938 N.W.2d 248
Supreme Court of Minnesota.

James Salvatore BERGMAN, Respondent,

v.

Isanti County Sheriff Christopher CAULK, Appellant.

A18-1784
|
Filed: February 5, 2020

Synopsis

Background: County sheriff denied gun owner's application to renew his permit to carry a pistol. Owner petitioned for writ of mandamus to compel sheriff to issue him a carry permit. The District Court, Isanti County, No. 30-CV-18-283, denied owner's petition. Owner appealed. The Court of Appeals, Schellhas, J., 931 N.W.2d 114, reversed and remanded. Sheriff appealed.

The Supreme Court, Chutich, J., held that owner's conviction was not "expunged," as required to reinstate his firearm rights.

Reversed

Syllabus by the Court

Respondent's right to carry a firearm cannot be reinstated because a district court's inherent authority to seal judicial records is not sufficient to satisfy the "expungement" required by section 921(a)(33)(B)(ii) of Title 18 of the United States Code.

Court of Appeals

Attorneys and Law Firms

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Jeffrey R. Edblad, Isanti County Attorney, Timothy C. Nelson, Chief Deputy County Attorney, Cambridge, Minnesota, for appellant.

Richard D. Hodsdon, Saint Paul, Minnesota, for amicus curiae Minnesota Sheriffs' Association.

OPINION

CHUTICH, Justice.

***249** This case considers the narrow question of whether the sealing of judicial records by the inherent authority of a Minnesota district court is sufficient under federal law to expunge a previous conviction of respondent James Salvatore Bergman and thereby reinstate his firearm rights. In 2007, a district court issued an expungement order under its inherent authority that sealed the judicial records of Bergman's prior conviction of domestic assault. Bergman then applied for, and received a permit to

carry a firearm. In 2018, the Isanti County Sheriff, appellant Christopher Caulk (the Sheriff), denied Bergman's permit-to-carry application because of his prior domestic assault conviction.

Bergman petitioned the district court for a writ of mandamus, which was denied. Upon appeal, a divided panel of the court of appeals reversed, holding that Bergman was not disqualified from receiving a permit to carry a firearm. Because we conclude that the sealing of judicial records under a court's inherent authority does not satisfy the federal requirement of expungement, we reverse.

FACTS

Bergman was convicted in 1996 of domestic assault. In 2007, Bergman sought to expunge his conviction in order "to possess a firearm for the purpose of hunting." An Anoka County district court granted Bergman relief under its inherent authority. The expungement order directed the county court administrator to seal Bergman's file, remove the case caption from index books and records open to the public, and "refrain from disclosing or revealing the file contents without a court order or specific statutory authority." The district court also ordered the county corrections department to "seal or otherwise remove references from its records related to [Bergman]'s arrest and subsequent court proceedings ... to preclude any public access."

Bergman states that, starting in 2008, he was consistently granted a permit to carry a firearm. In 2018, the Sheriff denied Bergman's permit-to-carry application. In doing so, the Sheriff relied upon Minnesota Statutes section 624.713, subdivision (1)(10)(viii) (2018), which incorporates federal law prohibiting a person convicted of "a misdemeanor crime of domestic violence" from possessing a firearm. *See* 18 U.S.C. § 922(g)(9) (2018). Bergman requested reconsideration, but the Sheriff again denied his permit application.

Bergman appealed to the Isanti County District Court by filing a petition for writ of mandamus under Minnesota Statutes section 624.714, subdivision 12 (2018), asking that the court order the Sheriff to issue him a permit to carry. The court denied Bergman's petition. The court concluded that, because the sealing of Bergman's conviction did not remove or eliminate the conviction, it was not "removed or eliminated as defined under federal law."

Bergman appealed, and a divided panel of the court of appeals reversed the decision of the district court. *Bergman v. Caulk*, 931 N.W.2d 114 (Minn. App. 2019). The court looked to state law "to determine whether Bergman's domestic-assault conviction" was expunged. *Id.* at 117. The court determined that "[f]ederal law does not require that the expungement be statutory or result in the sealing of records in every branch of government." *Id.* The court concluded that the "2007 expungement order meets the plain meaning of 'expunged' in 18 U.S.C. § 921(a)(33)(B)(ii)," so that Bergman was "not disqualified from holding a carry permit." *Id.*

***250** The dissent contended that sealing judicial records had no effect on the executive branch records of Bergman's conviction, noting that Minnesota distinguishes between sealing judicial records through inherent authority and the statutory sealing of records held in the executive branch. *Id.* at 118–19 (Worke, J., dissenting). The dissent concluded that the majority's reasoning "negates the legislative intent to deny permits to carry to individuals convicted of domestic violence crimes." *Id.* at 119.

The Sheriff appealed, and we granted his petition for review.

ANALYSIS

This case requires us to interpret federal and state statutes, and we review matters of statutory interpretation de novo. *Christianson v. Henke*, 831 N.W.2d 532, 535 (Minn. 2013).

At the outset, we note that this case does not concern any constitutional challenges. Nor does Bergman raise any claims of estoppel or contest that his 1996 conviction was for a "misdemeanor crime of domestic violence." The case is simply one of statutory interpretation, and we look to the relevant state and federal laws to discern the meaning and import of "expungement."

Minnesota law makes it a crime for anyone to possess a firearm in public without a permit. *See* Minn. Stat. § 624.714, subd. 1a (2018). Applications for carry permits are "made to the county sheriff where the applicant resides." *Id.*, subd. 2(a) (2018). Sheriffs must issue the permit if the person (1) has gun safety training; (2) is "at least 21 years old and a citizen or a permanent resident of the United States;" (3) "completes an application for a permit;" (4) is not prohibited under certain enumerated provisions; and (5) "is not listed in the criminal gang investigative data system." *Id.*, subd. 2(b).

But a sheriff must not issue a permit to a person prohibited from possessing a firearm under section 624.713 or "any federal law." Minn. Stat. § 624.714, subd. 2(b)(v), (ix). Section 624.713 specifically prohibits "a person who ... is disqualified from possessing a firearm under United States Code, title 18, section 922(g) ... (9)" from possessing a firearm. Minn. Stat. § 624.713, subd. 1(10)(viii).

This specific federal provision—section 922(g)(9)—makes it "unlawful for any person ... convicted in any court of a *misdemeanor crime of domestic violence*, to ... possess ... any firearm." 18 U.S.C. § 922(g)(9) (emphasis added). In turn, section 921(a)(33) of the United States Code, Title 18, defines "misdemeanor crime of domestic violence" and also references "expungement."

Specifically, subsection 921(a)(33)(B)(ii) provides:

> A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been *expunged* or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, *expungement*, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(33)(B)(ii) (emphasis added).[1]

***251** Minnesota law therefore incorporates by reference federal law that prohibits persons convicted of misdemeanor crimes of domestic violence from carrying firearms. Minn. Stat. § 624.713, subd. 1(10)(viii). And section 921(a)(33) in Title 18 of the United States Code provides the relevant federal definition of misdemeanor crimes of domestic violence, including a reference to whether a crime has been expunged.[2] Because Minnesota law incorporates this federal law, we conclude that the federal meaning of expungement applies when determining whether a conviction of a misdemeanor crime of domestic violence has been expunged so as to reinstate firearm rights in Minnesota.

When considering a federal statute, "our task is to give effect to the will of Congress." *Goodman v. Best Buy, Inc.*, 777 N.W.2d 755, 758 (Minn. 2010) (internal quotation marks omitted) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982)). If the intent is clear and unambiguous, then no further analysis is necessary. *Id.* We consider the "bare meaning" of the words, as well as their "placement and purpose in the statutory scheme." *Id.* (citations omitted) (internal quotation marks omitted).

Here, where Congress has not defined "expunged" or "expungement," we may consider dictionary definitions to determine a word's plain meaning. *See, e.g.*, *id.* at 759 n.2. Because the word "expunge" "frequently appears as a legal [term] in statutory references, we may look to legal dictionaries to define it." *Getz v. Peace*, 934 N.W.2d 347, 354 (Minn. 2019); *see also* Minn. Stat. § 645.08(1) (2018). Expunge is defined as "[t]o remove from a record, list, or book; to erase or destroy."[3] *Expunge*, *Black's Law Dictionary* (10th ed. 2014).

***252** Applying this definition of expunge here, we must determine whether the 2007 district court expungement order that sealed the judicial records of Bergman's 1996 conviction removed, erased, or destroyed Bergman's conviction.[4] In *State v.*

M.D.T., we spoke about the limitations of sealing judicial records through expungement by inherent authority. There we said, "[r]ecognition of inherent judicial authority to expunge ... criminal records held in the executive branch would effectively override the legislative policy judgments expressed in" the statutes on expungement. 831 N.W.2d 276, 283 (Minn. 2013). We concluded that it is well-settled law that the sealing of judicial records under inherent authority simply does not reach those records that are held in the executive branch. *Id.* at 282, 284. Accordingly, the district court expungement order here sealed Bergman's *judicial* records, but his executive branch records still exist.

In Minnesota, when sheriffs consider an applicant's initial or ongoing eligibility, the law requires them to check records that are held in the *executive branch*, namely the National Instant Criminal Background Check System and the Minnesota Crime Information System. *See* Minn. Stat. § 624.714, subd. 4(a), (c) (2018). Consequently, when the Sheriff ran a routine background check to determine Bergman's eligibility to possess a firearm, his conviction appeared in the records that the Sheriff was required by law to check; the Sheriff therefore determined that Bergman was disqualified from possessing a firearm. Bergman's conviction was not removed, erased, or destroyed from the executive branch records relevant to considering an application to possess a firearm.

In sum, the expungement that took place in 2007 under the district court's inherent authority did not remove, erase, or destroy the executive branch records of Bergman's prior domestic assault conviction. We therefore hold that expungement by inherent authority does not by itself satisfy the federal meaning of expungement, and Bergman's right to carry a firearm in Minnesota cannot be reinstated under these circumstances.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals.

Reversed.

All Citations

938 N.W.2d 248

Footnotes

1 Notably, the court of appeals did not refer to this subsection, but instead referenced an inapplicable subsection of section 921 that defines "crimes punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 921(a)(20) (2018). Subsection 921(a)(20) differs from subsection 921(a)(33)(B)(ii) by explicitly directing courts to determine whether such a crime has occurred by looking to the law of the jurisdiction of conviction:

> *What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.* Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Id. (emphasis added).

2 This subsection says nothing about whether state or federal law should apply to determine when a conviction is expunged under the statute. *See* 18 U.S.C. § 921(a)(33)(B)(ii) (referring only to the law of the "applicable jurisdiction" in reference to the restoration of civil rights).

3 Federal cases interpreting the term "expunge" as used in section 921(a)(33)(B)(ii), have concluded "that Congress intended ... to require a state procedure that *completely* removes the effects of the misdemeanor conviction in question." *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1239 (10th Cir. 2008). *See also Jennings v. Mukasey*, 511 F.3d 894, 899 (9th Cir. 2007) (concluding that a conviction had not been expunged when California law contains a "sweeping limitation" on the relief it offers, precluding persons afforded relief under this statute from possessing a firearm).

The federal cases cited by Bergman do not contradict this interpretation of expungement because they involve circumstances where, by state law, the effects of the previous conviction have been completely removed from records. *See United States v. Laskie*, 258 F.3d 1047, 1050–52 (9th Cir. 2001) (overturning a conviction for being a felon in possession of a firearm because an "honorable discharge" of a previous drug conviction was "unequivocal," changed the finding of "Guilty" to "Not Guilty," and released Laskie from "all penalties and disabilities resulting from the crime of which he has been convicted"); *Siperek v. United States*, 270 F. Supp.3d 1242, 1249 (W.D. Wash. 2017) (concluding that the expungement of plaintiff's juvenile adjudication was established under federal law because "Washington law clearly dictates that ... the sealing of a juvenile record constitutes expungement of the juvenile offense" because the statute explicitly states that "the proceedings in the case shall be treated as if they never happened").

4 We note that, in 2007, expungement by a district court's inherent authority was the only remedy available to Bergman. Minnesota Statutes sections 609A.01–.04 (2018) now provide for statutory expungement, including statutory expungement of misdemeanor crimes of domestic violence. *See* Minn. Stat. § 609A.02, subd. 3(a)(3). This remedy may be available to Bergman. Because the question before us involves the narrower question of whether expungement by inherent authority satisfies subsection 921(a)(33)(B)(ii), we express no opinion as to whether statutory expungement may do so.

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Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

IN RE: Request for Records by Amina MOHAMED.

A19-1694
|
Filed August 31, 2020

Hennepin County District Court, File No. 27-CR-CV-19-31

Attorneys and Law Firms

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Considered and decided by Larkin, Presiding Judge; Segal, Chief Judge; and Reilly, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

***1** Appellant-victim challenges the district court's order denying her request to reopen the expungement record of the individual who was acquitted of her brother's murder. Because appellant fails to establish that she is entitled to such relief as a remedy for an alleged violation of Minnesota's victims' rights statutes, we affirm.

FACTS

A grand jury indicted B.O. for the 2011 murder of appellant Amina Mohamed's brother. Her brother was shot three times following a verbal altercation, while sitting in the back seat of a parked car. A jury acquitted B.O. of the murder after a trial in 2012. Appellant asserts that the acquittal occurred because B.O. threatened and intimidated witnesses.

After his acquittal, B.O. petitioned the district court to expunge his court file. Respondent State of Minnesota did not object, and the district court granted the expungement petition in 2013. The state did not notify appellant of the expungement petition or hearing. She learned of the expungement in 2019, while seeking a harassment restraining order against B.O.

In May 2019, appellant moved to reopen, disclose, and reseal B.O.'s expungement record so she could determine whether the district court adhered to Minnesota's expungement and victims' rights statutes when granting the expungement. She sought access to expungement-related documents such as the expungement petition, affidavit, and order. As grounds for reopening the record, she asserted that the prosecuting authority failed to notify her of B.O.'s expungement petition and hearing, as required by law.

In September 2019, the district court denied appellant's motion, reasoning that appellant was not entitled to relief under the plain language of Minnesota's expungement and victims' rights statutes. The court acknowledged that the state did not notify appellant of the expungement petition or hearing, but it concluded that the state was not obligated to do so because appellant did not request notice.[1] This appeal followed.

DECISION

I.

Appellant contends that the district court erred in denying her request to reopen B.O.'s expungement file, arguing that she is a victim of her brother's murder and that the prosecutor therefore was required by statute to notify her of B.O.'s expungement action.

Minnesota requires that crime victims be notified of certain rights and defines "victims" to include any "natural person who incurs loss or harm as a result of a crime," including the "family members" of a "deceased person." Minn. Stat. § 611A.01(b) (2012); *see* Minn. Stat. §§ 611A.01-.06 (2012) (providing for victim-notification rights). The state agrees that appellant is a crime victim within the meaning of those statutes.

