FILED BY CLERK
OCT 20 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2010-0081
Appellant,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
MARIO TAMEZ,	)	Rule 111, Rules of
	)	the Supreme Court
Appellee.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. DL92000063

Honorable Ann Littrell, Judge

AFFIRMED IN PART;
REVERSED IN PART AND REMANDED

Edward G. Rheinheimer, Cochise County Attorney
By Erin D. Bennett
Sierra Vista
Attorneys for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 The state appeals from the juvenile court's order granting appellee Mario Tamez's application for destruction of juvenile records and setting aside his delinquency adjudication for aggravated assault. On appeal, the state argues the court erred in ordering the destruction of records and setting aside the adjudication because Tamez had a felony conviction. It also contends the court erred in setting aside his adjudication for aggravated assault without considering the nature of the offense. For the reasons stated below, we affirm the court's order granting the destruction of records and reverse and remand its order setting aside Tamez's adjudication for aggravated assault.

Factual and Procedural Background

¶2 After a hearing on May 29, 1992, the juvenile court adjudicated Tamez delinquent on one count of burglary in the second degree and one count of theft. In June or July 1992, he also was adjudicated delinquent for conspiracy, a class six felony, and aggravated assault, a class three felony. The court placed Tamez on juvenile intensive probation for all of his adjudications, and he was successfully terminated from probation on November 5, 1993.

¶3 In 2002, Tamez pled guilty pursuant to a plea agreement to possession of drug paraphernalia, an open-ended, class six felony. The trial court suspended the imposition of sentence and placed him on probation for four years. However, when Tamez violated the terms of probation and elected not to be reinstated on probation, the court sentenced him to prison for four months and designated the offense as a class six felony. He completed his sentence on June 8, 2007, and later successfully petitioned to have the conviction set aside.

¶4 Beginning in 2007, Tamez filed various applications to have his juvenile records destroyed and his adjudications set aside, culminating in the present application for destruction of juvenile records. During the hearing on the application, Tamez responded in the affirmative when the court asked if he also was seeking to have his juvenile adjudications set aside. Over the state's objection, the court ordered the destruction of Tamez's juvenile records and set aside all his felony adjudications. The state filed a timely notice of appeal.[1]

Discussion

Felony Conviction

¶5 The state first contends the juvenile court erred in granting Tamez's application for destruction of juvenile records and in setting aside his adjudications because Tamez had been convicted of a felony. It argues the statutes authorizing the setting aside of delinquency adjudications, A.R.S. § 8-348, and permitting the destruction of juvenile records, A.R.S. § 8-349, do not apply to persons who have a felony conviction.

¶6 "We review de novo issues concerning the meaning and scope of statutes, attempting to discern and fulfill legislative intent." *State v. Payne*, 223 Ariz. 555, ¶ 16, 225 P.3d 1131, 1137 (App. 2009). Under "'fundamental principles of statutory

[1]We observe that Tamez has not filed an answering brief. "When a debatable issue is raised on [appeal], the failure to file an answering brief generally constitutes a confession of error." *Gibbons v. Indus. Comm'n of Ariz.*, 197 Ariz. 108, ¶ 8, 3 P.3d 1028, 1031 (App. 1999). However, we may exercise our "discretion to waive this general rule to address a purely legal issue." *Id.* And, because "[t]his case presents such an issue" we address the merits of the state's appeal. *Id.*

construction, . . . the best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction.'" *State v. Hansen*, 215 Ariz. 287, 289, ¶ 7, 160 P.3d 166, 168 (2007), *quoting Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, ¶ 8, 152 P.3d 490, 493 (2007).

¶7 A person who is at least eighteen years of age, who has been adjudicated delinquent, and who has met certain conditions, may apply to the juvenile court to have his adjudication set aside pursuant to § 8-348. However, a person may not apply to have an adjudication set aside if he "has been convicted of a criminal offense." § 8-348(C)(1). Similarly, § 8-349 authorizes the destruction of juvenile court and juvenile department of corrections records upon application, subject to certain conditions having been met and provided "[t]he person has not been convicted of a felony offense." § 8-349(D)(2).

