

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
WARREN COUNTY

MICHELLE D. SCHUSSHEIM n.k.a. HENNEMAN,	:	
	:	CASE NO. CA2011-07-078
Petitioner-Appellee,	:	
	:	<u>OPINION</u>
	:	6/11/2012
- vs -	:	
	:	
ALAN C. SCHUSSHEIM,	:	
	:	
Respondent-Appellant.	:	

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS  
DOMESTIC RELATIONS DIVISION  
Case No. 09DV4460

Michelle D. Schussheim n.k.a. Henneman, 4354 Marival Drive, Mason, Ohio 45040,  
petitioner-appellee, pro se

Jerry H. Shade, 226 Reading Road, Mason, Ohio 45040, for respondent-appellant

**RINGLAND, J.**

{¶ 1} Respondent-appellant, Alan Schussheim, appeals a decision of the Warren County Court of Common Pleas, Domestic Relations Division, denying his motion to expunge and seal the record of a civil protection order (CPO) issued against him and later dismissed.

{¶ 2} On July 13, 2009, petitioner-appellee, Michelle Henneman (f.k.a. Michelle

Schussheim), sought a CPO against appellant, her then husband. An ex parte CPO was issued against appellant that same day. A week later, Henneman filed for divorce. She subsequently moved to dismiss the CPO. On August 14, 2009, the trial court dismissed the CPO. The parties eventually divorced and co-parent their two minor children under a shared parenting agreement. Appellant was never charged with or convicted of domestic violence in connection with this matter or otherwise.

{¶ 3} In April 2011, appellant moved the trial court to expunge and seal the record of the CPO. Appellant asserted that the CPO was the result of a domestic quarrel; there was no compelling state interest to maintain the record of the CPO against him, an "upstanding citizen" with "an unblemished criminal record;" and he was afraid the record of the CPO could have adverse effects on his employment with regard to future promotions, transfers, and/or income. Appellant is a section manager for Procter & Gamble. Henneman filed an affidavit in support of appellant's motion.

{¶ 4} Following a brief hearing on the motion, the magistrate denied appellant's motion. The magistrate first stated that while there were two statutory methods to expunge or seal criminal records, there was no statutory authority to expunge or seal CPO records. The magistrate then noted that in 1981, the Ohio Supreme Court established the doctrine of judicial expungement, and that the doctrine and its balancing test were applied by the Second Appellate District to a motion to expunge and seal the record of a CPO. Turning to appellant's motion, the magistrate first found that the Twelfth Appellate District has never held that courts have the authority to seal CPO records. The magistrate then found that even under the supreme court's balancing test, appellant's motion failed as "there has been no proof presented that [appellant] has had any negative consequences from the record of the ex parte [CPO] and accompanying dismissal." Appellant filed objections to the magistrate's decision.

{¶ 5} On July 13, 2011, the trial court overruled the objections and denied appellant's motion to expunge and seal the record of the CPO. The trial court found that appellant's failure to present evidence that his employment (1) had been affected or directly harmed by the record of the CPO, and/or (2) would be hindered or terminated under a company policy as a result of the CPO, was detrimental to his motion.

{¶ 6} Appellant appeals, raising three assignments of error.

{¶ 7} Assignment of Error No. 1:

{¶ 8} THE TRIAL COURT HAD AUTHORITY UNDER THE CONSTITUTION AND DECISION OF THE OHIO SUPREME COURT TO GRANT THE REQUESTED JUDICIAL EXPUNGEMENT OF A DOMESTIC RELATIONS EX-PARTE CPO, AND THE TRIAL COURT FAILED TO CONSIDER THE APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND PRIVACY.

{¶ 9} Appellant argues that even though there is no statutory authority to expunge and seal CPO records, courts have the authority to judicially expunge and seal such records following the Ohio Supreme Court's 1981 decision in *Pepper Pike v. Doe*, 66 Ohio St.2d 374 (1981). We disagree.

