STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1365

State of Minnesota,
Respondent,

vs.

T. K. S.,
Appellant.

Filed August 20, 2018
Affirmed
Florey, Judge

Anoka County District Court
File No. 02-CR-14-4452

Lori Swanson, Attorney General, St. Paul, Minnesota; and

David J. Brodie, City of Coon Rapids, Coon Rapids, Minnesota (for respondent)

Peter J. Nickitas, Peter J. Nickitas Law Office, L.L.C., Minneapolis, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Peterson, Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

FLOREY, Judge

Appellant challenges the district court's order granting the state's rule 60.02 motion to modify an expungement order to remove language indicating that the state had no probable cause for appellant's underlying charges and no predicate facts supporting a no-

contact order against appellant. Relator asserts (1) that the district court erred in granting the state's motion to modify the expungement order under rule 60.02 because it made improper factual findings, lacked statutory authority to modify the order, granted the motion based on the state's improper motive, and erred in concluding that appellant would experience no prejudice from the modification and (2) that the district court has no authority to sanction relator and his counsel for seeking a writ of prohibition from the court of appeals. Because the district court properly applied Minn. R. Civ. P. 60.02 and the *Finden* elements, we affirm.

FACTS

Appellant T.K.S. sought to expunge the record of a prosecution against him for disorderly conduct and misdemeanor obstruction of legal process, as well as for a no-contact order relating to the charges.[1] The state dismissed the underlying prosecution for the charges. Appellant initially filed a pro se petition with the district court and provided a form proposed order. Appellant later hired counsel. The state did not oppose the expungement. At the expungement hearing, appellant's counsel stated that he had a proposed order that was different from the one filed by appellant, but the district court indicated that it did not have a copy of the order. The district court permitted the attorneys time to discuss the proposed order off the record and then later communicate the agreed-upon order to the district court.

[1] Appellant previously appealed to this court challenging his pretrial release conditions on these charges on October 20, 2014. We dismissed the appeal as moot in a special-term order following the state's dismissal of the charges against him.

Later, during a discussion on the record, appellant's counsel indicated he wanted the order to include language concerning how appellant could respond to questions on future job applications regarding the expungement. The state objected to this language as it seemed that the order would be giving improper legal advice (the legal-advice language). Appellant's counsel summarized the content of its proposed order on the record, indicating that it would contain "the original form order prepared by [appellant] plus, after that form, paragraphs 5 and 6 of the draft." The district court instructed appellant's counsel to submit his proposed order, along with any authority supporting the inclusion of the legal-advice language. Appellant's counsel emailed a proposed order to the district court and the state on the evening of the hearing.

The district court signed the expungement order provided by appellant's counsel on October 7, 2015. The signed order did not contain the legal-advice language that the parties had discussed at the expungement hearing, but it did contain the district court's findings that it would not include the language. The order also contained statements in paragraph 6 of the order that "the prosecution lacked probable cause *ab initio*" and that "the state lacked predicate facts to seek, and the court lacked predicate facts to impose the no-contact order" (the disputed language).

On February 2, 2016, more than 60 days after the district court signed the expungement order, the state moved to amend the order. In its memorandum in support of its motion to modify, the state noted that appellant's counsel agreed to not include the legal-advice language following its objection. The Coon Rapids City Attorney, representing the state in the expungement proceeding, indicated that he did not review the order before it

was signed but had asked appellant's counsel whether the language he objected to had been removed. He stated that appellant's counsel confirmed that it had, and the City Attorney indicated to the judge that he did not object to the expungement order because he was not aware of the inclusion of the disputed language.

The state further claimed in its memorandum that, on December 30, 2015, it first discovered that the order contained the disputed language, to which it would have objected had it been aware that the language was in the order. The state noted that appellant was using the additional language contained in the order against the state in a federal lawsuit against the City of Coon Rapids and in seeking a HRO against a Coon Rapids police officer.[2] The state indicated that the language contained in the order "hampered" the state's defense in that suit. The state also asked the district court to clarify language in the order that stated appellant was a "crime victim."

The district court granted the state's motion to amend the expungement order after a hearing. It issued a modified expungement order, deleting the language relating to probable cause and predicate facts, and also deleted the words "which finds a nexus between the criminal record and the Petitioner's status as a crime victim." Appellant appealed the amendment of the order. In an unpublished opinion, this court concluded that the district court's limited findings did not allow us to determine whether it considered the necessary elements to grant relief pursuant to Minn. R. Civ. P. 60.02, and reversed and

[2] The parties indicated at oral argument that this lawsuit has been settled.

remanded the case, instructing the district court to apply the *Finden* elements. *State v. T.K.S.*, No. A16-0541, 2016 WL 188701 (Minn. App. Dec. 12 2016) (*T.K.S. I*).[3]

Following a hearing on remand, the district court concluded that the four *Finden* elements were satisfied, finding that the state presented a meritorious claim, that it had a reasonable excuse for failure to act, that it acted with due diligence upon learning of the challenged language, and that no substantial prejudice would result to appellant. It found credible the City Attorney's testimony that he did not recall the disputed language being part of the proposed expungement order that he reviewed. It granted the state's motion to amend the expungement order. The district court also ordered appellant's counsel to appear for a show-cause hearing as to why it should not impose Rule 11 sanctions on him for failing to make an effort to inform the district court about the disputed language's presence in the order, for seeking to include in the expungement order a finding that the judge issuing the no-contact order lacked a basis to issue the order, and for filing a writ of prohibition in what appeared to be an attempt to delay the proceedings.

