

SEALING A RECORD OF CONVICTION IN OHIO

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I. INTRODUCTION

Ohio Revised Code sections 2953.31-2953.35 establish the procedure for sealing a record of conviction, commonly known as “expungement.” There are many complicated barriers to expungement and exceptions to the barriers that may not be apparent to the casual or even experienced criminal law practitioner.

II. WHAT IS EXPUNGEMENT?

Sealing a record of criminal conviction is a process whereby the legal effect of a valid criminal conviction is nullified. A convicted person applies to the Court of conviction¹ to seal his record and if the application is granted the offender is no longer under any direct or collateral disability from the conviction. R.C. 2953.33(A). Furthermore, a person whose conviction has been sealed may truthfully answer that he has not been convicted with regard to the offense in question. The sealed conviction may be introduced as evidence in a subsequent criminal proceeding at least for impeachment purposes, the same as non-sealed convictions. R.C. 2953.32(E).

III. WHO IS ELIGIBLE

A. First Offender

Eligibility is the largest hurdle to expungement. Only a “first offender” is eligible to have his or her record sealed. A person with two convictions is not eligible to expunge either, subject to exceptions. Convictions from other jurisdictions will disqualify the applicant. However, if two or more convictions occur at the same time, for example possession of drugs and possession of drug paraphernalia, they are counted as only one conviction. R.C. 2953.21(A). Likewise, two or three offenses committed within a three month “spree” period count as one conviction if they are prosecuted in the same indictment or complaint. For example, a person who passes three bad checks in a single month may have a guilty plea to all three from the same case number considered as a single offense. R.C. 2953.21(A). Most minor misdemeanor traffic offenses whether under state statute or municipal ordinance are not considered an “other conviction.” Therefore a person with a petty theft and two minor misdemeanor speeding tickets may

¹ If the application is to seal a federal or out of state conviction the application is to be filed in “a Common Pleas Court”. R.C. 2953.32(A)(1).

expunge the theft if all other qualifications are met. “Minor misdemeanor” is a term of art for an offense not punishable by jail time. R.C. 2901.02, 2929.24, and 2929.28. A traffic offense that is a misdemeanor of the first, second, third or fourth degree is disqualifying as an “other offense.” Note, for example, that a second traffic conviction within one year is a fourth degree misdemeanor. Thus in the example of the person with the petty theft and two speeding tickets if the second speeding ticket conviction was entered within one year of the date of conviction of the first speeding ticket, the second speeding ticket became a fourth degree misdemeanor, R.C. 4511.99(B), whether or not a jail sentence was actually imposed and that second speeding conviction would have made the defendant ineligible to expunge his theft conviction.

B. Eligible Offenses

A conviction for any felony where there is a mandatory prison term is not subject to expungement. This includes aggravated murder, murder, rape and any felony with a gun specification. Many sex offenses are not subject to expungement R.C. 2953.36(B). Under the same code section traffic offenses including OVI are not eligible. Aurora v. Bulanda (1996) Ohio App. Lexis 2453. Any conviction from a felony that is an “offense of violence” is ineligible. That term of art is defined in R.C. 2901.01. A (9) and includes offenses such as robbery and aggravated burglary. A first degree misdemeanor offense of violence such as domestic violence R.C. 2919.25 is not sealable, but by statute the first degree misdemeanors of assault, inciting to violence and inducing panic are sealable. R.C. 2953.35(C).

C. Time to File

If a “first offender” has a conviction for an expungeable offense she may not file her application until one year after her final discharge for a misdemeanor or three years after her final discharge for a felony R.C. 2953.32A(1). A very common mistake is premature filing. “Final Discharge” does not occur until completion of community control or post release control. Thus a person charged with breaking and entering in 2000 who is placed on five years of community control in 2001 and who completes community control in 2006 is not eligible to file to seal the conviction until 2009.

D. Pending Charges

An offender may not receive an expungement if he has any charges pending against him at the time the matter is set for hearing. R.C. 2953.32 C 1(3), 2953.43 C(2).

E. Hearing

The applicant must pay a filing fee of fifty dollars R.C. 2953.32(C)(3). The court must notify the prosecutor and set the motion for hearing. If the defendant has 2 or 3 “spree” convictions at issue the court must initially determine whether or not it is in the public interest to treat the spree as one conviction. R.C. 2953.32(C). If so, the court then determines if the applicant is a first offender eligible for expungement, considers objections of the prosecutor if any, determines whether or not any criminal proceedings are pending against defendant, and whether or not the defendant has been rehabilitated to the satisfaction of the court. Lastly, the court must determine if the interests of the defendant in having the record sealed are outweighed by legitimate governmental interest in keeping the records maintained. If the evidence on this issue is equal, the motion to seal is to be granted. If all of these findings are made the court orders the conviction sealed and the offense is deemed not to have occurred.

IV. CONCLUSION

Most offenders are simply not eligible to have their records sealed because the offenses in question are not sealable or because the defendant is not a “first offender”. When those hurdles are cleared the lawyer must not file the application too soon (before the necessary time period after final release) nor too late (after another charge is pending).

Where an offender is eligible the motion should ordinarily be granted. A prosecutor’s boilerplate objection without specific reasons should not outweigh the defendant’s interest in sealing the record. Sealing of the record is a very important opportunity for a first offender to be restored to her rights.