

July 9, 2015

The Honorable Daniel G. Padden
Guernsey County Prosecuting Attorney
139 West Eighth Street
P.O. Box 640
Cambridge, Ohio 43725-0640

SYLLABUS:

2015-023

1. A court may delay issuance of an order on an application to seal the record of a conviction upon a finding by the court that the applicant has not demonstrated his rehabilitation to the court's satisfaction, and this finding may be premised upon the applicant's failure to pay the costs of the prosecution.
2. A court may not delay issuance of an order on an application to expunge the record of a conviction for the reason that the applicant has not paid the costs of the prosecution.
3. A clerk of court may not enforce a judgment against a defendant for the costs of the prosecution in a case in which a court has sealed or expunged the record of the defendant's conviction.



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OPINION NO. 2015-023

The Honorable Daniel G. Padden
Guernsey County Prosecuting Attorney
139 West Eighth Street
P.O. Box 640
Cambridge, Ohio 43725-0640

Dear Prosecutor Padden:

You have requested an opinion concerning collection of court costs in a criminal case in which the record of the conviction has been sealed or expunged. You ask whether the sealing or expungement of the record of the conviction may be delayed until after the defendant has paid the costs of the criminal prosecution for which he is liable. You also ask how a clerk of court shall collect those costs when the record of a defendant's conviction has been sealed or expunged.

Assessment of Costs in Criminal Cases

Court costs are “the statutory fees to which officers, witnesses, jurors, and others are entitled for their services in an action or prosecution, and which the statutes authorize to be taxed and included in the judgment or sentence.” *Middleburg Hts. v. Quinones*, 120 Ohio St. 3d 534, 2008-Ohio-6811, 900 N.E.2d 1005, at ¶8. In all criminal cases the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for those costs. R.C. 2947.23(A). See *State v. Threatt*, 108 Ohio St. 3d 277, 2006-Ohio-905, 843 N.E.2d 164, at ¶23; *State v. White*, 103 Ohio St. 3d 580, 2004-Ohio-5989, 817 N.E.2d 393, at ¶5; see also R.C. 2746.02 (“[a] court of record of this state shall tax as costs ... (B) In any criminal case, the costs of prosecution, as provided in [R.C. 2947.23]”). The clerk of a court of common pleas is responsible for attempting to collect the costs from the person convicted of a felony offense charged in the case. R.C. 2949.14. A prosecuting attorney shall cause execution to be issued for costs in every case of conviction and urge their collection until they are effected or found to be impracticable to collect. R.C. 309.08(A); *State v. White*, at ¶14.

A judgment for costs in a criminal case is a civil obligation that shall be collected by the methods the law provides for the collection of civil judgments. *State v. Threatt*, at ¶¶15-16; *Strattman v. Studt*, 20 Ohio St. 2d 95, 103, 253 N.E.2d 749 (1969); see *State v. Joseph*, 125 Ohio St. 3d 76, 2010-Ohio-954, 926 N.E.2d 278, at ¶20; *State v. Ushery*, No. C-120515, 2013-Ohio-2509, 2013 WL 3148715 (Hamilton County App.), at ¶15. “Court costs are not financial

sanctions.” *State v. Lux*, No. 2010 CA 30, 2012-Ohio-112, 2012 WL 114188 (Miami County App.), at ¶45.