This appeal followed.

[3] Before the district court heard the case on remand, appellant filed a writ of prohibition with this court seeking to restrain the district court from enforcing its December 27, 2016 order and arguing that the district court did not have jurisdiction to conduct a hearing on remand. We declined to issue this writ of prohibition, concluding that we had specifically recognized the district court's jurisdiction to consider the case on remand.

D E C I S I O N

I. Minn. R. Civ. P. 60.02 applies to the state's motion to amend the expungement order.

We first address appellant's argument that the district court had no statutory authority to modify the expungement order because Minn. R. Civ. P. 60.02 does not apply to expungement proceedings and the expungement statute, Minn. Stat. § 609A.03 (2016), provides the only remedy for a party opposing an expungement order.

"Statutory interpretation is a question of law, which this court reviews de novo." *State v. L.W.J.*, 717 N.W.2d 451, 455 (Minn. 2006). Minn. Stat. § 609A.03, subd. 1, provides that "[a]n individual who is the subject of a criminal record who is seeking the expungement of the record shall file a petition under this section and pay a filing fee." The statute further provides that "[a]n expungement order shall be stayed automatically for 60 days after the order is filed and, if the order is appealed, during the appeal period." *Id.* at subd. 9. Minn. R Civ. P. 60.02 provides that a party may move for relief from a final judgment, order, or proceeding based on "mistake, inadvertence, surprise, or excusable neglect"; "newly discovered evidence"; "fraud"; a "void" judgment; where a judgment has been "satisfied, released, or discharged"; or for "any other reason justifying relief from the operation of the judgment."

Minnesota law provides that certain proceedings may be classified as special proceedings. "A proceeding is 'special, within the ordinary meaning of the term 'special proceeding,' when 'the law confers a right, and authorizes a special application to a court to enforce it.'" *Fiduciary Foundation, LLC ex rel. Rothfusz v. Brown*, 834 N.W.2d 756,

761 (Minn. App. 2013) (quoting *Schuster v. Schuster*, 84 Minn. 403, 407, 87 N.W. 1014, 1015 (1901)). In other words, a special proceeding "is not part of the underlying action and that is brought by motion or petition, upon notice, for action by the court independent of the merits of the underlying action." *In re Estate of Janecek*, 610 N.W.2d 638, 642 (Minn. 2000). Remedies provided by special proceedings are civil in nature. *Fiduciary Foundation, LLC ex rel. Rothfusz*, 834 N.W.2d at 761. A special proceeding may arise from, and be independent of, an underlying criminal matter. *Id.* "[T]he fact that a proceeding is a 'special proceeding' does not preclude treating it as a civil action." *State by Humphrey v. Baillion Co.*, 502 N.W.2d 799, 803 (Minn. App. 1993). In fact, an appeal may be taken from a final order in a special proceeding under civil appellate rules. Minn. R. Civ. App. P. 103.03(g).

Appellant argues that expungement proceedings are criminal proceedings to which Minn. R. Civ. P. 60.02 cannot apply. We conclude that expungement proceedings are special proceedings to which Minn. R. Civ. P. 60.02 does apply. Minn. Stat. § 609A.03 provides for the expungement of criminal records upon petition to the district court. Because the statute provides for a right which may be enforced following application to a district court, an expungement proceeding is properly classified as a special proceeding. *See Fiduciary Foundation, LLC ex rel. Rothfusz v. Brown*, 834 N.W.2d at 761 (stating that a proceeding may be classified as a special proceeding when the law provides for a right which may be conferred upon application to a district court). Accordingly, we are not precluded from treating an expungement proceeding as a civil action, *State by Humphrey*,

502 N.W.2d at 803, to which Minn. R. Civ. P. 60.02 applies. Appellant provides us with no binding authority to the contrary.

Moreover, the doctrine of law-of-the-case supports this result. "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). In *T.K.S. I*, we determined that the district court made limited findings which did not permit us to review whether it properly considered the necessary elements to grant relief pursuant to rule 60.02. *T.K.S. I.*, 2016 WL 7188701 at *2. We reversed and remanded the order, instructing the district court to apply the *Finden* elements in analyzing the state's rule 60.02 motion. *Id.* Our decision in *T.K.S. I* provides that rule 60.02 applies to the state's motion to amend the district court's expungement order, and the law-of-the-case doctrine strongly supports our conclusion in this appeal that rule 60.02 applies to this expungement proceeding.

