IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2020-0700
	:	
Plaintiff-Appellee,	:	On Appeal from the Franklin
	:	County Court of Appeals,
v.	:	Tenth Appellate District
	:	
[P.J.F.],	:	Court of Appeals Case No. 19AP-147
	:	
Defendant-Appellant.	:	

MERIT BRIEF OF APPELLANT P.J.F.

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STATEMENT OF THE CASE AND FACTS

On March 1, 2012, Appellant was convicted of Nonsupport of Dependents, a felony of the fifth degree, in violation of R.C. 2919.21. R. 82, 84-87, 10CR-3828; see also R. 7, 8, 18EP-784. The Appellant appealed his original conviction to the Tenth District Court of Appeals and his conviction was affirmed. See *State v. [P.J.F.]*, 10th Dist. No. 12AP-282, 2012-Ohio-6231 (Dec. 31, 2012). The facts of that case are set forth in the Tenth District's first opinion as follows:

> Appellant was ordered to pay a total monthly obligation of $216.85 for the support of his minor child, [D.F.], effective April 24, 2002. Appellant was indicted for failure to provide adequate support as ordered by the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, for the timeframe from June 21, 2008 to June 21, 2010.
>
> The mother of the minor child, Carmenika Westbrook, testified on behalf of the prosecution. Westbrook testified that she has had custody of and has lived with [D.F.] since the child's birth. According to Westbrook, appellant was ordered to pay child support to Franklin County Child Support Enforcement Agency ("FCSEA"), which would then forward the support onto her. Westbrook testified that she received very little monies from appellant through FCSEA during the timeframe of June 21, 2008 through June 21, 2010.
>
> Linda Meeks, FCSEA client affairs officer and keeper of the records, testified as to the prosecution's exhibit No. 2, which showed the account summary for appellant's child support case. This evidence showed that the total monthly amount appellant was ordered to pay to FCSEA in this case was $216.85. The evidence further showed that, for the time period at issue, there was only one payment of $150 made on February 11, 2009. Meeks testified to the total balance, or arrearage due.
>
> In his defense, appellant called [D.F.] and his fiancé Dilisa Malone. [D.F.] testified that she lives with her mother, grandmother, two sisters, and brother. According to [D.F.] she has a good relationship with her father and called herself "a daddy's girl." (Tr. 52.) [D.F.] explained to the jury that she cooks and plays games with her dad, among other activities, and that he bought her clothes, games, and other items. [D.F.] also testified that her father took good care of her and would always pay for things when asked.
>
> Malone testified that [D.F.] comes to the house she shares with appellant twice per month on the weekends and that appellant spent approximately $200 monthly on [D.F.] for clothes and other items. Malone also testified that at the time of the trial, appellant was

> not working, but that he had worked construction "off and on" from June 2008 through June 2010. (Tr. 60.)
>
> Appellant testified on his own behalf and testified he was very active in the community as a mentor and coach, and worked with troubled youth. Appellant admitted that he did not make child support payments directly to FCSEA. Appellant testified that he did not make payments to FCSEA as ordered, because he was concerned that the money would not actually be spent on [D.F.]. According to appellant, it was his belief that the money would be used specifically for [D.F.] if he gave her the money directly or bought her needed items. Appellant did not provide receipts for any of the support given to [D.F.].

State v. [P.J.F.], 10th Dist. No. 12AP-282, 2012 Ohio 6231, ¶¶2-7.

The jury found Appellant guilty of one count of nonsupport of dependents, a felony of the fifth degree. On or about March 1, 2012, Appellant was sentenced to five years of community control and found to owe an arrearage of $8,857.80 in child support. *Id.* at ¶8. The trial court ordered Appellant to pay child support as a condition of his community control, not as restitution. On July 21, 2014, the trial court terminated the Appellant's community control. R. 127, 10CR-3828; see also R. 7, 8, 18EP-748.

On December 17, 2018, the Appellant filed to have his conviction and record sealed. R. 131, 10CR-3828; R. 2, 3, 18EP-748. On March 6, 2019, the trial court held a hearing on his application to seal the conviction in case number 10CR-3828. At the hearing, Appellant's application was granted, over the State's objection, based on its opinion that Appellant was eligible for sealing. Tr., p. 8. The only objection presented by the State was that the Appellant was not eligible for sealing because "applicant failed to establish that he paid all of the court-ordered restitution in this case." R. 8, 18-EP-748; see also Tr., p. 2. The State did not argue, and it is not subject to this appeal, whether the Appellant's interests in having his record sealed were outweighed by any legitimate government interest. Regardless, the Appellant presented overwhelming evidence of his legitimate and important interests at the hearing in having his

record sealed, including the facts that he was a victim of crime and that he now has custody of his emancipated daughter, D.F. Tr., pp. 5-7.

Further, at the hearing, the trial court stated:

The Court: I've read through this material yesterday. The defendant is asking his record be sealed, and the state has filed an objection; and, if I remember correctly, you are suggesting that he has not shown that he has paid all of the court-ordered restitution and therefore is not eligible for expungement. Do I understand the state's objection correctly?

The State: Yes, you Honor.

The State did not present any further information or objections at the hearing. The trial court concluded by finding that Appellant was eligible for sealing:

The Court: The court's going to grant the entry to seal the record. *I think he becomes statutorily ineligible if he has not made restitution*. I think that the court, in sentencing, can't order as restitution anything outside of the time frame that is covered in the indictment. In this case Judge Beatty Blunt ordered complete restitution of all the arrearages. *That means that this must necessarily be a condition of community control and not an order of restitution; and, since it's not restitution, he is not statutorily ineligible.*

Tr., p.8 (emphasis added).

The State appealed the trial court's granting of the Appellant's application for sealing of record, arguing that Appellant was not eligible for sealing and thus the trial court lacked jurisdiction to entertain his application. The Tenth District sustained the State's sole assignment of error and reversed the trial court's decision. *State v. P.J.F.*, 10th Dist. No. 19AP-147, 2020-Ohio-1522 (Apr. 20, 2020). The Appellant hereby also relies on the Tenth District's statement of facts presented in paragraphs three through seven of its Opinion. On June 4, 2020, Appellant timely filed his Notice of Appeal with the Ohio Supreme Court. On August 19, 2020, this Court accepted the Appellant's appeal on his single Proposition of Law.

LAW AND ARGUMENT

Proposition of Law:

> **In a felony child support case, an applicant becomes eligible to have his record sealed when his child support payments are ordered as a condition of community control, his community control is terminated and the statutory waiting period has elapsed.**

A. **Standard of Review in Sealing of Record Cases**

The interpretation of R.C. 2953.31(A) and the application of that statute in determining whether an offender is "eligible" to have a conviction sealed are issues of law that a court reviews *de novo*. *Bedford v. Bradberry,* 8th Dist. Cuyahoga No. 100285, 2014-Ohio-2058, ¶ 5, citing *State v. Ushery,* 1st Dist. Hamilton No. C-120515, 2013-Ohio-2509, ¶ 6.

Pursuant to R.C. 2953.32(A), an eligible offender may apply to the sentencing court for the sealing of the record of the case that pertains to the conviction. Application may be made at the expiration of three years after the offender's final discharge of a felony. The trial court must make certain determinations when ruling on a motion to seal conviction, including the following:

> whether the applicant is an "eligible offender"; whether criminal proceedings are pending against the applicant; and whether the applicant has been rehabilitated to the satisfaction of the court. The court must then "consider the reasons against granting the application specified by the prosecutor" and weigh the applicant's interests in having the records sealed versus the government's needs, if any, for maintaining those records.

State v. T.S., 8th Dist. Cuyahoga No. 102648, 2017-Ohio-7395, ¶ 8. *See also* R.C. 2953.32(C)(1)(a)-(e).

The statutory definition of "eligible offender" is found in R.C. 2953.31(A)(1)(a), which states in pertinent part, “[a]nyone who has been convicted of one or more offenses, but not more

than five felonies, in this state . . . if all of the offenses . . . are felonies of the fourth or fifth degree . . . and none of those offenses are an offense of violence or a felony sex offense . . . ."

For an eligible offender to have his or her record sealed, "final discharge" of the conviction must have occurred. The term "final discharge" is not defined by statute. However, this Court has held that, for purposes of R.C. 2953.32(A)(1), an offender is not finally discharged if he or she still owes restitution. *State v. Aguirre,* 144 Ohio St.3d 179, 2014-Ohio-4603, 41 N.E.3d 1178, ¶ 19-20 ("final discharge cannot occur until restitution is fully paid. Only then does the three-year waiting period in R.C. 2953.32(A)(1) commence to run, and only after the expiration of that period may [the defendant] apply to have her record sealed.")

