STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1850

Vaundell Duwayne Kingbird, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed August 31, 2020
Affirmed
Reilly, Judge

Itasca County District Court
File No. 31-CR-10-1511

Robert J. Shane, Minneapolis, Minnesota (for appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Matti R. Adam, Itasca County Attorney, Rachel A. Evenson, Assistant County Attorney, Grand Rapids, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Connolly, Judge; and Florey, Judge.

S Y L L A B U S

A defendant is not exonerated within the meaning of Minn. Stat. § 590.11, subd. 1(c)(2) (Supp. 2019), when his conviction has been vacated based on a later clarification of the law, when the conduct violated the law under existing precedent at the time the offense was committed.

O P I N I O N

REILLY, Judge

In this appeal from an order denying his petition for exoneration compensation, appellant argues that the district court erred by concluding that his conviction for being a felon in possession of a firearm was not vacated based on factual innocence when appellant possessed a BB gun and the Minnesota Supreme Court, years later, concluded that a BB gun is not a firearm within the meaning of the felon-in-possession-of-a-firearm statute. We affirm.

FACTS

On May 19, 2010, appellant Vaundell Duwayne Kingbird slapped A.R.H., who was pregnant with his child, after she tried to stop him from drinking. Appellant left but later returned to the residence drunk and again slapped A.R.H. That evening, two witnesses saw appellant pushing A.R.H into a vehicle outside the residence. Both witnesses observed that appellant possessed a black pistol. One of the witnesses called the police. Upon their arrival, the police officers observed appellant walking around the residence and toward the street with his hands in his pockets. The police officers drew their weapons and ordered appellant to show his hands and get on the ground. Appellant continued to walk toward the street and did not remove his hands from his pockets. One of the police officers used his taser on appellant and placed him under arrest. The police officers located a black BB gun behind the residence.

On May 20, 2010, respondent State of Minnesota charged appellant with being a felon in possession of a firearm in violation of Minn. Stat. § 609.165, subd. 1b(a) (2008),

two counts of misdemeanor domestic assault in violation of Minn. Stat. § 609.2242, subd. 1(2) (2008), and misdemeanor obstructing legal process in violation of Minn. Stat. § 609.50, subd. 1(2) (2008). Appellant pleaded guilty to the felon-in-possession-of-a-firearm charge and the state dismissed the remaining charges under a plea agreement. Following his plea, the district court sentenced appellant to 60 months' imprisonment, execution of which was stayed for ten years, and placed appellant on probation. In August 2011, the district court revoked appellant's probation after he violated conditions and committed appellant to the commissioner of corrections for 60 months.

In 2016, the Minnesota Supreme Court determined that an air-powered BB gun is not a "firearm" under the felon-in-possession-of-a-firearm statute. *State v. Haywood*, 886 N.W.2d 485 (Minn. 2016). Later, the state moved to vacate appellant's conviction and dismiss the charge. In January 2017, the district court granted the state's motion, dismissed the charge and vacated appellant's conviction and sentence.

In July 2019, appellant filed an amended petition[1] for an order declaring him eligible for compensation based on exoneration pursuant to Minn. Stat. § 590.11 (Supp. 2019). The state opposed appellant's motion, arguing that appellant does not meet the definition of "exonerated" under the statute. The district court denied appellant's petition, concluding that appellant's conviction was not vacated "on grounds consistent with innocence," and that appellant failed to "proffer[] 'any evidence of factual innocence.'" The district court

[1] In September 2017, appellant petitioned for an order declaring eligibility for compensation based on exoneration pursuant to Minn. Stat. § 590.11 (2014), which he later dismissed.

declined to hold a hearing, stating that the issue was "purely a legal issue" and that there was no evidence for it to consider at an evidentiary hearing. This appeal follows.

ISSUE

Has a defendant been exonerated within the meaning of Minn. Stat. § 590.11, subd. 1(c)(2), when his conviction has been vacated based on a clarification of the law so that the conduct of which the defendant was convicted is no longer criminal, but the conduct did violate the criminal law under then-existing precedent?