***2** Among the notification rights afforded victims is a requirement that a "prosecuting authority with jurisdiction over an offense for which expungement is being sought" must "make a good faith effort to notify a victim that the expungement is being sought if ... the victim has mailed to the prosecuting authority ... a written request for this notice." Minn. Stat. § 611A.06, subd. 1a.

Likewise, under the expungement-petition statute, "[t]he prosecutorial office that had jurisdiction over the offense for which expungement is sought shall serve by mail the petition for expungement and a proposed expungement order on any victims of the offense for which expungement is sought who have requested notice of expungement pursuant to section 611A.06," and "must specifically inform the victims of the victims' right to be present and to submit an oral or written statement at the expungement hearing." Minn. Stat. § 609A.03, subd. 3(b), (c) (2012).

Appellant "concedes that neither she nor her family members ever requested to be put on such notice." Thus, under the plain language of Minn. Stat. § 611A.06, subd. 1a, and Minn. Stat. § 609A.03, subd. 3(b), (c), the prosecuting authority was not statutorily obligated to notify appellant of B.O.'s expungement efforts. Appellant argues that her failure to request notice should not be held against her because she was not earlier informed of the need to do so. She relies on Minn. Stat. § 611A.0385 (2012), which provides:

> At the time of *sentencing or the disposition hearing* in a case in which there is an identifiable victim, the court or its designee shall make reasonable good faith efforts to inform each affected victim of the ... notice of expungement provisions of section 611A.06.

(Emphasis added.)

The parties disagree regarding whether section 611A.0385 applies in a criminal case that resulted in an acquittal, as is the case here. The state suggests that the phrase "sentencing or the disposition hearing" indicates that the court's obligation arises only if

a defendant is found guilty. Appellant asserts that the phrase "disposition hearing" has a broader meaning and includes a hearing at which a jury's verdict of acquittal is accepted by the district court.

The parties' disagreement regarding the meaning of section 611A.0385 presents an issue of statutory interpretation, which we review de novo. *Heilman v. Courtney*, 926 N.W.2d 387, 393 (Minn. 2019). "The goal of all statutory interpretation is to ascertain and effectuate the intention of the legislature." *Id.* at 394 (quotation omitted).

We do not resolve the dispute regarding the meaning of section 611A.0385 or determine whether appellant's right to notice under that provision was violated because appellant fails to offer legal support for her underlying assumption that such a violation would provide grounds for her to access B.O.'s expunged record.[2] The legislature has delineated circumstances that justify reopening expunged records. *See* Minn. Stat. § 609A.03, subd. 7 (2018) (setting forth limited grounds for reopening expunged records and stating that "[u]pon request by law enforcement, prosecution, or corrections authorities, an agency or jurisdiction subject to an expungement order shall inform the requester of the existence of a sealed record and of the right to obtain access to it as provided by this paragraph"). The Minnesota legislature has also provided a method for investigating alleged violations of the rights of crime victims. *See* Minn. Stat. § 611A.74 (2018) (providing for the investigation of complaints regarding possible violations of crime-victims' rights). Appellant does not assert that either of those statutory provisions is applicable here. Nor does she assert any other legal basis for gaining access to B.O.'s expungement record.

***3** Error on appeal is never presumed; it must be established by the party claiming error. *Waters v. Fiebelkorn*, 13 N.W.2d 461, 464-65 (Minn. 1944). Because appellant has not established a legal basis that would have authorized the district court to reopen B.O.'s expungement record, we cannot say that the district court erred by refusing to do so. *See Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 730-31 (Minn. 2003) (denying petitioners' requested relief for lack of any "sound legal basis").

II.

Appellant argues that the district court violated her right to due process "by censoring evidence which might be relied on [to] pursue civil relief." But in district court, appellant did not present a due-process argument in support of her request for relief. Moreover, appellant fails to offer legal argument or authority to support her due-process claim on appeal.

Appellate courts generally do not consider issues not raised in and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Moreover, an assignment of error in an appellate brief based on "mere assertion" and not supported by argument or authority is waived "unless prejudicial error is obvious on mere inspection." *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quoting *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971)).

Whether a party's procedural-due-process rights were violated is a question of law that an appellate court reviews de novo. *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012). Appellant's due-process claim requires that she be deprived "of a protected life, liberty, or property interest." *Id.* But appellant does not provide legal support for the proposition that she has a protected interest in B.O.'s expungement record. Moreover, although appellant indicates that she might pursue civil relief against B.O. for her brother's murder, "procedural due process protections do not apply when government action *may* lead to the deprivation of a protected interest at some indeterminate point in the future based on certain unfulfilled conditions." *Id.* at 633. On this record, we do not discern an obvious prejudicial error.

Conclusion

We are extremely sympathetic to the pain and suffering that appellant has endured as the result of her brother's murder, and we understand her disappointment with the result of the ensuing prosecution and trial. But we are obligated to follow the law, and

appellant has not established that she is entitled to access B.O.'s expungement record under the law. We therefore cannot say that the district court erred by denying her access to that record.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2020 WL 5136968

Footnotes

1 The court also concluded that appellant was not entitled to reopen the expungement record pursuant to Minn. Stat. § 609A.03, subd. 7a(b)(6) (2018), because she was not the victim of the underlying offense. Subdivision 7a applies to expungement orders "effective on or after January 1, 2015." Minn. Stat. § 609A.03, subd. 7a(g) (2018). Because the district court granted B.O.'s expungement petition in 2013, subdivision 7a is inapplicable.

2 Nonetheless, we observe that Minn. Stat. § 611A.039 (2018) generally provides that "within 15 working days after a *conviction, acquittal, or dismissal in a criminal case* in which there is an identifiable crime victim, the prosecutor shall make reasonable good faith efforts to provide to each affected crime victim oral or written notice of the final *disposition* of the case," which indicates that the meaning of the word "disposition" is broader than the state suggests. (Emphasis added.)

906 N.W.2d 526
Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

A.S.R., Appellant.

A17-0284
|
Filed December 26, 2017

Synopsis

Background: Applicant filed a motion to expunge a dismissed charge. The District Court, Hennepin County, No. 27-CR-14-27666, denied the motion. Applicant appealed.

Holdings: The Court of Appeals, Bjorkman, J., held that:

the trial court abused its discretion when it determined that the Metropolitan Airport Commission (MAC) rebutted the presumption in favor of expungement;

the trial court clearly erred when it found applicant submitted an application for an airport badge and had improperly marked a box on the employer's portion of the form addressing employee security access levels indicating applicant should receive "escort" authority; and

the trial court clearly erred when it found as fact that the maintenance of airport security is highly complex and that a mistake or an exploitation of the process could have disastrous consequences.

Reversed and remanded.

***527** *Syllabus by the Court*

A criminal charge that is continued for dismissal and subsequently dismissed without an admission or finding of guilt is "resolved in favor of the petitioner" under Minn. Stat. § 609A.02, subd. 3(a)(1) (2016), presumptively entitling the petitioner to expungement under Minn. Stat. § 609A.03, subd. 5(b) (2016).

Hennepin County District Court, File No. 27-CR-14-27666

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Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Reyes, Judge.

***528 OPINION**

BJORKMAN, Judge

Appellant challenges the denial of his petition to expunge a dismissed charge, arguing that he is presumptively entitled to expungement and the district court abused its discretion by determining that the Metropolitan Airport Commission (MAC), which opposed the petition, successfully rebutted that presumption. We reverse and remand for entry of an order of expungement.

FACTS

In September 2014, appellant A.S.R. was charged with providing false identification to gain access to an airport security area, a violation of a MAC ordinance. MAC alleged that A.S.R. submitted an application for an airport badge and had improperly marked a box on the employer's portion of the form addressing employee security access levels, indicating that he should receive "escort" authority. A.S.R. pleaded not guilty to this misdemeanor charge.

On May 29, 2015, MAC agreed to continue the case for dismissal after one year on the conditions that A.S.R. (1) not commit any offenses identical or similar to the false-identification charge, (2) "remain out of the airport for one year unless he has a valid ticket to travel," and (3) pay prosecution costs and surcharges totaling $400.

A.S.R. subsequently asked MAC to modify these conditions so he could work at the airport. MAC had not responded to the request when A.S.R. went to the airport to apply for a security badge for an airline job he sought. He had a valid ticket for travel but left the airport after completing the application and did not fly. A.S.R. provided his badge application to MAC in support of his work-related modification request.

MAC did not grant A.S.R.'s request. Instead, MAC moved the district court to terminate the continuance for dismissal, alleging that A.S.R. violated the conditions by being at the airport.

While the motion was pending, A.S.R. again went to the airport with a ticket, planning to travel with his mother and aunt. A.S.R. was waiting to proceed through security when law-enforcement officers approached him and asked about his travel intentions. A.S.R. later explained that the inquiry embarrassed him and caused him to abandon his flight plans that day, seeking alternative travel means.

The parties stipulated to the foregoing facts as the basis for MAC's motion to terminate the continuance for dismissal. The district court denied the motion, reasoning that A.S.R.'s possession of valid tickets to travel justified his presence at the airport on both occasions. The false-identification charge was dismissed on August 1, 2016.

Just over one month later, A.S.R. petitioned to have the charge expunged. MAC objected. A.S.R. testified at the expungement hearing; MAC argued against expungement but did not present any evidence. A referee determined that A.S.R.'s case was resolved in his favor but that ***529** MAC demonstrated the interests of the public and public safety outweigh the disadvantages to A.S.R. of not sealing the record, and denied A.S.R.'s expungement petition. The district court approved the referee's decision. A.S.R. appeals.

ISSUES

I. Was A.S.R.'s case resolved in his favor?

II. Did the district court abuse its discretion in determining that MAC rebutted the presumption in favor of expungement?

ANALYSIS

The legislature has identified specific circumstances in which an individual may petition to expunge a criminal record.[1] *See* Minn. Stat. § 609A.02 (2016). In most circumstances, a petitioner seeking statutory expungement must prove by clear and convincing evidence that sealing his criminal record would "yield a benefit to the petitioner commensurate with the disadvantages to the public and public safety." Minn. Stat. § 609A.03, subd. 5(a) (2016). But the scenario is reversed when "all pending actions or proceedings were resolved in favor of the petitioner." Minn. Stat. § 609A.02, subd. 3(a)(1); *see State v. R.H.B.*, 821 N.W.2d 817, 821 (Minn. 2012). In those cases, the district court must grant expungement unless the agency whose records would be affected "establishes by clear and convincing evidence that the interests of the public and public safety outweigh the disadvantages to the petitioner of not sealing the record." Minn. Stat. § 609A.03, subd. 5(b); *see R.H.B.*, 821 N.W.2d at 821 (describing this framework as a "statutory presumption").

The state argues that A.S.R. did not establish that the false-identification charge was resolved in his favor and therefore he is not presumptively entitled to expungement.[2] A.S.R. asserts that the district court abused its discretion by determining that the state met its burden of rebutting the presumption in favor of expungement. We address each argument in turn.

I. A.S.R.'s case was resolved in his favor.

Whether a case was resolved "in favor of" the petitioner is a question of statutory interpretation. We review statutory interpretation de novo, seeking to ascertain and effectuate the legislature's intent. *State v. S.A.M.*, 891 N.W.2d 602, 604 (Minn. 2017). "Interpretation of a statute begins with the statute's plain language." *R.H.B.*, 821 N.W.2d at 820. But we are mindful of that language's context. We interpret a statute as a whole and consider its structure. *S.A.M.*, 891 N.W.2d at 604. We also presume that the legislature, when enacting or amending a statute, was aware of existing judicial interpretations of the statute. *Rockford Township v. City of Rockford*, 608 N.W.2d 903, 908 (Minn. App. 2000).

It is to prior judicial interpretations of the phrase "in favor of" that we turn first. In *State v. C.P.H.*, we considered whether a continuance for dismissal and eventual dismissal of a criminal charge is a resolution in favor of the petitioner. 707 N.W.2d 699, 702 (Minn. App. 2006). ***530** The answer lay not in the mere fact of the dismissal but in the substance of the dismissal. *Id.* We reasoned, consistent with decades of prior cases addressing the "in favor of" language, that the critical factor is whether there has been an admission or finding of guilt. *Id.* at 703-04. If there has been, a subsequent dismissal is "in the nature of a pardon, not a declaration of innocence and therefore not a determination in favor of [the] accused." *State v. Davisson*, 624 N.W.2d 292, 296 (Minn. App. 2001) (quotation omitted), *review denied* (Minn. May 15, 2001). But in the absence of an admission or a finding of guilt, "the petitioner's innocence must be assumed." *C.P.H.*, 707 N.W.2d at 703. Consequently, we held that "[f]or the purpose of expungement under Minn. Stat. § 609A.02, subd. 3 (2004), a criminal charge that is continued for dismissal and subsequently dismissed, without an admission or finding of guilt, is resolved in favor of the petitioner." *Id.* at 701.

The state argues that subsequent changes to Minn. Stat. § 609A.02, subd. 3, have rendered *C.P.H.* obsolete. We disagree. When we decided *C.P.H.*, there were few statutory grounds for expungement and only one ground for presumptive expungement—a resolution in favor of the petitioner. *See* Minn. Stat. §§ 609A.02, subd. 3, .03, subd. 5 (2004). In 2014, the legislature extended presumptive expungement to a second category of individuals—those who demonstrate successful completion of "a diversion program or a stay of adjudication," followed by one year without new criminal charges. 2014 Minn. Laws ch. 246, §§ 6, at 812; 10, at 815. And the legislature added provisions permitting individuals convicted of certain crimes to petition for expungement after a designated crime-free period. *Id.* § 6, at 812-14. But the legislature, presumably aware of our holding in *C.P.H.* and the numerous cases following it, declined to alter the provision affording presumptive expungement to petitioners whose cases were

resolved "in favor of" them. *Id.* § 6, at 811. In short, the legislative changes reflect an expansion of the grounds for expungement, not an abrogation of *C.P.H.*

The state nonetheless contends that the 2014 provision addressing diversion programs, Minn. Stat. § 609A.02, subd. 3(a)(2), limits the "in favor of" basis for presumptive expungement. The state asserts that the new provision evinces the legislature's intent to distinguish petitioners who successfully complete any type of pretrial diversion, including a continuance for dismissal, from petitioners whose cases were resolved in their favor. We are not persuaded. The new provision does not address pretrial diversion generally. Rather, it refers to a specific type of diversion that differs in two critical respects from the continuances for dismissal at issue in *C.P.H.* and here.

