STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0391

State of Minnesota,
Respondent,

vs.

C. L. S.,
Appellant.

Filed December 19, 2022
Reversed and remanded
Bryan, Judge

Wabasha County District Court
File No. 79-CR-16-880

Keith Ellison, Attorney General, Benjamin C. Johnson, Assistant Attorney General, St. Paul, Minnesota (for respondents Minnesota Department of Human Services and Minnesota Department of Health)

Karrie Kelly, Wabasha County Attorney, Jacob J. Barnes, Sr. Assistant County Attorney, Wabasha, Minnesota (for respondent county)

Thomas R. Braun, Restovich Braun & Associates, Rochester, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Bjorkman, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this appeal from an order denying appellant's petition for statutory expungement of a criminal record, appellant makes the following two arguments: (1) the district court

erred by requiring appellant to bear the burden of proof; and (2) the district court erred in its analysis of whether the public's interest in keeping the criminal record unsealed outweighed the disadvantages to appellant. We conclude that the district court erred in its application of the law, and we reverse and remand for consideration of appellant's petition under the proper burden of proof and based on the applicable statutory factors.

FACTS

On September 30, 2016, respondent State of Minnesota charged appellant C.L.S. with disseminating child pornography. In 2017, C.L.S. pleaded guilty to the charge. The district court stayed adjudication and placed C.L.S. on probation for seven years. In August 2020, the district court discharged C.L.S. from probation following a recommendation from the Minnesota Department of Corrections. A few months later, C.L.S. submitted his first petition for expungement of his criminal record, seeking to regain employment as a physician assistant among other reasons. Although he remained licensed as a physician assistant in the State of Minnesota, C.L.S. could not find employment in this field as a result of his criminal record. The district court denied C.L.S.'s initial expungement petition, concluding that C.L.S. was not yet eligible for expungement because one year had not passed since the district court discharged C.L.S. from probation.

In October 2021, C.L.S. submitted a second petition for expungement. C.L.S. stated that he was seeking an expungement of his record "for several reasons, which include employment, medical licensure, and volunteer opportunities." C.L.S. again noted that although he was employed as an electrician, he wished to regain employment as a physician assistant but could not do so because of his record. The Minnesota Bureau of Criminal

Apprehension (BCA) submitted a letter to the district court noting that it would not oppose C.L.S.'s petition. However, the state opposed the petition, stating that its position "remains the same" as articulated in response to the first expungement petition.

On January 21, 2022, the district court denied the second petition, concluding that C.L.S. failed to show that the statutory factors favored expungement.[1] The district court determined that the following six factors favored denying the petition: the nature of the underlying offense; the risk posed to society; the length of time since the underlying offense occurred; the stated reasons supporting the petition; the preference of the victim of the underlying offense; and the final, catch-all factor listed in the statute. In considering the nature of the offense, the district court emphasized the age of the victim in this case, the harm experienced by the victim, and the public policy favoring registration of sex offenders:

> The Court views this as a serious criminal offense. The maximum sentence for dissemination of pornographic work involving minors is seven years and/or a $10,000.00 fine. It is also not a victimless crime. The child victim in this case was just 9-12 years old. The Minnesota Legislature has taken steps, such as the creation of the Minnesota Predatory Offender Registration, to ensure that child predators cannot veil

[1] The expungement statute enumerates eleven specific factors and one general, "catch-all" factor for district courts to consider when balancing the interests of the public against the interests of the petitioner: (1) "the nature and severity of the underlying crime"; (2) any risk to society; (3) "the length of time since the crime occurred"; (4) "steps taken by the petitioner toward rehabilitation following the crime"; (5) aggravating or mitigating factors relating to the crime; (6) the "reasons for the expungement, including the petitioner's attempts to obtain employment"; (7) "the petitioner's criminal record"; (8) "the petitioner's record of employment and community involvement"; (9) law enforcement, prosecutorial, and corrections recommendations; (10) the victim's recommendations; (11) the petitioner's efforts to pay, if any, restitution; and (12) "other factors deemed relevant by the court." Minn. Stat. § 609A.03, subd. 5(c) (2020).

> themselves from the public eye. If the Court were to allow [C.L.S.'s] records to be sealed, he could finish his probation and be absolved of having ever committed this crime. The damage to the Victim, however, can never be undone. This factor weighs against [C.L.S.].

In analyzing the risk to society, the district court considered the harm that a new, similar offense would cause, despite a "very low risk" of this occurring:

> Even a very low risk, however, could carry serious consequences in a case involving minors. This is because the gravity of the harm that would be inflicted on another child victim, if [C.L.S.] were to re-offend, is very high. For this reason, the Court views this factor as weighing against [C.L.S.].

In evaluating the length of time that has passed from the underlying offense until the filing of the expungement petition, the district court focused on the date that C.L.S. was discharged from probation:

> The crime occurred on July 4, 2016. [C.L.S.] was discharged from probation on August 20, 2020. He promptly filed a petition for expungement. [C.L.S.] has been law abiding since the date of his sentencing. [C.L.S.], however, has only been discharged from probation for about a year-and-a-half. This is a fairly insubstantial amount of time, and indeed, it is just past the statutory one-year requirement to apply for expungement under Minn. Stat. 609A. This factor weighs against [C.L.S.].

The district court also determined that C.L.S.'s stated reason for filing the petition weighed in favor of denying the petition because he has obtained employment as an electrician, even if his criminal record prevents him from returning to work as a physician assistant:

> [C.L.S.] relies heavily on this factor in arguing that his expungement should be granted. [C.L.S.], however, has

> successfully completed electrician school and has worked as an electrician for the past two years. There is no indication that [C.L.S.] is unable to provide for his family's basic needs in his new profession. This factor weighs against [C.L.S.].

In analyzing the final factor, the district court expressed concern that as a physician assistant, C.L.S. could pose a risk of harm to minor patients:

> The Petition suggests that if the expungement were granted, [C.L.S.] may be able to practice as a physician[] assistant. [C.L.S.'s] former court-ordered therapist, Dr. James Alsdurf, indicated that Defendant may be able to work in a supervised setting. He did not, however, say that Defendant could work in a fully unsupervised role as a physician[] assistant. The Court is concerned that [C.L.S.] may be unsupervised if he were to practice, and is concerned about possible interaction with minor patients. This factor weighs against [C.L.S.].

The district court determined that the following four factors were neutral: the steps C.L.S. took toward rehabilitation; aggravating and mitigating factors relating to the underlying offense; the recommendations of law enforcement agencies, prosecutors, and corrections officers; and C.L.S.'s efforts to pay restitution. More specifically, in its reasoning concerning rehabilitative steps, the district court acknowledged that C.L.S. completed court-ordered therapy, but the district court determined that C.L.S. presented no additional evidence of any rehabilitative action.

Finally, the district court determined that two factors favored granting the petition: the absence of a lengthy criminal record and C.L.S.'s history of employment and community involvement. C.L.S. appeals.

DECISION

C.L.S. argues that the district erred as a matter of law when it misapplied the statutory burden of proof and when it analyzed the first three of the statutory expungement factors. We reverse and remand because it is unclear whether the district court required the state to bear the burden of proof and because the district court misstated two of the applicable statutory factors.

I. Burden of Proof

The applicable burden of proof depends on which of two statutory provisions apply. When a petitioner has successfully completed a stay of adjudication and "has not been charged with a new crime for at least one year since completion of the . . . stay of adjudication," Minn. Stat. § 609A.02, subd. 3(a)(2) (2020), the petitioner is presumptively entitled to expungement and the burden of proof to rebut this presumption rests with the state. The district court "shall grant the petition to seal the record unless the agency . . . 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) (2020); *see also State v. Ambaye*, 616 N.W.2d 256, 257 (Minn. 2000) (concluding that under subdivision 5(b), a petitioner "is presumptively entitled to expungement"). An individual who cannot satisfy the requirements of subdivision 3, however, may still petition for expungement, but no presumption in favor of the petition applies, and the burden of proof rests with the petitioner. Minn. Stat. § 609A.03, subd. 5(a) (2020); *see also State v. R.H.B.*, 821 N.W.2d 817, 821 at n.2 (Minn. 2012) (observing that

the petitioner bears the burden of proof under subdivision 5(a)).[2] Although we generally review expungement decisions for an abuse of discretion, *see id.* at 822 (concluding that the district court exercises its discretion when it weighs the competing interests set forth in the expungement statute), we review issues of law de novo, *State v. C.W.N.*, 906 N.W.2d 549, 552 (Minn. App. 2018). The question of who bears the burden of proof is a question of law that we review de novo. *E.g.*, *C.O. v. Doe*, 757 N.W.2d 343, 352 (Minn. 2008).

In this case, it is not entirely clear whether the district court applied the burden of proof in subdivision 5(a) or the burden of proof in subdivision 5(b). On the one hand, before analyzing the statutory factors for expungement in this case, the district court cited subdivision 5(a), and portions of the district court's reasoning required C.L.S. to prove facts relevant to the expungement factors. At the conclusion of its analysis, however, the district court also cited subdivision 5(b). Given these inconsistent statements, we are unable to determine which burden of proof provision the district court ultimately applied. We reverse and remand for the district court to analyze the expungement factors under the burden of proof set forth in subdivision 5(b).

II. Statutory Factors for Expungement

As noted above, the expungement statute requires the district court to balance public safety and the interests of the public against the interests of the petitioner, while considering twelve factors. Minn. Stat. § 609A.03, subd. 5(b)-(c). C.L.S. argues that the district court

[2] The standard of proof remains the same: clear and convincing evidence. *Compare* Minn. Stat. § 609A.03, subd. 5(a), *with* subd. 5(b). Clear and convincing evidence is shown when "the truth of the facts asserted is highly probable." *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978) (quotation omitted).

erred as a legal matter in the following three ways: (1) the district court effectively converted the first factor into a per se rule, mandating automatic denial of petitions for expungement of offenses involving dissemination of child pornography; (2) the district court misstated the second factor by considering the harm that would result from a new, similar offense; and (3) the district court misstated the third factor by considering the time that elapsed from the date C.L.S. was discharged from probation until the filing of the second petition. We review these legal challenges de novo. *C.W.N.*, 906 N.W.2d at 552.[3]

We are not convinced that the district erred as a matter of law in its consideration of the first factor for three reasons. First, the district court made particularized findings, specific to the facts of the underlying offense. Second, contrary to C.L.S.'s characterization, the district court did not go so far as to conclude that this factor categorically favors denial of all similar expungement petitions. Third, we agree with the district court that the available consequences after conviction for an offense can be an indication of the seriousness of that offense. The district court referred to the legislature's decision to require predatory offender registration for persons convicted of possessing child pornography "to ensure that child predators cannot veil themselves from the public eye."

[3] C.L.S. also expresses disagreement with the weight that the district court gave to certain evidence, such as the evidence that C.L.S. took steps toward rehabilitation by completing his court-ordered therapy and evidence that C.L.S. desired to participate in recreational activities with his family, including organized athletics. Given our decision to remand for findings consistent with the applicable burden of proof, however, we need not determine whether the district court acted against logic or otherwise abused its discretion in weighing this evidence or in weighing any of the other contested expungement factors.

Had the district court decided not to impose the stay of adjudication, C.L.S. could have been required to register as a sex offender and would not be eligible to petition for expungement. *See* Minn. Stat. § 609A.02, subd. 4 (2020) (prohibiting expungement of offenses for which registration is required).[4] In staying adjudication, the district court necessarily determined that registration was not required as a consequence of the offense in this case. However, the registration requirement that could have applied makes this offense more serious than other offenses that do not involve the predatory offender registry.

Turning our attention to the second factor, we conclude that the district court erred as a matter of law for two reasons. First, the second factor requires district courts to consider whether the act of granting expungement and sealing the criminal record would harm the public. *R.H.B.*, 821 N.W.2d at 823 (analyzing the second factor and affirming the district court's decision to grant an expungement petition because "the state presented no evidence that sealing R.H.B.'s criminal record would present a unique or particularized harm to the public"). The district court in this case, however, considered the consequences

[4] Although we are not aware of precedential decisions squarely addressing this issue, two nonprecedential decisions suggest that the registration requirement applies to convictions for dissemination of child pornography, at least in some circumstances. *See In re Welfare of J.C.L.*, No. A21-1018, 2022 WL 1210405, at *5 (Minn. App. Apr. 25, 2022), *rev. denied* (Minn. July 19, 2022) (stating that dissemination of child pornography "is an offense enumerated for predatory registration" in Minnesota Statutes section 243.166, subdivision 1b(a)(2)(vii)); *see also Rye v. State*, No. A21-1731, 2022 WL 3581566, at *2 (Minn. App. Aug. 22, 2022) (discussing *J.C.L.* and remanding to the district court with instructions to remove the registration requirement imposed at sentencing because the possession charges that were dismissed did not arise out of the same set of circumstances as the dissemination charges to which appellant pleaded guilty).

of a subsequent offense, weighing "the gravity of the harm that would be inflicted on another child victim." It did not analyze the impact of sealing the criminal record.

Second, this factor requires analysis of actual, not speculative, harm tied to the particular criminal record at issue. *See State v. D.R.F.*, 878 N.W.2d 33, 36 (Minn. App. 2016) (reversing denial of expungement petition where the state's identified harm to the public was speculative rather than actual); *R.H.B.*, 821 N.W.2d at 823 (concluding that the second expungement factor requires consideration of "a unique or particularized harm to the public"). The district court, however, considered generalized harm; it did not consider actual harm tied the criminal record at issue in this case.

Finally, we also conclude that the district court erred as a matter of law regarding the third factor. The statute specifically requires consideration of "the length of time since the crime occurred." Minn. Stat. § 609A.03, subd. 5(c)(3). The district court however considered the length of time that had elapsed since the date that C.L.S. was discharged from probation: "[C.L.S.], however, has only been discharged from probation for about a year-and-a-half. This is a fairly insubstantial amount of time." The offense here occurred in July 2016, but C.L.S. was discharged more than four years later in August 2020, and C.L.S. filed the instant petition in October 2021. The statute requires consideration of the entire period of time from July 2016 through October 2021, not only consideration of the "a year-and-a-half" that elapsed between being discharged from probation and filing the instant petition. For these reasons, we remand for consideration of the petition under the proper burden of proof and based on the applicable statutory factors.

Reversed and remanded.