{¶ 10} The CPO was issued against appellant pursuant to R.C. 3113.31. It is undisputed there is no statutory authority in Ohio to expunge and seal CPO records, or more generally, civil (or noncriminal) records. By contrast, there are currently two statutory methods to expunge and seal criminal records: R.C. 2953.32, which allows convicted first-time offenders to seek the expungement and sealing of their conviction records, and R.C. 2953.52, which allows for the expungement and sealing of a defendant's criminal records if the defendant was found not guilty, the case was dismissed, or a grand jury returned a no bill.

{¶ 11} *Pepper Pike* dealt with the question of whether a defendant charged with but

not convicted of a criminal offense had a right to a judicial expungement of his criminal record. *Pepper Pike*, 66 Ohio St.2d at 376; *State v. Ruffle*, 12th Dist. No. CA96-12-124, 1997 WL 401574, \*1 (July 14, 1997). The supreme court held that:

The trial courts in Ohio have jurisdiction to order expungement and sealing of records in a criminal case where the charges are dismissed with prejudice prior to trial by the party initiating the proceedings.

The trial courts have authority to order expungement where such unusual and exceptional circumstances make it appropriate to exercise jurisdiction over the matter. When exercising this power, the court should use a balancing test which weighs the privacy interest of the defendant against the government's legitimate need to maintain records of criminal proceedings.

*Pepper Pike* at paragraphs one and two of the syllabus.

{¶ 12} In the opinion, the supreme court stated that "even absent statutory authorization, trial courts in unusual and exceptional circumstances expunge criminal records out of a concern for the preservation of the privacy interest." *Id.* at 376. The court further stated that when exercising judicial expungement, trial courts "should use a balancing test, which weighs the interest of the accused in his good name and right to be free from unwarranted punishment against the legitimate need of government to maintain records." *Id.* at 377. The court cautioned, however, that this judicial power should not be exercised as a matter of course. *Id.* (emphasizing that its holding was not to be construed as a *carte blanche* for every defendant acquitted of criminal charges in Ohio courts).

{¶ 13} At the time *Pepper Pike* was decided, no statutory procedure existed for expunging criminal records in cases where offenders were charged with crimes but were found not guilty or where the charges were dismissed. Statutory expungement was limited only to persons who had been convicted of a criminal offense. As a result, the supreme court fashioned the foregoing remedy in *Pepper Pike*. Then, in 1984, the General Assembly enacted R.C. 2953.52 which provides for the sealing of criminal records in cases where the

offender was acquitted or charges were dismissed. R.C. 2953.52 requires trial courts to weigh the interest of the accused in having his criminal records sealed against the legitimate need of the government to maintain the records. R.C. 2953.52(B)(2)(d).

{¶ 14} In 2006, the Second Appellate District applied the doctrine of judicial expungement to a motion to seal the record of a CPO. *Rieger v. Rieger*, 165 Ohio App.3d 454, 2006-Ohio-482 (2d Dist.). In that case, Joseph Rieger consented to the issuance of a CPO (which was sought by his former wife). One year after the CPO expired, Mr. Rieger moved to seal the record of the CPO on the ground its accessibility on the Internet was preventing him from obtaining a better job. The trial court denied the motion. On appeal, the Second Appellate District reversed the trial court's decision and remanded the case on the basis of *Pepper Pike*.

{¶ 15} The appellate court first quoted a significant portion of the decision in *Pepper Pike* which (1) briefly stated that the basis for judicial expungement is the constitutional right of privacy, (2) explained the balancing test, and (3) emphasized that its holding was not a carte blanche for every defendant acquitted of criminal charges in Ohio courts. *Rieger* at 461, quoting *Pepper Pike*, 66 Ohio St.2d at 377. The appellate court then held:

As a matter of public policy, we think it is ultimately for the legislature to provide a remedy for the problem presented here. In 1984, the legislature provided a remedy for the problem the court faced in *Pepper Pike*. See R.C. 2953.52. We conclude, however, that the trial court erred in two respects: (1) in concluding that it required statutory authorization to seal the record of the CPO, and (2) in performing an incorrect balancing test, having assumed *arguendo* the authority to judicially expunge the record of the CPO.

(Emphasis sic.) *Rieger* at ¶ 47.

{¶ 16} While we are sympathetic to appellant's plight, we decline to extend the holding of *Pepper Pike* to include non-criminal cases or proceedings. As stated earlier, there are no statutory provisions in Ohio providing for the expungement and sealing of records of a CPO,

or more generally, of civil (or noncriminal) records. "The law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and its text, including footnotes." S.Ct.R.Rep.Op. 1(B)(1). The second paragraph of the syllabus, which sets forth the doctrine of judicial expungement and its balancing test, cannot be read in isolation from the first paragraph of the syllabus or from the opinion itself which is plainly and solely directed to individuals with criminal charges and criminal records. See *In re Hashim*, 6th Dist. No. L-00-1064, 2000 WL 1161890 (Aug. 18, 2000); *State v. Netter*, 64 Ohio App.3d 322 (4th Dist.1989); *Pepper Pike*, 66 Ohio St.2d at paragraphs one and two of the syllabus and 375-378 (regularly using the term "criminal" throughout the opinion).

{¶ 17} The courts must strive to set aside what the law should be or what they would like it to be, and give deference to the legislature. If a remedy is needed (and we believe it is needed in this case), the legislature, not the courts, should address it. Assuming that the supreme court's 1981 decision in *Pepper Pike* is somehow on point in its result, this pre-statutory expungement decision was an attempt to fashion a result-oriented remedy that will not withstand our current state supreme court's scrutiny concerning judicial restraint. See Stokes, *Judicial Restraint and the Presumption of Constitutionality*, 35 U.Tol.L.Rev. 347 (2003).

{¶ 18} We therefore decline to apply the doctrine of judicial expungement as established in *Pepper Pike*, a decision solely involving a criminal case, to the case at bar, a civil case involving a CPO. Appellant's first assignment of error is accordingly overruled.

{¶ 19} Assignment of Error No. 2:

{¶ 20} THE TRIAL COURT ERRED IN ITS APPLICATION OF THE *PEPPER PIKE V. DOE* BALANCING TEST. "NEGATIVE CONSEQUENCES" IS NOT REQUIRED.

{¶ 21} Assignment of Error No. 3:

{¶ 22} THE TRIAL COURT FAILED TO CONSIDER THE COMPLETE LACK OF THE

GOVERNMENT'S INTEREST IN MAINTAINING REORDS. [SIC]

{¶ 23} In light of our holding under the first assignment of error, we find it unnecessary to reach the issues presented in appellant's second and third assignments of error. Accordingly, the second and third assignments of error are moot. However, even assuming arguendo that *Pepper Pike* is on point and controlling, and judicial philosophy aside, there was insufficient evidence provided to allow the trial court to establish appellant's "right to be free of unwarranted punishment" under the balancing test of *Pepper Pike*. Whatever "punishment" the supreme court was alluding to is presumably criminal and is absent in this stage of appellant's ex parte order. Given the evidence presented in the record, the calamities suggested by appellant are simply speculative and conjectural.

{¶ 24} Judgment affirmed.

HENDRICKSON, P.J., concurs.

PIPER, J., dissents.

**PIPER, J., dissenting.**

### **The Seriousness of Domestic Violence Allegations**

{¶ 25} "State statutes need to protect women and children during and after the break-up of relationships because of their continuing, and often heightened, vulnerability to violence." *Felton v. Felton*, 79 Ohio St.3d 34, 1997-Ohio-302, quoting Klein & Orloff, *Providing Legal Protection to Battered Women: An Analysis of State Statutes and Case Law* (1993), 21 Hofstra L.Rev. 801, 816. Thus, "[i]n Ohio, the domestic violence statutes grant police and courts great authority to enforce protection orders, and violations of those protection orders incur harsh penalties." *Felton* at 45. Advanced societies take intra-family violence seriously and therefore "the Ohio legislature has passed one of the most

comprehensive set of statutes authorizing Civil Protection Orders to combat domestic violence. \* \* \* The legislation that provides for Civil Protection Orders is responsive to the immediate needs of the victims and provides a necessary alternative and supplement to criminal legal remedies." *Id.*, quoting Voris, *The Domestic Violence Civil Protection Order and the Role of the Court* (1990), 24 Akron L.Rev. 423, 432.

The General Assembly enacted the domestic violence statutes specifically to criminalize those activities commonly known as domestic violence and to authorize a court to issue protection orders designed to ensure the safety and protection of a complainant in a domestic violence case. Accordingly, R.C. 3113.31 authorizes a court in an ex parte hearing to issue a temporary protection order when the court finds there to be an "[i]mmediate and present danger of domestic violence to the family or household member." R.C. 3113.31(D).

*Id.* at 38. (Internal citations omitted.)

{¶ 26} Society does not condone violence in general and violence within the family unit is particularly disturbing. Therefore, ex parte proceedings make it easy and convenient for "victims" to present criminal domestic violence accusations. There is no denying that the stigma of such allegations can be damaging and onerous.

#### **When Statutory Expungement is Absent, Unusual and Exceptional Circumstances May Require Judicial Expungement**

{¶ 27} The majority opinion acknowledges the holding in *Pepper Pike* which establishes that a judge has the authority or power to order expungement, or seal records, once a balancing test has been performed to determine whether the individual's privacy interest outweighs the government's legitimate need to maintain the records. The majority opinion believes that because *Pepper Pike* was a criminal proceeding such judicial authority can only be exercised in a criminal proceeding.

{¶ 28} In *Pepper Pike*, a woman was acquitted and she subsequently requested her records be sealed. The Supreme Court determined the need for a balancing test which



weighs the interest of the accused and his or her good name and right to be free from unwarranted penalty against the legitimate need of government to maintain records. The Supreme Court stated in *Pepper Pike* "[t]here can be no compelling state interest or reason to maintain the records of the criminal proceeding against defendants like appellant here, a school teacher with a previously unblemished reputation in her community." 66 Ohio St.2d at 377.

{¶ 29} The majority opinion offers no logic as to why the accused in a criminal proceeding may be heard on the issue and have the matter "weighed" but yet an accused in a unilateral, ex parte civil protection proceeding that is subsequently dismissed has no such remedy. In the absence of statutory procedure permitting an expungement or sealing of records, courts have routinely provided a remedy in unusual and exceptional circumstances, under the principle of "inherent power" or "inherent authority." *State v. Stadler*, 14 Ohio App.3d 10, 11 (9th Dist.1983), superseded by statute on other grounds; see also *Hari v. Hari*, 2nd Dist. No. 21448, 2007-Ohio-324, ¶ 10.

### **Judicial Expungement Springs From the Constitution Not the Legislature**

{¶ 30} The effect of the majority opinion is that the judiciary is paralyzed from providing a remedy because the legislature has failed to provide a statutory framework in situations like the one before us. The inherent authority of the judiciary, however, springs from fundamental constitutional principles, not the legislature.

Judicial expungement is a *constitutional* remedy, and it is elementary that although the legislature has freedom to provide greater protections, it has no authority to place limits on rights guaranteed under the Constitution. The legislature does not control the meaning and scope of constitutional guarantees, and it may not limit the ability of the judiciary to perform its essential functions.

*In re Application to Seal Records of No Bill*, 131 Ohio App.3d 399, 403 (3rd Dist.1999).

(Emphasis in original.) (Internal citations omitted.)

{¶ 31} "[T]he exercise of the court's inherent authority should be done on a case by case basis." *Bound v. Biscotti*, 76 Ohio Misc.2d 6, \*11 (M.C.1995). Yet, we must remain mindful that,

due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Rather, it is "flexible and calls for such procedural protections as a particular situation demands." Due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty to the judicial process must be given a meaningful opportunity to be heard.

*Little v. Streater*, 452 U.S. 1, 5 101 S.Ct. 2202 (1981). (Internal citations omitted.) While acknowledging that some courts order expungement or sealing of records in appropriate circumstances out of concern for due process rights, the Ohio Supreme Court expressed that "[t]he basis for such expungement, in our view, is a constitutional right to privacy." *Pepper Pike*, 66 Ohio St.2d at 377, citing *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, (1973); *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507 (1971); and *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965). In applying the constitutional right to privacy, the cases cited by the Ohio Supreme Court are *civil* cases. In other words, the Ohio Supreme Court has not distinguished a different constitutional right to privacy as applicable to criminal proceedings than the right to privacy found in civil proceedings.

{¶ 32} Permitting the court to balance the various interests provides a person the opportunity to be heard while also maintaining governmental interests in keeping records public. The public's need to know is an important, legitimate governmental consideration. Additionally, a person's public employment may be a factor in weighing that person's right to privacy. But the potential adverse and onerous effect of keeping records open to the public where there has been no formal charge substantiated may also warrant being weighed. This balancing process rightfully should include the allegations of a criminal nature interwoven into

a civil ex parte proceeding.

{¶ 33} The allegation before us is one of domestic violence which is a criminal accusation regardless if the proceeding is labeled criminal, civil, or quasi-criminal. Although the affidavit seeking a CPO is not evidence, the mere allegations can have extremely serious and severe effects. When discussing the appropriateness of judicial expungement, the Supreme Court specifically said "where there is no compelling state interest, or reason to retain the judicial and police records, *such as where they arise from a domestic quarrel* and constitute vindictive use of our courts, the accused is entitled to this remedy." *Pepper Pike*, 66 Ohio St.2d at 377. (Emphasis added.) The ex parte CPO, being reviewed here, was dismissed and arose from a domestic quarrel.

{¶ 34} With the facts before us, there is no legitimate need of government which outweighs appellant's interest in his good name being preserved without suffering the negative and severe stigmatization of domestic violence accusations. Appellant's ex-wife testified on his behalf and supports the records being sealed. The majority opinion applies the constitutional principles in *Pepper Pike* so narrowly as to deny appellant the process he is due and an opportunity to be heard on his request for a potential remedy. Both parties are desirous of "privacy" being applied to the circumstances that arose from their domestic quarrel, which occurred a long time ago.

#### **Other Courts Have Used Judicial Expungement**

{¶ 35} Records other than those possessed by law enforcement may contain allegations which implicate the accused in conduct of a criminal nature. In *State v. S.R.*, 63 Ohio St.3d 590, 596 (1992), the Ohio Supreme Court acknowledged the children services records retained by the Children Services Board should not always be retained. "There may be strong reasons to permit the sealing of records kept by CSB which implicate the accused in criminal conduct." *Id.* at 596.

{¶ 36} In *Rieger v. Rieger*, 165 Ohio App.3d 454, 2006-Ohio-482 (2nd Dist.), the court considered the appellant's request to seal the civil protection order which had expired. The court of appeals concluded that while there was a preference for the legislature to provide a remedy for the problem, the trial court nevertheless erred in concluding that it required statutory authorization to seal records pertaining to the CPO. The court noted that an allegation of domestic violence was a necessary predicate to the issuance of a protective order and thus instructed the trial court to engage in the weighing process of the various interests involved to determine whether the circumstances were unusual and exceptional such that sealing the record was required.

### **Conclusion**

{¶ 37} Even when records are expunged or sealed, *Pepper Pike* made it clear that those records are still available for official law enforcement purposes. Furthermore, previous decisions have acknowledged that even records sealed can be unsealed. See *State ex rel. Highlander v. Ruddick*, 103 Ohio St.3d 370, 2004-Ohio-4952; *Davis v. Cincinnati Enquirer*, 164 Ohio App.3d 36, 2005-Ohio 5719 (1st Dist.). The exceptions that permit nondisclosure within the public records act, R.C. 149.43, are applicable in both civil and criminal proceedings. Furthermore, investigatory records belonging to law enforcement have a specific exception which applies in criminal, quasi criminal, civil, or administrative proceedings which exempts the disclosure of information pertaining to an uncharged suspect. See R.C. 149.43(A)(2)(a).

{¶ 38} Therefore, a judicial remedy springing from constitutional principles should provide no less. The accused in an ex parte civil protection order which is dismissed, or unsubstantiated, should at least have the due process of having his privacy interest weighed by the court, particularly where the allegations arose from a domestic quarrel where the parties subsequently divorced and are currently raising their children together and the party

who originally initiated the ex parte proceedings supports the sealing of the records. The inherent authority of the trial court to administer justice should be permitted to operate, particularly where the legislature has failed to act.