B. **<u>This Court's decision in *Aguirre* is distinguishable and should be limited to restitution cases</u>**.

In *Aguirre*, this Court was asked to resolve a conflict between appellate districts over whether an offender had secured a "final discharge" to pursue her sealing of record application pursuant to R.C. 2953.32(A)(1), when it was undisputed she had not fully paid all of her court-ordered restitution to a third-party insurance company. In 2002, Aguirre plead guilty to a felony theft for stealing money from her employer. *Id.* at 180. The parties recommended a sentence of five years community control, plus restitution to be paid to the defendant's former employer and two of its insurance companies who had reimbursed the employer for the stolen funds. The trial court agreed to the sentence and ordered Aguirre to pay restitution of $2,000.00 to her former employer and $32,562.47 to the insurance companies. *Id.* Five years later in 2007, the defendant's supervision reached its maximum duration, and the trial court terminated her community control. While the defendant had paid a substantial portion of the court-ordered

restitution over the five years, she did not fully satisfy the restitution obligation, and had an outstanding balance at the time her community control was terminated. *Id.*

Nevertheless, in 2012, Aguirre filed an application to have her record sealed. The trial court granted the defendant's application and the Tenth District affirmed. *Id.* at 181. The Tenth District certified that its decision was in conflict with the Eighth District's decision in *State v. McKenney*, 8th Dist. Cuyahoga No. 79033, 2001 WL 587493 (May 31, 2001), which held that a trial court cannot seal a defendant's conviction until that offender has finished paying court-ordered restitution to a third-party insurance company.

In reversing the Tenth District's decision, this Court found the court of appeals applied the wrong standard in determining an offender's eligibility to have her conviction sealed. *Id.* at 183. Instead of reviewing whether the defendant in *Aguirre* was first eligible to have her record sealed, the lower court jumped directly to other considerations, including liberal construction and weighing of the public interest. This Court found that to be error, finding the relevant statutory language dictates that a court must first find that the applicant is an actual eligible offender under R.C. 2953.32(C)(1)(a). *Id.* at 183-84. In analyzing whether a defendant is eligible to have her record sealed, a court must first determine whether the offender obtained a "final discharge" and whether the statutory waiting period has elapsed since that event. See R.C. 2953.32(A)(1) ("[a]pplication may be made at the expiration of three years after the offender's final discharge . . .").

This Court noted that for purposes of sealing a record, the General Assembly has not defined the terms "final discharge". *Id.* at 182, citing *State v. Hoover*, 10th Dist. No. 12AP-818, 2013-Ohio-3337. As such, the court looked to other Ohio appellate courts, concluding that an

offender is not finally discharged for purposes of sealing a record if the offender still owes restitution. "When restitution is owed, discharge from community control does not effect a final discharge for purposes of R.C. 2953.32(A)(1)." *Id.* at 184. Given Aguirre had not paid all her court-ordered restitution, she had not received a "final discharge" of her sentence, and thus was not eligible to have her record sealed.

In reversing the Tenth District, this Court also emphasized the importance of restitution and its punitive and remedial aspects. While the primary goal of restitution is remedial or compensatory, it also serves punitive purposes. *Id.*, citing *Paroline v. United States*, 572 U.S. 434, 134 S.Ct. 1710, 1726 (2014). The court found that a trial court is not imposing "continued punishment" by denying an application to seal a defendant's record before all court-ordered restitution is paid. Rather, the court is ensuring that both the punitive and remedial aspects of the restitution order are fulfilled before a defendant's conviction is sealed. *Id.* at 185. Of significance, the court compared the statutory scheme found in R.C. 2929.15(A)(1) to that of R.C. 2929.18(A)(1). R.C. 2929.15(A)(1) limits the maximum duration of a defendant's community control supervision and sanctions to five years. *Id.* In contrast, R.C. 2929.18 permits a court to order restitution in a criminal case, placing no time limit on the duration of the restitution obligation. *Id.* In other words, when a trial court orders restitution to a victim, that restitution order remains until fully paid by the offender, or unless it is modified or changed by the court.

C. **It is undisputed the trial court ordered Appellant to pay his child support arrears as a condition of his community control, and not as court-ordered restitution; as such, Appellant received a "final discharge" when the court terminated his community control and the three-year waiting period elapsed**.

At Appellant's sealing of record hearing, the trial court correctly found that any outstanding child support arrearages were part of Appellant's community control, not restitution. Tr., p. 8. Several Ohio appellate courts have recognized the difference between restitution and arrearages as part of a defendant's community control in felony non-support cases. "While restitution may be the amount that's included in the indictment, a court is permitted to order the entire arrearage as a condition of community control." *State v. Stewart*, 10th Dist. Franklin No. 04AP-761, 2005-Ohio-987; also see *State v Lattimore*, 8th Dist. Cuyahoga No. 101321, 2015 Ohio 522, ¶11 (discussing the difference between child support arrearages for purposes of a condition of community control versus restitution). Here, because the trial court at sentencing ordered full child support arrearages be paid beyond what was owed in the indictment, it is viewed as a condition of community control, not restitution. *Id.*

As was discussed in this Court's decision in *Aguirre*, there is a stark contrast between R.C. 2929.15(A)(1) and R.C. 2929.18. Under R.C. 2929.15, a court can place a defendant on community control for up to a maximum five years. During those five years, a trial court has discretion to modify a defendant's supervision to add other conditions, revoke a defendant's supervision and sentence him to a jail or prison term, and/or to terminate a defendant's community control. A court cannot exceed the duration of a defendant's community control beyond the five-year term. However, when a court orders restitution as a financial sanction under

R.C. 2929.18, the statute makes clear there are no time limits on the duration of the restitution obligation.

Here, the State-Appellee concedes the trial court's sentence ordering the Appellant to pay his past child support arrears was a condition of his community control, and was not ordered separately as restitution. The Appellant was placed on a five-year period of community control on March 1, 2012. The trial court terminated his community control only two years later, on July 21, 2014, fully aware that Appellant had not paid all of his child support arrears. While the trial court could have kept the Appellant on community control for an additional three years (or even revoke his supervision and sentence him to prison), the court terminated him early. When the trial court terminated his community control, the court ended its jurisdiction over the Appellant. It was at that time the Appellant received a final discharge of his sentence. Given the Appellant waited more than three years to file his application to seal his record, the trial court correctly found he was eligible for sealing of his fifth-degree felony.

D. <u>Public policy and fundamental fairness support a defendant's sealing for a felony of the fifth-degree nonsupport of dependents conviction after the defendant has been discharged from community control and the statutory waiting period has elapsed.</u>

The Appellant was convicted for failing to pay his child support over about a two-year period, a felony of the fifth degree. As already mentioned, the trial court terminated his community control *three years early*, and some of the Appellant's child support apparently remained unpaid at that time. However, the court's order the Appellant pay his child support was made part of his community control; there was no separate restitution order. Nevertheless, even if the Appellant failed to pay all of his child support arrears at the time his community control

was terminated, the recipient of the child support, i.e., the obligee, still had other ways to enforce any outstanding child support order.

"The purpose of child support is to meet the current needs of a minor child." *Carnes v. Kemp*, 104 Ohio St.3d 629, 631 (2004), quoting *Park v. Ambrose*, 85 Ohio App.3d 179, 183 (1993) (the purpose is not to punish the parent, unlike an order of restitution for a victim). Generally, a parent's duty to support their children terminates on the child's eighteenth birthday. *Id.*

The age of majority in Ohio is presently eighteen. R.C. 3109.01. Once a child attains the age of majority, he or she is no longer a child within the meaning of the statute. The authority of the court over an emancipated child no longer exists. With respect to present and future support, the court is without power to provide an emancipated child with support, the child has no legal right to be supported, and the court no longer has the power to order a parent to pay child support. *Snider v. Lillie*, 131 Ohio App.3d 444, 448 (1997), citing *Miller v. Miller*, 154 Ohio St. 530 (1951), citing with approval. *Thiessen v. Moore*, 105 Ohio St. 401 (1922) 6.

If a defendant's community control is terminated and child support is still owed, the obligee has several ways to still enforce a child support order. First, the obligee can file an action for contempt against the obligor, whereby the obligor could very well face certain sanctions, including a jail sentence. See R.C. 3119.44; R.C. 2705.02. Further, a child support order may be enforced by the Child Support Enforcement Agency ("CSEA") through several administrative options available. *See* generally, Chapter 5101:12 of the Ohio Administrative Code.

Maintaining the record of conviction in these kinds of cases is contrary to public policy and fundamental fairness to the accused. It is widely known that a felony conviction on an individual's record can have significant collateral consequences, including inability to secure employment. If not sealed, it becomes even more difficult for a defendant to find a job and to pay his or her child support arrears. "Sealing a conviction allows the offender to put away the past and have a clean slate going forward . . . it helps mitigate some of the adverse impact . . . of a conviction—like damage to the offender's reputation and diminished employment prospects." *State v. Namaky*, 2nd Dist. No. 2018-CA-32, 2019-Ohio-1474, ¶27 (J. Hall dissenting); also see *State v. Ricciardi*, 135 Ohio App.3d 155, 159 (7th Dist. 1999)("[A] felony conviction carries a stigma that may hinder an individual in various aspects of life, including efforts to obtain gainful employment.") One could reasonably argue that it is in the best interests of the child and family to allow a defendant to have this kind of conviction sealed, thus allowing for a better opportunity for the defendant to find gainful employment and make payments on his child support owed.

Further, allowing sealing in this kind of case is align with the recent amendments by the General Assembly contained in R.C. 2953.31. Prior to the amendments, an individual could generally only be eligible to have a single conviction sealed, provided that conviction was the only thing on his record. However, the legislature has now provided individuals to be eligible to have *up to five* felonies of the fourth or fifth degree sealed, so long as they are not offenses of violence or a felony sex offense. R.C. 2953.31(A)(1)(a). The legislature clearly intended to give individuals convicted of more than one offense to have the privilege of erasing their past and minimizing the adverse collateral consequences of a criminal conviction.

For all these reasons, public policy supports the sealing in these kinds of cases, after a defendant's community control is terminated and the waiting period has elapsed.

CONCLUSION

The trial court correctly sustained the Appellant's application for sealing of his record, finding that the order to pay his child support arrears was a condition of his community control, not restitution. The Tenth District, relying on this Court's decision in *Aguirre,* should be reversed, and this Court should either overrule *Aguirre* or limit its holding to cases involving restitution. Finally, public policy supports reversing the Tenth District's decision under the facts of this case.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Merit Brief was served upon counsel for Appellee, Barbara Farnbacher, Franklin County Assistant Prosecuting Attorney, 373 South High Street, 14th Floor Columbus, Ohio 43215, via email and efiling, this 3rd day of November, 2020.

/s/ Mark J. Miller
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Counsel for Appellant

APPENDIX

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	On Appeal from the Franklin
	:	County Court of Appeals,
v.	:	Tenth Appellate District
	:	
PETER J. FERGUSON,	:	Court of Appeals
Defendant-Appellant.	:	Case No. 19AP-147
	:	

NOTICE OF APPEAL OF APPELLANT PETER J. FERGUSON

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STATE OF OHIO

Notice of Appeal of Appellant Peter J. Ferguson

Appellant Peter J. Ferguson hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals case no. 19 AP 147, on April 20, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was served upon Barbara Farnbacher, Franklin County Assistant Prosecuting Attorney, 373 South High Street, 14th Floor Columbus, Ohio 43215, via email, this 3rd day of June 2020.

/s/ Mark J. Miller
Mark J. Miller (#0076300)
Counsel for Appellant Peter J. Ferguson

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 19AP-147
v.	:	(C.P.C. No. 10CR-3828)
[P.J.F.],	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N
NUNC PRO TUNC[1]

Rendered on April 20, 2020

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellant.

On brief: *Law Offices of Mark J. Miller* and *Mark J. Miller*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

NELSON, J.

{¶ 1} The state appeals from the trial court's decision that granted P.J.F.'s application to seal the record of his fifth-degree felony conviction for nonsupport of dependents in Franklin County Common Pleas case No. 10CR-3828. Guided by our precedents and the law, we determine that P.J.F. did not demonstrate that he was eligible for expungement and the trial court therefore lacked jurisdiction to entertain his application.

{¶ 2} This appeal presents much the same scenario as that considered by this court only months ago in *State v. Newkirk*, 10th Dist. No. 19AP-191, 2019-Ohio-4342. There, we

[1] This decision replaces, nunc pro tunc, the original decision released on April 16, 2020, and is effective as of that date. It adds Mark J. Miller as counsel of record for appellee, P.J.F., and reflects the proper common pleas court case number.

held that an applicant who had not fulfilled the payment conditions of his community control sentence for nonsupport had not received a "final discharge" despite having been terminated from community control, and therefore was not eligible to have his criminal record sealed. "Because appellee filed his application prior to final discharge, the trial court lacked jurisdiction to entertain appellee's application." *Id.* at ¶ 1. Consistent with the logic of that ruling, we reach the same conclusion here.

