COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	**:**	
Plaintiff	**:**	**CASE NO. 2002 CR 00375**
vs.	**:**	**Judge McBride**
KENNETH NICHOLAS ANDERSON	**:**	**DECISION/ENTRY**
Defendant	**:**	

Catherine Adams, assistant prosecuting attorney for the State of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

W. Kenneth Zuk, attorney for the defendant Kenneth Nicholas Anderson, 3487 St. Annes Turn, Cincinnati, Ohio 45245.

This cause is before the court for consideration of an application filed by the defendant Kenneth Nicholas Anderson on June 3, 2013 for the sealing of the official records in this case.

The court scheduled and held a hearing on the motion on June 26, 2013. At the conclusion of that hearing, the court took the issues raised by the application under advisement.

Upon consideration of the application, the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The defendant Kenneth Anderson was charged in a two-count indictment in the present case with two counts of felonious assault in violation of subsections (A)(1) and (A)(2) of Section 2903.11 of the Revised Code, felonies of the second degree. On October 29, 2002, Anderson entered a plea to and was found guilty of one count of attempted felonious assault in violation of Sections 2923.02 and 2903.11(A)(2) of the Revised Code, a felony of the third degree.[1]

Anderson has now filed an application to have the official records of this case sealed.

LEGAL ANALYSIS

Expungement "is a state-created act of grace and 'is a privilege, not a right.' "[2] "A trial court may only grant expungement when an applicant meets all of the statutory requirements."[3]

Pursuant to R.C. 2953.32(A)(1):

[1] Plea of Guilty, filed October 29, 2002 and Judgment Entry Sentencing Defendant to Community Control, filed December 4, 2002.
[2] *State v. Williamson* (Nov. 20, 2012), 10th Dist. No. 12AP-340, 2012-Ohio-5384, ¶ 10, quoting *State v. Simon* (2000), 87 Ohio St.3d 531, 533, 721 N.E.2d 1041.
[3] Id., citing *State v. Hamilton* (1996), 75 Ohio St.3d 636, 640, 665 N.E.2d 669.

> " * * * [A]n eligible offender may apply to the sentencing court if convicted in this state, or to a court of common pleas if convicted in another state or in a federal court, for the sealing of the conviction record. Application may be made at the expiration of three years after the offender's final discharge if convicted of a felony, or at the expiration of one year after the offender's final discharge if convicted of a misdemeanor."

While this statute applies generally, R.C. 2953.36 provides that sections 2953.31 to 2953.35 of the Revised Code do not apply to certain convictions. R.C. 2953.36(C), the subsection which is relevant to the case sub judice, states that sections 2953.31 to 2953.35 of the Revised Code do not apply to "[c]onvictions of an offense of violence when the offense is * * * a felony and when the offense is not a violation of section 2917.03 of the Revised Code and is not a violation of section 2903.13, 2917.01, or 2917.31 of the Revised Code that is a misdemeanor of the first degree."

R.C. 2953.36 does not define "offense of violence." However, this term is defined in R.C. 2901.01, the general definition section for Ohio's criminal code, and this definition is commonly applied in the context of sealing of records.[4] As such, the court will use this definition to determine whether R.C. 2953.36(C) applies to preclude the application of sections 2953.31 to 2953.35 of the Revised Code to the conviction in the case at bar.

R.C. 2901.01(A)(9) provides in pertinent part as follows:

> " 'Offense of violence' means any of the following:
>
> (a) A violation of section * * * 2903.11 * * *;
>
> * * *

[4] See, e.g., *State v. Ventura* (Sept. 26, 2005), 12th Dist. No. CA2005-03-079, 2005-Ohio-5048, ¶ 11; *State v. Lawson* (May 23, 2013), 10th Dist. No. 12AP-771, 2013-Ohio-2111, ¶ 10; and *State v. Stislow* (Aug. 11, 2006), 11th Dist. No. 2005-L-207, 2006-Ohio-4168, ¶ 20.

> (d) A conspiracy or attempt to commit, or complicity in committing, any offense under division (A)(9)(a), (b), or (c) of this section."

