

[Cite as *State v. Clellan*, 2010-Ohio-5867.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 10AP-44
	:	(M.C. No. 2009 CRX 051708)
Joan K. Clellan,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 2, 2010

Richard C. Pfeiffer, Jr., City Attorney, Lara N. Baker, City Prosecutor, Melanie R. Tobias and Orly Ahroni, for appellee.

Joan K. Clellan, pro se.

APPEAL from the Franklin County Municipal Court.

BRYANT, J.

{¶1} Defendant-appellant, Joan K. Clellan, appeals from a judgment of the Franklin County Municipal Court denying her application to seal records pursuant to R.C. 2953.52. Because the trial court erred in denying defendant's application to seal the records regarding the charge for which defendant was found not guilty, we reverse.

I. Facts and Procedural History

{¶2} Defendant and her husband each were charged with one count of aggravated menacing in violation of R.C. 2903.21. Both entered not guilty pleas, and a

joint trial was held. The jury returned a not guilty verdict for defendant on October 9, 2009, but found her husband guilty.

{¶3} On October 13, 2009, defendant filed an application to seal the records related to the charge against her. At a December 16, 2009 hearing, the State of Ohio, without prior written notice to defendant, opposed defendant's application. In an entry dated December 16, 2009, the trial court denied defendant's application, determining the state's legitimate governmental interests in keeping the records open outweighed the interests of defendant in having them sealed.

II. Assignments of Error

{¶4} Defendant timely appeals, assigning the following errors:

ASSIGNMENT OF ERROR I:

The trial court erred by denying Petitioner reasonable notice of opposition by prosecutor for the State to Petitioner's application for expungement.

ASSIGNMENT OF ERROR II:

The trial court erred by denying Petitioner's application for expungement due to the fact that the manifest weight of the evidence before the trial court mandated the conclusion that the interests of Appellant in having her record sealed outweighed any hypothetical or legitimate needs of the government to maintain the same.

ASSIGNMENT OF ERROR III:

The trial court erred as a matter of law by denying the Appellant's motion to expunge records.

ASSIGNMENT OF ERROR IV:

The trial court abused its discretion in failing to carry out the clear legislative intent in enacting RC 2953.31 and RC 2953.52 by denying Appellant's application to expunge records.

Because defendant's second and fourth assignments of error are interrelated and resolve defendant's appeal, we address them first and jointly.

III. Second and Fourth Assignments of Error

{¶5} Taken together, defendant's second and fourth assignments of error assert the trial court abused its discretion in denying defendant's application to seal the records relating to the aggravated menacing charge for which she was acquitted.

A. Applicable Law

{¶6} Pursuant to R.C. 2953.52(A)(1), any person whom a jury or court finds "not guilty of an offense * * * or who is the defendant named in a dismissed complaint, * * * may apply to the court for an order to seal his official records in the case." Upon filing such an application, the trial court must hold a hearing (1) to determine whether the applicant was found not guilty or whether the complaint, indictment, or information was dismissed, (2) to determine whether criminal proceedings are pending against the applicant, (3) to consider any objections of the prosecutor, and (4) to weigh the interests of the applicant to seal the record against the legitimate needs, if any, of the government to maintain those records. R.C. 2953.52(B)(2); see also *State v. Streets*, 10th Dist. No. 09AP-453, 2009-Ohio-6123, ¶4. If the trial court finds the government's interests in maintaining the records do not outweigh the applicant's interests in sealing the records, then "the court shall issue an order directing that all official records pertaining to the case be sealed." R.C. 2953.52(B)(3).

{¶7} "The decision whether to grant or deny an application to seal criminal records lies within the sound discretion of the trial court." *Streets* at ¶6, citing *State v. Haney* (1991), 70 Ohio App.3d 135, 138. An appellate court may only reverse such a

decision upon a showing of an abuse of that discretion. *Id.* citing *Haney, Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157 (stating the test for an abuse of discretion).

B. Trial Court Proceedings

{¶8} At the December 16, 2009 expungement hearing, the trial court asked the state why it objected to defendant's application to seal records. The state responded it objected on two grounds, both of which resolve to the same issue: a gun was involved in the scenario leading to the charges. The state initially noted that "the charge of aggravated menacing and the specific facts of this case involved a gun." Secondly, the state asserted that, in the event law enforcement ever has to respond to defendant's residence again, it needed to "be aware that these people have used guns to protect themselves before." (Tr. 3.)