{¶ 3} P.J.F. had been sentenced on March 1, 2012 to "a period of Intensive Specialized Supervision of Community Control for Five (5) years." Mar. 1, 2012 Judgment Entry in Franklin C.P. No. 10CR-3828 at 1. As a condition of that community control, he was required to "pay arrearage in the amount of $8,857.80 to Franklin County Child Support Enforcement Agency." *Id.* at 2. We affirmed his conviction in *State v. Ferguson*, 10th Dist. No. 12AP-282, 2012-Ohio-6231.

{¶ 4} P.J.F. did not comply with conditions of his community control, *see, e.g.*, June 25, 2014 Entry, and the trial court in July 2014 terminated it as unsuccessful. July 21, 2014 Entry Terminating Community Control Unsuccessfully in Franklin C.P. No. 10CR-3828.

{¶ 5} On December 17, 2018, P.J.F. filed his application to seal the conviction. The state opposed the application, arguing that he had not paid his "court-ordered restitution." January 2, 2019 Objections to Application for Expungement at 2-3. "Should applicant produce documentation showing that restitution has been paid," the state continued, "the state would defer to the Court" on sealing unless Mr. Ferguson had not "fulfilled the [sealing statute's] mandatory waiting period." *Id.* at 3.

{¶ 6} At the hearing, P.J.F.'s failure to have discharged his arrearages was not contested. March 6, 2019 Transcript of Expungement Proceedings at 6-8 (P.J.F. protested that his payment obligations had continued after he gained custody of his daughter, who then went on to earn a scholarship for pre-med studies at a major university). Rather, P.J.F. correctly noted that the trial court had ordered payment of the arrearage not as restitution, but "as part of his community control"; consequently, his argument continued, with community control having ended in 2014, he should be seen as an eligible offender. *Id.* at 3. The trial court agreed: "[S]ince it's not restitution, he is not statutorily ineligible." *Id.* at

8. The trial court granted P.J.F.'s application and sealed the record of his nonsupport conviction.

{¶ 7} We note that P.J.F. has asked us to take judicial notice of an Agreed Entry from the Division of Domestic Relations and Juvenile Branch of the Franklin County Common Pleas Court dated April 16, 2019 (the month following the trial court's sealing order and some four months or so after P.J.F. had filed his application). See Appellee's Brief at 8. We do so, even while observing that the entry does not retroactively affect whether the trial court's sealing order was correct at the time it issued and therefore does not affect the outcome of this appeal. The Domestic Relations and Juvenile Branch entry sustains a motion of the Franklin County Child Support Enforcement Agency ("FCCSEA") "To Determine and Liquidate Support Arrearage," and recites that "as of 3/29/19," P.J.F. owes zero dollars in support arrearage to the named "plaintiff/petitioner" in that action and zero dollars in support arrearage to the State of Ohio. April 16, 2019 Agreed Entry Sustaining FCCSEA's Motion To Determine And Liquidate Support Arrearage.

{¶ 8} The state assigns one error for our review: "The trial court erred in granting defendant's application to seal his felony conviction." Appellant's Brief at iv (with capitalizations modified). P.J.F. did not receive a "final discharge" from his sentence and then wait the requisite three years before making his application, the state urges. *Id.* at 5.

{¶ 9} "An appellate court generally reviews a trial court's decision on an R.C. 2953.32 application to seal a record of conviction under an abuse of discretion standard. * * * * [But] [w]hether an applicant is an eligible offender for purposes of sealing a criminal record is an issue of law that we review de novo. Similarly, whether an applicant has complied with the mandatory waiting period prior to filing an application is a question we review de novo." *Newkirk*, 2019-Ohio-4342, at ¶ 8 (citations omitted); *see also, e.g., State v. A.A.*, 10th Dist. No. 19AP-506, 2020-Ohio-508, ¶ 2, quoting *State v. Young*, 10th Dist. No. 19AP-49, 2019-Ohio-3161, ¶ 8 (" '[T]he question whether an applicant has complied with the mandatory waiting period prior to filing an application is a question we review de novo,' examining the matter afresh").

{¶ 10} Pursuant to R.C. 2953.32(A)(1)(a), an eligible offender convicted of one felony may apply for sealing of his or her record "[a]t the expiration of three years after the offender's final discharge." Thus, we have said that "[t]he initial considerations in

determining eligibility under R.C. 2953.32 are whether the offender has obtained a final discharge and whether three years have elapsed since that event." *Newkirk* at ¶ 11, citing *State v. Aguirre*, 144 Ohio St.3d 179, 2014-Ohio-4603, ¶ 18. "An offender is not eligible to have his or her record sealed unless he or she satisfies these two prerequisites." *Newkirk* at ¶ 11, citing *Aguirre* at ¶ 18. "[F]or purposes of determining eligibility, an offender is not finally discharged until the offender has served all components of his or her sentence previously imposed by the court." *Newkirk* at ¶ 11 (citation omitted).

{¶ 11} *Newkirk* underscored that *Aguirre* "made it clear that all sentencing requirements must be satisfied before an applicant is eligible to have his or her record of conviction sealed," *Newkirk* at ¶ 13, and also pointed to precedent that "an offender who had not fulfilled the community service requirement of her sentence had not received a final discharge and was therefore not an eligible offender for purposes of R.C. 2953.32(A)(1)," *id.*, citing *State v. Gainey*, 10th Dist. No. 14AP-583, 2015-Ohio-3119, ¶ 12. A "discharge from probation," we said, "is not analogous to a 'final discharge' within the meaning of R.C. 2953.32(A)(1)." *Newkirk* at ¶ 14, citing *Gainey* at ¶ 14. "Because appellee admitted he had not paid all of the arrearages required by his sentence," we concluded, "appellee is not an eligible offender, and the trial court erred in granting appellee's application to seal his criminal record." *Newkirk* at ¶ 14.

{¶ 12} So too here, P.J.F. failed to establish that he had liquidated all of the nonsupport arrearages as required under his community control sentence and that he then had waited at least three years before submitting his application to seal. Guided by the analysis that directed our decision in *Newkirk*, we conclude that the trial court erred in ordering P.J.F.'s record sealed.

{¶ 13} P.J.F. maintains that the state has waived the point that P.J.F. failed to establish the date of "final discharge" and related satisfaction of the waiting period because the state argued to the trial court only that P.J.F. had failed to satisfy "court-ordered restitution" (and did not observe that P.J.F. had failed to show that he had liquidated his arrearage as required by the conditions of his community control). But we have held that an applicant's failure to show that he or she achieved "final discharge" before filing an application to seal a record of conviction deprives a trial court of jurisdiction to entertain the application. *Newkirk* at ¶ 1; *see also, e.g., A.A.*, 2020-Ohio-508, at ¶ 2, quoting *State v.*

Young, 10th Dist. No. 19AP-49, 2019-Ohio-4169, ¶ 9 (" 'we hold that the trial court lacked jurisdiction to entertain appellee's application because appellee failed to comply with the mandatory waiting period of R.C. 2953.32 prior to filing [the] application' "). Arguments as to the trial court's jurisdiction are not waived. *See, e.g., State v. Winship*, 10th Dist. No. 04AP-384, 2004-Ohio-6360, ¶ 9 (reasoning that "a prosecutor's failure to object or attend a hearing does not constitute a waiver because the trial court's lack of jurisdiction voids the expungement"). Further, the state did argue on some basis that P.J.F. had not received a final discharge, and again whether he made that requisite showing is an issue that we are required to review afresh. *See* State's Objection at 1.

{¶ 14} We sustain the state's assignment of error. In doing so, we note that the state acknowledges that the April 16, 2019 domestic relations court entry that established support arrearages at zero as urged by the plaintiff/petitioner there and by the county child support enforcement agency might "be relevant to a court's consideration of a future application to seal the instant felony conviction." Reply Brief at 7. We mean nothing in this decision to gainsay or undercut that possibility.

{¶ 15} Having sustained the state's sole assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court to vacate its order sealing the record.

Judgment reversed; case remanded.

BROWN and LUPER SCHUSTER, JJ., concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 19AP-147
v.	:	(C.P.C. No. 10CR-2838)
[P.J.F.],	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on April 16, 2020 that sustained appellant's sole assignment of error, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed and the case is remanded for proceedings consistent with the decision of this court. Any outstanding appellate court costs are waived.

NELSON, BROWN & LUPER SCHUSTER, JJ.

/S/JUDGE

Tenth District Court of Appeals

Date:	04-20-2020
Case Title:	STATE OF OHIO -VS- PETER J FERGUSON
Case Number:	19AP000147
Type:	JEJ - JUDGMENT ENTRY

So Ordered

/s/ Judge Frederick D. Nelson