Various methods may be used to collect a civil judgment for money, which are, in turn, available to collect the costs that accrue and are assessed in a criminal case. *See, e.g., State v. Threatt*, at ¶¶11-16 (listing the mechanisms available pursuant to R.C. 2929.18(D), R.C. 2947.23(B), and R.C. 5120.133(A) to collect costs in a criminal case); *see* R.C. 2949.09 (“[w]hen a judge or magistrate renders judgment for a fine, an execution may issue for such judgment and costs of prosecution, to be levied on the property, or in default thereof, upon the body of the defendant for nonpayment of the fine”); R.C. 2949.15 (if a non-indigent felon fails to pay costs of prosecution, the clerk of the court of common pleas shall issue to the sheriff executions against the felon’s property for fines and the costs); *State v. White*, at ¶15 (the possible methods of collection are numerous, including assessing costs and attempting collection through the defendant’s prison account or attempting to collect at a later date, when it becomes apparent that the defendant is no longer indigent). The court also may order a defendant to perform community service until the judgment for costs is satisfied by payment or is forgiven. R.C. 2947.23(A)(1)(a)(i); *State v. White*, at ¶15. Ordering an offender to perform community service pursuant to R.C. 2947.23 “does not preclude the state from taking any other action to execute the judgment.” R.C. 2947.23(B). A court retains jurisdiction to waive, suspend, or modify payment of the costs of a criminal prosecution at the time of sentencing or at any time thereafter. R.C. 2947.23(C).

Sealing the Record of a Conviction in a Criminal Case

Sealing a defendant’s record of conviction in a criminal case is a privilege rather than a right and an “act of grace created by the state.” *State v. Aguirre*, Sup. Ct. Nos. 2013–0870 and 2013–0876, 2014-Ohio-4603, 2014 WL 5369332, at ¶16; *State v. Martin*, No. 14AP-582, 2015-Ohio-1557, 2015 WL 1851676 (Franklin County App.), at ¶8. A court may seal the record of a defendant’s conviction only when the conditions for sealing set forth in the pertinent statutes have been satisfied in full. *State v. Martin*, at ¶8.

R.C. 2953.31-36 address sealing the record of a conviction in most criminal cases.¹ With certain exceptions, *see* R.C. 2953.36, an “eligible offender”² may apply to a court for an

¹ R.C. 2953.51-55 authorize a court to seal the record of a defendant’s conviction in a criminal case in which the defendant is found not guilty or the charges are dismissed. R.C. 2953.57-60 authorize a court to seal the record of a defendant’s conviction that is set aside or vacated for a reason related to DNA testing.

² An “eligible offender” is defined in R.C. 2953.31(A). Whether a defendant is an “eligible offender” is determined by the number and type of convictions delineated in his criminal history record. R.C. 2953.31(A).

order to seal the record of his conviction. R.C. 2953.32(A)(1).³ This application may be made only after the offender's "final discharge" at a time prescribed by the statute. *Id.*

After the application to seal the record of conviction is filed, the court shall set a date for a hearing and notify the prosecutor for the case; the prosecutor may file objections to the application. R.C. 2953.32(B). The court shall then determine, among other things, whether the interests of the applicant in having the record of his conviction sealed are outweighed by any legitimate governmental needs to maintain the record and whether rehabilitation of the applicant has been attained to the satisfaction of the court. R.C. 2953.32(C)(1)(c), (e), (C)(2). Once the record of conviction in the criminal case is ordered sealed, all index references to the case shall be deleted. R.C. 2953.32(C)(2). The proceedings in the case "shall be considered not to have occurred[.]" *Id.* See generally, e.g., 1993 Op. Att'y Gen. No. 93-038; 1983 Op. Att'y Gen. No. 83-100. In certain circumstances a sealed record of a conviction may be inspected. A sealed record of conviction may be accessed and used by the persons or for the purposes set out in R.C. 2953.32(D)(1)-(13).⁴

Further, a sealed record of a conviction may be accessed and used with respect to a pending criminal case. When the sealed record of a conviction bears upon the nature and character of an offense with which a defendant is about to be charged, the sealed record of the conviction may be used to determine the appropriate charge in the pending case. R.C. 2953.32(D)(1). A court may consider the sealed record of a conviction to determine the appropriate sentence or disposition in a subsequent criminal prosecution of the defendant. R.C. 2953.32(C)(2). And "[i]n any criminal proceeding, proof of any otherwise admissible prior conviction may be introduced and proved, notwithstanding the fact that for any such prior conviction an order of sealing previously was issued pursuant to [R.C. 2953.31-.36]." R.C. 2953.32(E).