{¶9} The trial court asked defendant to respond to the state's objections to her application to seal records. Defendant initially pointed to her background as a law-abiding attorney of 30 years, with "not so much as a traffic ticket" against her. (Tr. 5.) Because she had "done nothing wrong," she did not want her "name to be smeared" or the "documents to be accessible." (Tr. 6.) Defendant explained, "[t]he only reason [she] had a gun was because [she] was under a protective order" from a man who four times threatened to kill her as a result of her representing "his family against him in a probate matter." (Tr. 6.) She advised she "was raised with guns[,] * * * know[s] the safe usage of guns[,] * * * [and] never pulled a gun on anyone." (Tr. 7.) Noting she has political aspirations, defendant stated she would like the records to be sealed both for her own privacy and to prevent disclosure of this matter should she seek public office.

{¶10} The trial court noted defendant is "licensed to carry" a weapon, but observed "someone who had access to that gun and is not licensed to carry was convicted of an offense involving that gun." (Tr. 9.) The trial court then stated, "based on the Government need and based on the considerations raised by the arguments, I'm not granting the expungement," concluding the government's need "outweighs [defendant's] request." (Tr. 10-11.)

C. Argument on Appeal

{¶11} In response to defendant's second and fourth assigned errors, the state asserts the trial court did not abuse its discretion in denying a request to seal records where the trial court complied with all statutory requirements by holding a hearing, asking questions, considering arguments and evidence, and weighing the interests of the parties. See *Streets* at ¶11, citing *In re Page*, 10th Dist. No. 08AP-966, 2009-Ohio-1565 (finding no abuse of discretion in denying application where trial court complied with all statutory requirements). The state argues that, after weighing defendant's interest in privacy against the government's interest in protecting its law enforcement officers against the possibility of a future visit to defendant's residence, the trial court properly concluded the state's legitimate interests in opposing the application to seal outweighed defendant's interest in sealing them. See, e.g., *In re Brown*, 10th Dist. No. 07AP-715, 2008-Ohio-4105, ¶14 (noting "the government's interest in maintaining the safety of law enforcement officers is served by permitting access to criminal records of persons with whom officers are confronted, especially those * * * who were charged with crimes involving the discharge of a firearm").

{¶12} Initially, the state appears to argue we explicitly have held a trial court that denies a request to seal records after the court states it held a hearing, asked questions, considered arguments and evidence, and weighed the evidence cannot be said to have abused its discretion. To the extent the state so argues, it extends the case law it cites. Indeed, to embrace the state's argument would allow a trial court to arbitrarily deny a petition to seal records by so stating, whether or not the weighing process conceivably could support the trial court's decision. Rather, the procedure set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, is instructive because it addresses statutory provisions with aspects analogous to those at issue here.

{¶13} Applying *Kalish* here by analogy, we first must "ensure that the trial court has adhered to all applicable rules and statutes" in its decision, the part of the review process the state's argument appears to address. *Id.* at ¶14. Thus, "[a]s a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law * * *." *Id.* Cf. *Streets*, *supra*. Once we have ascertained that the trial court complied with the statutory language, we must consider the trial court's application of the statutory language, under which the trial court has "full discretion" to determine whether the government's interest in maintaining open records outweighs the acquitted individual's need to have the records sealed. *Id.* at ¶16. Here, we agree with the state that the trial court's entry on its face complies with the statutory requirements. The remaining issue is whether the trial court abused its discretion in the weighing process that led to the court's decision to deny the request to seal defendant's records.

{¶14} Defendant presented a plausible, legitimate reason for wanting the record sealed. She noted she is a 30-year attorney who has not incurred so much as a traffic

ticket. She explained she possessed a gun due to threats arising from her practice of law. Finally, she noted her desire to pursue elected office, with the accompanying concern the electorate would not understand the records if they were to be disclosed during an election contest. In response, the state indicated it wanted defendant's record to remain open because the offense involved a gun, and law enforcement's safety required that it be able to ascertain defendant possesses a gun.

