IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	**CASE NO: CR 98 360551-B**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs	)	
	)	
M. D.	)	**JOURNAL ENTRY**
	)	
Defendant.	)	

John P. O'Donnell, J.:

On July 2, 2008, defendant M.D. filed a motion to seal the record of his 1998 convictions for two counts of receiving stolen property, forgery, uttering, and obstructing justice.[1] A hearing was held October 2, 2008, and the court denied the motion on November 12, 2008. The defendant appealed that denial. By its journal entry and opinion dated October 29, 2009, the Cuyahoga County Court of Appeals, in case number 92534, reversed that denial and remanded the motion for expungement to this court with instructions to issue findings in accordance with Ohio Revised Code Section 2953.32. This entry follows.

The statute allowing for the expungement of the record of conviction provides, in pertinent part:

> **2953.32 Sealing of conviction record or bail forfeiture record.**
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> (A)(1) . . . (A) first offender may apply to the sentencing court . . . for the sealing of the conviction record. . .
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> ***
>
> (C)(1) The court shall do each of the following:

[1] The defendant's conviction on count 6, tampering with evidence, was reversed by the court of appeals.

> (a) Determine whether the applicant is a first offender. . . If the applicant applies as a first offender . . . and has two or three convictions that result from the same indictment, . . . and result from related criminal acts that were committed within a three-month period but do not result from the same act or from offenses committed at the same time, in making its determination under this division, the court initially shall determine whether it is not in the public interest for the two or three convictions to be counted as one conviction. If the court determines that it is not in the public interest for the two or three convictions to be counted as one conviction, the court shall determine that the applicant is not a first offender; if the court does not make that determination, the court shall determine that the offender is a first offender.
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> (b) Determine whether criminal proceedings are pending against the applicant;
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> (c) If the applicant is a first offender who applies pursuant to division (A)(1) of this section, determine whether the applicant has been rehabilitated to the satisfaction of the court;
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> (d) If the prosecutor has filed an objection in accordance with division (B) of this section, consider the reasons against granting the application specified by the prosecutor in the objection;
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> (e) Weigh the interests of the applicant in having the records pertaining to the applicant's conviction sealed against the legitimate needs, if any, of the government to maintain those records.
>
> (2) If the court determines, after complying with division (C)(1) of this section, that the applicant is a first offender . . ., that no criminal proceeding is pending against the applicant, and that the interests of the applicant in having the records pertaining to the applicant's conviction . . . sealed are not outweighed by any legitimate governmental needs to maintain those records, and that the rehabilitation of an applicant who is a first offender applying pursuant to division (A)(1) of this section has been attained to the satisfaction of the court, the court, . . . shall order all official records pertaining to the case sealed and, . . . all index references to the case deleted . . .
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> ***

The defendant has five convictions and has applied for expungement as a first offender, so the court's initial obligation is to determine whether he is a first offender. O.R.C. § 2953.31(A) defines a "first offender" in the expungment context as:

> (A) "First offender" means 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. When two or more convictions result from or are connected with the same act or result from offenses committed at the same time, they shall be counted as one conviction. When two or three convictions result from the same indictment, information, or complaint, from the same plea of guilty, or from the same official proceeding, and result from related criminal acts that were committed within a three-month period but do not result from the same act or from offenses committed at the same time, they shall be counted as one conviction, provided that a court may decide as provided in division (C)(1)(a) of section 2953.32 of the Revised Code that it is not in the public interest for the two or three convictions to be counted as one conviction.

Because the defendant has multiple convictions, the court must first consider whether the five convictions here "result from or are connected with the same act" or "result from offenses committed at the same time" so as to qualify as one conviction.

