STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1250

State of Minnesota,
Respondent,

vs.

T. K. S., Defendant,

Peter J. Nickitas,
Appellant.

Filed March 30, 2020
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge

Anoka County District Court
File No. 02-CV-19-4146

David Brodie, Coon Rapids City Attorney, Coon Rapids, Minnesota (for respondent)

Jordan S. Kushner, Law Office of Jordan S. Kushner, Minneapolis, Minnesota (for appellant)

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

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

SMITH, TRACY M., Judge

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

[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.

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):

> 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.

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.

D E C I S I O N

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).

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.

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).

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.

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.