

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2011-L-084
ROBERT W. RYBAK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 99 CR 000519.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Richard L. Dana, 3537 North Ridge Road, Perry, OH 44081 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Robert W. Rybak, appeals the decision of the Lake County Court of Common Pleas denying his Motion to Seal Record of Convictions. For the following reasons, we affirm.

{¶2} On April 14, 2000, appellant entered a plea of guilty, by way of information, to the charge of attempted aggravated assault, a felony of the fifth degree, in violation of R.C. 2923.02 and 2903.12. Appellant was sentenced to serve 120 days

in the Lake County Jail, with three days credit for time served. Further, appellant was ordered to serve three years of community control.

{¶3} The information, filed March 10, 2000, alleges appellant engaged “in conduct that, if successful, would constitute or result in the offense of Aggravated Assault, a violation of Section 2903.12 of the Revised Code.

{¶4} “This act, to wit: Attempted Aggravated Assault, constitutes a Felony of the Fifth degree, contrary to and in violation of the Ohio Revised Code, Title 29, section 2923.02 * * *.”

{¶5} Thereafter, on April 12, 2000, appellant entered a written plea of guilty to, and was adjudged guilty of, “Attempted Aggravated Assault, a felony of the fifth degree, in violation of Section 2923.02 of the Ohio Revised Code.”

{¶6} In 2011, appellant moved to have his criminal record sealed under R.C. 2953.32(A)(1), which allows for a “first offender” to apply for expungement.

{¶7} The matter was set for an expungement hearing. The trial court denied appellant’s application for expungement, reasoning that appellant is ineligible for expungement under the current statutory scheme. The trial court found that appellant’s conviction was for an “offense of violence,” which is precluded from expungement by statute.

{¶8} Appellant appeals from this denial and asserts the following assignments of error for our review:

{¶9} [1.] The trial court erred in ruling that the Supreme Court of Ohio categorically prohibits any felony expungement and/or sealing of a record, as applied to appellant, filed after the implementation of the

current version of R.C. 2953.36(C) and the Supreme Court of Ohio's holding in *State v. LaSalle*, 96 Ohio St.3d 178, 179.

{¶10} [2.] The trial court's judgment is against the manifest weight of the evidence.

{¶11} In denying appellant's application for expungement, the trial court relied upon the Ohio Supreme Court's holding in *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009. In *LaSalle*, the Ohio Supreme Court held that "the statutory law in effect at the time of the filing of an R.C. 2953.32 application to seal a record of conviction is controlling." *Id.* at ¶19. The trial court then stated that appellant was ineligible for expungement under the current statutory scheme.

{¶12} In his brief, appellant focuses on his understanding at the time of his plea negotiations that he would be eligible for expungement under the law at that time. Appellant argues that he could not have anticipated a change of the law, specifically the enactment of R.C. 2953.36, which enumerates certain offenses exempt from expungement.

{¶13} To invoke the jurisdiction of the trial court in proceedings brought under R.C. 2953.31 et seq., the applicant must be eligible for expungement and the offense must be one that is subject to expungement. To be eligible, an applicant must be a 'first 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*, 2005-Ohio-6251, 10th Dist. No. 05AP-335, 2005-Ohio-6251, ¶8.

{¶14} In the instant case, the trial court essentially determined it did not have jurisdiction to consider appellant's application for expungement, as it found that appellant's attempted aggravated assault conviction is excluded by R.C. 2953.36(C).

{¶15} Thus, this court must determine whether appellant was eligible for expungement. Specifically at issue is whether the offense, attempted aggravated assault, is subject to expungement and not excluded by R.C. 2953.36. Although a trial court's treatment of an application to seal a conviction record is reviewed under an abuse of discretion standard, this court reviews the "applicability of R.C. 2953.36 categories to the applicant's convictions" de novo. *State v. M.R.*, 8th Dist. No. 94591, 2010-Ohio-6025, ¶15.

{¶16} Pursuant to the current version of R.C. 2953.36, which became effective on March 23, 2000, some crimes are not eligible for expungement. R.C. 2953.36 lists several types of "convictions precluding sealing." For purposes of this appeal, R.C. 2953.36(C) is applicable and states, in pertinent part:

{¶17} "Sections 2953.31 to 2953.35 of the Revised Code do not apply to any of the following:

{¶18} "Convictions of an offense of violence when the offense is a * * * felony * * * ."