An examination of the facts underlying the convictions is therefore necessary. The facts are found in the indictment, the opinion of the Cuyahoga County Court of Appeals in the defendant's appeal from the trial verdicts in consolidated cases 75339, 75340 and 75341, the expungement investigation report completed by the probation department, and reasonable inferences from the known information. Those sources reveal that the plaintiff was the operator of co-defendant United Pawn Shop and that, in that relation, the defendant received a laptop computer stolen from the Cleveland Clinic. The defendant later sold the computer. Thereafter, once law enforcement investigated the defendant for those crimes, he forged a pawn ticket and/or a sales slip for the computer and uttered it to the state in an effort to deflect or minimize his criminal responsibility.

A reading of the indictment shows that the date of offense for count one, receiving stolen property, is "February 26, 1996 to June 30, 1996" and the date of offense for count two, another RSP charge, is "July 1, 1996 to June 2, 1997." The elements of each of these two charges are that the defendant "did receive, retain or dispose of computers and electronic

equipment, the property of Cleveland Clinic, knowing or having reasonable cause to believe" that the equipment was stolen. A reasonable inference may be made that count one applies to the defendant's initial receipt of the stolen computer at the pawn shop and that count two relates to his subsequent disposition of the property.

The date of offense for each of counts three, four, and five is August 29, 1997. These charges relate to the defendant's having forged "a pawn ticket and/or a purchaser's bill of sale" and then using it, or them, to hinder prosecution. While these three charges do not result from the same act, they do "result from offenses committed at the same time" and may therefore, as a group, be considered as one conviction under R.C. 2953.31(A).

However, the separate RSP counts and the group of counts three through five, counted as one, do not qualify as a single conviction. First, setting aside counts three through five, the two RSPs alone did not "result from" the same act, nor were they "connected with" the same act, so as to qualify as one conviction. Using the dates on the indictment, the acts occurred anywhere from one day to over fifteen months apart. Even if the crimes were committed only one day apart (June 30 and July 1, 1997, using the nearest possible dates for the two counts), they are still separate acts: receiving in count one and disposing in count two. Furthermore, while the two RSP offenses may have been close in time, they can't be said to have been committed at the "same time" as required by O.R.C. § 2953.31(A).

But even if the two RSP's were counted as one conviction, the forgery and related crimes were done at least 14 months after the first RSP and, by statute, cannot be grouped with the RSP charges to count as one conviction under R.C. 2953.31(A). Putting aside whether the RSPs should be considered a single offense, there is no question that the August 29, 1997 offenses and either, if not both, RSP offenses were committed at different times. There is also no question

that the convictions do not result from, nor are they connected with, the same act. The acts of receiving stolen property and then, at least 14 months later, committing forgery to hinder prosecution for the first crime cannot be considered the same act.

The court is therefore left to consider whether the separate RSP offenses and the single other offense (counts three through five combined) may be counted as one by virtue of being "two or three convictions result(ing) from the same indictment, information, or complaint, from the same plea of guilty, or from the same official proceeding, and result(ing) from related criminal acts that were committed within a three-month period." All the convictions here were from the same indictment. However, the law limits to three months the period within which separate crimes can be committed and still be counted as a single conviction. Thus, even a finding that counts one and two should be considered a single conviction – a conclusion the court expressly rejects for the reasons already given – is insufficient to vest the court with discretion to consider the two groups of offenses (counts one and two together and counts three through five together) as a single conviction because the minimum amount of time between the "two" offenses under that scenario would be 14 months, *i.e.* well beyond the statutory three-month limit.

In summary, the court finds: that the convictions for counts three, four and five may be counted as a single conviction; that the convictions for counts one and two may not be counted as a single conviction; and that, regardless of whether counts one and two are considered separate convictions or a single conviction, all five counts may not be considered a single conviction. The court therefore finds that the defendant is not a first offender as defined by O.R.C. 2953.31 because, prior to the August 29, 1997 offenses, he was convicted of two different offenses in this state, namely separate counts of receiving stolen property. The

defendant is therefore not eligible for an expungement under R.C. 2953.32 and the application to seal the record of conviction filed July 2, 2008, is denied.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

SERVICE

A copy of this Journal Entry was sent by e-mail, this _____ day of June, 2010, to the following:

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_____
Judge John P. O'Donnell