A), as amended by 2012 Am.Sub.S.B. No. 337 ("S.B. No. 337") expanded the number of offenses subject to sealing of the records (also referred to as

"expungement" in some circumstances) in determining whether an applicant is an "eligible offender":

[A]nyone who has been convicted of an offense in this state or any other jurisdiction and ~~who previously or subsequently has not been convicted of the same or a different offense~~ has not more than one felony conviction, not more than two misdemeanor convictions if the convictions are not of the same offense, or not more than one felony conviction and one misdemeanor conviction in this state or any other jurisdiction. When two or more convictions result from or are connected with the same act or result from offenses committed at the same time, they shall be counted as one conviction. When two or three convictions result from the same indictment, information, or complaint, from the same plea of guilty, or from the same official proceeding, and result from related criminal acts that were committed within a three-month period but do not result from the same act or from offenses committed at the same time, they shall be counted as one conviction, provided that a court may decide as provided in division (C)(1)(a) of section 2953.32 of the Revised Code that it is not in the public interest for the two or three convictions to be counted as one conviction.

(Emphasis sic.) S.B. No. 337.

{¶ 7} Under R.C. 2953.32(C)(1)(a), when a trial court reviews an application for the sealing of an adult criminal record, it must determine as a threshold question whether an applicant is an "eligible offender" as is set forth in R.C. 2953.32(A) and 2953.31(A). A court lacks jurisdiction to seal records when an applicant is not an "eligible offender." *State v. Dominy*, 10th Dist. No. 13AP-124, 2013-Ohio-3744, ¶ 6. Whether an applicant is an eligible offender is an issue that we review de novo (although if factual findings are a necessary predicate to applying the law regarding eligibility, we review those for an abuse of discretion). *State v. Tauch*, 10th Dist. No. 13AP-327, 2013-Ohio-5796, ¶ 7.

{¶ 8} Once an applicant has been found to be an eligible offender, the statutes require a court to use its discretion to weigh a number of factors that vary, depending on whether the person seeks to seal records of convictions and bail forfeitures or records relating to arrests and cases ending in dismissals, "not guilty" findings, or "no bill" verdicts. *Compare* R.C. 2953.32 *with* 2953.52. When considering sealing records of a conviction for an eligible offender, a trial court must make statutorily required

determinations of: (1) whether the applicant has been rehabilitated to the satisfaction of the court, (2) whether the reasons, if any, offered by the prosecutor in any written objection against sealing the records are persuasive, and (3) whether the interests of the applicant in having conviction records sealed outweigh the legitimate needs, if any, of the state to maintain those records. R.C. 2953.32(C)(1)(c) through (e). We review a trial court's determination on these issues for abuse of discretion. *Tauch* at ¶ 17.

{¶ 9} If the trial court finds that a person is eligible and using its discretion determines that the facts supporting the other required findings should be construed to favor sealing the records of conviction, the trial court "*shall* order all official records of the case that pertain to the conviction or bail forfeiture sealed." (Emphasis added.) R.C. 2953.32(C)(2). Under S.B. No. 337, if the jurisdictional requirements and discretionary factors are met, a trial court is without authority to refuse to seal the records. Further, the sealing statutes are remedial and are, therefore, to be construed liberally to promote their purpose and assist the parties in obtaining justice. *State ex rel. Gains v. Rossi*, 86 Ohio St.3d 620, 622 (1999), citing R.C. 1.11; *Barker v. State*, 62 Ohio St.2d 35, 42 (1980).

{¶ 10} In this case, the state challenges J.M.'s eligibility based on the number of prior convictions that appear on his record. As relevant to this issue, an "eligible offender" is:

[A]nyone who has been convicted of an offense in this state or any other jurisdiction and who has not more than one felony conviction, not more than two misdemeanor convictions if the convictions are not of the same offense, or not more than one felony conviction and one misdemeanor conviction in this state or any other jurisdiction.¹

R.C. 2953.31(A). The state claims that J.M. does not meet this definition because he has one felony and two misdemeanor convictions. The state contends that he is thus not an eligible offender since the statute only allows him to have "one felony conviction, * * * two misdemeanor convictions, * * * *or* * * * one felony conviction and one misdemeanor conviction." (Emphasis added.) R.C. 2953.31(A).

¹ Effective September 19, 2014, the legislature removed the language "if the convictions are not of the same offense." 2014 Am.Sub.S.B. No. 143. However, because J.M. filed his application in January 2014, the applicable definition still contained this language.