¶8 The state acknowledges that Tamez's criminal conviction has been set aside. However, it argues that the "set aside does not negate the *fact* that he has been *convicted* of a felony offense." To support its argument, the state quotes the following portion of this court's holding in *Russell v. Royal Maccabees Life Ins. Co.*, 193 Ariz. 464, ¶ 27, 974 P.2d 443, 449 (App. 1998): "[E]xpungement does not protect a person from having to disclose the *fact of conviction* . . . ." Although the proposition is sound, *Russell* is factually distinguishable and does not support the state's position.

¶9 There, Russell had applied for a disability insurance policy. In completing the application for insurance, he responded in the negative to a question asking whether he had ever been convicted of a felony. *Id.* ¶ 4. After the policy was issued, Russell was

injured and subsequently filed a disability claim under the policy. *Id.* ¶ 5. He filed a lawsuit against the insurance carrier when it denied his claim, and during litigation the carrier's investigation revealed Russell had been convicted of a felony that had been expunged pursuant to A.R.S. § 13-907. *Russell*, 193 Ariz. 464, ¶¶ 3, 5, 974 P.2d at 444-45. The trial court granted the carrier's motion for summary judgment, finding the company was entitled to rescind the insurance policy based on Russell's failure to disclose his felony conviction. *Id.* ¶¶ 5, 6.

¶10 On appeal, Russell argued he had not misrepresented his criminal history when he completed the insurance application. *Id.* ¶ 13. He contended "that because his prior conviction was vacated pursuant to A.R.S. [§] 13-907, legally no conviction ever existed." *Id*. ¶ 13. Thus, the issue in *Russell* was whether the expungement statute "permits non-disclosure of a conviction set aside under that section in response to a direct question about such conviction." *Id*. ¶ 17. And, the complete text of the language quoted by the state makes this apparent. Therefore, we concluded, expungement does not relieve an insurance applicant of the duty to disclose the fact of a prior conviction, notwithstanding the fact it was set aside. *Id*. ¶ 27. Here, there simply is no issue involving Tamez's duty to disclose his felony conviction.

¶11 The expungement statute, § 13-907, provides, in pertinent part, that if the application is granted, "the judge . . . shall set aside the judgment of guilt . . . and order that the person be released from all penalties and disabilities resulting from the conviction other than those" enumerated in the statute. § 13-907(C). Sections 8-348 and 8-349 both plainly impose the disability of disqualifying a person who has been

convicted of a felony from filing an application under those statutes. *State v. Zaputil*, 220 Ariz. 425, ¶ 12, 207 P.3d 678, 681 (App. 2008) (noting "[t]he term 'disability' is defined as '[a] legal incapacity or disqualification'"). However, neither statute is listed in § 13-907 as an exception to the "penalties and disabilities" from which a successful applicant for expungement can be released. And, contrary to the state's assertion on appeal, the juvenile court "acknowledge[d] the *fact*" of Tamez's felony conviction in granting the application. Thus, we cannot say the court erred on this ground.

The State's Objection

¶12 The state also argues the juvenile court was precluded from ordering the juvenile records destroyed because the state had filed an objection to Tamez's application. The state relies on § 8-349(E), which authorizes the court to enter an order for the "destruction of records under subsection D of this section if the county attorney does not object within ninety days after the date of the notice and the court" makes certain statutory findings. To the extent the state interprets this language to mean that its objection, standing alone, precluded the court even from considering the application to destroy juvenile court records, we disagree. The state has not cited, nor are we aware of, any authority for the proposition that a party's mere objection can preclude a court from exercising its discretion in deciding, much less considering, whether to grant an application. Were we to interpret the statute in the manner suggested by the state, we would be adding a precondition to the juvenile court's ability to review an application that does not exist. We cannot and will not rewrite the statute to achieve this result. *See Ariz. City Sanitary Dist. v. Olson*, 224 Ariz. 330, ¶ 11, 230 P.3d 713, 717 (App. 2010).