{¶19} An "offense of violence" is defined by R.C. 2901.01(A)(9), stating, in pertinent part:

{¶20} “(a) A violation of section * * * 2903.12[;]

{¶21} “(d) A conspiracy or attempt to commit, or complicity in committing, any offense under division (A)(9)(a), (b), or (c) of this section.”

{¶22} Here, appellant was convicted of attempted aggravated assault in violation of R.C. 2923.02 and 2903.12; R.C. 2903.12 is listed as an offense of violence in R.C. 2901.01(A)(9)(a). Consequently, appellant is not eligible for expungement under R.C. 2953.36(C).

{¶23} Appellant argues, however, that his due process rights were violated because, at the time of the plea, the offense of attempted aggravated assault was eligible for expungement. Appellant notes that his “ability to continue his employment in the nursing field was of paramount concern in his determination in entering a plea of guilty” and there are numerous documents in the record to indicate such. Further, appellant maintains that it is inconceivable that an attorney negotiating a plea in 1999 could have anticipated a change in the application of the expungement statute.

{¶24} In *LaSalle, supra*, the Ohio Supreme Court stated:

{¶25} [T]he date of filing of the application to seal is relevant. Sealing of a record of conviction pursuant to R.C. 2953.32 is a postconviction remedy that is civil in nature. *State v. Bissantz* (1987), 30 Ohio St.3d 120, 121. R.C. 2953.32(A)(1) provides that application to seal a record of conviction may not be filed until one year following the offender’s final discharge if convicted of a misdemeanor or three years if convicted of a felony. In this regard, an application to seal a record of conviction is a separate remedy, completely apart

from the criminal action, and is sought after the criminal proceedings have concluded. *State v. Wilfong* (Mar. 16, 2001), Clark App. No. 2000-CA-75, 2001 Ohio App. LEXIS 1195. See, generally, *State v. Nichols*, 11 Ohio St.3d 40 (1984). Therefore, it follows and we hold that the statutory law in effect at the time of the filing of an R.C. 2953.32 application to seal a record of conviction is controlling. *Id.* at ¶19.

{¶26} Initially, we note that section (C) was added to R.C. 2953.36 in Senate Bill 13, which became effective March 23, 2000. See 1999 Ohio S.B. 13. Therefore, at the time of the plea, which was entered into on April 12, 2000, a conviction for attempted aggravated assault was an offense that was not eligible for expungement, as it was considered an offense of violence. See R.C. 2901.01. As such, although appellant argues that he was eligible for expungement at the time of the plea, the law in effect demonstrates otherwise.

{¶27} Additionally, this court has addressed whether an appellant's due process rights were violated when relying on the expectation of having the criminal record sealed when entering into a plea. Although decided four months prior to *LaSalle*, we stated the following in *State v. Gaebler*, 11th Dist. No. 2001-G-2362, 2002 Ohio App. LEXIS 1983, *4:

{¶28} [I]n *State v. Davenport*, * * * the court held that a retroactive change in expungement law did not violate due process rights. The *Davenport* Court noted that 'the mere fact that appellant chose to accept the state's plea bargain based upon some unilateral hope

that he might be able to expunge his convictions in the future does not render expungement a fundamental right protected by due process * * *.' We agree.

{¶29} The law of Ohio clearly states that changes in statutory law regarding expungement may be applied retroactively. Therefore, a defendant should never be able to assert that their due process rights were violated because they relied on the possibility of expungement, and then the expungement statute changed. If we were to hold otherwise, it would allow every defendant entering a plea agreement to 'rely' on the possibility of expungement. The resulting effect would be that changes in statutory law regarding expungement could not be applied *ex post facto*. That is not the law of Ohio. Citing *State v. Davenport*, 116 Ohio App.3d 6, 11 (1996).

{¶30} Based on the above, the trial court did not err in finding that it was without jurisdiction to entertain appellant's motion for expungement. Appellant's conviction of attempted aggravated assault is a crime not subject to expungement either at the time he entered his plea or under the current statutory scheme. Appellant's first assignment of error is without merit.

{¶31} As the trial court did not have jurisdiction in this matter, it was unable to reach the merits of appellant's case and, therefore, could not engage in weighing any of the evidence. Appellant's second assignment of error is therefore moot.

{¶32} Based on the opinion of this court, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.