A person or governmental agency, office, or department that is responsible for maintaining custody of sealed records of convictions may create an index to those records that uses the name of the person that is the subject of a sealed record of conviction, alphanumeric identifiers related to that person, the word "sealed," and the name of the specific person, agency, office, or department that retains custody of the sealed record. R.C. 2953.32(F). The index shall

³ We confine our consideration to an eligible offender that applies under R.C. 2953.32(A)(1) for an order to seal the record of his conviction, in accordance with your inquiry, and do not consider the sealing standards for an eligible offender arrested for a misdemeanor that has effected a bail forfeiture, see R.C. 2953.32(A)(2).

⁴ Another exception is found in R.C. 2953.32(G), which permits boards of education of certain school districts to maintain the record of a conviction that either the board used, R.C. 3301.121, or the Superintendent of Public Instruction used, R.C. 3313.662, to exclude a person from attending any school of the district, or any school within the state, respectively.

not disclose the offense of which the defendant was convicted. *Id.* The index shall be made available by the person that has custody of the sealed records only for the purposes set forth in R.C. 2953.32(C)-(E). *Id.*

Any officer or employee of the state or a political subdivision of the state that knowingly discloses or releases a sealed record of a conviction, except as expressly authorized by law, is guilty of “divulging confidential information, a misdemeanor of the fourth degree.” R.C. 2953.35(A)(2). In any application for employment, license, or other right or privilege, any appearance as a witness, or in any other inquiry, a person may not be questioned about a previous conviction when the record of that conviction has been sealed, subject, however, to certain exceptions set forth in the statute. R.C. 2953.33(B)(1).

Expunging the Record of a Conviction in a Criminal Case

The General Assembly has authorized expungement of a person’s record of a conviction of the offense of improperly handling a firearm in a motor vehicle that is no longer a crime, R.C. 2953.37, and a person’s record of a conviction of a violation of R.C. 2907.24 (soliciting), R.C. 2907.241 (loitering to engage in solicitation), or R.C. 2907.25 (prostitution), if the person’s participation in the offense was a result of the person having been a victim of human trafficking, R.C. 2953.38. As used in R.C. 2953.37 and R.C. 2953.38, “[e]xpunge” means “to destroy, delete, or erase a record as appropriate for the record’s physical or electronic form or characteristic so that the record is permanently irretrievable.”⁵ R.C. 2953.37(A)(1); R.C. 2953.38(A)(1).

Upon the filing of an application for expungement pursuant to R.C. 2953.37 or R.C. 2953.38, the court shall set a date for a hearing and notify the prosecutor in the case; the prosecutor may file objections to the application. R.C. 2953.37(C); R.C. 2953.38(D). At a hearing held pursuant to R.C. 2953.37, the court shall consider the prosecutor’s objections, if any were filed, and weigh the interests of the applicant in having the record of his conviction expunged against the legitimate needs, if any, of the government to maintain the record. R.C. 2953.37(D)(1)(c)-(d).

⁵ “Though the Tenth District repeatedly referred to the process at issue in this case as ‘expungement,’ we note that expungement is a separate process from sealing a conviction record. Expungement results in deletion, making all case records ‘permanently irretrievable,’ R.C. 2953.37(A)(1), while sealing simply provides a shield from the public’s gaze[,] R.C. 2953.32(D), restricting inspection of sealed records of a conviction to certain persons for certain purposes.” *State v. Aguirre*, Sup. Ct. Nos. 2013–0870 and 2013–0876, 2014-Ohio-4603, 2014 WL 5369332, at ¶5 n.2

At a hearing held pursuant to R.C. 2953.38, the court shall consider the reasons against granting the application if any were specified by the prosecutor in his objection. R.C. 2953.38(E)(1). Upon determining that the interests of the applicant in having the records pertaining to the applicant's conviction expunged are not outweighed by any legitimate needs of the government to maintain those records, the court shall order expungement of the record of conviction. R.C. 2953.38(G)(1)(b). In either proceeding, if the court orders that the record of a conviction shall be expunged, the record "shall not be used for any purpose," including, but not limited to, a criminal records check under R.C. 109.572, and the proceedings in the case "shall be considered not to have occurred[.]" R.C. 2953.37(D)(2)(b); R.C. 2953.38(G)(2). In any application for employment, license, or other right or privilege, any appearance as a witness, or in any other inquiry, a person may not be questioned with respect to any conviction expunged under R.C. 2953.37. R.C. 2953.33(B)(2).⁶ Upon an inquiry into a matter expunged under R.C. 2953.38, the applicant may, and the court shall, reply that no record of conviction exists with respect to the applicant. R.C. 2953.38(G)(2).

A Court May Delay Issuance of an Order on an Application to Seal the Record of a Conviction upon a Finding by the Court that the Applicant Has Not Been Rehabilitated to the Court's Satisfaction

In your first question you ask whether a court may delay granting a defendant's application to seal or expunge a record of conviction until the defendant has paid court costs that were assessed against him in the criminal prosecution. Pursuant to R.C. 2953.32(A)(1), an eligible offender's application to seal the record of a conviction "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." Thus, an offender becomes eligible to file an application to seal the record of his conviction upon receiving a final discharge and the expiration of the period of time following his final discharge that is specified in the statute. A final discharge is one condition the satisfaction of which makes an offender eligible to file an application for sealing the record of his conviction. First we shall consider what constitutes a "final discharge" for the purpose of the filing of a sealing application by an eligible offender under R.C. 2953.32(A)(1).

The General Assembly has not enacted within R.C. Title 29 (crimes and procedure) a definition of the term "final discharge." It has, rather, been the task of the Ohio judiciary to explicate the meaning of this term as it is used within the criminal law context. The courts have stated that a final discharge is characterized by, *inter alia*, the offender's satisfaction of the entire sentence imposed by a court for the commission of a crime. See *Aguirre*, at ¶2; *State v. Hoover*, Nos. 12AP-818 and 12AP-826, 2013-Ohio-3337, 2013 WL 3963460, at ¶7 (Franklin County

⁶ Under Ohio R. Evid. 609 evidence that a witness has been convicted of a crime is admissible in certain circumstances. If the record of a witness' conviction has been expunged, evidence of that conviction is not admissible. Ohio R. Evid. 609(C).

App.) (“[t]he term ‘final discharge’ is not defined by statute. Per case law, however, an offender is not finally discharged until he has served any sentence previously imposed by the court”); *State v. Pettis*, 133 Ohio App. 3d 618, 619, 729 N.E.2d 449 (Cuyahoga County 1999); *Willowick v. Langford*, 15 Ohio App. 3d 33, 34, 472 N.E.2d 387 (Lake County 1984); *State v. Braun*, No. 46082, 1983 WL 5542, at *1 (Cuyahoga County App. July 7, 1983) (“[a] final discharge from conviction means a release from all obligations imposed and not just a release from confinement”). In a criminal case the elements of a sentence may include a term of incarceration, a monetary fine, restitution, and a condition such as post-release or community control, which shall be satisfied by an offender following his release from incarceration. R.C. 2929.11 (purposes of felony sentencing); R.C. 2929.14 (basic prison terms for felonies); R.C. 2929.15 (community control sanctions for felonies); R.C. 2929.18 (financial sanctions; restitution; reimbursements (felonies)); R.C. 2929.21-28 (sentences a court may impose on an offender convicted of a misdemeanor).

R.C. 2947.23(A)(1)(a) declares, in pertinent part, that, “[i]n all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution[.]” A reasonable inference from this language is that costs imposed against a defendant in a criminal prosecution are a component of the defendant’s sentence to the same extent as a fine, a term of incarceration, or restitution. Courts have ruled the opposite, however. While costs imposed in a criminal case shall be included in the defendant’s sentence, those costs are not a part of the sentence in the same way as a fine, imprisonment, or restitution:

This court has held that costs are distinct from criminal punishment. “[A]lthough costs in criminal cases are assessed at sentencing and are included in the sentencing entry, costs are not punishment, but are more akin to a civil judgment for money.” *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 15. This court has held that “[t]he duty to pay court costs is a civil obligation arising from an implied contract.” *Strattman v. Studt* (1969), 20 Ohio St.2d 95, 49 O.O.2d 428, 253 N.E.2d 749, paragraph six of the syllabus. That court costs are a civil obligation is true in both criminal and civil cases: “By being involved in court proceedings, any litigant, by implied contract, becomes liable for the payment of court costs if taxed as a part of the court’s judgment. A judgment for costs in a criminal case is a civil, not a criminal, obligation, and may be collected only by the methods provided for the collection of civil judgments.” *Id.*

State v. Joseph, 125 Ohio St. 3d 76, 2010-Ohio-954, 926 N.E.2d 278, at ¶20; *see also State v. Ushery*, at ¶11 (“the costs of prosecution are not a part of the fine imposed in a criminal case”); *State v. Summers*, 71 Ohio App. 3d 1, 2, 592 N.E.2d 905 (Cuyahoga County 1990) (“court costs are not a part of a criminal sentence. Therefore, defendant’s failure to pay the court costs does not result in his sentence not being served,” and thus did not justify, solely on that basis, denial of the defendant’s application for expungement of the record of his conviction).

Thus, that a defendant has not paid costs assessed against him in a criminal case does not prevent a court from finding that he has completed his entire sentence and has received a final discharge within the meaning of R.C. 2953.32. Pursuant to R.C. 2953.32(A)(1), a defendant who has received a final discharge is eligible to apply to a court for an order to seal the record of his conviction, even though he has not paid the costs of prosecution imposed by the court.

The General Assembly has identified several factors and circumstances a court shall consider in passing upon a defendant's application to seal the record of his conviction. R.C. 2953.32(C)(1)(a)-(e). Among these, the court shall determine whether the defendant "has been rehabilitated to the satisfaction of the court." R.C. 2953.32(C)(1)(c). *See, e.g., State v. Evans*, No. 13AP-158, 2013-Ohio-3891, 2013 WL 4807021 (Franklin County App.), at ¶11 ("[e]vidence of rehabilitation normally consists of an admission of guilt and a promise to never commit a similar offense in the future, *or good character or citizenship in the community since the conviction*") (emphasis added); *State v. Schuster*, Case No. CA2012-06-042, 2013-Ohio-452, 2013 WL 501739 (Clermont County App.), at ¶22 ("a trial court must find that an applicant has been rehabilitated *to the satisfaction of the court*, not simply that he has been rehabilitated.... [Applicant] did not present any evidence of his current situation, beyond the required proof he has not committed a subsequent offense," and "did not offer any evidence of his good citizenship in the community").

The General Assembly thus expects a court that is considering an application to seal the record of a conviction to evaluate independently the state of an applicant's rehabilitation. Unless an applicant can demonstrate to the court's satisfaction that the applicant has been rehabilitated, the court shall not order all the official records of the case that pertain to the conviction sealed. R.C. 2953.32(C)(2); *State v. Schuster*, at ¶15 ("[a] trial court has broad discretion in ruling on an application filed pursuant to R.C. 2953.32. A trial court's decision to deny such an application will not be disturbed on appeal absent a showing the trial court abused its discretion. An abuse of discretion is more than an error of law or judgment and implies that the trial court's decision [to deny an application to seal] was unreasonable, arbitrary, or unconscionable") (citations omitted).

The court of appeals for Hamilton County (First Appellate District) recently ruled that unpaid court costs "is a factor that the trial court can consider when determining, in the exercise of its discretion, whether [the applicant] has been rehabilitated such that" an order to seal the record of the conviction is appropriate. *State v. Ushery*, at ¶15. The logical inference from this directive is that a court may determine that a defendant's failure to pay court costs supports a finding that the defendant has not been rehabilitated to the court's satisfaction, and so justifies the court in denying the defendant's application to seal the record of his conviction.

Insofar as a court has the discretion to deny issuance of an order to seal an applicant's record of conviction upon a finding that the applicant has not demonstrated rehabilitation to the court's satisfaction by virtue of the applicant's failure to pay the costs of prosecution, it follows that a court also may select the less drastic alternative of delaying issuance of an order to seal for

that same reason. We are of the opinion, therefore, that a court may delay issuance of an order on an application to seal the record of a conviction upon a finding by the court that the applicant has not demonstrated his rehabilitation to the court's satisfaction, and this finding may be premised upon the applicant's failure to pay the costs of the prosecution.

A Court May Not Delay Issuance of an Order on an Application to Expunge the Record of a Conviction for the Reason that the Applicant Has Not Paid the Costs of the Prosecution

Expungement of the record of a criminal conviction is available to a person who comes within the terms of R.C. 2953.37 or R.C. 2953.38. A person convicted of improper handling of a firearm in a motor vehicle, which no longer is a crime, may apply under R.C. 2953.37 to have the record of that conviction expunged. A person convicted of a violation of R.C. 2907.24 (soliciting), R.C. 2907.241 (loitering to engage in solicitation), or R.C. 2907.25 (prostitution), if the person's participation in the offense was a result of the person having been a victim of human trafficking, may apply under R.C. 2953.38 to have the record of that conviction expunged.

The process by which a court considers and rules upon a person's application for expungement mimics in several respects the process the General Assembly has enacted for sealing the record of a criminal conviction. In passing upon an expungement application submitted under R.C. 2953.37, a court shall consider objections to the application, if any, that have been raised by the prosecutor and "[w]eigh the interests of the applicant in having the records pertaining to the applicant's conviction ... expunged against the legitimate needs, if any of the government to maintain those records," R.C. 2953.37(D)(1)(c), (d). The court shall order expungement of the record of conviction upon a finding "[t]hat the interests of the applicant in having the records pertaining to the applicant's conviction ... expunged are not outweighed by any legitimate needs of the government to maintain those records," R.C. 2935.37(D)(2)(a)(ii).

In passing upon an expungement application submitted under R.C. 2953.38, a court shall consider objections to the application, if any, that have been raised by the prosecutor and "[d]etermine whether the applicant has demonstrated by a preponderance of the evidence that the applicant's participation in the offense was the result of having been a victim of human trafficking," R.C. 2953.38(E)(1), (2). The court shall order expungement of the record of conviction upon a finding "[t]hat the applicant has demonstrated by a preponderance of the evidence that the applicant's participation in the offense that is the subject of the application was the result of the applicant having been a victim of human trafficking," R.C. 2953.38(F).

Unlike the statutory blueprint for sealing a record of a conviction, neither R.C. 2953.37 nor R.C. 2953.38 conditions a person's expungement application upon the receipt of a final discharge. And the state of a person's rehabilitation is not a factor the court may consider in deciding whether to order expungement of the record of conviction.

Also, the General Assembly has not included language in R.C. 2953.37 or R.C. 2953.58 about a court denying or delaying its decision on an application to expunge the record of a conviction because the applicant has not paid prosecution costs assessed against him. Consequently, we are of the opinion that a court may not delay issuing an order regarding an expungement application for the reason that the applicant has not paid the costs of the prosecution.