{¶ 11} In the trial court, J.M.'s position is that his fourth-degree misdemeanor conviction for failure to annually apply to register his vehicle, in violation of R.C. 4503.11, does not count as a conviction under R.C. 2953.31. J.M.'s position that R.C. 2953.31 exempts certain classes of conviction when determining the permissible number and levels of offenses that are permitted by law to be sealed.

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.

R.C. 2953.31(A). Although neither R.C. Chapter 4503 nor section 4503.11 is specifically exempted by the sealing of records statute, J.M.'s position that a violation of R.C. 4503.11 is essentially an administrative traffic offense substantially similar to the offenses contemplated in the excluded chapters and, on that basis, should be excluded also.

{¶ 12} J.M.'s position appears to be based on an Eighth District decision, *State v. Ellis*, 8th Dist. No. 83207, 2004-Ohio-3108. In *Ellis*, the Eighth District considered whether driving under a license suspension counted as a conviction for purposes of R.C. 2953.31 and held as follows:

The question is whether the municipal ordinances for driving under suspension are substantially similar to R.C. Chapter 4511, 4513, or 4549, or whether they are substantially similar to R.C. 4511.19, 4511.192, 4511.251, 4549.02, 4549.021, 4549.03, 4549.042, 4549.07, 4549.41, or 4549.46.

Chapters 4511, 4513, and 4549 all involve traffic law. Driving under suspension is essentially a violation of driver's license

law. These types of convictions are substantially similar to other traffic laws and not the type of law found, for example, in driving under the influence, R.C. 4511.19.

We find that a driving under suspension charge is not substantially similar to those laws the statute cites as driving under the influence of alcohol or drugs, street racing, hit and run, vehicle master key possession, or deceptive practices regarding odometer rollback and disclosure. Driving under suspension relates better to the Ohio Revised Code chapters representing the excluded convictions than it does to the provisions which count against expungement.

In the case at bar, appellant's DUS was an administrative violation. Her driving under suspension charge was traffic related, a violation of the Financial Responsibility Act regarding her insurance. Appellant's previous suspensions were traffic related and, therefore, similar to the situations in which expungement applies. In determining whether a driving under suspension offense is analogous to a traffic offense, we look to the underlying basis for the suspension. Here the suspension was based on an administrative violation directly related to the operation of a motor vehicle under the Financial Responsibility Act. As such, the suspension was, in effect, traffic related. Whether a driving under suspension offense under the previous statute meets the criteria of a traffic related offense is dependent on the basis of the underlying suspension.

Id. at ¶ 17-20.

{¶ 13} In *State v. Black*, 10th Dist. No. 03AP-862, 2004-Ohio-5258, this court considered the same question presented in *Ellis*, whether driving under a suspension imposed for a violation of the Financial Responsibility Act was an offense that would disqualify an otherwise eligible person from seeking to seal records. This court found *Ellis* to be persuasive and followed it. *Black* at ¶ 10-14.

{¶ 14} Eight years later, in *In re Mooney*, 10th Dist. No. 12AP-376, 2012-Ohio-5904, this court applied *Black* and *Ellis* in the context of R.C. 4503.11. We held in *Mooney* that failing to register one's vehicle, in violation of R.C. 4503.11, was an offense that is "administrative in nature" (like driving under a Financial Responsibility Act suspension). *Id.* at ¶ 7-9. We held that a violation of R.C. 4503.11 is not of such a nature

as to count as a separate misdemeanor for purposes of determining eligibility under R.C. 2953.31. *Id.*

{¶ 15} Most recently, we considered the *Ellis* line of cases in the context of a violation of R.C. 5577.04(A), which regulates the weights of vehicles on public highways. *Dominy*. In *Dominy* we reasoned as follows:

Pursuant to [R.C. 2953.31(A)], certain convictions do not count as convictions for purposes of determining whether an offender is eligible for the sealing of 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.

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.

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.

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.

Id. at ¶ 9-12. Thus, having decided the precise issue of whether R.C. 4503.11 is a misdemeanor offense that counts for the purposes of determining eligible offender status, we adhere to the principle of stare decisis in reaching our decision to affirm the judgment of the trial court. *Mooney*.

