

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 10AP-691
v.	:	(C.P.C. No. 81CR-608)
	:	
Lawrence A. Bootes,	:	(ACCELERATED CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 31, 2011

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Appellant, State of Ohio ("the state"), appeals from the judgment of the Franklin County Court of Common Pleas which issued an order sealing the conviction record of defendant-appellee, Lawrence A. Bootes ("appellee"). For the following reasons we reverse and remand the matter to the trial court.

{¶2} On May 12, 2010, pursuant to R.C. 2953.32(A), appellee filed an application to seal the record of his 1981 conviction for attempted breaking and entering in Franklin County Court of Common Pleas case No. 81CR-608. On May 24, 2010, the state filed objections to the sealing of appellee's record of conviction. In support of its

objections, the state argued that appellee does not qualify as a first offender because he had previously been convicted for OVI.

{¶3} The application was set for hearing on June 28, 2010. On June 28, 2010, the application was continued for hearing on July 23, 2010. However, on July 15, 2010, the court filed an "Amended Entry Entry [sic] Sealing Record of Conviction Pursuant to R.C. 2953.32." With this entry, the trial court issued an order sealing the record of appellee's 1981 conviction for attempted breaking and entering.

{¶4} Appellant filed a timely notice of appeal and raises the following two assignments of error:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY GRANTING DEFENDANT'S APPLICATION FOR EXPUNGEMENT WITHOUT FIRST HOLDING A HEARING AS REQUIRED UNDER R.C. 2953.32(B).

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY GRANTING DEFENDANT'S APPLICATION FOR EXPUNGEMENT BECAUSE DEFENDANT WAS NOT A FIRST OFFENDER UNDER R.C. 2953.32(A).

{¶5} We begin by addressing the second assignment of error because it is a jurisdictional issue. " '[E]xpungement is an act of grace created by the state,' and so is a privilege not a right." *State v. Simon* (2000), 87 Ohio St.3d 531, 533, quoting *State v. Hamilton* (1996), 75 Ohio St.3d 636, 639. In light of its nature, "[e]xpungement should be granted only when all requirements for eligibility are met." *Simon* at 533.

{¶6} R.C. 2953.32 permits a "first offender" to apply to the sentencing court for sealing of a conviction record. R.C. 2953.31(A) defines a "first offender" as:

[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 in this state or any other jurisdiction.

{¶7} R.C. 2953.31(A) also mandates that "a conviction for a violation of section 4511.19 * * * for a violation of a substantially equivalent municipal ordinance * * * 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. 4511.19 prohibits driving under the influence of drugs or alcohol. "[A] conviction of DUI always bars expungement of the record of a conviction for another criminal offense." *State v. Sandlin*, 86 Ohio St.3d 165, 168, 1995-Ohio-147. See also *In re White*, 10th Dist. No. 05AP-529, 2006-Ohio-1346.

{¶8} It appears that appellee is not a "first offender" under R.C. 2953.31(A). Parenthetical 4 of the trial court's own "Criteria for Sealing: Conviction / Nolle Prosequi / Dismissal / No Bill / Bond Forfeitures / Not Guilty Finding" checklist indicates that appellee is a first offender. However, the Bureau of Criminal Identification & Investigation Law Enforcement Automated Database Search ("LEADS") report attached to the same indicates otherwise. The LEADS report reflects a June 22, 1989 conviction for an offense of "OVI-Alcohol &/or Drug."

{¶9} This court has held that an order granting an expungement to an applicant subsequently determined not to be a first offender "constitutes an error in the court's exercise of jurisdiction over a particular case," and therefore is voidable. *State v. Smith*, 10th Dist. No. 06AP-1059, 2007-Ohio-2873, ¶15; *In re Bowers*, 10th Dist. No. 07AP-49,

2007-Ohio-5969, ¶9. For these reasons, we sustain the state's second assignment of error.

{¶10} With respect to the first assignment of error, we refer to our prior holdings in *State v. Withrow*, 10th Dist. No. 03AP-999, 2004-Ohio-3699; *In re Byrd*, 10th Dist. No. 04AP-854, 2005-Ohio-3148, and *In re Bonner*, 10th Dist. No. 05AP-1317, 2006-Ohio-3958. R.C. 2953.32(B) requires a trial court to set a hearing for an expungement application. Failure to hold a hearing will result in reversal on appeal. *In re Bonner*. Here, although the trial court scheduled a hearing, the record contains no evidence that the trial court actually held a hearing, and appellee did not file a brief to argue otherwise. Indeed, the trial court's entry granting the application for sealing of records was filed with the clerk's office prior to the date of the scheduled hearing. On this record, we can only conclude that the court granted appellee's application without first holding an oral hearing. In so doing, we find that the trial court erred. Therefore, we sustain the first assignment of error.

{¶11} For the foregoing reasons, we sustain both of the state's assignments of error. Accordingly, we reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for it to enter judgment denying Bootes' application for expungement because it lacks jurisdiction to do otherwise.

Judgment reversed and cause remanded with instructions.

BROWN and FRENCH, JJ., concur.