First, the 2014 provision refers specifically to a diversion "program." A "program" is a "system of services, opportunities, or projects, usually designed to meet a social need." *American Heritage Dictionary* 1447 (5th ed. 2011). Consistent with this definition, the phrase "diversion program" refers to structured systems for pretrial diversion that include mandated screening, monitoring, counseling, and reporting. *See, e.g.*, Minn. Stat. §§ 388.24 (juvenile-offender "pretrial diversion program"), 401.065 (adult-offender "pretrial diversion program") (2016). By contrast, a continuance for dismissal is simply an agreement between the prosecutor and the defendant to suspend prosecution for a specified period of time, with agreed-to conditions, after which the charge is automatically dismissed. Minn. R. Crim. P. 27.05; *see also* Minn. Stat. § 609.132 (2016). A continuance for dismissal does not, in and of itself, involve programmatic ***531** components. Simply put, a continuance for dismissal, without more, is not a "diversion program."

Second, consideration of the diversion-program provision on its face and in the context of the entire statute persuades us that it applies only to cases involving an admission or finding of guilt. By its express terms, the provision treats diversion programs the same as stays of adjudication. It is well established that a stay of adjudication flows from a determination of guilt, *see State v. Martin*, 849 N.W.2d 99, 103 (Minn. App. 2014), *review denied* (Minn. Sept. 24, 2014), and thus is not a resolution in favor of the petitioner, *Davisson*, 624 N.W.2d at 295. It follows that a diversion program that is functionally equivalent to a stay of adjudication is one premised on an admission or finding of guilt. Moreover, the new provision conditions expungement on a showing that the petitioner "has not been charged with a new crime for at least one year." Minn. Stat. § 609A.02, subd. 3(a)(2). This requirement is similar to those in related provisions that permit expungement following a conviction. *See* Minn. Stat. § 609A.02, subd. 3(a)(3)-(5) (premising entitlement to expungement on two to five years without a new conviction, depending on severity of the underlying offense).

Accordingly, we conclude that the legislature, in enacting Minn. Stat. § 609A.02, subd. 3(a)(2), did not alter a petitioner's statutory right to presumptive expungement of a criminal charge that was continued for dismissal and later dismissed without any admission or finding of guilt. Instead, the 2014 amendments extended the reach of the expungement statute to a new class of individuals—those who admitted guilt or were found guilty but nonetheless successfully completed a diversion program or received a stay of adjudication, garnering dismissal of the charge and avoiding a conviction. Because the prosecutor dismissed the charge against A.S.R. without any admission or finding of guilt, the district court properly determined that A.S.R.'s case was resolved in his favor.

II. The district court abused its discretion in determining that MAC rebutted the presumption in favor of expungement.

A petitioner whose case was resolved in his favor is presumptively entitled to expungement of the case record. Minn. Stat. §§ 609A.02, subd. 3(a)(1), .03, subd. 5(b). To rebut the statutory presumption, the agency opposing expungement of its record must present clear and convincing evidence that sealing the record presents a unique or particularized public-safety risk that outweighs the disadvantages to the petitioner of not sealing the record. Minn. Stat. § 609A.03, subd. 5(b); *R.H.B.*, 821 N.W.2d at 821, 823. "[T]o prove a claim by clear and convincing evidence, a party's evidence should be unequivocal, intrinsically probable and credible, and free from frailties." *Gassler v. State*, 787 N.W.2d 575, 583 (Minn. 2010). In determining whether that standard is met, a district court is guided by 11 statutory factors and may consider others it deems relevant. Minn. Stat. § 609A.03, subd. 5(c) (2016).

We review for an abuse of discretion a district court's decision that the agency opposing expungement satisfied its burden. *R.H.B.*, 821 N.W.2d at 823. We will not reverse that decision unless it is based on an erroneous interpretation of the law or against the facts in the record. *Id.* at 822. "A district court's findings of fact will not be set aside unless clearly erroneous." *State v. H.A.*, 716 N.W.2d 360, 363 (Minn. App. 2006). A factual finding is clearly erroneous if it is "manifestly contrary ***532** to the weight of the evidence or not supported by the evidence as a whole." *Id.* (quotation omitted).

A.S.R. challenges several of the district court's factual findings and contends that the court misapplied the law by shifting the burden of proof to him. Both arguments have merit.

A.S.R. first points to the district court's findings regarding the circumstances of the alleged offense, particularly the finding that he "sought 'escort' privileges to which he was not entitled by altering an application for his badge." He argues that this finding is clearly erroneous because it mischaracterizes as fact the unproven allegation against him. We agree. A.S.R. did not plead guilty or stipulate to any facts regarding the false-identification charge. The only factual stipulation before the district court was the one that the parties submitted at the hearing on MAC's motion to terminate the continuance for dismissal on the ground that A.S.R. violated one of the conditions by going to the airport. The stipulation included the reports detailing the factual allegations underlying the charge but expressly indicated that the information was included only to provide the district court context, not as a stipulation that the allegations were true. As such, the stipulation supports no more than a finding that A.S.R. was alleged to have engaged in particular conduct. And we are not convinced that A.S.R.'s testimony at the expungement hearing supports the finding, as he stated only that he had an airport "escort" pass through a previous employer and noticed when he filled out the badge application at issue, "that box is not checked because I already have it." The district court clearly erred by finding that A.S.R. engaged in the underlying charged—but never proven—conduct.

A.S.R. next contests the district court's finding that he was "barred from the airport for the duration of his continuance." His argument is similarly persuasive. The plain language of the continuance-for-dismissal agreement permitted A.S.R. to be at the airport if he had a valid ticket to travel. Indeed, the presence of this clear language underlies both the district court's denial of MAC's motion to terminate the continuance for dismissal and conclusion that A.S.R.'s case was ultimately resolved in his favor.

Finally, A.S.R. argues that the district court clearly erred in finding as fact that "maintenance of airport security is highly complex" and that a "mistake, or an exploitation of the process, could have disastrous consequences." While we are mindful that airport security, as a general matter, is a vital public-safety concern, the district court's specific findings regarding the complexity and vulnerabilities of that security system lack any support in the record. Importantly, MAC did not offer evidence to explain the role that badge applications and the alleged false-identification offense play in maintaining airport security. Absent such evidence, the district court clearly erred in its airport-security findings.

As to legal error, A.S.R. asserts that the district court's analysis fails to hold MAC to its burden of proving that the public's interest in keeping his record unsealed outweighs the disadvantages to him of not sealing it. We agree. MAC argued that (1) it considered A.S.R.'s persistent interest in obtaining employment at the airport to be "odd" or "bizarre," and (2) if "other issues" arise with A.S.R. at other airports around the country, those airports would not have access to the information about the false-identification charge. But MAC presented no evidence that A.S.R. intends to or has submitted employment applications at any ***533** other airports. Nor did MAC explain how the charged misdemeanor false-identification offense presents a particularized public-safety risk, especially after MAC itself agreed to continue the charge for dismissal and the charge was ultimately dismissed. These types of generalizations and hypotheticals are insufficient to establish a genuine public-safety concern. *See R.H.B.*, 821 N.W.2d at 822-23 (rejecting as "unremarkable and generalized" affidavits stating that keeping a defendant's criminal records open give law enforcement more investigative tools); *State v. D.R.F.*, 878 N.W.2d 33, 36 (Minn. App. 2016) (rejecting as "hypothetical" and "speculative" an argument that acquitted petitioner's record of absconding would be relevant to setting bail if he were charged with another offense in the future). The district court erred by relying on MAC's bald allegations concerning the public interest.

Likewise, the district court erred in its analysis of the disadvantages to A.S.R. of not sealing the record of his false-identification charge. MAC argued that A.S.R.'s petition should be denied because he did not demonstrate that the unsealed charge poses

an employment barrier. But a petitioner like A.S.R., whose case was resolved in his favor, "is not required to prove specific disadvantages that he ... will suffer if the petition is denied." *R.H.B.*, 821 N.W.2d at 824. There are "inherent disadvantages caused by unproven criminal accusations—such as personal and professional reputational damage—that would be suffered by *any* expungement petitioner," even if he did not identify any particular disadvantages from denying expungement. *See id.* at 823-24. Although A.S.R. had no obligation to do so, he identified two issues that expungement would address. He testified that he enlisted with the Air Force but was told the false-identification charge would disqualify him unless it is expunged; MAC argued that this claimed employment barrier is doubtful but presented no contrary evidence. And A.S.R. testified, unrebutted, that he experiences personal embarrassment because of the charge and wants it "to be over with."

On this record, we conclude that the district court abused its discretion in determining that MAC presented clear and convincing evidence that expungement of A.S.R.'s false-identification charge presents a unique or particularized risk of harm to the public that outweighs the unrebutted and legally recognized benefits that A.S.R. expects from expungement. A.S.R. is entitled to expungement of his criminal record.

DECISION

The district court abused its discretion by denying A.S.R.'s expungement petition. We reverse that decision and remand for the district court to enter an order of expungement.

Reversed and remanded.

All Citations

906 N.W.2d 526

Footnotes

1 While district courts have both statutory and inherent powers to grant expungement relief, *State v. L.W.J.*, 717 N.W.2d 451, 455 (Minn. App. 2006), A.S.R. requested and the district court addressed only statutory expungement.

2 Because MAC presented this argument to the district court and urges it now as an alternative basis for affirming the district court's decision, it is properly before us in this appeal. *See Day Masonry v. Indep. Sch. Dist. 347*, 781 N.W.2d 321, 331 (Minn. 2010).

2017 WL 1548627
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

C.E.S., Appellant.

A16–1582
|
Filed May 1, 2017

Ramsey County District Court, File Nos. 62–K3–98–003179, 62–CR–08–7025, 62–K9–00–002247

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Considered and decided by Kirk, Presiding Judge; Schellhas, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

***1** Appellant challenges the district court's orders denying her requests for expungement of her criminal records arising out of three convictions. Because the district court did not abuse its discretion or err in interpreting the expungement statutes, we affirm.

FACTS

Appellant C.E.S. was convicted of gross misdemeanor intent to engage in prostitution on November 16, 1998. She received a stayed sentence of one year in the Ramsey County Workhouse. During the term of the stay, she admitted two separate probation violations. She was discharged in November 2000.

On December 22, 2000, C.E.S. was convicted of felony third-degree controlled-substance crime. She received a stay of imposition of sentence and was placed on probation, during which she admitted committing two probation violations. After her second probation violation, C.E.S. requested execution of her sentence, which was granted. On September 27, 2004, the district court vacated the stay, imposed a 27–month sentence, and C.E.S. was committed to the commissioner of corrections. She was discharged in November 2005.

On August 13, 2008, C.E.S. was convicted of misdemeanor prostitution charges. The district court stayed execution of C.E.S.'s sentence; she successfully completed one year of supervised probation and was discharged on August 13, 2009.

C.E.S. petitioned the district court for expungement of each of these three criminal records. Each criminal record was considered in one expungement proceeding and the district court issued three separate orders denying C.E.S.'s petitions. The district court determined that C.E.S. is ineligible for expungement of her first prostitution conviction and her controlled-substance conviction because she was convicted of crimes within the four-and five-year periods prescribed by law. *See* Minn. Stat. § 609A.02, subd. 3(a)(4)–(5) (2016). The district court also concluded that C.E.S.'s third-degree controlled-substance conviction could not be expunged because the legislature did not include the offense in its list of felonies that may be expunged. Minn. Stat. § 609A.02, subd. 3(b).

Regarding C.E.S.'s 2008 prostitution conviction, the district court determined that C.E.S. failed to meet her burden that "sealing the record would yield a benefit to [her] commensurate with the disadvantages to the public and public safety." The district court considered the factors set out in Minn. Stat. § 609A.03, subd. 5(c) (2016), and found that C.E.S. presented some evidence of rehabilitation, but she presented no evidence of being denied employment or housing due to her convictions. The district court commented that C.E.S.'s "11 convictions over 20 years weigh[ed] against her," and C.E.S.'s multiple failures to successfully complete probation before 2008 also weighed against her. The district court denied expungement after concluding that C.E.S. did not establish that sealing the record would benefit her in proportion to "the disadvantages to the public and public safety of: (1) sealing the record; and (2) burdening the court and public authorities to" comply with an expungement order. C.E.S. appeals.

DECISION

***2** We understand C.E.S. to argue that the district court erred in concluding that she was statutorily ineligible for expungement and that the court abused its discretion in denying her petitions because she is seeking expungement for housing and employment purposes. While C.E.S makes no reference to the expungement statute, it appears that this is the basis for her petitions. The record does not reflect that C.E.S. asked the district court to consider expungement under its inherent authority.[1] Thus, we address the district court's orders with respect to the applicable expungement statutes.

A district court is authorized to order expungement by statute. Minn. Stat. §§ 609A.01–.03 (2016); *State v. Ambaye*, 616 N.W.2d 256, 257 (Minn. 2000). This court will review a district court's interpretation of the expungement statute de novo. *Ambaye*, 616 N.W.2d at 258. We review a district court's decision to grant or deny expungement for abuse of discretion. *State v. M.D.T.*, 831 N.W.2d 276, 279 (Minn. 2013).

A person seeking expungement must file a petition stating, among other things, why expungement is sought, the authority for expungement, and what steps the person has taken toward rehabilitation. Minn. Stat. § 609A.03, subd. 2(a)(1)–(9). An expungement petition may be filed for a misdemeanor conviction if an individual has no new convictions "for at least two years since the discharge of the sentence." Minn. Stat. § 609A.02, subd. 3(a)(3). For a gross misdemeanor conviction, the individual must have no new convictions "for at least four years since discharge of the sentence." *Id.*, subd. 3(a)(4). For a felony conviction, the crime must be enumerated in the statute, and the individual must have no new convictions "for at least five years since discharge of the sentence." *Id.* subd. 3(a)(5); § *Id.*, subd. 3(b)(1)–(50).

If the petitioner meets these initial requirements, she must prove, by clear and convincing evidence, that expungement would "yield a benefit to the petitioner commensurate with the disadvantages to the public and public safety of: (1) sealing the record; and (2) burdening the court and public authorities to" comply with an expungement order. Minn. Stat. § 609A.03, subd. 5(a). In determining whether a petitioner has satisfied her burden under Minn. Stat. § 609A.03, the district court must consider 12 factors including, but not limited to, "the petitioner's criminal record," the petitioner's current risk to society, "the length of time

since the crime occurred," the petitioner's progress toward rehabilitation including "employment and community involvement," and "other factors deemed relevant by the court." *Id.*, subd. 5(c)(1)–(12).

The first issue is whether C.E.S. is eligible to expunge each conviction. We examine each of C.E.S.'s convictions in turn.

C.E.S. was convicted of a gross misdemeanor offense on November 16, 1998, and was discharged in November 2000. Within approximately one month of her discharge, on December 22, 2000, C.E.S. was convicted of a new offense. Thus, she failed to have no new convictions "for at least four years since the discharge of" her sentence, as required by the statute. Minn. Stat. § 609A.02, subd. 3(a)(4). The district court did not err in concluding C.E.S. was ineligible to expunge her 1998 conviction.