{¶15} To the extent the trial court relied on the argument that a gun alone warrants denying defendant's application to seal the records, it arguably erred. A single factor, such as the presence of a gun, generally is not a sufficient basis for denying an application. See *State v. M.D.*, 8th Dist. No. 92534, 2009-Ohio-5694, ¶22, quoting *State v. Haas*, 6th Dist. No. L-04-1315, 2005-Ohio-4350, ¶24, citing *State v. Hilbert* (2001), 145 Ohio App.3d 824, 827, appeal not allowed, 94 Ohio St.3d 1430, 2002-Ohio-5651 (noting "[t]he nature of the offense, however, 'cannot provide the sole basis to deny an application' "); *State v. Berry* (1999), 135 Ohio App.3d 250, 253 (reversing the trial court for failure to hold hearing and on the separate error of "summarily and categorically denying the application because the matters investigated were sex offenses"); *State v. Bates*, 5th Dist. No. 03-COA-057, 2004-Ohio-2260 (reversing denial of application where gambling addiction was sole basis for denying expungement of theft offense); cf. *State v. Spicer*, 1st Dist. No. C-040637, 2005-Ohio-4302, ¶9 (concluding trial court did not abuse its discretion in considering the nature of the offense "[o]nly after weighing all [the other] factors" presented by both parties at the hearing). Indeed, nothing in the statute governing applications to seal records suggests the presence of a gun alone is grounds for denying the application when possessing a gun is permitted under law.

{¶16} The state's second reason for objecting to defendant's application involved protecting law enforcement, a significant and vitally important goal. The state's argument, however, fails to articulate how, in these circumstances, denying defendant's application protects law enforcement. While the state suggests keeping the records open will permit law enforcement to know defendant has a gun in the event law enforcement ever is called to defendant's home, the record established defendant has a license to carry a weapon, a record that is public and available to law enforcement in the appropriate registry. See *Cleveland v. Cooper-Hill*, 8th Dist. No. 84164, 2004-Ohio-6920, ¶15 (holding "the trial court's discretion is not without limits" and defendant's interest "clearly outweighs the state's interest in some hypothetical, potential crime enhancement" when "there are no indicators whatsoever of any likelihood of reoffending").

{¶17} Moreover, although the state relies on *Brown* to support its argument, *Brown* is distinguishable. In *Brown*, the underlying offense involved a defendant who admitted he actually discharged a firearm. Here, however, no one alleged, and defendant did not admit, she discharged a firearm. To the contrary, defendant stated she has "never pulled a gun on anyone," and the jury apparently agreed. (Tr. 7.) Similarly, to the extent the state or the trial court relied on the actions of defendant's co-defendant, neither the trial court nor the state clarifies on the record or through case law how his conduct creates a legitimate government interest in maintaining the records of defendant who was found not guilty of any offense. The co-defendant's records remain open and allow law enforcement to peruse them as needed if law enforcement is called to return to defendant's home.

{¶18} The state's brief also points to portions of the record that indicate defendant is involved in litigation with the Franklin County Sheriff's Office arising out of an incident where someone "was shooting into [their] house," leading to a false arrest claim. (Tr. 5.) To the extent the state suggests such civil litigation is grounds for denying defendant's application, it creates an undesirable situation that encourages criminal charges against those engaged in civil litigation against law enforcement. We in no way suggest that happened here or will happen, but the potential makes us reluctant to sanction considering such facts as part of the weighing process.

{¶19} The abuse of discretion standard that applies here does not permit us to substitute our judgment for that of the trial court in weighing the various factors. See, e.g., *Streets* at ¶11 (holding that where trial court complied with all the statutory requirements and engaged in the requisite weighing of interests, an appellate court cannot find an abuse of discretion "[r]egardless of whether [the appellate] court might have ruled differently"). The trial court, however, has discretion only within the limits of the statute. Neither the state nor the trial court's decision articulates a legitimate government interest, under the facts and circumstances here, to support a decision to deny defendant's application to seal her records. *Hilbert* at 828 (stating the expungement statutes "are to be liberally construed, the relief available is to be liberally granted, and it is an abuse of discretion not to do so").

{¶20} Accordingly, the trial court abused its discretion in concluding the legitimate interests of the government outweighed the interests of defendant in having her records sealed, and we sustain defendant's second and fourth assignments of error. Our

resolution of defendant's second and fourth assignments of error renders moot defendant's first and third assignments of error. App.R. 12(A)(1)(c).

IV. Disposition

{¶21} Having sustained defendant's second and fourth assignments of error, we reverse the judgment of the Franklin County Municipal Court and remand with instructions to grant defendant's application to seal her record pursuant to R.C. 2953.52.

*Judgment reversed and case
remanded with instructions.*

TYACK, P.J., and CONNOR, J., concur.