Collection of Court Costs by a Clerk of Court Following Issuance of an Order to Seal or Expunge the Record of a Conviction

You further ask how a clerk of court is to collect costs assessed against a defendant in a criminal case that remain unpaid when the defendant's record of conviction has been sealed or expunged. Sealing the record of a conviction pursuant to R.C. 2953.32 results in all index references to the case being deleted. R.C. 2953.32(C)(2). The proceedings in the case that pertain to the conviction "shall be considered not to have occurred." *Id.* While the sealed record of a conviction may be accessed for the specific purposes enumerated in R.C. 2953.32(D)(1)-(13), none of those purposes includes enforcement of a general civil judgment, including a judgment for costs assessed against a defendant in the criminal case in which the record of conviction has been sealed.

Expungement of a record of a conviction ordered by a court pursuant to R.C. 2953.37 or R.C. 2953.38 results in a record that "shall not be used for any purpose," R.C. 2953.37(D)(2)(b), R.C. 2953.38(G)(2), and a person may not be questioned as a witness or in any application, appearance, or inquiry of a type described in R.C. 2953.33(B)(1) with respect to any record of a conviction expunged under R.C. 2953.37, R.C. 2953.33(B)(2). Upon an inquiry into a matter expunged under R.C. 2953.38, the applicant may, and the court shall, reply that no record of conviction exists with respect to the applicant. R.C. 2953.38(G)(2). An expungement ordered under R.C. 2953.37 or R.C. 2953.38 also means that the proceedings in the case that is the subject of the order "shall be considered not to have occurred," R.C. 2953.37(D)(2)(b), R.C. 2953.38(G)(2).

Thus, a court's order to seal the record of a conviction restricts the purposes for which information covered by the court's order may be accessed or used, and the proceedings resulting in the conviction shall be considered not to have occurred. An order to expunge the record of a conviction eliminates the use of that record for any purpose, and the proceedings that resulted in the conviction shall be considered not to have occurred. Implicit in your inquiry is the possibility that these consequences deprive a clerk of court of the ability to collect court costs once the record of a conviction has been sealed or expunged.

An order to seal or expunge the record of a defendant's conviction will hamper a clerk of court's exercise of his responsibility to collect costs of the prosecution the defendant has not paid. We read the controlling statutes to mean that a clerk of court may not use any information encompassed by the court's order to collect from the defendant costs that have not been paid at

the time the order is issued. If access to the information within the terms of the court's order is a necessary predicate to the clerk of court's collection of the costs, the clerk of court may not be able to collect the costs.

The statutes also declare that, once the record of a conviction is sealed or expunged, the underlying criminal proceeding shall be considered not to have occurred. The statutes do not qualify or limit that injunction. Even as the criminal proceeding shall be considered not to have occurred, it follows that a court's issuance of all orders during the course of that proceeding shall be considered not to have occurred. A court's issuance of an order assessing costs against the defendant, having not occurred, cannot be enforced by the court, much less utilized by the clerk of court as the basis of a collection action against the defendant. *See, e.g., Davis v. Ramsey*, No. 05CA16, 2006-Ohio-5030, 2006 WL 2780114 (Jackson County App.), at ¶1 (because a criminal proceeding in which the record of conviction is sealed is deemed not to have occurred, plaintiff was not able establish the elements of his malicious prosecution claim while the record remained sealed). Thus, a clerk of court may not enforce a judgment against a defendant for the costs of the prosecution in a case in which a court has sealed or expunged the record of the defendant's conviction.

Conclusions

It is, therefore, my opinion, and you are hereby advised that:

1. A court may delay issuance of an order on an application to seal the record of a conviction upon a finding by the court that the applicant has not demonstrated his rehabilitation to the court's satisfaction, and this finding may be premised upon the applicant's failure to pay the costs of the prosecution.
2. A court may not delay issuance of an order on an application to expunge the record of a conviction for the reason that the applicant has not paid the costs of the prosecution.
3. A clerk of court may not enforce a judgment against a defendant for the costs of the prosecution in a case in which a court has sealed or expunged the record of the defendant's conviction.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General