

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23794
Plaintiff-Appellee	:	
	:	Trial Court Case No. 05-CR-1069
v.	:	
	:	
KATHERINE T. DETSKAS	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	

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OPINION

Rendered on the 17<sup>th</sup> day of September, 2010.

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BROGAN, J.

{¶ 1} The issue in this case is whether the trial court erred when it denied Katherine Detskas's application for the sealing of her conviction record for fifth-degree felony vandalism, an offense to which she pleaded guilty in 2005. The decisional question is whether she is a "first offender," which is a statutory

requirement for sealing. This question is relevant because Detskas was previously convicted in Michigan, under that state's law, for the offense of driving while impaired (DWI) (a lesser included offense of driving under the influence of drugs or alcohol). The sub-question raised here is whether the DWI conviction is a "previous conviction" for purposes of the first offender definition; the answer depends in part on whether DWI is a "minor misdemeanor."

{¶ 2} Through section 2953.32 of the Revised Code the General Assembly, in its grace, gives courts the ability to order the official records sealed (or expunged) pertaining to a criminal conviction. *State v. Simon* (2000), 87 Ohio St.3d 531, 533 ("[E]xpungement is an act of grace created by the state,' and so is a privilege, not a right."), quoting *State v. Hamilton* (1996), 75 Ohio St.3d 636, 639. But the General Assembly has extended its grace only to first offenders. See *id.* "First offender" is statutorily defined in division (A) of section 2953.31 as "**anyone 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 in this state or any other jurisdiction." Detskas was convicted of vandalism in Ohio and was previously convicted of DWI in Michigan—neither conviction is disputed. The question here is whether the DWI conviction is a "previous conviction."

{¶ 3} Convictions for certain offenses are not previous convictions under the first offender definition. The definition in division (A) exempts minor traffic offenses from acting as a bar to expungement, *State v. Sandlin* (1999), 86 Ohio St.3d 165, 168: "For purposes of, and except as otherwise provided in, this division [A], 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 previous or subsequent 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 previous or subsequent conviction." R.C. 2953.31(A). Since Detskas's Michigan conviction is for none of the specified sections, only the minor misdemeanor exclusion is relevant.

{¶ 4} The question, then, is whether the DWI offense here is a minor misdemeanor under Michigan or Ohio law. Under Michigan law DWI is not a minor misdemeanor, because Michigan law, we have discovered, has no minor-misdemeanor class of offenses. See *In the Matter of Proffitt*, Franklin App. No. 06AP-363, 2006-Ohio-6642, at ¶7 (finding the same). In Ohio, section 2901.02 pertinently says that "[a]ny offense not specifically classified is a minor misdemeanor if the only penalty that may be imposed is one of the following: \* \* \* a fine not exceeding one hundred fifty dollars, community service under division (C) of section 2929.27 of the Revised Code, or a financial sanction other than a fine under section 2929.28 of the Revised Code." R.C. 2901.02(G). DWI is codified in subsection (3)

of section 257.625 of the Michigan Compiled Laws (M.C.L.). Since the DWI conviction was apparently Detskas's first, Michigan law specifically classifies her offense as a misdemeanor. See M.C.L. 257.625(11)(a) ("If a person is convicted of violating subsection (3)[,] \* \* \* [e]xcept as otherwise provided in subdivisions (b) [violation occurs within seven years of one prior conviction] and (c) [violation occurs after two or more convictions], the person is guilty of a misdemeanor."). A misdemeanor DWI offense is "punishable by 1 or more of the following: (i) Community service for not more than 360 hours. (ii) Imprisonment for not more than 93 days. (iii) A fine of not more than \$300.00." M.C.L. 257.625(11)(a). Thus, because the penalty for Detskas's DWI offense is not limited to the penalties listed in R.C. 2901.02, the DWI offense is not a "minor misdemeanor" under Ohio law either. Detskas's DWI conviction is therefore a "previous conviction." See *State v. Morris*, Licking App. No. 09-CA-128, 2010-Ohio-2403 (holding that a conviction under Michigan law for driving under the influence, of which driving while impaired is a lesser-included offense, is a previous offense under R.C. 2953.31[A]).

{¶ 5} The question here is not whether Michigan's DWI offense and Ohio's OVI offense are "substantially equivalent" offenses, the question on which the trial court's decision is based and the only question the parties argue in their briefs. The trial court and the parties seem to misconstrue the definition of "first offender." The trial court said (and the parties agree) that "[a] conviction for an offense in another jurisdiction or state that is 'substantially similar' or 'substantially equivalent' \* \* \* to the delineated Ohio sections [in R.C. 2953.31(A)] must be considered by the Court as to whether it is a previous or subsequent offense." November 13, 2009 Decision,

Order and Entry Overruling Defendant's Motion to Seal, p.8. Among the offense convictions that the statute expressly says constitute previous or subsequent convictions is a conviction for violating section 4511.19, operating a vehicle under the influence of alcohol or drugs (OVI). The court found that the DWI offense is substantially equivalent to Ohio's OVI offense. The trial court concluded that therefore the DWI conviction is a previous conviction, rendering Detskas not a "first offender" and not eligible to have her vandalism conviction record sealed.

{¶ 6} But we see no language in the statutory definition saying that a conviction for an offense in another state is considered a previous or subsequent conviction if the offense is substantially equivalent to one of the listed Ohio offenses. And neither the trial court nor the parties cite case law that so interprets the statutory language. The definition mentions substantial equivalence only with respect to municipal ordinances and former Ohio law—"a violation of a *municipal ordinance* that is substantially similar," "a violation of a substantially equivalent *municipal ordinance*," and "a violation of a substantially equivalent former *law of this state* or former *municipal ordinance*." R.C. 2953.31(A) (Emphasis added). Issues of substantial equivalence are not relevant in this case.

{¶ 7} Because her DWI conviction is a previous conviction, Detskas is not a "first offender." The state's grace does not extend to Detskas, so she is not eligible to have her vandalism conviction record sealed.

{¶ 8} The trial court did not err when it denied Detskas's application, so the sole assignment of error is overruled.

{¶ 9} On alternative grounds, the trial court's judgment is Affirmed.

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GRADY and FROELICH, JJ., concur.

Copies mailed to:

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Hon. Timothy N. O'Connell