II. The district court did not abuse its discretion in its application of the *Finden* elements on remand.

We next consider whether the district court properly applied the *Finden* elements on remand. Appellant makes no argument that the trial court abused its discretion in its application of these elements, though he does raise the argument that there was no excusable neglect on the part of the state in failing to timely object to the language contained in the district court's expungement order.

"Absent an abuse of discretion, a reviewing court will uphold a district court's decision to vacate a judgment under Minn. R. Civ. P. 60.02." *Galbreath v. Coleman*, 596 N.W.2d 689 (Minn. App. 1999). To grant relief under rule 60.02, a district court must consider and "expressly find" that a party satisfied all four of the elements set forth in *Finden v. Klass*. *Gams v. Houghton*, 884 N.W.2d 611, 619 (Minn. 2016). The four elements are: "(1) a debatably meritorious claim; (2) a reasonable excuse for the movant's failure or neglect to act; (3) the movant acted with due diligence after learning of the error or omission; and (4) no substantial prejudice will result to the other party if relief is granted." *Id*. at 620 (quotation and citations omitted). "The decision whether to grant rule 60.02 relief is based on all the surrounding facts of each specific case, and is committed to the sound discretion of the district court." *Id.*

The district court concluded that the state presented a debatably meritorious claim. A meritorious claim is one that provides a defense to the plaintiff's claim. *Finden v. Klass*, 128 N.W.2d 748, 750 (Minn. 1964). The district court found that the state demonstrated it had a defense to the imposition of the original expungement order because it found the City Attorney's testimony that the state was not aware of the disputed language and did not agree to it credible. The district court concluded that, because there was no agreement between the state and appellant on the disputed language, it would have needed to make determinations regarding probable cause or predicate facts to address those issues in an expungement order. It further concluded that there was no evidence submitted that would permit it to make a determination on those issues. It ultimately concluded that the disputed language was not properly included in the original expungement order.

The district court also concluded that the state had a reasonable excuse for its failure to act, in satisfaction of the second *Finden* element. *Gams*, 884 N.W.2d at 619. It credited the City Attorney's testimony that he was unaware of the disputed language and thus had no reason to review the language of the unopposed expungement order after raising his objections to the legal-advice language.

The district court concluded that the state acted with due diligence upon learning the expungement order contained the disputed language, satisfying the third *Finden* element. District courts may determine whether parties act within a reasonable amount of time on a case-by-case basis. *Sommers v. Thomas*, 88 N.W.2d 191, 195-95 (Minn. 1958). Here, the state brought its motion to amend under rule 60.02 on January 27, 2016, after learning about the presence of the disputed language in the order on December 30, 2015. Minn. R. Civ. P. 60.02 requires that a motion for relief must be brought "within a reasonable time" and for motions under 60.02(a)-(c) within a year. The state took action within a month of learning of the disputed language and within a year of the initial entry of the expungement order.

The district court also concluded that the fourth *Finden* element, that "no substantial prejudice" would result to appellant, was satisfied. It concluded that no prejudice would result because the expungement itself would remain and only the language of the order would change. It also noted that appellant's concern that the file expunged was "open" while this matter is pending is moot because appellant was the one who referred to the expungement order in the federal proceeding.

We see no abuse of discretion in the district court's thorough, detailed application of the *Finden* elements on remand. The record is unclear as to when the disputed language was identified and presented to the state and to the district court. The district court determined that the City Attorney credibly testified that he had no knowledge that the disputed language was contained in the order until after the 60-day appeal period provided by Minn. Stat. § 609A.03. We give deference to the district court's credibility determinations. *Bobo v. State*, 860 N.W.2d 681, 684 (Minn. 2015). The district court did not abuse its discretion in applying the *Finden* elements.

III. Appellant's arguments concerning rule 11 sanctions are not properly before this court.

We next address appellant's arguments that the district court erred in ordering appellant's counsel to show cause as to why the district court should not impose rule 11 sanctions under the Minnesota Rules of Civil Procedure. Minn. R. Civ. App. P. 103.03 provides that an appeal may be taken from a final judgment or from a partial judgment pursuant to Minn. R. Civ. P. 54.02. Here, there has been no final judgment against appellant's counsel on the issue of rule 11 sanctions. This issue is not properly before us until final judgment has been entered on the issue of sanctions. *See T.A. Schifsky Sons, Inc. v. Bahr Const., LLC*, 773 N.W.2d 783, 789-90 (Minn. 2009) (concluding that there is no appeal from an order awarding attorney fees, rather, the "proper appeal lies from the judgment or amended judgment entered on the order"). We further note that, because appellant is not the party aggrieved by the district court's order, he does not have standing to appeal an attorney-fee award against his counsel. *See Twin Cities Metro. Pub. Transit*

Area v. Holter, 311 Minn. 423, 425, 249 N.W.2d 458, 460 (Minn. 1977) ("A party who is not aggrieved by a judgment may not appeal from it.").

Affirmed.