

**IN THE SUPREME COURT OF OHIO
2014**

STATE OF OHIO,

Case No. 2014-990

Plaintiff-Appellant,

-vs-

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth Appellate District,

Court of Appeals
Case No. 100522

V.M.D.,

Defendant-Appellee.

**BRIEF OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTOR RON O'BRIEN
IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO**

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STATEMENT OF AMICUS INTEREST

Franklin County Prosecutor Ron O'Brien offers this amicus brief in support of plaintiff-appellant State of Ohio. Each year, the Franklin County Prosecutor's Office prosecutes thousands of criminal cases and responds to hundreds of applications requesting to seal criminal convictions. Franklin County Prosecutor Ron O'Brien therefore has a strong interest in issues related to maintaining public access to criminal convictions and correctly resolving a defendant's request to seal a criminal conviction. Indeed, as pertinent here, the Franklin County Prosecutor has an appeal pending before the Tenth District Court of Appeals, where the trial court followed the reasoning articulated by the Cuyahoga County Court of Appeals in this case and granted an application to seal a conviction for attempted robbery, in contravention of persuasive precedent in the appellate district. The Franklin County Prosecutor has a compelling interest in the correct resolution of the issue raised in this case. Therefore, in the interest of aiding this Court's review of this appeal from Cuyahoga County, Prosecutor Ron O'Brien offers this brief in support of the State of Ohio.

STATEMENT OF THE CASE AND FACTS

Amicus accepts the statement of the case and facts set forth in the Merit Brief of Appellant-State of Ohio.

PROPOSITION OF LAW

**OHIO COURTS ARE PROHIBITED FROM GRANTING
MOTIONS TO EXPUNGE AND SEAL RECORDS OF
CRIMINAL CONVICTIONS THAT ARE OFFENSES OF
VIOLENCE.**

"Expungement is an act of grace created by the state, and so is a privilege, not a right."
State v. Simon, 87 Ohio St.3d 531, 533, 721 N.E.2d 1041 (2000) (internal quotation marks omitted).
"[T]he government possesses a substantial interest in ensuring that expungement is granted only to

those who are eligible.” *State v. Hamilton*, 75 Ohio St.3d 636, 640, 665 N.E.2d 669 (1996). Consequently, “[e]xpungement should be granted only when all requirements for eligibility are met.” *Simon*, 87 Ohio St.3d at 533, citing *Hamilton*, 75 Ohio St.3d at 640; *see also State v. Williams*, 10th Dist. No. 10AP-166, 2010-Ohio-4520, ¶6, citing *Simon*. Whether an offender meets the requirements for eligibility under R.C. 2953.32 is an issue of law for a reviewing court to decide de novo. *See Williams*, at ¶¶6-7; *see also State v. Lovelace*, 2012-Ohio-3797, 975 N.E.2d 567 (1st Dist. 2012) (court lacks authority to grant application to seal conviction of unqualified applicant).

An applicant’s eligibility to seal the record of a criminal conviction is governed by R.C. 2953.31, 2953.32 and 2953.36. The applicant must be an eligible offender, as defined in R.C. 2953.31(A), must have no pending criminal proceedings, and must have complied with the statutory waiting period. R.C. 2953.32(A) and (C). Additionally, the conviction to be sealed must not fall within any category in R.C. 2953.36.

To be eligible, an applicant must be [an ‘eligible’ offender’ as defined in R.C. 2953.31(A). Moreover the offense must be subject to expungement and not excluded by R.C. 2953.36. Additionally, the application must not be filed until the time set by R.C. 2953.32(A)(1) has expired. Unless the application meets all of these requirements, the trial court lacks jurisdiction to grant an expungement.

State v. Reed, 10th Dist. No. 05AP-335, 2005-Ohio-6251, ¶8.

Yet, even if an applicant meets the criteria under R.C. 2953.32(A) and (C), that applicant may be ineligible if the conviction is for an offense specified under R.C. 2953.36. Indeed, as this Court has stated: “R.C. 2953.36 provides that the conviction records of some offenders cannot be sealed.” *Simon*, 87 Ohio St.3d at 533. Identified as “Exceptions to preceding sections,” R.C. 2953.36 states that “Sections 2953.31 to 2953.35 of the Revised Code do not apply to any of the following.” The section then identifies numerous offenses that may not be sealed. Thus, even when an applicant is an eligible offender, if the conviction falls under R.C.

2953.36, it may not be sealed. *See Simon*, 87 Ohio St.3d at 533; *State v. Miller*, 10th Dist. No. 06AP-192, 2006-Ohio-5954, ¶19; *see also State v. Pierce*, 10th Dist. No. 06AP-931, 2007-Ohio-1708, and *State v. Barnett*, 8th Dist. No. 78941, 2001 WL 563270 (May 24, 2001).

And the burden is on the applicant, as movant, to show all statutory requirements have been met and to establish a particularized need to have the records sealed. *See State v. Brown*, 10th Dist. No. 07AP-255, 2007-Ohio-5016, ¶4. The defendant’s application is insufficient to meet this burden. *State v. Evans*, 10th Dist. No. 13AP-158, 2013-Ohio-3891, ¶11 (citations omitted).

An offender who has been convicted of an offense of violence may not seal his criminal conviction, under R.C. 2953.36(C), which provides:

Sections 2953.31 to 2953.35 of the Revised Code do not apply to any of the following:

* * *

(C) Convictions of an offense of violence when the offense is a misdemeanor of the first degree or a felony and when the offense is not a violation of section 2917.03 of the Revised Code and is not a violation of section 2903.13, 2917.01 or 2917.31 of the Revised Code that is a misdemeanor of the first degree;

Thus, with four stated exceptions, an “offense of violence” which is a felony or a first-degree misdemeanor may not be sealed.

“Offense of violence” is defined in R.C. 2901.01(A)(9), and that definition applies to the sealing statutes. R.C. 2901.01(A)(9) defines “offense of violence” for purposes of the entire “Revised Code.” R.C. 2901.01 (“As used in the Revised Code”). As stated in R.C. 1.01, “All statutes of a permanent and general nature of the state as revised and consolidated into general provisions, titles, chapters, and sections shall be known and designated as the ‘Revised Code’ * * *.” The definition of “offenses of violence” for purposes of the “Revised Code” therefore extends to all titles and chapters in the Revised Code as a whole, including R.C. 2953.36 and its

exclusionary language regarding “offenses of violence.”

Here, the Eighth District committed fundamental error as it failed to recognize that an attempted offense of violence is still an “offense of violence” as a matter of law. Specifically, R.C. 2901.01(A)(9) provides, in pertinent part:

(9) “Offense of violence” means any of the following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.15, 2903.21, 2903.211, 2903.22, 2905.01, 2905.02, 2905.11, 2905.32, 2907.02, 2907.03, 2907.05, 2909.02, 2909.03, 2909.24, 2911.01, 2911.02, 2911.11, 2917.01, 2917.02, 2917.03, 2917.31, 2919.25, 2921.03, 2921.04, 2921.34, or 2923.161, of division (A)(1), (2), or (3) of section 2911.12, or of division (B)(1), (2), (3), or (4) of section 2919.22 of the Revised Code or felonious sexual penetration in violation of former section 2907.12 of the Revised Code;

* * *

(d) *A conspiracy or attempt to commit, or complicity in committing, any offense under division (A)(9)(a), (b), or (c) of this section.*

(Emphasis added). Thus, R.C. 2901.01(A)(9)(d) unambiguously provides that “[a] conspiracy or attempt to commit, or complicity in committing any offense under division (A)(9)(a), (b), or (c) of this section” is an “offense of violence”, and, as pertinent here, attempted robbery is categorically an “offense of violence,” regardless of the underlying facts. “[U]nder R.C. 2901.01(A)(9)(d), an attempt to commit an offense of violence also meets the statutory definition of offense of violence.” *Evans*, 2014-Ohio-2081, ¶15. Because attempted robbery is an offense of violence, it may not be sealed.

The Tenth District Court of Appeals has followed a different approach from the analysis contained in the instant case for determining whether an offense is an offense of violence and excluded from the sealing provisions pursuant to R.C. 2953.36(C). The Tenth District Court of Appeals’ well-reasoned analysis presents the correct analysis. *See Miller*, 2006-Ohio-5954;

State v. Glass, 10th Dist. No. 10AP-155, 2010-Ohio-4954; *State v. Lawson*, 10th Dist. No. 12AP-771, 2013-Ohio-2111.

In *Miller*, the Tenth District considered the defendant's claim that a conviction for menacing by stalking could be sealed. The defendant acknowledged that the offense was included within the statutory definition of "offense of violence," but argued that it should not be excluded from sealing under R.C. 2953.36(C), because the defendant did not commit a physically violent offense. The court of appeals rejected this claim, stating:

{¶9} "The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 394, 2006-Ohio-943, quoting *BedRoc Ltd., LLC v. United States* (2004), 541 U.S. 176, 124 S.Ct. 1587, 1593, quoting *Connecticut Natl. Bank v. Germain* (1992), 503 U.S. 249, 253-254, 112 S.Ct. 1146. Thus, it is the duty of the court to give effect to the words used, not to delete words used or to insert words not used. *Erb v. Erb* (2001), 91 Ohio St.3d 503, 507, citing *Cleveland Elec. Illum. Co. v. Cleveland* (1988), 37 Ohio St.3d 50, paragraph three of the syllabus. As such, if the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary. *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543.

{¶10} A review of R.C. 2901(A)(9)(a) discloses that it is not ambiguous and needs no interpretation. The statute expressly includes a violation of R.C. 2903.211 as an "offense of violence," and does not differentiate between conduct causing physical harm and conduct causing mental distress. Since the General Assembly did not make that distinction, neither shall we. To accept *Miller's* argument would require this court to read words into the statute that the General Assembly did not include, and contradict the plain meaning of the language it chose to employ. This we decline to do. See, e.g., *City of Youngstown v. Garcia*, Mahoning App. No. 05 MA 47, 2005-Ohio-7079, at ¶22 ("Here, the legislature enacted R.C. 2953.36(C) which sets forth a restriction on the sealing of a record for 'an offense of violence.' The appellant has been found guilty of an offense statutorily categorized as 'an offense of violence.' There is no inherent authority for a trial court to do anything but follow the directive of law enacted by the general assembly. Accordingly, the mandates of R.C. 2953.36(C) must be followed without exception.").

Miller, 2006-Ohio-5954; see also *Glass*, 2010-Ohio-4954 (following *Miller*).

Likewise, in *Lawson*, the court rejected the defendant's multiple challenges to the trial court's decision denying the defendant's application to seal her conviction for menacing by stalking, because it was an "offense of violence" as defined in R.C. 2901.01(A)(9)(a). The court of appeals began its analysis by noting that "offense of violence" is not defined in R.C. 2953.31 to 2953.36. Nonetheless, the definition of "offense of violence" contained in R.C. 2901.01 applies when that term is used in the Ohio Revised Code. *Id.* at ¶9. The court of appeals also stated, "[W]e have previously recognized that R.C. 2901.01(A)(9)(a) is not ambiguous and needs no interpretation." *Id.* at ¶14 (citation omitted). Because the General Assembly specifically defined the term "offense of violence" for purposes of interpreting the Revised Code, and because dictionary definitions of the word 'violence' "do not supersede or invalidate the *wholly unambiguous specific statutory definition* of 'offense of violence'", the appellate court rejected all of the defendant's challenges. *Id.* (emphasis added). Accordingly, given the clear and unambiguous definition of "offense of violence," contained in R.C. 2901.01(A)(9)(a), which specifically includes an attempt to commit an offense of violence within the definition, R.C. 2901.01(A)(9)(d), and which applies to the sealing provisions contained in R.C. 2953.31 to 2953.35, the Eighth District Court of Appeals' conclusion that attempted robbery is not an offense of violence and may be sealed, is incorrect and must be reversed.

The role of the judiciary is to interpret legislation, and "[t]he primary goal in construing a statute is to ascertain and give effect to the intent of the legislature." *State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 2009-Ohio-2610, 910 N.E.2d 432, ¶15. To determine the General Assembly's intent, "the court first looks to the language in the statute and the purpose to be accomplished." *State v. S.R.*, 63 Ohio St.3d 590, 595, 589 N.E.2d 1319 (1992), citing *Henry v. Cent. Natl. Bank*, 16 Ohio St.2d 16, 242 N.E.2d 342 (1968),

paragraph one of the syllabus. "Where the meaning of the statute is clear and definite, it must be applied as written," but "where the words are ambiguous and are subject to varying interpretations, further interpretation is necessary." *State v. Chappell*, 127 Ohio St.3d 376, 2010-Ohio-5991, 939 N.E.2d 1234, ¶ 16, citing *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 40, 741 N. E.2d 121 (2001).

Courts must honor the General Assembly's plain meaning because the General Assembly has plenary law-making authority. As stated in *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, 941 N.E.2d 745:

{¶ 10} The General Assembly has plenary power to enact legislation; it is limited only by the Ohio Constitution and the Constitution of the United States. Section 1, Article II, Ohio Constitution. See *Williams v. Scudder* (1921), 102 Ohio St. 305, 307, 131 N.E. 481. "[B]efore any legislative power, as expressed in a statute, can be held invalid, it must appear that such power is clearly denied by some constitutional provision." *Id.* See *Lehman v. McBride* (1863), 15 Ohio St. 573, 592 (when the power of the General Assembly to enact a law is questioned, the proper inquiry is whether the law is clearly prohibited by the Constitution). * * *

{¶ 11} The General Assembly's legislative power enables it to "pass any law unless it is specifically prohibited by the state or federal Constitutions." *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St.2d 159, 162, 38 O.O.2d 404, 224 N.E.2d 906. See *State ex rel. Poe v. Jones* (1894), 51 Ohio St. 492, 504, 37 N.E. 945 ("whatever limitation is placed upon the exercise of that plenary grant of [legislative] power must be found in a clear prohibition by the constitution"). * * *

The General Assembly has the plenary power and prerogative to choose to express its plain meaning as it sees fit.

Disregarding the General Assembly's plain language excluding attempted offenses of violence from sealing would be so violative of legislative intent as to violate the constitutional separation of powers. The people "vested the legislative power of the state in the General Assembly," and courts "must respect the fact that the authority to legislate is for the General

Assembly alone * * *.” *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶¶ 43, 48, 52. “The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, * * *.” *Id.* ¶ 44 (quoting another case).

Courts must honor the General Assembly’s plain legislative intent to exclude convictions for attempted “offenses of violence” from the sealing statutes, under R.C. 2953.36(C) , 2901.01(A)(9)(a) and (d), and the lower court’s decision to the contrary must therefore be reversed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, December 5, 2014, to A. Steven Dever, 13363 Madison Ave., Lakewood, Ohio 44107; Counsel for Defendant-Appellee, and to Diane Smilanick, Assistant Prosecuting Attorney, at The Justice Center, 1200 Ontario St., Cleveland, Ohio 44113, counsel for Plaintiff-Appellant.

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