***3** C.E.S. was discharged from her felony sentence sometime in November 2005. On August 13, 2008, she was convicted of a new offense. Thus, C.E.S. faces two barriers to expunging her 2000 felony conviction. First, third-degree felony controlled-substance crime is not an enumerated offense under the expungement statute and, second, C.E.S. was convicted of a new crime less than five years after discharge from her felony sentence. Minn Stat. § 609A.02, subds. 3(a)(5), (3)(b)(1)–(50). For both of these reasons, the district court did not err in concluding C.E.S. was ineligible to expunge her felony conviction.

The second issue is whether the district court abused its discretion in denying C.E.S's petition to expunge her 2008 conviction. The district court determined that C.E.S is eligible to expunge the 2008 conviction, but failed to meet her burden of proof that sealing the record would provide her a benefit in proportion to the disadvantages to the public and public safety of sealing the record and burdening the system by enforcing an expungement order. Minn. Stat. § 609A.03, subd. 5(a). The district court weighed several factors. The court specifically considered that C.E.S. had no new convictions since 2008 and had presented evidence of rehabilitation, including that she attended therapy, participated in a restorative justice program, attended church, and taught Sunday school. The district court also considered that C.E.S. offered no evidence of being denied housing or employment opportunities. Also, the court determined that C.E.S.'s extensive criminal history weighed against her, as did her consistent failure to successfully complete probation before her most recent misdemeanor charge. The district court concluded that, on balance, the statutory factors "weigh[ ] against Petitioner."

C.E.S. essentially asks this court to reweigh the evidence. But it is not for this court to do so. *State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997). Our role is to review the district court's interpretation of the statute for error and its decision for an abuse of discretion. Because the district court weighed C.E.S.'s rehabilitation against other statutory factors, we conclude that the district court did not abuse its discretion in determining that C.E.S. failed to prove by clear and convincing evidence that the benefit of expungement would be commensurate to the "disadvantages to the public and public safety."

We commend C.E.S's efforts to turn around her life and serve her community. Nothing in our opinion today precludes C.E.S., in the future, from gathering more evidence and petitioning the district court to expunge those criminal records for which she is eligible to seek expungement.

Affirmed.

All Citations

Not Reported in N.W.2d, 2017 WL 1548627

Footnotes

1 C.E.S. did not provide a transcript of the expungement hearing and did not make an explicit request in her expungement petitions for the district court to consider the petitions under its inherent authority. *See State v. L.W.J.*, 717 N.W.2d 451, 456 (Minn. App. 2006) (declining to consider whether district court had inherent authority to expunge criminal records because petitioner did not make that request in the district court and the district court did not grant expungement under that theory).

2017 WL 1548627

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906 N.W.2d 549
Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

C.W.N., Appellant.

A17-0728, A17-0729
|
Filed January 2, 2018

Synopsis

Background: Petitioner, who was convicted of misdemeanor and gross-misdemeanor violations of a harassment restraining order (HRO) and third-degree driving while impaired (DWI) two years later, sought expungement of judicial and executive branch records of his HRO convictions. The District Court, Redwood County, Nos. 64-TX-00-000587, 64-K6-00-00280, granted expungement of judicial-branch records of HRO convictions, but denied expungement of executive-branch records. Petitioner appealed.

The Court of Appeals, Schellhas, J., held that petitioner was eligible to seek expungement of executive-branch criminal records related to his HRO convictions.

Reversed in part and remanded.

***550** *Syllabus by the Court*

To be eligible for expungement of executive-branch records of a petty-misdemeanor or misdemeanor conviction under Minn. Stat. § 609A.02, subd. 3(a)(3) (2016), a petitioner must not have been convicted of a new crime for at least two years immediately preceding the filing of an expungement petition. To be eligible for expungement of executive-branch records a gross-misdemeanor conviction under Minn. Stat. § 609A.02, subd. 3(a)(4) (2016), a petitioner must not have been convicted of a new crime for at least four years immediately preceding the filing of an expungement petition.

Redwood County District Court, File Nos. 64-TX-00-000587, 64-K6-00-00280

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Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and Kirk, Judge.

***551 OPINION**

SCHELLHAS, Judge

Appellant challenges the district court's denial of his petition for expungement under Minn. Stat. § 609A.02, subd. 3(a)(3)-(4), of executive-branch records related to his misdemeanor and gross-misdemeanor convictions.

FACTS

A district court convicted appellant C.W.N. of misdemeanor and gross-misdemeanor violations of a harassment restraining order in 2000 (HRO convictions). In 2002, a district court convicted C.W.N. of third-degree driving while impaired (DWI).[1] In December 2015, C.W.N. filed petitions under Minn. Stat. § 609A.02, subd. 3(a)(3)-(4) to expunge his HRO convictions. The Minnesota Bureau of Criminal Apprehension (BCA) objected in district court to C.W.N.'s petitions, arguing that C.W.N. is ineligible for statutory expungement of its agency records. Neither the City of Redwood Falls nor Redwood County objected to C.W.N.'s petitions.

At his expungement hearing, C.W.N. argued that clear and convincing evidence supported expungement of judicial- and executive-branch records of his 2000 HRO convictions. The district court, under its inherent authority, granted expungement of judicial-branch records of the HRO convictions and ordered that all files and records relating to the offenses be sealed. The parties do not challenge this portion of the district court's order. But the court denied C.W.N.'s petitions for statutory expungement of executive-branch records, embracing the BCA's interpretation of the expungement statute. The court concluded that C.W.N. is ineligible for executive-branch-records expungement of his misdemeanor HRO conviction because of his gross-misdemeanor HRO-violation conviction within two years immediately following the misdemeanor conviction and of his gross-misdemeanor HRO-violation conviction because of his DWI conviction within four years immediately following the gross-misdemeanor conviction.

This appeal follows.

ISSUE

Is C.W.N. eligible for expungement of his executive-branch records under Minn. Stat. § 609A.02, subd. 3(a)(3)-(4)?

ANALYSIS

C.W.N. challenges the district court's denial of his petition to expunge executive-branch records and its interpretation of Minn. Stat. § 609A.02, subd. 3(a)(3)-(4), and argues that he is eligible for expungement under the statute because he was not convicted of any new crimes within two and four years immediately preceding the filing of his expungement petitions. This court reviews the district court's decision on whether to expunge criminal records under an abuse-of-discretion standard. ***552** *State v. M.D.T.*, 831 N.W.2d 276, 279 (Minn. 2013). We review the district court's interpretation of the expungement statute de novo as a question of law. *State v. S.A.M.*, 891 N.W.2d 602, 604 (Minn. 2017).

Minnesota law establishes two bases for expungement of criminal records: Minn. Stat. §§ 609A.01-.04 (2016 & Supp. 2017) and the judiciary's inherent authority. *M.D.T.*, 831 N.W.2d at 279. The judiciary's inherent authority only allows a court to seal those records kept by the judicial branch and does not extend to records held by executive-branch agencies. *Id.* at 282–83. A district court may order executive-branch agencies to seal their records only if a petitioner for expungement is eligible under Minn. Stat. § 609A.02 and the court finds "clear and convincing evidence that it would yield a benefit to the petitioner commensurate with the disadvantages to the public and public safety." Minn. Stat. § 609A.03, subd. 5(a) (2016).

The Minnesota Supreme Court has "never held that the judiciary's inherent authority to order expungement extends to records held in the executive branch." *M.D.T.*, 831 N.W.2d at 281. And until 2015, the expungement statute only "provided for the expungement of criminal records for certain controlled substance crimes, Minn. Stat. § 609A.02, subd. 1, certain juvenile offenders prosecuted as adults, Minn. Stat. § 609A.02, subd. 2, and certain criminal cases that do not result in convictions, Minn. Stat. § 609A.02, subd. 3." *M.D.T.*, 831 N.W.2d at 282 (citing Minn. Stat. § 609A.02, subds. 1-3 (2012)). The law did not allow for expungement of the criminal records of someone like C.W.N. But effective 2015, the Minnesota Legislature amended the expungement statute to allow expungement of petty misdemeanors, misdemeanors, gross misdemeanors, and certain felonies. 2014 Minn. Laws ch. 246, § 6, at 811–14 (codified as amended at Minn. Stat. § 609A.02, subd. 3 (2016)).

The portion of the expungement statute at issue in this case states:

> (a) A petition may be filed under section 609A.03 to seal all records ... if:
>
> ....
>
> (3) the petitioner was convicted of or received a stayed sentence for a petty misdemeanor or misdemeanor and has not been convicted of a new crime for at least two years *since* discharge of the sentence for the crime; [or]
>
> (4) the petitioner was convicted of or received a stayed sentence for a gross misdemeanor and has not been convicted of a new crime for at least four years *since* discharge of the sentence for the crime[.]

Minn. Stat. § 609A.02, subd. 3(a)(3)-(4) (emphasis added). In *S.A.M.*, following the legislature's amendment to the statute, the supreme court characterized the two-, four-, and five-year periods in Minn. Stat. § 609A.02, subd. 3(a)(3)-(5), as "waiting periods." 891 N.W.2d at 608.

When interpreting a statute, an appellate court must first determine whether the statute's language, on its face, is ambiguous. *State v. Thonesavanh*, 904 N.W.2d 432, —— (2017). The plain language of the statute controls only if it is unambiguous and "is susceptible to only one reasonable meaning." *Brayton v. Pawlenty*, 781 N.W.2d 357, 363 (Minn. 2010). A statute is ambiguous if it is subject to more than one reasonable interpretation. *Poehler v. Cincinnati Ins. Co.*, 899 N.W.2d 135, 139 (Minn. 2017).

The BCA objected to C.W.N.'s petition in district court on the basis that the statutory language means that if a person has a new conviction during an applicable waiting period—two years for a petty misdemeanor or misdemeanor and four years for ***553** a gross misdemeanor—the person will never be eligible to seek statutory expungement of executive-branch records related to the original conviction. C.W.N. argues that, under Minn. Stat. § 609A.02, subd. 3(a)(3)-(4), a person is eligible to seek statutory expungement of executive-branch records as long as the person has not been convicted of a new crime during the applicable waiting period immediately preceding the filing of an expungement petition. In other words, the BCA argued that "since" in Minn. Stat. § 609A.02, subd. 3(a)(3)-(4), means that the two- or four-year waiting period begins to run on the date of "discharge of the sentence for the crime" and that if any new convictions occur during those waiting periods, a petitioner is forever ineligible to seek expungement with respect to the crimes subject to the waiting periods. C.W.N. argues that the minimum two- or four-year period immediately precedes the date of filing the petition.

Chapter 609A does not define "since." "In determining the plain and ordinary meaning of undefined words or phrases in a statute, we may consult the dictionary definitions of those words and apply them in the context of the statute." *Poehler*, 899 N.W.2d at 140–41. The dictionary definition of "since" depends on whether it serves as an adverb ("[f]rom then until now or between then and now"); a preposition ("[c]ontinuously from"); or a conjunctive ("[d]uring the period subsequent to the time when"). *The American Heritage Dictionary of the English Language* 1635 (5th ed. 2011). We conclude that "since" in the statute serves as an adverb, modifying "has not been convicted." Applying the dictionary definition of "since," as an adverb, we interpret the statutory language to mean that the two- and four-year conviction-free periods must occur between the date of discharge of the sentence for the crime, i.e., "then," and the date of filing an expungement petition, i.e., "now." We therefore

conclude that C.W.N. is eligible to petition for statutory expungement of the executive-branch records under Minn. Stat. § 609A.02, subd. 3(a)(3)-(4).

Our conclusion is supported by the fact that the expungement statute automatically bars those individuals convicted of a crime requiring registration from petitioning for expungement. Minn. Stat. § 609A.02, subd. 4 (2016) ("Records of a conviction of an offense for which registration is required [for predatory offenses] may not be expunged."). Further, in amending the expungement statute in 2014, the legislature added a paragraph excluding from the exceptions in Minn. Stat. § 609A.02, subd. 3(a)(3)-(4), certain offenses related to domestic abuse and sexual assault. 2014 Minn. Laws. ch. 246, § 6, at 811–14 (providing that "[t]his paragraph expires on July 15, 2015"). Had the legislature wanted to permanently disqualify C.W.N.'s HRO convictions from expungement due to his subsequent convictions within the waiting periods, the legislature could have used more restrictive language, but it did not. *See State v. Expose*, 872 N.W.2d 252, 258–59 (Minn. 2015) ("The inference to be drawn from the Legislature's decision to create exceptions ... in some statutes, but not others, is that it did not intend to create an exception ... in those statutes that do not mention [an exception].").

We do not address the language in Minn. Stat. § 609A.02, subd. 3(a)(5), relating to felonies. And we offer no opinion on whether the district court should grant C.W.N.'s petition for statutory expungement; we hold only that the court may consider C.W.N.'s petition for statutory expungement in applying the factors in Minn. Stat. § 609A.03, subd. 5(a)-(c).

*554 DECISION

Because C.W.N. has not been convicted of a new crime for at least two years immediately preceding the filing of his expungement petition regarding his misdemeanor HRO conviction, and because he has not been convicted of a new crime for at least four years immediately preceding the filing of his expungement petition regarding his gross-misdemeanor HRO conviction, he is eligible under Minn. Stat. § 609A.02, subd. 3(a)(3)-(4), to seek expungement of executive-branch records of his misdemeanor and gross-misdemeanor HRO convictions. We therefore reverse the district court's denial of statutory expungement of the executive-branch records and remand for further proceedings consistent with this opinion.

Reversed in part and remanded.

All Citations

906 N.W.2d 549

Footnotes

1 In August 2015, a district court granted C.W.N. a stay of adjudication after C.W.N. pleaded guilty to making obscene or harassing phone calls under Minn. Stat. § 609.79, subd. 1(1)(ii) (2014). The record on appeal contains no additional details about this offense.

2020 WL 5107296
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

G.R.K., Appellant.

A19-2037
|
Filed August 31, 2020

Washington County District Court, File Nos. 82-CR-18-41; 82-CV-18-4

Attorneys and Law Firms

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Jon Geffen, The Reentry Clinic, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Reilly, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

FLOREY, Judge

***1** Appellant seeks review of the district court's order denying her petition to expunge elements of her criminal record with respect to two record-holding agencies, arguing that the district court did not conform to procedural requirements of the controlling statute. We reverse.

FACTS

In 2018, appellant G.R.K. was charged with three crimes in two separate cases. In January, G.R.K. was charged with domestic assault by strangulation; and in July, felony terroristic threats and misdemeanor DANCO violation. G.R.K. never pleaded to any of the charges. G.R.K.'s domestic partner—the alleged victim in both cases—avoided service of subpoenas in both cases, so both cases were continued for dismissal and later dismissed. G.R.K. subsequently petitioned the district court for expungement of these charges.

G.R.K. argued in her petition that both cases were resolved in her favor under Minn. Stat. § 609A.02, subd. 3(a)(1) (2018), that none of the charges were disqualified from expungement, and that she was therefore presumptively entitled to expungement.