ANALYSIS

The Minnesota Imprisonment and Exoneration Remedies Act (MIERA) allows certain previously-incarcerated individuals to receive compensation after a court reverses their convictions. *Buhl v. State*, 922 N.W.2d 435, 438 (Minn. App. 2019); Minn. Stat. §§ 590.11, 611.362-.368 (Supp. 2019). "The threshold determination under the exoneration-compensation statute is whether an individual has been exonerated." *Back v. State*, 902 N.W.2d 23, 26 (Minn. 2017) (quotation omitted). If the individual has been exonerated and meets the other statutory requirements, then the district court must issue an order declaring the individual eligible for compensation. *Id.*; Minn. Stat. § 590.11, subd. 7. Whether a petitioner is "exonerated" under the statute presents a legal question, which we review de novo. *Buhl*, 922 N.W.2d at 438.

Minn. Stat. § 590.11, subd. 1(b), provides that "Exonerated" means

> (1) a court:
>
> (i) vacated, reversed, or set aside a judgment of conviction on grounds consistent with innocence and there are no remaining felony charges in effect against the petitioner from the same behavioral incident, or if there are remaining

> felony charges against the petitioner from the same behavioral incident, the prosecutor dismisses those remaining felony charges; or
>
> (ii) ordered a new trial on grounds consistent with innocence and the prosecutor dismissed all felony charges against the petitioner arising from the same behavioral incident or the petitioner was found not guilty of all felony charges arising from the same behavioral incident at the new trial.

The statute also provides that "On grounds consistent with innocence" means either:

> (1) exonerated, through a pardon or sentence commutation, based on factual innocence; or
> (2) exonerated because the judgment of conviction was vacated or reversed, or a new trial was ordered, and there is any evidence of factual innocence whether it was available at the time of investigation or trial or is newly discovered evidence.

Id., subd. 1(c).

The issue here is whether appellant has established that his conviction was vacated "on grounds consistent with innocence," which requires a showing of "any evidence of factual innocence" under Minn. Stat. § 590.11, subd. 1(c)(2). In 2010, appellant was convicted for being a felon in possession of a firearm in violation of Minn. Stat. § 609.165, subd. 1b(a), after he admitted that he possessed a BB gun. His guilty plea was based on established caselaw at the time. *See State v. Seifert*, 256 N.W.2d 87, 87-88 (Minn. 1977) (stating that term "firearm" as used in Minn. Stat. § 609.02 "should be defined broadly to include guns using newer types of projectile propellants and should not be restricted in meaning to guns using gunpowder"); *State v. Fleming*, 724 N.W. 537, 538 (Minn. App. 2006) (holding that a BB gun is a firearm under Minn. Stat. § 624.713, subd. 1(b), which prohibits possession of a firearm by a person convicted of a crime of violence); *State v.*

Newman, 538 N.W.2d 476, 477 (Minn. App. 1995) (holding that a BB gun is a firearm within meaning of drive-by-shooting statute), *review denied* (Minn. Nov. 30, 1995).[2]

But in 2016, the supreme court in *Haywood* held that "an air-powered BB gun is not a 'firearm' under the plain meaning of Minn. Stat. § 609.165." 886 N.W.2d at 487. In reaching this conclusion, the supreme court observed that neither section 609.165 nor Minn. Stat. § 609.02, the definitions section for Minnesota Statute Chapter 609, define "firearm." *Id*. at 488. The supreme court noted that it had previously "construed the word 'firearm' in the context of the definition of a 'dangerous weapon' under Minn. Stat. § 609.02." *Id*. (citing *Seifert*, 256 N.W.2d 87-88 (holding that a .177-caliber CO_2 BB pistol was a "firearm" under Minn. Stat. § 609.02, subd. 6 (1974))). It also acknowledged that this court twice before had relied on *Seifert* to interpret the meaning of "firearm" to conclude that a BB gun is a firearm. *See Newman*, 538 N.W.2d at 477-478 (interpreting Minn. Stat. § 609.66, subd. 1(e)(a) (Supp. 1993), felony drive-by shooting statute); *Fleming*, 724 N.W.2d at 538 (interpreting Minn. Stat. § 624.713, subd. 1(b) (2004), which prohibits a person convicted of a crime of violence from possessing a pistol or other firearm). *Haywood*, 886 N.W.2d at 489. But in concluding that a BB gun is not a firearm,

[2] This court previously recognized that the legislature had declined to "comprehensively define the term 'firearm' under chapter 609" and "encouraged" the legislature to define the term. *State v. Haywood*, 869 N.W.2d 902, 907-08 (Minn. App. 2015), *rev'd,* 886 N.W.2d 485 (Minn. 2016). But the legislature did not do so and instead left it to the courts to define the term. *See Haywood*, 886 N.W.2d at 491 (noting that despite its conclusion that a BB gun is not a firearm, "the question of how to define a 'firearm' is best left to the Legislature" and that "[i]t is not for the courts to make, amend, or change the statutory law, but only to apply it" (citations omitted)).

the supreme court noted that this court relied on dictum in *Seifert* to construe the term "firearm" in *Newman* and *Fleming*. *Id*. at 491. *Seifert*, therefore, was not binding precedent on whether a BB gun is a firearm. Finally, it observed that no appellate court in Minnesota "has defined the term 'firearm' in section 609.165." *Haywood,* 886 N.W.2d at 487. And the supreme court had never addressed whether a BB gun is a firearm for purposes of this statute.

In its analysis, the supreme court looked to the dictionary definition of "firearm" and concluded that "dictionaries consistently define 'firearm' as including only weapons that use explosive force." *Id.* at 490. The supreme court determined that, because Haywood possessed an air-powered BB gun, which used compressed air rather than gunpowder or any other explosive force as propellant, Haywood's possession of a BB gun did not violate section 609.165. *Id.* The supreme court reversed the decision of the court of appeals and vacated Haywood's conviction. *Id.* at 491. Because the supreme court has now clarified that a BB gun does not qualify as a firearm under Minn. Stat. § 609.165, the district court granted the state's motion and vacated appellant's conviction.

The issue in this appeal is whether appellant qualifies as exonerated under Minn. Stat. § 590.11, subd. 1(c)(2), because of the supreme court's *Haywood* decision. In another case interpreting the exoneration statute, this court recently reversed and remanded to allow the district court to consider appellant's petition for exoneration. *Livingston v. State*, No. A19-1243, 2020 WL 2117602, at *1 (Minn. App. May 4, 2020). But unpublished opinions

of the court of appeals are not precedential. *See* Minn. Stat. § 480A.08, subd. 3(c) (2018).[3] And we conclude that *Livingston* is readily distinguishable from this case.

Livingston pleaded guilty to driving while impaired (DWI) by a hazardous substance after he drove under the influence of Difluoroethane. *Livingston*, 2020 WL 2117602, at *1. Later the supreme court determined that Difluoroethane was not a "hazardous substance" under the impaired-driving statute in effect when Livingston was charged. *State v. Carson*, 902 N.W.2d 441, 446 (Minn. 2017). The statute in effect prohibited a person from driving, operating, or being in physical control of a vehicle while "the person is knowingly under the influence of a *hazardous substance*." *Id.* at 444 (citing Minn. Stat. § 169A.20, subd. 1(3) (2014)). Under the statute, "hazardous substance" was defined as "any chemical or chemical compound that is *listed* as a hazardous substance in rules adopted under chapter 182 (occupational safety and health)." *Id*. (citing Minn. Stat. § 169A.03, subd. 9). The commissioner of labor and industry promulgated the rules in Minnesota Rules Chapter 5206 in accordance with Minnesota Statutes Chapter 182 (2016). *Id*.; *see* Minn. Stat. § 182.655. The rules defined "hazardous substance" and included a list of hazardous substances in alphabetical order. *Carson*, 902 N.W.2d at 444; s*ee* Minn. R. 5206.0400, subp. 5. The rule acknowledged that the list "does not include all hazardous substances and will not always be current." *Carson*, 902 N.W.2d at 444 (citation omitted). The supreme court determined that Difluoroethane was not a hazardous substance because

[3] Both Minn. Stat. § 480A.08, subd. 2(c) (2018), and the Minnesota Rules of Civil Appellate Procedure have been amended, but these changes only apply to appeals filed on or after August 1, 2020. Minn. Laws ch. 82, § 3; *Order Promulgating Amendments to the Rules of Civil Appellate Procedure*, No. ADM09-8006 (Minn. July 22, 2020).

it was not listed as a hazardous substance in Minnesota Rules Chapter 5206 (2015). *Id*. at 446. And Carson was not criminally liable under the plain language of the existing DWI statute. *Id.*

In *Livingston*, this court explained that the *Carson* holding made clear that "at the time of Livingston's inhaling Difluoroethane and driving under its influence, his conduct was not illegal under the statute." 2020 WL 2117602, at *3 (citing *Carson*, 902 N.W.2d at 442). Because the supreme court held that Difluoroethane is not a hazardous substance, given that "the legislature never designated it as such either directly within the statute or indirectly by rule," the supreme court did not alter any prior holding in the *Carson* opinion. *Id.* Consequently, the "effect of the supreme court's statutory construction is that any other interpretation was never the law. Difluoroethane had never been a hazardous substance under the law when Livingston inhaled it and drove." *Id.* (citation omitted). We concluded that when the "charged statute does not actually criminalize the conduct" it presents a circumstance that is "consistent with innocence." *Id.*

By contrast here, appellant's conduct, his possession of a BB gun, was criminal under established court precedent when he committed the act. The supreme court's clarification of the meaning of the term "firearm" under the felon-in-possession statute in its *Haywood* decision does not equate to exoneration "on grounds consistent with innocence" for purposes of the exoneration-compensation statute because appellant committed a crime under existing law at the time. Thus, unlike Livingston's conduct, which was never criminal, appellant's conduct, his possession of a BB gun, was criminal when he committed the act.

Thus, this case is distinguishable from those cases in which an appellate court vacates a conviction because it determines that (1) an offense was never a crime, or (2) a criminal statute is unconstitutional. *See State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998) (holding Minn. Stat. § 609.749, subd. 2(7), unconstitutional and dismissing charges against Machholz); *see also State v. Mullen*, 577 N.W.2d 505, 512 (Minn. 1998) ("The general rule when the court overrules a rule of law is that the new rule is applied to the case before the court and to claims arising after the date of the overruling decision, but when the court finds a statute unconstitutional, the statute is not a law; it is just as inoperative as had it never been enacted." (quotation omitted)).

Additionally, while the district court vacated appellant's conviction for unlawful possession of a firearm based on the supreme court's clarification of the law in *Haywood*, we are not persuaded that such a clarification qualifies as "any evidence of factual innocence" under our interpretation of that phrase. We recently interpreted the phrase "any evidence of factual innocence" to mean "any evidence that shows some fact establishing the absence of the petitioner's guilt." *Freeman v. State*, 944 N.W.2d 488, 491 (Minn. App. 2020). In that case, we rejected Freeman's argument that impeachment evidence about the victim's prior acts of dishonesty constitutes evidence of factual innocence; under the specific facts of that case "it [did] not show [Freeman's] absence from guilt for the charged offenses." *Id.* at 493. We explained that if a witness came forward and said that a victim had told the witness that the claim against the defendant was fabricated, this could constitute "any evidence of factual innocence." *Id*. Likewise, we stated that "[o]ther evidence of factual innocence would include DNA evidence establishing someone else

committed the charged offense or an alibi witness who testified that a petitioner did not commit the charged offense." *Id.* at 493 n.5.

Here, although the district court vacated appellant's conviction, it did not do so because appellant offered evidence that a witness had fabricated a claim against him. And appellant presented no DNA or alibi evidence to establish his innocence or any other evidence to show his "lack of guilt for the charged offense[]." Rather, the district court vacated appellant's conviction because of a clarification of the term "firearm" in Minnesota law. Appellant was guilty of the crime charged when he committed it. The only change is that the supreme court has now clarified that a BB gun is not a firearm under the felon-in-possession statute. Nor has appellant provided any evidence demonstrating that the facts underlying the crime he committed have changed so as to make him factually innocent of that crime. The district court did not err when it denied appellant's petition for an order declaring him eligible for compensation based on exoneration.

D E C I S I O N

A defendant is not exonerated within the meaning of Minn. Stat. § 590.11, subd. 1(c)(2), when the defendant's conviction has been vacated based on a clarification of the law so that the admitted-to conduct is no longer criminal but the conduct did violate the criminal law under existing precedent when the defendant pleaded guilty. Thus, appellant does not qualify as "exonerated" under the MIERA and the district court did not err when it denied appellant's petition for an order declaring him eligible for exoneration compensation.

Affirmed.