The more plausible interpretation is that the legislature intended to provide the state a ninety-day period for making an objection, after which the court can consider the application and enter an appropriate order under the circumstances.

Adjudication for Aggravated Assault

¶13 The state next contends the juvenile court erred in setting aside Tamez's adjudications without first considering the nature of his adjudication for aggravated assault.[2] We review the court's factual findings for an abuse of discretion, but review its conclusions of law and issues of statutory interpretation de novo. *State v. Noceo*, 223 Ariz. 222, ¶ 3, 221 P.3d 1036, 1038 (App. 2009). As the state correctly points out, § 8-348 states that a person may not apply to have an adjudication set aside if the offense involved "the infliction of serious physical injury" or "the use or exhibition of a deadly weapon or dangerous instrument" as those terms are defined in A.R.S. § 13-105.

¶14 At the hearing on Tamez's application, a juvenile probation officer testified that "[o]n the petition from May 8, 1992, there was a . . . class six conspiracy, and a class three felony aggravated assault." The court later asked, "There is still an aggravated assault that you're saying he was adjudicated on?" and the officer replied, "Yes. That was from the petition [o]n . . . May 8th of 1992." At the conclusion of the testimony, the court noted:

[2]Although the state did not raise this issue below, Tamez's application did not include a request to set aside his delinquency adjudications. Rather, during the hearing on his application for destruction of records, the juvenile court inquired for the first time whether he was "asking to have [his] adjudication set aside in juvenile court." In our discretion we conclude that under these circumstances, the state has not waived the issue by not raising it in the juvenile court, and we address the state's argument on the merits.

> The problem I'm having, looking through this file, is apparently they didn't have orders of probation back then the way we do now, and so it's hard to pull out. They also didn't designate the felonies back then. I could reference to statutes, but of course I have no idea in 1992 what the statute was or what the offenses were, the level of offense. It's nice to know we have made improvements.

¶15 Under the statutes in effect when Tamez committed the offense, aggravated assault was designated a class three felony only if the offense involved "the infliction of serious physical injury" or "the use or exhibition of a deadly weapon or dangerous instrument." *See* 1991 Ariz. Sess. Laws, ch. 225, § 2; *see also Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 269 n.5, 872 P.2d 668, 673 n.5 (1994) (appellate court can take judicial notice of legislative history, even if not introduced at trial). Thus, if Tamez indeed had a prior adjudication for a class three aggravated assault, the court would have been precluded from setting aside his juvenile adjudications. § 8-348.

¶16 However, the record is unclear as to the nature of Tamez's prior adjudications. The probation officer's testimony does not clarify what information he had before him, and the petition from May 8, 1992, originally alleged robbery and simple assault. There is handwriting on that document indicating a potential amendment changing the offense from robbery to conspiracy, but both allegations were ultimately crossed out. An amended petition was filed on June 12, 1992, but that petition again only alleged robbery and assault.

¶17 Given the conflicting evidence, we would normally defer to the juvenile court's determination. *See State v. Norcross*, 26 Ariz. App. 115, 117, 546 P.2d 840, 842 (1976) (appellate court does not reweigh evidence; such is in trial court's discretion).

However, its statements indicate that the court made no attempt to resolve whether Tamez in fact had a prior adjudication for aggravated assault or whether the offenses for which he had been adjudicated in relation to the May 8, 1992, petition would preclude it from setting aside the juvenile adjudications. Thus, the court failed to consider all the relevant facts and circumstances before arriving at its determination. Its order setting aside Tamez's juvenile adjudications was therefore an abuse of discretion. *See Avila v. Ariz. Dep't of Econ. Sec.*, 160 Ariz. 246, 248, 772 P.2d 600, 602 (App. 1989) (court abuses discretion when decision characterized by "arbitrariness or capriciousness, and failure to conduct an adequate investigation into the relevant facts").

Disposition

¶18 For the reasons stated above, we affirm the juvenile court's order granting the destruction of court records and reverse and remand that portion of its order setting aside Tamez's adjudication for aggravated assault for further proceedings consistent with this decision.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge