

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

STATE OF OHIO)	CASE NO.: CR 99 383300
)	
Plaintiff)	JUDGE JOHN P. O'DONNELL
)	
vs)	
)	
DERREK G.)	
)	
Defendant)	<u>JOURNAL ENTRY</u>

STATE OF OHIO)	CASE NO.: CR 99 384799
)	
Plaintiff)	
)	
vs)	
)	
DERREK G.)	
)	
Defendant)	

John P. O'Donnell, J.:

On February 8, 2000, the defendant was convicted, after pleading guilty, of two separate third degree felony offenses of possession of drugs, one each in case numbers 383300 and 384799. On May 13, 2009, the defendant filed applications in both cases to seal the record of conviction pursuant to O.R.C. Section 2953.32.

The State opposed the applications, arguing that the defendant has not been finally discharged within the meaning of the expungement statute by not having paid all court costs, and that he is not an eligible "first offender." A hearing was held on October 22, 2009, and this entry follows.

First, the failure to pay court costs does not bar the defendant from filing a motion for expungement. The State's argument to the contrary was rejected in *State v. Summers* (1990), 71

App.3d 1, where the Eighth District Court of Appeals, noting that court costs are not a part of a criminal sentence, found that unpaid court costs did not preclude a defendant from being statutorily eligible for expungement.

The State's second argument is that G. is not a first offender. Revised Code Section 2953.32(A)(1) provides that only a first offender may apply for the sealing of a conviction record. However, the statute allows the court to determine whether a defendant with two or three convictions may be considered a first offender as follows:

(C)(1) The court shall do each of the following:

(a) Determine whether the applicant is a first offender or whether the forfeiture of bail was agreed to by the applicant and the prosecutor in the case. *If the applicant applies as a first offender pursuant to division (A)(1) of this section and has two or three convictions that 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, 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.* (Emphasis in italics added.)

The evidence at the hearing included an expungement investigation report prepared by the Cuyahoga County Adult Probation Department on July 2, 2009. Both crimes involve possession of drugs and are therefore related criminal acts. The report also notes that the offense in case number 383300 occurred on August 4, 1999, and the offense in case number 384799 was committed on October 22 of that same year, *i.e.* within a three-month period. Finally, although the convictions did not result from the same indictment, they did result "from the same plea of guilty" on February 8, 2000. Under these circumstances, the statute requires the court to determine whether it is not in the public interest for the two convictions to be counted as one.

In these cases, the court has very little evidence to support a determination that it is not in the public interest to count the two convictions as one.¹ Because of this dearth of evidence, the court is unable to find that it is not in the public interest for G.'s two convictions to be counted as one and the court is therefore constrained to find that the defendant is an eligible first offender.

Having found that G. is a first offender, the court, pursuant to R.C. 2953.32(C)(2) must proceed as follows:

(C)(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 or bail forfeiture 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 . . . has been attained to the satisfaction of the court, the court, . . . shall order all official records pertaining to the case sealed . . .
(Emphasis in italics added.)

In considering whether to order an expungement, this court is guided by the principle that expungement provisions are remedial in nature and must be liberally construed to promote their purposes.² The court also remains mindful of the notion that the enactment of the expungement statute is, in a way, a manifestation of the traditional western civilization concepts of sin, punishment, atonement, and forgiveness.³

Based upon the available evidence, the court finds, first, that no criminal proceeding is pending against the defendant. The court also finds that the rehabilitation of the defendant has been satisfactory. Although past serious criminal conduct may engender a concern or suspicion that a defendant has a predilection for committing crimes, the court must base its decision on

¹ R.C. 2953.32(C)(1) is worded to require a determination that "it is not in the public interest" to consider the two convictions as one under the circumstances here. This suggests to the court that a defendant whose two or three convictions fit the circumstances outlined in the statute – *i.e.* that they result from the same plea of guilty and from related criminal acts that were committed within the three-month period – is entitled to a presumption that he is a first offender and places the burden on the State to produce evidence why it is not in the public interest to consider him a first offender.

² *State of Ohio v. M.D.*, 2009-Ohio-5694, Cuyahoga App. No. 92534, ¶8.

³ *Id.*

evidence, not intuition, and here there is no evidence that the defendant has continued to engage in criminal conduct since being released from prison.

The final consideration is whether the interests of the defendant in sealing the records are outweighed by any legitimate governmental needs to maintain the records. Since the majority of the hearing was devoted to the issue of whether the defendant is an eligible first offender, neither the defendant nor the State presented much evidence on this subject. The court is, therefore, left with only the general considerations that apply to most expungement cases. From the defendant's perspective, he has paid the price for the crimes he committed by serving two years in prison and spending seven years, into the late part of his young adulthood, labeled as a convicted felon. Through those penalties his expiation is arguably complete. It is also worth noting that none of the charged offenses alleged the possession of a gun, and that although the defendant was charged with trafficking in case number 384799, he was convicted of drug possession and the trafficking charge was dismissed.

From the State's perspective, the defendant was arrested in case number 384799 less than three months after his separate arrest in case number 383300. Both indictments accuse him of being a drug dealer. Although he was not convicted of a trafficking offense, law enforcement agents would be benefited by knowing this history in the event of any encounters with the defendant in the future. Although the court trusts that police officers are ordinarily cautious in all of their dealings with the public, knowledge of prior drug dealing allegations may provide extra assurance that appropriate caution will be exercised by a police officer who may encounter the defendant in the future. Yet, the ten years without an arrest since these cases suggests that the likelihood of a future encounter with law enforcement is low and that the likelihood that the defendant will be dangerous is even lower.

Having considered all of the available evidence, the court concludes that the defendant's interest in having the records sealed is not outweighed by any legitimate governmental needs to maintain the records. Therefore, the separate applications to seal the records in case number 383300 and case number 384799 are both granted.

IT IS SO ORDERED:

Date: _____

Judge John P. O'Donnell

SERVICE

A copy of this Journal Entry was sent by regular U.S. mail, this _____ day of November, 2009, to the following:

Diane Smilanick, Esq.
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, OH 44113
Attorney for Plaintiff

Patricia London, Esq.
Public Defender Office
310 Lakeside Avenue, Suite 400
Cleveland, OH 44113
Attorney for Defendant

Judge John P. O'Donnell