She argued further that the charges interfered with her ability to obtain housing, as at least one potential landlord denied her application as a result of these non-conviction charges.

Several entities opposed the expungement, including the Minnesota Department of Human Services (DHS), and the Minnesota Department of Health (MDH)—the respondents herein.[1] Respondents submitted a memorandum of law to support their opposition to the expungement, but they did not appear at the hearing on the petition. In their memorandum, respondents argued ultimately that, because G.R.K. is a licensed nurse, she might in the future apply for a job in which she would have care of or access to children and/or vulnerable adults. Because respondents screen and qualify applicants for certain positions, and because the conduct alleged by the records associated with the dismissed charges against G.R.K. would potentially be disqualifying for employment in such positions, respondents argue, they have a compelling interest in maintaining access to those records. G.R.K. is currently on permanent disability and not working any job. The district court, noting in the memorandum accompanying its order that respondents "have a compelling interest in reviewing and approving any such application," exempted respondents from the expungement order. G.R.K. appealed.

DECISION

Relevant to this appeal, expungement of criminal records is provided for by statute. *See* Minn. Stat. § 609A.03 (2018). The statute provides different schemes of analysis for different situations, and the parties do not dispute that the applicable provision here is subdivision 5(b)—specifically in its reference to section 609A.02, subdivision 3(a)(1)—which provides for situations in which the petitioner received a "favorable result" on the matters for which expungement is sought. Here, all parties agree that the dismissal of the charges at issue in the petition constitute a favorable result under the statute. We review "favorable result" expungement decisions under an abuse-of-discretion standard. *State v. R.H.B.*, 821 N.W.2d 817, 822 (Minn. 2012).

***2** Section 609A.03, subdivision 5(b), creates a burden-shifting framework, the starting-point of which is the presumption that the petitioner is entitled to expungement. *R.H.B.*, 821 N.W.2d at 821. "But the statutory presumption created under step one is not absolute. Rather, it is a rebuttable statutory presumption that shifts the burden of persuasion to the opposing party." *Id.* (quotations omitted). If an agency or other record-holding entity objects to the expungement, it may "prevent expungement if [it] ... 'establishes by clear and convincing evidence' that the public's interest in keeping the records unsealed 'outweigh[s] the disadvantages to the petitioner of not sealing the records.' " *Id.* (quoting Minn. Stat. § 609A.03, subd. 5(b)).

The statute further guides the analysis by enumerating twelve factors for the district court to consider when deciding whether the record-holding agency has met its burden of demonstrating with clear and convincing evidence that the public's interest in keeping the records available outweighs the disadvantages of the same to the petitioner. The enumerated factors are:

(1) the nature and severity of the underlying crime, the record of which would be sealed;

(2) the risk, if any, the petitioner poses to individuals or society;

(3) the length of time since the crime occurred;

(4) the steps taken by the petitioner toward rehabilitation following the crime;

(5) aggravating or mitigating factors relating to the underlying crime, including the petitioner's level of participation and context and circumstances of the underlying crime;

(6) the reasons for the expungement, including the petitioner's attempts to obtain employment, housing, or other necessities;

(7) the petitioner's criminal record;

(8) the petitioner's record of employment and community involvement;

(9) the recommendations of interested law enforcement, prosecutorial, and corrections officials;

(10) the recommendations of victims or whether victims of the underlying crime were minors;

(11) the amount, if any, of restitution outstanding, past efforts made by the petitioner toward payment, and the measures in place to help ensure completion of restitution payment after expungement of the record if granted; and

(12) other factors deemed relevant by the court.

Minn. Stat. § 609A.03, subd. 5(c).

Here, the district court noted each of these factors and provided its consideration of each in the memorandum accompanying its order. Under the heading for the second factor, after observing that it calls for consideration of the risk that the petitioner poses to individuals or society, the district court found that respondents failed to show that G.R.K. posed such a risk. The district court ends its consideration of this factor by concluding that respondents have a compelling interest in maintaining access to the records and "have met their burden under Minn. Stat. 609A.03, subd. 5(b)." On appeal, G.R.K. raises a number of specific contentions with respect to the district court's findings, analysis, and conclusions—the central thrust being that the district court's order does not conform to the statutory framework. We agree.

After finding that G.R.K. did not pose a threat, but before concluding that respondents met their burden, the district court's analysis of the second factor progressed through the following findings and comments: (1) that the threat G.R.K. poses to her domestic partner is mitigated by other factors; (2) that a purpose of the respondent departments involves screening applicants for certain positions involving vulnerable people; (3) that G.R.K. is licensed as a nurse but does not currently work due to a disability and that it is unknown if she ever will work; (4) that respondents would have a "compelling interest in reviewing and approving" an application from G.R.K. if she did submit one; (5) that G.R.K. would have alternate avenues of potential recourse if respondents denied her hypothetical application; (6) that an unrelated statute might authorize DHS to obtain certain records; (7) that it finds that respondents should maintain their own records "if" G.R.K. were to submit an application to a relevant position; and (8) that respondents might have alternative avenues of access to G.R.K.'s criminal record even if it were to be sealed. As G.R.K. points out, these matters provide little, if any, support or explanation for the court's conclusion that respondents have met their ultimate burden—showing by clear and convincing evidence that G.R.K.'s interests are outweighed by the public's. Minn. Stat. § 609A.03, subd. 5(b).

***3** First, the existence of alternative means by which the parties here might be able to attain what they seek lacks any relevance to the balance of the interests between G.R.K. and the public. Even if such considerations were relevant, they are unhelpful to the analysis given that the alternative means of recourse for respondents identified by the district court would be present in any case pursuant to this statutory framework and therefore do little to distinguish this case from any other. Further, even if we were to assume that the district court had sufficient reason to find that respondents have a compelling interest in preserving the records, that finding alone does not answer the question posed to the court—whether the public's interests, compelling as they might be, outweigh G.R.K.'s—and answering that question would be the only way to conclude that the respondents have "carried their burden." *R.H.B.*, 821 N.W.2d at 823. Ultimately, we conclude that the district court's findings on the second factor do not sufficiently support its conclusion that respondents have met their burden; but this fact alone does not necessarily mean that the district court abused its discretion.

We continue our review by considering the court's handling of the remaining factors. A finding that a petitioner does not pose a risk to individuals or society is not necessarily outcome-determinative. The risk factor is only one of eleven relevant factors specifically identified by the statute, and the district court may also consider any other relevant factors—any one or more of which could theoretically subordinate a petitioner's interests to those of the public. Here, however, the district court provided insufficient findings and legal analysis to permit effective appellate review. *Moylan v. Moylan*, 384 N.W.2d 859, 865 (Minn. 1986) (stating that even where the record might support a district court's decision, "it is nevertheless inadequate if that record fails to reveal that the trial court actually considered the appropriate factors").

In its consideration of the remaining factors, the district court only listed several uncontested facts in the record that might be relevant. It did not explain whether or to what extent those facts are incorporated into the statutorily required balancing of the interests. While it is possible that the district court silently factored any number of considerations into its undisclosed analysis of the extent to which respondents fulfilled their burden, we cannot know whether it did and therefore cannot review that analysis. Therefore, because the district court's order contained insufficient findings and indicates a failure to abide by the statutory framework, we conclude that the district court abused its discretion. *State ex rel. Swanson v. 3M Co.*, 845 N.W.2d 808, 817 (Minn. 2014).

Finally, we note that our review of the record reveals that respondents could not have met their burden under the proper analysis. They exerted minimal effort in opposing G.R.K.'s petition, submitting a brief that contained "mere generalities" and failing to appear at the hearing. In *R.H.B.*, the supreme court concluded that the "the State failed to establish by clear and convincing evidence" that the public's interests outweighed the petitioner's because the opposing departments submitted only three affidavits from their officials which briefly stated how maintenance of criminal records generally can be advantageous to their goals. *Id.* at 822. The court characterized the state's evidence as "little more than generalities," stating that "[t]hese statements are unremarkable and generalized and could be submitted in nearly every expungement case.... the State presented almost no evidence that sealing R.H.B.'s criminal record would present a unique or particularized harm to the public." *Id.* at 822-23. Here, while respondents' brief was more substantial, it was still "little more than generalities" in substance. Respondents provided more detail with respect to their intended purposes and the potential implications of the nature and perceived severity of the dismissed charges against G.R.K., but they did not explain how the expungement of *G.R.K.'s* dismissed charges would "present a unique and particularized harm to the public." *Id.* This, in tandem with the facts that the district court found that G.R.K. did not pose a risk to others and that there was no indication that she would apply for a job for which respondents are responsible for screening applicants, renders the evidence brought by respondents less than clear and convincing.

***4 Reversed.**

All Citations

Not Reported in N.W. Rptr., 2020 WL 5107296

Footnotes

1 While the district court denied G.R.K.'s expungement petition with respect to the records held by respondents, it granted that same petition with respect to a number of other entities, including the Washington County District Court, the Minnesota Bureau of Criminal Apprehension, the Minnesota Department of Corrections, three law-enforcement departments, and three prosecutorial offices.

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877 N.W.2d 205
Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

S.A.M., Appellant.

No. A15–0950.
|
March 21, 2016.

Synopsis

Background: Defendant filed petition for expungement of felony burglary conviction. The District Court, Olmsted County, denied the petition, and defendant appealed.

The Court of Appeals, Reilly, J., held that defendant was not "convicted of or received a stayed sentence for a misdemeanor" as required for expungement, even though felony conviction was later deemed a misdemeanor.

Affirmed.

***206** *Syllabus by the Court*

A felony conviction later deemed a misdemeanor conviction by operation of Minn.Stat. § 609.13, subd. 1(2) (2014), is a felony conviction for purposes of the expungement statute. A petitioner is not entitled to expungement when the felony offense is not one of the statutorily enumerated offenses for which relief may be sought under Minn.Stat. § 609A.02, subd. 3(b) (2015).

Attorneys and Law Firms

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David L. Liebow, Restovich Braun & Associates, Rochester, MN, for appellant.

Joshua Esmay, Council on Crime and Justice, Minneapolis, MN, for amicus curiae.

Considered and decided by CONNOLLY, Presiding Judge; STAUBER, Judge; and REILLY, Judge.

OPINION

REILLY, Judge.

Appellant S.A.M. challenges the district court's denial of his petition for expungement. Appellant argues that although he was convicted of a felony offense not enumerated in Minn.Stat. § 609A.02, subd. 3(b), he qualifies for relief under Minn.Stat.

§ 609A.02, subd. 3(a)(3), governing misdemeanor offenses because his felony conviction was later deemed a misdemeanor conviction following his discharge from probation. We affirm.

FACTS

In December 2003, respondent State of Minnesota charged appellant S.A.M. with second-degree burglary in violation of Minn. Stat. § 609.582, subd. 2(a) (2002), and felony theft in violation of Minn.Stat. §§ 609.52, subds. 2(1) and 3(2) (2002), arising from the nighttime burglary of an in-home business. Appellant pleaded guilty to second-degree felony burglary and the state dismissed the remaining charge and agreed to a stay of imposition and a 90–day jail sentence. At sentencing, the district court "enter[ed] judgment of guilty of Burglary in the Second Degree, Aid and Abet, a felony, in violation of Minnesota Statute § 609.582 Subd. 2(a) and § 609.05." The district court ordered that imposition of sentence be stayed for a period of ten years "or until earlier discharged by the court" upon satisfaction of certain conditions. The district court placed appellant on probation and, among other conditions, ordered him to participate in programing as directed by the probation officer. In April 2008, the probation officer submitted a discharge report indicating that appellant had completed the court-ordered probationary conditions. The district court discharged appellant from probation and ordered that "[t]his conviction is deemed to be a misdemeanor ([pursuant to Minn.Stat. §] 609.13)."

Appellant filed a series of petitions seeking to expunge his criminal records. The district court denied the first two petitions ***207** in 2008 and in 2011. Appellant filed a third petition in January 2015, seeking to expunge the felony burglary conviction and two other non-felony convictions under the newly amended version of Minnesota Chapter 609A, which became effective January 1, 2015. The district court granted expungement with respect to the two unrelated non-felony convictions.

With regard to the felony burglary offense, appellant argued that he qualified for expungement under Minn.Stat. §§ 609A.02, subd. 3 and 609A.03, because the conviction was deemed a misdemeanor. The Olmsted County Attorney, the Minnesota Bureau of Criminal Apprehension, and the Rochester City Attorney's Office objected to the petition. The district court denied expungement as to the felony burglary offense, determining that appellant was not entitled to a statutory expungement because felony burglary is not one of the specifically enumerated felonies for which expungement may be granted under Minn.Stat. § 609A.02, subd. 3(b). The district court further determined that appellant was not entitled to an inherent-authority expungement because he failed to show that the benefit to appellant in granting the petition outweighed the risk to public safety. This appeal followed.

ISSUE

May a felony conviction that is later deemed a misdemeanor conviction by operation of Minn.Stat. §§ 609.13, subd. 1(2); .135 (2014), be expunged under Minn.Stat. § 609A.02, subd. 3(a)(3) (2015)?

ANALYSIS

Appellant challenges the district court's denial of his expungement petition under the newly amended statute governing expungements. Minn.Stat. § 609A.02, subd. 3(a)(3) (2014); 2014 Minn. Laws, ch. 246, § 6 at 811–14 (effective Jan. 1, 2015). A district court's decision to grant or deny an expungement petition is reviewed under an abuse-of-discretion standard. *State v. K.M.M.,* 721 N.W.2d 330, 332–33 (Minn.App.2006) (citation omitted). However, statutory interpretation is a question of law subject to de novo review. *State v. L.W.J.,* 717 N.W.2d 451, 455 (Minn.App.2006).

Chapter 609A provides the grounds and procedures for expungement of criminal records. Minn.Stat. § 609A.01. This section articulates the grounds for an expungement, beginning with certain controlled substance offenses, Minn.Stat. § 609A.02, subd.

1, and offenses committed by juveniles who are prosecuted as adults, *id.,* subd. 2. Subdivision 3 allows for expungement of "all records relating to an arrest, indictment or information, trial, or verdict" if the records are not subject to section 299C.11, subdivision 1(b),[1] and if:

> (1) all pending actions or proceedings were resolved in favor of the petitioner....;
>
> (2) the petitioner has successfully completed the terms of a diversion program or stay of adjudication....;
>
> (3) the petitioner was convicted of or received a stayed sentence for a petty misdemeanor or misdemeanor and has not been convicted of a new crime for at least two years since discharge of the sentence for the crime;
>
> (4) the petitioner was convicted of or received a stayed sentence for a gross misdemeanor ...; or
>
> ***208** (5) the petitioner was convicted of or received a stayed sentence for a felony violation of an offense listed in paragraph (b), and has not been convicted of a new crime for at least five years since discharge of the sentence for the crime.

Minn.Stat. § 609A.02, subd. 3.

"When interpreting a statute, our objective is to effectuate the intent of the legislature, reading the statute as a whole." *State v. Franklin,* 861 N.W.2d 67, 68–69 (Minn.2015) (citations and quotations omitted). Statutory interpretation begins with the plain language of the statute. *KSTP–TV v. Ramsey County,* 806 N.W.2d 785, 788 (Minn.2011) (citation omitted); *see also ILHC of Eagan, LLC v. County of Dakota,* 693 N.W.2d 412, 419 (Minn.2005) ("The touchstone for statutory interpretation is the plain meaning of the statute's language."). Where the statutory language is "clear, explicit, unambiguous, and free from obscurity, courts are bound to expound the language according to the common sense and ordinary meaning of the words." *Krueger v. Zeman Const. Co.,* 758 N.W.2d 881, 885 (Minn.App.2008), *aff'd,* 781 N.W.2d 858 (Minn.2010) (citations omitted); Minn.Stat. § 645.08(1) ("[W]ords and phrases are construed according to rules of grammar and according to their common and approved usage[.]"). But we "look beyond" the statutory language if it is ambiguous and susceptible to more than one reasonable interpretation, and apply other canons of construction to ascertain and effectuate legislative intent. *Franklin,* 861 N.W.2d at 68–69; *KSTP–TV,* 806 N.W.2d at 788.

Here, the statute ranks criminal proceedings from least serious to most serious, beginning with all proceedings resolved in the petitioner's favor, through diversion, petty misdemeanor, misdemeanor, gross misdemeanor, and finally felony offenses. Moreover, subdivision 3(a)(3)-(5) directs the court to look to the level of offense for which the petitioner "was convicted of *or* received a stayed sentence." (Emphasis added.) In this case, the district court entered a judgment of conviction of second-degree felony burglary. Because the statute applies to convictions, we apply the plain language of subdivision 3(a)(5) relating to petitions for felony offenses. *Franklin,* 861 N.W.2d at 68–69. Subdivision 3(b) provides that Minn.Stat. § 609A.02, subd. 3(a)(5), applies to 50 specifically enumerated offenses, primarily related to nonviolent crimes, for which a defendant may seek expungement. Minn.Stat. § 609A.02, subd. 3(b)(1)-(50). Felony second-degree burglary is not one of the enumerated offenses listed in subdivision 3(b), and, as appellant concedes, he is not entitled to expungement under subdivision 3(a)(5) under the plain language of the statute. Accordingly, expungement is only possible if subdivision 3(a)(3)—permitting expungement of certain misdemeanor offenses—applies.

Appellant argues that because the district court stayed imposition of sentence and later discharged probation, his felony conviction must be deemed a misdemeanor by operation of Minn.Stat. § 609.13, subd. 1(2), entitling him to seek an expungement under the misdemeanor provision of the statute. *See* Minn.Stat. § 609A.02, subd. 3(a)(3) (authorizing expungement petition if petitioner was "convicted of or received a stayed sentence" for misdemeanor offense). "When the district court stays the imposition of a sentence, no sentence is pronounced and imposition of a sentence is stayed." *State v. Beaty,* 696 N.W.2d 406, 410 (Minn.App.2005). "A feature unique to a stay of imposition is that, upon a person's successful completion of probation, a felony or gross misdemeanor conviction may be reduced in degree [.]" ***209** *State v. Martin,* 849 N.W.2d 99, 102 (Minn.App.2014); Minn.Stat. § 609.13, subd. 1(2) ("Notwithstanding a conviction is for a felony ... the conviction is deemed to be for a

misdemeanor if the imposition of the prison sentence is stayed, the defendant is placed on probation, and the defendant is thereafter discharged without a prison sentence.").

But here, the misdemeanor portion of the expungement statute plainly provides that a petitioner who "was convicted of or received a stayed sentence for a misdemeanor" may seek expungement. Minn.Stat. § 609A.02, subd. 3(a)(3). The district court entered a judgment of conviction for a felony burglary. Although appellant's felony conviction was later deemed a misdemeanor, it is uncontested that he was "convicted of" a felony offense and he received a stayed sentence for a felony. He is therefore not entitled to seek relief under the section of the expungement statute related to misdemeanor offenses.

A review of caselaw is instructive and further supports our interpretation. In *State v. Moon,* the defendant was convicted of felony theft and the district court stayed imposition of sentence. 463 N.W.2d 517, 518 (Minn.1990). The district court later discharged the defendant from probation and deemed the offense a misdemeanor pursuant to section 609.13, subd. 1(2), but imposed a firearm restriction. *Id.* The supreme court considered whether the firearm prohibition applied to defendant when the felony theft charge was deemed a misdemeanor. *Id.* The *Moon* court determined that the relevant inquiry was "the offense for which the defendant was originally convicted rather than the disposition subsequently imposed by the trial judge," and affirmed noting that "because [defendant] was originally convicted of felony theft, the trial court correctly imposed the firearms restriction upon his discharge from probation." *Id.* at 521; *see also State v. Anderson,* 733 N.W.2d 128, 135 (Minn.2007) (reaffirming *Moon* in light of recent amendments to the firearm-prohibition statute); *Matter of Woollett,* 540 N.W.2d 829, 829–30 (Minn.1995) (concluding that applicant who seeks licensure as a peace officer whose felony conviction was subsequently deemed a misdemeanor under Minn.Stat. § 609.13, subd. 1(2), has been "convicted of a felony" and is rightly prohibited from obtaining a license).[2]

In *Franklin,* the Minnesota Supreme Court considered

> whether a felony conviction that has been deemed a misdemeanor pursuant to Minn.Stat. § 609.13, subd. 1 (2014), before an offender is sentenced on the current offense, can be considered when determining whether the offender "has five or more prior felony convictions" under the career-offender statute, Minn.Stat. § 609.1095, subd. 4 (2014).

861 N.W.2d at 67–68. The district court treated the offense as a felony and sentenced defendant as a career offender. *Id.* at 68. This court reversed, concluding that one of the defendant's felony convictions did not meet the requirements of the career-offender statute because it had been deemed a misdemeanor under the particular language used in that particular statute. *Id.* The state petitioned for further review and the supreme court affirmed our decision based upon a plain reading of the career-offender statute. *Id.* ("[U]nder the plain language of [the career-offender statute], a felony conviction that has been deemed a misdemeanor by operation of section 609.13, before an offender is sentenced for the current offense, ***210** may not be considered when determining whether the offender 'has five or more prior felony convictions.' "). The *Franklin* court specifically limited its holding to the career-offender statute, which governs sentences and length of incarceration.

We decline to extend *Franklin* to challenges arising under the expungement statute. The language used in the career-offender statute is distinct from the language governing expungement petitions. Specifically, whereas the statute at issue in *Franklin* was directed toward a career-offender who "*has* five or more prior felony convictions," the felony-expungement statute refers to a petitioner who "*was* convicted of or received a stayed sentence for a felony violation." *Compare id.* at 68 (citing Minn.Stat. § 609.1095, subd. 4 (2014)) *with* Minn.Stat. § 609A.02, subd. 3(a)(5). (Emphasis added.) The expungement statute, unlike the career-offender statute, does not use the language "prior felony convictions." Appellant was convicted of a felony and received a stayed sentence on his burglary offense. Appellant's felony conviction was not one of the enumerated offenses listed in Minn.Stat. § 609A.02, subd. 3(b), and, accordingly, he is not entitled to relief under subdivision 3(a)(5).[3]

The state argues in the alternative that appellant is not entitled to an expungement because the district court found that "the disadvantages to the public from the elimination of this record outweigh the benefit to [appellant] of having his record expunged." Because we conclude that appellant is not entitled to petition for expungement under Minn.Stat. § 609A.02, subd. 3(a)(3), we decline to address the merits of this argument.

The Council on Crime and Justice (CCJ) submitted an amicus curiae brief urging this court to reverse the district court's decision and hold that convictions that are deemed misdemeanors under section 609.13 are eligible for expungement as misdemeanor offenses under section 609A.02, subdivision 3(a)(3). CCJ argues that a strict interpretation of the expungement statute "would eliminate an entire class of misdemeanor convictions from eligibility" and make it more difficult for Minnesotans with criminal records to rehabilitate their lives upon completion of a criminal sentence. While we are not unsympathetic to appellant's circumstances, we are limited to interpreting the plain language of the statute itself, *KSTP–TV,* 806 N.W.2d at 788, and the policy arguments raised by CCJ are properly directed to the legislature. *Great River Energy v. Swedzinski,* 860 N.W.2d 362, 367–68 (Minn.2015) (ruling that reviewing court may not rely on policy arguments to insert language into an otherwise plain-and-unambiguous statute).

DECISION

The district court did not err in denying appellant's petition for expungement because the plain language of the expungement statute does not entitle appellant to relief under the subdivisions relating to misdemeanor or felony convictions, Minn.Stat. §§ 609A.02, subd. 3(a)(3) or 3(a)(5).

Affirmed.

All Citations

877 N.W.2d 205

Footnotes

1 This statute addresses identification data, such as DNA and fingerprints, furnished to the Bureau of Criminal Apprehension.

2 Like this case, *Moon, Anderson,* and *Woollett* dealt with collateral consequences of stayed felony sentences that were later deemed to be misdemeanors.

3 The Minnesota Sentencing Guidelines further support our decision. The sentencing guidelines instruct that felony offenses continue to be treated as felonies for purposes of computing an offender's criminal history score, regardless of whether the offense is later deemed a misdemeanor by operation of Minn.Stat. § 609.13. Minn. Sent. Guidelines 2.B.1; I.B.19.a; cmt. 2.B.101 (2015).

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

S.M.C., Appellant.

A17–0183

|

Filed December 18, 2017

Nicollet County District Court, File No. 52–CR–06–39

Attorneys and Law Firms

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Craig E. Cascarano, Minneapolis, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Halbrooks, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

REILLY, Judge

Appellant S.M.C. challenges the district court's order denying his petition for statutory expungement of criminal-sexual-conduct charges, arguing that the proceedings were resolved in his favor and the state failed to meet its burden of establishing that the disadvantages to public safety outweighed the benefits of the expungement. We affirm.

FACTS

In January 2006, the state charged appellant with criminal sexual conduct stemming from an incident where the victim, C.H., reported that she had been raped by appellant and by a second individual identified as J.M. In November 2008, J.M. entered a plea of guilty to criminal sexual conduct and admitted to having nonconsensual sex with C.H. J.M. testified that he saw appellant touch C.H.'s breast, but he did not know whether the contact was consensual. A year later, in November 2009, the state dismissed the charges against appellant without prejudice and the district court issued an order for dismissal without prejudice under Minnesota Rule of Criminal Procedure 30.01.

In July 2016, appellant filed a petition for statutory expungement under Minnesota Statutes section 609A.03 (2016), arguing that he qualified for expungement because the charges were dismissed by the prosecuting authority. The state opposed the petition, arguing that appellant failed to include required information in his petition—including records of his seven past criminal charges and convictions—and failed to demonstrate that he would receive any benefit from the expungement. The Minnesota Department of Human Services and the Minnesota Department of Health also opposed the petition. C.H. opposed the petition and appeared at the expungement hearing to provide a statement. The district court denied the petition. While recognizing that the proceedings were resolved in appellant's favor and the state bore the burden of proof, the district court determined that the statutory expungement factors, considered together, "establish by clear and convincing evidence that the public's interest in keeping the records unsealed outweighs the disadvantages to [appellant] of not sealing the records."

This appeal follows.

DECISION

I. Standard of Review

We review a district court's denial of an expungement petition for an abuse of discretion and will only set aside factual findings for clear error. *State v. H.A.*, 716 N.W.2d 360, 363 (Minn. App. 2006). A factual finding is clearly erroneous if it is "manifestly contrary to the weight of the evidence or not supported by the evidence as a whole." *Id.* (quotation omitted). We review questions of statutory interpretation de novo. *See State v. S.A.M.*, 891 N.W.2d 602, 604 (Minn. 2017).

II. Expungement Statute

A district court has both statutory and inherent authority to expunge a petitioner's criminal records. *State v. Ambaye*, 616 N.W.2d 256, 257 (Minn. 2000). Statutory expungement is available only in limited circumstances. *See* Minn. Stat. § 609A.02 (2016) (limiting statutory expungement to certain controlled-substance offenses, to crimes committed by juveniles prosecuted as adults, and to certain enumerated criminal proceedings). A petitioner qualifies for expungement under section 609A.02, subdivision 3(a)(1), when "all pending actions or proceedings were resolved in favor of the petitioner." If a petitioner meets this legal threshold, the district court "shall grant the petition to seal the record unless the agency or jurisdiction whose records would be affected establishes by clear and convincing evidence that the interests of the public and public safety outweigh the disadvantages to the petitioner of not sealing the record." *State v. R.H.B.*, 821 N.W.2d 817, 821 (Minn. 2012) (describing "two-step procedure for statutory expungement"). The district court considers

***2** 1. the nature and severity of the underlying crime, the record of which would be sealed;

2. the risk, if any, the petitioner poses to individuals or society;

3. the length of time since the crime occurred;

4. the steps taken by the petitioner toward rehabilitation following the crime;

5. aggravating or mitigating factors relating to the underlying crime, including the petitioner's level of participation and context and circumstances of the underlying crime;

6. the reasons for the expungement, including the petitioner's attempts to obtain employment, housing, or other necessities;

7. the petitioner's criminal record;

8. the petitioner's record of employment and community involvement;

9. the recommendations of interested law enforcement, prosecutorial, and corrections officials;

10. the recommendations of victims or whether victims of the underlying crime were minors;

11. the amount, if any, of restitution outstanding...; and

12. other factors deemed relevant by the court.

Minn. Stat. § 609A.03, subd. 5(c).

It is undisputed that the criminal charges against appellant were dismissed, and the proceeding was resolved in his favor. Thus, appellant is "presumptively entitled to expungement," *Ambaye*, 616 N.W.2d at 257, and the state bears the "burden of persuasion," *R.H.B.*, 821 N.W.2d at 821 (citation omitted). The district court analyzed the 12 statutory expungement factors articulated in section 609A.03, subdivision 5(c), and concluded that clear and convincing evidence weighed against the petition.

III. Analysis

a. Disadvantages to Public and Public Safety

i. Nature and severity of crime, 5(c)(1); Risk to individuals or society, 5(c)(2); Victim recommendation, 5(c)(10)

The district court determined that the nature and severity of the underlying crime, the risk to society, and the recommendation of the victim weighed against expungement. Minn. Stat. § 609A.03, subds. 5(c)(1), (2), (10). C.H. opposed the petition at the hearing and stated that appellant "held her down" while J.M. sexually assaulted her. Minnesota Statute permits a victim to speak at an expungement hearing and directs the district court that:

> A victim of the offense for which expungement is sought has a right to submit an oral or written statement to the court at the time of the hearing describing the harm suffered by the victim as a result of the crime and the victim's recommendation on whether expungement should be granted or denied. The judge shall consider the victim's statement when making a decision.