At the hearing on this matter, defense counsel discussed the defendant's military service and cited to the case of *State v. J.K.* (Nov. 3, 2011), 8th Dist. No. 96574, 2011-Ohio-5675, in support of the application to seal. The court in *State v. J.K.* held that a court is to look at the entire record when determining whether an offense is an offense of violence.[5] That court ultimately concluded that the defendant's conviction of attempted arson was not an offense of violence and could be sealed.[6] The *J.K.* court cites the Ohio Supreme Court of *State v. Simon* (2000), 87 Ohio St.3d 531, 533, 721 N.E.2d 1041, for the proposition that " '[w]hen considering whether an applicant is ineligible to have a conviction sealed under R.C. 2953.36 * * * a trial judge must examine the entire record * * *.' "[7]

First, the court would note that the holding of the *Simon* case is the following:

> "Consequently, we hold that, when considering whether an applicant is ineligible to have a conviction record sealed under R.C. 2953.36 because the applicant may have been 'armed with a firearm or dangerous ordnance' (R.C. 2951.02) at the time of the offense, a trial judge must examine the entire record to determine whether the applicant was so armed. In some cases, it may not be apparent from the record whether the defendant was armed, and further inquiries outside the record may be necessary. The case *sub judice* is not such a case.
>
> Since the record in this case clearly reveals that defendant committed his crime with a firearm, defendant is not eligible to have his record of conviction sealed. Accordingly, the judgment of the court of appeals is affirmed."[8]

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[5] *J.K.*, supra, at ¶¶ 27-29.
[6] Id. at ¶ 30.
[7] Id. at ¶ 28, quoting, *Simon*, supra, 87 Ohio St.3d at 532. See also, *State v. Jithoo* (Sept. 26, 2006), 10th Dist. No. 05AP-436, 2006-Ohio-4978, ¶ 11.
[8] *Simon* at 535.

While an examination of the record to determine whether a firearm was actually used in a crime, when that factor is the sole basis upon which expungement would be denied, has a basis in logic, this court questions the appropriateness of the examination of the particular factor scrutinized by the *J.K.* court. R.C. 2901.01(A)(9)(d) specifically and unequivocally states that complicity, conspiracy or an attempt to commit an offense of violence itself constitutes an offense of violence. The *Simon* court did not make the analysis of the record subjective and open to interpretation by various courts – a record will either clearly demonstrate that the offender actually used a firearm in the commission of the offense or did not. The *J.K.* court has now expanded this caselaw to allow a subjective analysis of the actions of the defendant at the time of the offense apparently in order to determine if the court believes violence was actually committed. The analysis of the facts by the *J.K.* court states only that the defendant served in the military and directed a fellow soldier to take and destroy his vehicle for the insurance money and that the act was attempted and quickly detected by law enforcement.[9] The court does not specifically discuss why it found, under these facts, that the defendant's offense of attempted arson was not an "offense of violence." Furthermore, the court does not explain its departure from R.C. 2901.01(A)(9)(d) or, in fact, even mention that subsection in the case. Oddly, the court actually states that "[t]here is no question that arson is defined as an offense of violence. R.C. 2901.01(A)(9)(a). But the question we are presented with is whether attempted arson is an offense of violence."[10] The court does not explain how R.C. 2901.01(A)(9)(d) does not unequivocally answer this question.

[9] *J.K.* at ¶ 29.
[10] Id. at ¶ 26.

R.C. 2901.01(A)(9)(a) and (d) together provide that attempted felonious assault is an offense of violence. As such, the defendant's conviction is not one for which expungement is available.

Additionally, even if an examination of the entire record is necessary in this case, that record clearly supports that this was an offense of violence. The defendant himself, in his statement in the pre-sentence investigation report, described "hitting [the victim] in the head with a metal curl bar which he had in his car. He stated he also hit the victim with his fist a couple of times and fled the scene." The victim was hospitalized as a result of the defendant's conduct and suffered a deep laceration of his forehead requiring stitches. Based on the defendant's admission, the court made a finding in the sentencing entry at the time the offense was more serious than conduct normally constituting the offense of attempted felonious assault " * * * for the reason that the defendant actually committed the offense of felonious assault rather than the lesser included offense of attempted felonious assault."[11]

The court finds that the defendant in the present case was convicted of an offense of violence. As a result, pursuant to 2953.36(C), sections 2953.31 to 2953.35 of the Revised Code do not apply to the defendant's conviction for attempted felonious assault in this case and the application for sealing of the official records in this case shall be denied.

[11] Judgment Entry Sentencing Defendant to Community Control, filed December 4, 2002.

CONCLUSION

The defendant's application for the sealing of the official records in this case is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 5th day of July 2013 to all counsel of record and unrepresented parties.

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Administrative Assistant to Judge McBride