{¶ 16} We note that, prior to our decisions in *Mooney* and *Dominy* and the changes to the law expanding opportunities for sealing of the records of criminal conviction, the Fourth District Court of Appeals, in *State v. Clark*, 4th Dist. No. 11CA8, 2011-Ohio-6354, narrowly read R.C. 2953.31(A) to exempt exactly and only the sections listed in that section. The Fourth District specifically concluded that a violation of R.C. 4503.11 counts as a conviction for the purposes of determining eligibility for the sealing of records of criminal conviction. *Id.* at ¶ 15-20. The two cases for which we observe stare decisis were decided *after* the Fourth District decided *Clark* and *after* the adoption of S.B. No. 337, which expanded access to the sealing of criminal records beginning September 28, 2012. The state has brought this appeal, fully aware of our prior holdings on this very issue and apparently seeks a holding that reflects a different outcome. We find no emergent justification to change our prior course to adopt the holding in *Clark*.

{¶ 17} In addition to noting that *Clark* was decided before the enactment of S.B. No. 337, we note that the strict reading applied by the Fourth District is inconsistent with

law providing that the sealing statutes are remedial and are to be construed liberally to promote their purpose and assist the parties in obtaining justice. *Rossi* at 622, citing R.C. 1.11; *Barker* at 42. The Fourth District's literal reading of R.C. 2953.31 denies access to remedies found in R.C. 2953.31 because of what are essentially administrative, traffic-related mistakes. We prefer to allow the statutory scheme to achieve its designated purpose as we have previously interpreted it, to give eligible offenders who have learned from their mistakes, a second chance. In doing so, we adhere to our prior holdings that a trial court is empowered to find that an administrative, traffic-related offense, such as R.C. 4503.11, is exempt from being counted as a misdemeanor in determining eligible offender status under R.C. 2953.31. *Dominy; Mooney*.

{¶ 18} J.M.'s failure to timely register his car did not count as a criminal conviction for the purposes of determining his eligibility to have his records of criminal conviction sealed under R.C. 2953.31. Thus, J.M. had one felony conviction and one misdemeanor conviction on his record and was, therefore, an eligible offender pursuant to R.C. 2953.31(A). The state's assignment of error is overruled.

{¶ 19} The state requests that we certify to the Supreme Court of Ohio a conflict between our decision today and the decision of the Fourth District Court of Appeals on the identical issue in *Clark*, concerning whether a violation of R.C. 4503.11, concerning failure to register a motor vehicle, a fourth-degree misdemeanor, must be counted as an offense when determining eligible offender status under R.C. 2953.31. While Loc.R. 14 of the Tenth District Court of Appeals requires the filing of a motion, we recognize the conflict as discussed in the state's brief. Based on the state's request in its brief and pursuant to S.Ct.Prac.R. 8.01 and Ohio Constitution, Article IV, Section 3(B)(4), we sua sponte certify the record of this case to the Supreme Court for review and final determination, recognizing that our judgment today is in conflict with the judgment of the Fourth District Court of Appeals in *Clark*, on the same question, that being:

Whether a violation of R.C. 4503.11, concerning failure to register a motor vehicle, a fourth-degree misdemeanor, must be counted as an offense when determining eligible offender status under R.C. 2953.31?

IV. CONCLUSION

{¶ 20} The state's assignment of error is overruled, and we affirm the decision of the Franklin County Court of Common Pleas. Being in conflict with the judgment of the Fourth District Court of Appeals in *Clark*, we hereby certify a conflict pursuant to S.Ct.Prac.R. 8.01 and Ohio Constitution, Article IV, Section 3(B)(4).

*Judgment affirmed;
sua sponte certify a conflict.*

SADLER, J., concurs in judgment only.
DORRIAN, J., concurs in part; dissents in part.

SADLER, J., concurring in judgment only.

{¶ 21} Based solely on the doctrine of stare decisis and the recent holding of this court in *In re Mooney*, 10th Dist. No. 12AP-376, 2012-Ohio-5904, where the precise issue before us was previously decided, I concur with the lead decision in affirming the judgment of the trial court. Additionally, as we did in *Mooney*, I would expressly limit our holding to the facts presented herein.

{¶ 22} Finally, I concur in the decision to sua sponte certify a conflict to the Supreme Court of Ohio.

DORRIAN, J., concurring in part; dissenting in part.

{¶ 23} I respectfully dissent. Given the plain language of the relevant statutes, I would overrule our precedent in *In re Mooney*, 10th Dist. No. 12AP-376, 2012-Ohio-5904, *State v. Black*, 10th Dist. No. 03AP-862, 2004-Ohio-5258, and *State v. Dominy*, 10th Dist. No. 13AP-124, 2013-Ohio-3744.

{¶ 24} I concur, however, with the sua sponte certification of this case to the Supreme Court of Ohio to determine a conflict between this decision and the decision of the Fourth District Court of Appeals in *State v. Clark*, 4th Dist. No. 11CA8, 2011-Ohio-6354.