Minn. Stat. § 609A.03, subd. 4 (2016).

The district court found C.H.'s testimony "sincere and credible," and reasoned that her testimony lent credence to a determination that appellant "pose[d] a risk to society, especially young females." It is the district court's prerogative to weigh the evidence and make credibility determinations. *See State v. Engle*, 731 N.W.2d 852, 859–60 (Minn. App. 2007) ("Assessing the credibility of witnesses and weighing their testimony are within the exclusive province of the factfinder.") (quotation omitted). We do not discern any error in the district court's determination that these factors weighed against expunging appellant's criminal record.

ii. Aggravating or mitigating factors, 5(c)(5)

***3** The district court found that aggravating factors weighed against expungement because C.H. testified that appellant was an "active participant in the crime" and acted "callous[ly]" toward her, and J.M. testified at his plea hearing that appellant was "present in the hotel room and was touching [C.H.] on the breast." Appellant argues that the district court mischaracterized J.M.'s testimony and "inculpat[ed] [a]ppellant for [the charged] offense." We disagree. The district court explained that "in finding [C.H.'s] testimony to be credible, it is not thereby finding Defendant guilty of the offense." The district court acknowledged that the case was dismissed seven years ago and that appellant "has never been convicted of anything in connection with it." But the district court continued:

> The question here is whether to grant the expungement petition. The testimony of [C.H.] is relevant and properly used for that purpose. Minn. Stat. § 609A.03, subd. 4 gives [C.H.] the right to make a statement and directs the Court to consider it.

> The opinion of a victim is one of the factors listed in Minn. Stat. § 609A.03, subd. 5(c). The Court used the testimony of [C.H.] when applying the factors to determine whether expungement is appropriate.

The record demonstrates that the district court carefully analyzed this statutory factor as it relates to appellant's expungement petition, without suggesting that appellant was guilty of the underlying offense.

iii. Steps toward rehabilitation, 5(c)(4); and Petitioner's criminal record, 5(c)(7)

Upon review of appellant's criminal record, the district court determined that appellant has a "significant record of other charges and convictions," including driving offenses in 1997, 1999, 2006, and 2009, and a domestic assault charge in 2010. The district court characterized appellant as having "a significant record of trouble with the law," and noted that appellant originally failed to include records of these charges and convictions in his petition for relief. Appellant argues that the 1997 and 1999 driving offenses occurred before the offense at issue, and that his only criminal conviction was eight years ago. We are not persuaded by this argument. Minnesota law directs the district court to consider "the petitioner's criminal record," Minn. Stat. § 609A.03, subd. 5(c)(7), and the plain language of the statute is not limited to charges and convictions arising after the date of the underlying crime.

The district court also found that appellant had a history of alcohol-related criminal offenses but failed to "set forth any steps that he has taken toward rehabilitation since the incident." The district court noted that appellant "present[s] a risk to society, particularly if he is under the influence of alcohol." The January 2006 complaint states that appellant and J.M. were drinking alcohol with C.H. before the assault occurred. And appellant's criminal record includes several impaired-driving offenses. The district court found that, as of the date of the hearing, there was no evidence "regarding what, if anything, [appellant] has done with regards to alcohol use." Because the record supports the district court's factual findings, the district court's review of appellant's criminal record is not erroneous.

b. Benefits to Petitioner

Appellant did not articulate how the benefits of an expungement outweighed the disadvantages to the public or to public safety. The district court considered the reasons for expungement and found that appellant "did not state that he has had any difficulty obtaining employment, housing or other necessities for living." *See* Minn. Stat. § 609A.03, subd. 5(c)(6) (directing court to consider reasons for expungement "including the petitioner's attempts to obtain employment, housing, or other necessities"). Appellant has not contested this determination on appeal. On balance, the district court found that "[t]he foregoing factors considered together establish by clear and convincing evidence that the public's interest in keeping the records unsealed outweighs the disadvantages to [appellant] of not sealing the record." We agree. The record demonstrates that the district court considered each of the statutory factors and concluded that the state met its burden of establishing that clear and convincing evidence weighed in favor of denying the petition.

***4** Appellant argues that the district court's ruling is contrary to *R.H.B.*, 821 N.W.2d at 817 and *State v. D.R.F.*, 878 N.W.2d 33 (Minn. App. 2016). We disagree. The petitioner in *R.H.B.* sought an expungement under section 609A.03, subdivision 5(b). *R.H.B.*, 821 N.W.2d at 820. The state opposed the petition and presented three affidavits stating that an expungement threatened public safety. *Id.* at 822. However, the affidavit statements were "unremarkable and generalized, and could be submitted in nearly every expungement case" because they were not unique to the petitioner. *Id.* The Minnesota Supreme Court noted that "the State presented almost no evidence that sealing R.H.B.'s criminal record would present a unique or particularized harm to the public," and reinstated the district court's order granting expungement. *Id.* at 822–23 ("Because the State presented little more than generalities explaining why it is beneficial for State and county licensing agencies and police departments to maintain the criminal records of an acquitted defendant, we hold that the district court did not err when it granted R.H.B.'s petition."). The petitioner in *D.R.F.* also sought statutory expungement under section 609A.03, subdivision 5(b), which the state opposed. *D.R.F.*, 878 N.W.2d at 35. The district court denied the petition and we reversed on appeal, determining that because there was

not a "unique or particularized harm to the public" presented by the facts of the case, the harm suggested by the state was "too speculative to constitute clear-and-convincing evidence." *Id.* at 36.

R.H.B. and *D.R.F.* are inapplicable here. The district court had specific evidence regarding the "unique and particularized harm" to the public of granting the petition. While appellant disagrees with how the district court weighed the competing interests, the record reveals that the district court addressed each of the 12 statutory factors and determined that it was in the public's interest to deny the expungement petition. A district court's weighing of competing interests in an expungement case is a discretionary task, which we review for abuse of discretion. *R.H.B.*, 821 N.W.2d at 822. The district court did not abuse its discretion by determining that the state sustained its burden of persuasion in this case.

Affirmed.

All Citations

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

T.K.S., Defendant,

Peter J. Nickitas, Appellant.

A19-1250
|
Filed March 30, 2020
|
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Anoka County District Court, File No. 02-CV-19-4146

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Considered and decided by Rodenberg, Presiding Judge; Johnson, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

***1** On appeal from a final judgment, appellant attorney Peter J. Nickitas challenges a district court order sanctioning him in the amount of $3,000 under Minn. R. Civ. P. 11 for his conduct while representing a client in an expungement proceeding. Nickitas argues that the district court abused its discretion (1) by applying the rules of civil procedure in the context of an expungement proceeding and (2) by sanctioning him for petitioning this court for a writ of prohibition. We affirm in part, reverse in part, and remand for correction of the judgment.

FACTS

Based on an incident that occurred in Coon Rapids in the summer of 2014, the state charged Nickitas's client T.K.S. (petitioner) with disorderly conduct and a no-contact order (NCO) was issued against petitioner. The state later dismissed the disorderly conduct charge, and the NCO was vacated. Petitioner then sought an expungement of records from the district court.[1]

Petitioner filed his petition for expungement pro se in July 2015. As part of the petition, he included a proposed order. The proposed order was apparently based on a form order, including language (the perjury language) stating that the order restores petitioner to the status occupied before the arrest and he "will not be guilty of perjury for failure to acknowledge the arrest or proceeding in response to any inquiry made for any purpose." Petitioner's proposed order included no language related to a lack of probable cause for the dismissed charge or to the absence of an adequate factual basis for the NCO.

By the time of the expungement hearing on September 24, 2015, petitioner had engaged Nickitas to represent him. Nickitas did not file another proposed order with the district court before the hearing, but he brought a second proposed order with him to the hearing. An assistant city attorney appeared at the hearing as well. After the assistant city attorney reviewed the second proposed order, the parties informed the district court that there was a dispute about the order: specifically, the city believed that the perjury language constituted inappropriate legal advice.

Discussion followed regarding the perjury language, and eventually Nickitas informed the district court that he would submit another proposed order, which would consist of "[t]he form that [petitioner] prepared plus, after that form, paragraphs 5 and 6 of [Nickitas's] draft." The district court directed Nickitas to also submit any legal authority regarding inclusion of the perjury language.

Nickitas emailed his proposed order to the district court and the Coon Rapids city attorney. The final proposed order's fourth paragraph included the perjury language that was in the proposed order prepared by petitioner and that was the topic of debate at the hearing. Nickitas's proposed order also contained the following in paragraph 6 (the probable-cause language):

> ***2** The state, after due and timely notice, and appearing before the court, does not oppose the petition for expungement. The court concludes the following:
>
> • The prosecution lacked probable cause *ab initio.*
>
> • The state lacked predicate facts to seek, and the court lacked predicate facts, to imposed [sic] the no-contact order (NCO).

Nickitas's email informed the district court and the assistant city attorney that the final proposed order was "conformable to the stipulation agreed on the record by the parties before the court this afternoon" and that "[petitioner] seeks no additional language beyond that which the parties stipulated on the record before the court."

The assistant city attorney replied by email, copying the district court, stating that his "only concern" remained the language that he thought gave legal advice about whether petitioner could be charged with perjury. Nickitas responded, saying, "[N]othing is added to the prepared forms except the two paragraphs to which you stipulated in court." The district court, based on its understanding that the only disputed language had been the perjury language in paragraph 4, decided to remove the perjury language and enter the expungement order as otherwise proposed by Nickitas. The expungement order, filed on October 7, 2015, thus excluded the perjury language but it included Nickitas's proposed probable-cause language in paragraph 6.

In December 2015, the city became aware that the expungement order contained the probable-cause language when petitioner sued the city in federal court for arresting him without probable cause. The city moved to modify the expungement order to remove the probable-cause language. At a hearing on the motion, the assistant city attorney testified under oath that he only learned of the probable-cause language when petitioner brought his lawsuit against the city. The district court found that the assistant city attorney credibly testified that the probable-cause language had not been in the second proposed order that Nickitas had brought with him to the earlier expungement hearing. The district court then amended the expungement order to remove the probable-cause language.

Petitioner appealed the amended order. This court reversed and remanded the case for additional findings and consideration of whether modification of the order was permissible under Minn. R. Civ. P. 60.02. *State v. T.K.S.*, No. A16-0541, 2016 WL 7188701 (Minn. App. Dec. 12, 2016) (*T.K.S. I*). The district court ordered a hearing on the remanded issue and set a briefing deadline. A week before the hearing, on the day of the briefing deadline, petitioner filed in this court a petition for writ of

prohibition, arguing that the district court did not have jurisdiction to hear the case. The district court continued the hearing pending the resolution of the petition. We denied the petition eight days after it was filed, stating that the district court had jurisdiction because we had remanded the case to it. *State v. T.K.S.*, No. A17-0104 (Minn. App. Jan. 31, 2017) (order) (*TKS II*).

The district court eventually held its hearing over a month after it was initially scheduled. At the end of the hearing, the district court requested additional briefing on the motion to modify the expungement order, as well as on possible sanctions under Minn. R. Civ. P. 11 in connection with the probable-cause language and the petition for the writ of prohibition. After receiving the additional briefing, the district court filed an order granting the city's request to modify the expungement order. The district court also determined that Nickitas's insertion of the probable-cause language and his pursuit of a petition for a writ of prohibition were potential grounds for sanctions. The district court ordered Nickitas to show cause as to why it should not impose rule 11 sanctions based on his conduct.

***3** Petitioner appealed the district court's ruling to modify the expungement order. We affirmed. *State v. T.K.S.*, No. A17-1365, 2018 WL 3966223 (Minn. App. Aug. 20, 2018) (*T.K.S. III*). We declined to reach the issue of sanctions, as the district court had not yet entered a final judgment on the matter. *Id.* at *5.

In a December 2018 show-cause hearing at the district court, Nickitas argued that sanctions were improper because there was no evidence of bad faith in his actions and that he was simply being a zealous advocate. He also argued that the city had an opportunity to object to the additions but did not. The district court noted at the hearing on sanctions that the only way for a court to conclude that the prosecution lacked probable cause was through a stipulation or an evidentiary hearing, neither of which had occurred.

The district court issued an order imposing sanctions on Nickitas, determining that he had improperly added the probable-cause language to the order without adequately disclosing the contents of the language. The district court concluded that Nickitas's argument that it was the city's responsibility to notice the added language amounted to a "gotcha" tactic and was without merit. It also noted that it was troubled by Nickitas's conduct after the language was found: rather than seek a stipulation or an evidentiary hearing, Nickitas instead fought to keep the language in the order. The district court concluded that these actions constituted bad faith and imposed a sanction of $1,500.

The district court also determined that Nickitas's petition to this court for a writ of prohibition was a frivolous motion intended to delay proceedings. The district court concluded that Nickitas's motion was frivolous because it essentially amounted to a petition to this court to reverse its decision to remand the issue to the district court. Given the frivolousness of the petition, the district court determined that filing the petition constituted bad faith and imposed another $1,500 sanction. The district court then entered judgment.

This appeal follows.

DECISION

The standard of review for sanctions imposed under Minn. R. Civ. P. 11 is whether the district court abused its discretion. *Collins v. Waconia Dodge, Inc.*, 793 N.W.2d 142, 145 (Minn. App. 2011), *review denied* (Minn. Mar. 15, 2011).

Under rule 11.02, when an attorney presents a document to the court, the attorney certifies that, to the best of that attorney's knowledge, information, and belief, the following is true about the document:

> (a) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(c) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;

Minn. R. Civ. P. 11.02(a)-(c). Because one of the primary purposes of rule 11 is to deter litigation abuse, the district court or the injured party should provide notice of the alleged violation "as early as possible during the proceedings to provide the attorney and party the opportunity to correct future conduct." *Uselman v. Uselman*, 464 N.W.2d 130, 143 (Minn. 1990).

***4** If the district court determines that rule 11.02 has been violated, the district court may impose appropriate sanctions on the violating attorney. Minn. R. Civ. P. 11.03. "The [district] court should impose the least severe sanction necessary to effectuate the purpose of deterrence and may also consider the presence or absence of bad faith in determining an appropriate sanction." *Uselman*, 464 N.W.2d at 145 (citations omitted). The conduct is measured against an objective standard, but sanctions are not appropriate simply because a party does not prevail on the merits. *Radloff v. First Am. Nat'l Bank of St. Cloud, N.A.*, 470 N.W.2d 154, 157 (Minn. App. 1991), *review denied* (Minn. July 24, 1991). "The extent to which the offender persisted in advancing a position while on notice that the position was not well grounded in fact or law is an aggravating factor." *Id.* (quotation omitted).

Nickitas challenges both the sanctions imposed for the contents of the expungement order and the sanctions imposed for petitioning this court for a writ of prohibition. We address each issue in turn.

I. The district court did not abuse its discretion by sanctioning Nickitas for his conduct in connection with the probable-cause language in the proposed order.

Nickitas argues that the district court abused its discretion by sanctioning him in connection with the probable-cause language in the proposed expungement order because (1) Minn. R. Civ. P. 11 does not apply in a criminal expungement proceeding, and (2) even if it did apply, his conduct did not warrant sanctions.

A. The rules of civil procedure apply to this case.

Nickitas argues that an expungement is a criminal proceeding and, as such, the district court should not have applied sanctions to him under rule 11 of the Minnesota Rules of Civil Procedure. He makes this argument despite an earlier ruling in this case in which this court held that the expungement was a special proceeding in which Minn. R. Civ. P. 60.02 applies. *T.K.S. III*, 2018 WL 3966223, at *3-4. He points to *State v. Scheffler*, which noted that *T.K.S. III*, as an unpublished decision, was not precedential authority establishing that an expungement action is a civil action. 932 N.W.2d 57, 60-61, 61 n.3 (Minn. App. 2019).

But, while unpublished opinions are not generally precedential, they are precedential as the law of the case. Minn. R. Civ. App. P. 136.01, subd. 1(b). "Law-of-the-case doctrine commonly applies to issues decided in earlier stages of the same case. [It] provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *State v. Miller*, 849 N.W.2d 94, 98 (Minn. 2014) (emphasis omitted) (quotations omitted). In *T.K.S. III*, we decided that an expungement was a special proceeding because an expungement arises from a law-conferred right that the court enforces after a party makes a special application. *T.K.S. III*, 2018 WL 3966223, at *3 (citing *Fiduciary Found., LLC v. Brown*, 834 N.W.2d 756, 761 (Minn. App. 2013)). We noted that special proceedings may be civil actions, even if the proceeding arose from an underlying criminal matter. *Id.* We then concluded that Minn. R. Civ. P. 60.02 applied to expungement proceedings, permitting the district court to modify its expungement order. *Id.* Thus, we concluded that the rules of civil procedure apply to this expungement action.

Nickitas points out that this court only determined that rule 60.02 applied to expungements in *T.K.S. III*, not that other rules of civil procedure apply. It is true that this court did not specifically address whether rule 11 also applied to expungement proceedings. But Nickitas offers no explanation for why rule 11 would not apply to an expungement proceeding when rule 60.02

does, other than claiming that an expungement proceeding is more akin to a criminal proceeding than a civil one. Concluding that an expungement proceeding is a criminal proceeding would contradict this court's earlier decision in *T.K.S. III*. Under the doctrine of law of the case, rule 11 applies to petitioner's expungement proceedings.

B. The district court did not abuse its discretion by imposing sanctions on Nickitas related to the probable-cause language.

***5** Nickitas argues that sanctions are not warranted under rule 11. He contends that the record does not support the district court's determination of bad faith and that the district court was retaliating against him for providing "zealous and aggressive advocacy."

Fleshing out these arguments, Nickitas first asserts that he presented the changes that he had planned to make to the proposed order openly in court and provided the prosecution "ample opportunity" to respond. He claims that he made a full disclosure that he was adding language beyond what is typically included in expungement orders in the initial expungement hearing and in his later emails.

But Nickitas overstates how transparent he was about adding the language to the proposed order. Nickitas brought a second proposed order to the initial expungement hearing. He argues that it is undisputed that the second proposed order contained paragraphs 5 and 6, including the probable-cause language. But the district court later found that the second proposed order did not include the probable-cause language. And whether the second proposed order contained the probable-cause language or not, it is clear from the transcript that the parties never discussed the probable-cause language at the hearing. Instead, they and the district court focused on the appropriateness of the perjury language. Nickitas then informed the district court that he would submit another proposed order. He stated that that proposed order would be "[t]he form that [petitioner] prepared plus, after that form, paragraphs 5 and 6 of the draft." At no point during the hearing did Nickitas provide any description about the contents of paragraphs 5 or 6. There was no acknowledgement by either party or the district court that the probable-cause language in paragraph 6 would expose the city to civil liability, even though this admission would clearly be unusual in an expungement proceeding.

Not only was Nickitas not forthcoming about the probable-cause language at the expungement hearing, but he was far from transparent about it in his later emails to the court and opposing counsel. After the hearing, Nickitas emailed the final proposed order to the district court, indicating that the city had stipulated to the added paragraphs: Nickitas described the final proposed order as "conformable to the stipulation agreed on the record by the parties before the court," stating that it only contained language to which "the parties stipulated on the record before the court." As reflected in the transcript, the exchange that comes closest to a "stipulation" occurred after Nickitas explained that he would be emailing a proposed order that includes a form order and "paragraphs 5 and 6":

> THE COURT: It appears there's no objection to that, right?
>
> ASSISTANT CITY ATTORNEY: Yeah, I don't know if this whole business of including some sort of paragraph about doesn't need to disclose about—
>
> THE COURT: He's not indicating that that should be in the order.
>
> ASSISTANT CITY ATTORNEY: Yeah, and I don't know if that's appropriate that that should be in the order.

The district court then decided to have Nickitas submit his proposed order with authorities related to the perjury language and asked the city attorney if that was "fair enough." The city attorney replied that he thought so. What Nickitas described as a "stipulation" in his email to the district court dramatically overstates the level of agreement from the city. The assistant city attorney never stipulated to the probable-cause language. Thus, Nickitas's final proposed order, especially in light of his email statements to the district court describing the probable-cause language as "stipulated to" by the parties, was presented for the improper purpose of misleading the court. It was sanctionable under rule 11.02(a).

***6** Nickitas argues that it is not his fault that neither the district court nor the city attorney sufficiently reviewed the final proposed order. If either had caught the language, it is true this case would likely have resolved more quickly. But the issue under review is Nickitas's conduct and the content of his presentations to the district court, not whether other parties promptly noticed his actions.

Nickitas next argues that he did not violate rule 11 because there is no statutory prohibition on a finding that there was no probable cause. But Nickitas offers no statutory authority suggesting that an expungement proceeding is an appropriate place to assess whether there was probable cause to support an arrest. Expungement orders are used to seal certain criminal records. *See* Minn. Stat § 609A.02, subd. 3 (2018). Yet Nickitas attempted to use an expungement order to establish factual findings that would support a civil suit without an affirmative stipulation or an evidentiary hearing. Nickitas certainly knew the implications of what he was asking the district court to do with the proposed order, as petitioner, his client, promptly used the order to sue the city in federal court.

Nickitas also argues that the district court's delay in raising the issue of rule 11 sanctions reveals an inappropriate, retaliatory motive. The district court did not raise the issue of rule 11 sanctions until after the first appeal and this court's denial of the petition for a writ of prohibition. As Nickitas points out, this delay occurred despite the fact that the district court knew of the probable-cause language mistake before the first appeal had even been filed. One could view this delay as suggesting that the district court was retaliating against Nickitas for the appeal rather than attempting to deter Nickitas from future bad conduct. But the district court's delay is also consistent with a growing recognition of the nature and scope of Nickitas's behavior. What may have appeared at first to the district court to simply be aggressive advocacy may have begun to look more like a "gotcha" trick as the litigation wore on. The district court noted that, rather than recognize the misunderstanding and allow the city to correct what appears to have been a clear mistake, Nickitas fought for years to keep the probable-cause language in the order. This behavior culminated in Nickitas filing with this court a dubious petition for a writ of prohibition, arguing that the district court did not have jurisdiction, shortly after this court had remanded the issue. The district court raised the possibility of sanctions at the very next hearing. We conclude that the sanctions were not retaliatory.

Nickitas also complains that the delay in raising sanctions violates the principle that rule 11 should be invoked as soon as alleged abuse occurs so a party can correct their conduct. It is true that the district court's delay in imposing sanctions for Nickitas's actions is not completely in line with the caselaw describing the deterrence-minded goals of rule 11. But, given that the district court was witnessing additional conduct that continued to inform its assessment of the original conduct, it does not appear that the delay rises to the level of an abuse of discretion.

Finally, Nickitas asserts that, while he is not requesting a hearing on the amount of the sanctions, the district court's failure to consider his ability to pay the sanctions was indicative of the district court's arbitrariness in the proceedings. The district court here concluded that $1,500 for each violation was sufficient to deter repetition of such conduct. "If the court chooses to impose a monetary sanction, it might consider the attorney's or party's ability to pay." *Uselman*, 464 N.W.2d at 145. In *Uselman*, however, the sanction was $190,200. *Id.* Here, the district court's conclusion does not seem unreasonable, particularly given that *Uselman* states that a court *might*, not must, consider an attorney's ability to pay. The amount of sanctions imposed by the district court does not show that the district court abused its discretion.

II. The district court abused its discretion by sanctioning Nickitas for filing a petition for a writ of prohibition from this court.

***7** Similar to his arguments with respect to the probable-cause language, Nickitas argues that the district court abused its discretion by imposing sanctions on him for petitioning this court for a writ of prohibition because (1) the district court could not impose sanctions under Minn. R. Civ. P. 11 for an appellate proceeding and (2) in any event, his conduct did not warrant sanctions.

Rule 11.02 applies to "pleading[s], written motion[s], or other document[s]" that are "present[ed] to *the* court," Minn. R. Civ. P. 11.02 (emphasis added). This language plainly implies that the district court is limited to imposing sanctions on parties

under rule 11.03 for documents presented to the district court itself. The district court cannot impose rule 11 sanctions on a party for presenting documents to *another* court. Instead, it falls upon the court in which the party presents the documents to determine whether sanctions are appropriate. The district court therefore abused its discretion by imposing sanctions on Nickitas for petitioning this court for a writ of prohibition, and we reverse the $1,500 sanction imposed on that basis and remand for correction of the judgment. We do not reach Nickitas's second argument that his conduct in filing the petition did not rise to the level of sanctionable conduct.

Affirmed in part, reversed in part, and remanded.

All Citations

Not Reported in N.W. Rptr., 2020 WL 1517962

Footnotes

1 While Coon Rapids prosecutors participated in the expungement proceeding in district court, neither the state nor the city of Coon Rapids have filed a brief in this appeal.

Questioned Identity Information Sheet

Your identity can come into question when one of the following situations occurs: you and another individual have the same name and date of birth; or another person — either knowingly or unknowingly — uses your name and date of birth. When a person's identity comes into question, he or she may encounter problems of a financial or criminal nature. The Bureau of Criminal Apprehension (BCA) can address only the criminal aspects of questioned identity. This information sheet identifies the steps you should take if you find yourself the subject of questioned identity.

Step 1: Contact the BCA

The BCA is committed to working with individuals to mitigate the impact of questioned identity. If you are involved in a questioned identity situation, contact the BCA by phone, mail, or in person as soon as possible.

Minnesota Bureau of Criminal Apprehension
MNJIS Section – Attn: Questioned Identity
1430 Maryland Ave. East
St. Paul, Minnesota 55106
Telephone: 651- 793-2400

BCA personnel will compile and review information that will help to verify your identity. If the situation did not originate with the BCA, you may be referred to the appropriate agency.

Step 2: Provide Documentation and Fingerprints

If you come in person to the BCA office, you will be asked to complete a "Questioned Identity Initial Report Form." Bring along a picture ID and any documents that lead you to believe that you are the subject of questioned identity.

If you would like the BCA to assist you with an issue of questioned identity, you must also provide fingerprints. Analysis of fingerprints is the only means of verifying identity.

If you cannot go to the BCA office, you may take the report form, your picture ID, and any documentation to your local law enforcement agency, where you can provide fingerprints. Personnel from that agency **must** submit the form and fingerprints to the BCA.

Although fingerprinting is free at the BCA office, some law enforcement agencies may charge a fee for this service.

Step 3: Receive Verification

A BCA representative will review your completed form, documents, and fingerprints. The process of determining whether an individual is the subject of a criminal record may take up to two hours; you can wait for the results of the review or have them mailed to you. If your information is mailed to the BCA, your results will be mailed to you.

If you are not the subject of a record, you will be issued a letter confirming that you are not the subject of that record. You can provide this letter to law enforcement agencies, or individuals such as potential employers or landlords, who may choose to make and retain copies.
Individuals who are subjects of criminal records will receive letters reflecting that information.

Step 4: Keep Your Letter in a Safe Location

Retain the original letter stating that you are not the subject of a criminal history; individuals who wish to do so can make copies for their records.

Keep the original letter in a safe location. If this letter is lost or stolen, notify the BCA immediately so it can be voided. Failure to report a missing letter can result in further questioned identity problems. You will be issued a new letter only after resubmitting fingerprints and other information.

Step 5: Direct Inquiries to the BCA

The information contained in your letter is current through the date it was issued. Individuals who require more information, including employers or landlords, should contact the BCA Criminal History Access Unit and provide the name on the letter, date, and validation number. The BCA will verify its validity. Inquiries should be directed to 651/793-2400.

Version 2.2
March 14, 2018

Questioned Identity Initial Report Form

Please print all information clearly. (Illegible forms will not be processed.)

Last Name_____ Date of Birth_____ (mm/dd/yyyy) Sex_____ (M or F)

First Name_____ Middle Name_____

Other Names and Name Variations Used_____

_____

_____

Street Address_____

City_____ State_____ ZIP Code_____

Phone Number (___)_____ (Area Code) Alternate Phone Number (___)_____ (Area Code)

Why do you believe you are the subject of questioned identity? Please be specific. Attach additional pages if needed.

_____

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Under Minnesota Statutes § 13.04, the Bureau of Criminal Apprehension (BCA) must inform users of this form of the following: You are providing private data in order to attempt to resolve a situation of questioned identity. The BCA intends to use this data to determine whether a criminal history record or fingerprints for an unsolved crime with your name or fingerprints exists in the BCA Computerized Criminal History or Automated Fingerprint Identification system. You may refuse to supply the requested data. However, if you do not provide this data, the BCA cannot determine whether or not you are the subject of a criminal history record and cannot assist in resolving your questioned identity situation. The information provided will be used by BCA employees and individuals to whom you release it. ***As part of the questioned identity resolution process, your fingerprints will be compared with other fingerprints on file at the BCA. If fingerprint comparison confirms that you are the subject of a criminal history record or unsolved crime, information which you provide, including name and date of birth, may be added to the corresponding criminal history record and/or shared with other criminal justice agencies.***

I acknowledge that I have read the information on both sides of this form, and I expressly authorize the BCA to use the information I am providing for the purpose of verifying my identity. I acknowledge that the BCA may retain the information which I provide, and that this information may be added to BCA records in appropriate circumstances.

Signature _____ Date_____

Law enforcement agencies: Please send the completed form and fingerprints, along with copies of the documents that substantiate that the individual is the subject of questioned identity to: Bureau of Criminal Apprehension, MNJIS Section, Attention: Questioned Identity, 1430 Maryland Ave E, St. Paul, MN 55106.

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