STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1610

State of Minnesota,
Respondent,

vs.

R. D. S.,
Appellant.

Filed May 3, 2011
Affirmed; motion to enlarge the record denied; motion to strike granted in part, denied in part
Shumaker, Judge

Anoka County District Court
File No. 02-K6-95-002965

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

Tony Palumbo, Anoka County Attorney, Marcy S. Crain, Assistant County Attorney, Anoka, Minnesota (for respondent)

R.D.S., Arden Hills, Minnesota (pro se appellant)

Considered and decided by Schellhas, Presiding Judge; Shumaker, Judge; and Halbrooks, Judge.

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

SHUMAKER, Judge

Appellant challenges the district court's denial of his petition for expungement and its refusal to reverse a previous order that vacated expungement of appellant's record.

Appellant argues that all of the proceedings were resolved in his favor, entitling him to expungement. Because not all of the proceedings were resolved in appellant's favor and because the public's interest in not expunging appellant's record outweighs the disadvantages to him, we affirm.

FACTS

Appellant R.D.S. was charged in Anoka County District Court on March 15, 1995, with three counts of third-degree criminal sexual conduct stemming from his sexual relations with 15-year-old T.L.C., while he was 17 or 18 years old. Shortly thereafter, T.L.C. gave birth to twin girls.

R.D.S. pleaded guilty to an amended charge of fifth-degree criminal sexual conduct under a plea agreement by which the district court would not accept R.D.S.'s guilty plea; the remaining charges would be dismissed; and the amended charge would be continued for dismissal for one year on the conditions that R.D.S.: (1) complete a psychological evaluation and follow any recommendations; (2) comply with paternity blood testing for T.L.C.'s twins, and if test results showed a presumption of paternity, waive a paternity hearing and sign necessary documents declaring paternity. Upon satisfaction of the conditions and dismissal of the case, the county attorney agreed to an expungement of R.D.S.'s record and to waive sex-offender registration and DNA sample requirements.

On November 13, 1995, R.D.S. pleaded guilty under oath to the amended charge, executed a plea petition, and waived his trial rights. He refused to admit to the element of lack of consent, instead entering an *Alford* plea, but he acknowledged that the evidence

was sufficient to convict him and that he was pleading guilty to take advantage of the favorable plea agreement. The court did not accept the plea.

R.D.S.'s paternity blood testing revealed him as the father of T.L.C.'s twins. He executed a recognition of parentage (ROP) on August 21, 1996. Asserting compliance with the plea agreement, R.D.S. requested expungement of his record in September 1996. The district court dismissed R.D.S.'s case and issued an expungement order on October 11, 1996. Unbeknownst to the district court or the prosecutor, R.D.S. had revoked his ROP on September 24, 1996. After learning of this, the state moved on February 28, 1997, to vacate the dismissal and the expungement and to reinstate R.D.S. on probation under the original terms and conditions. On November 5, 1997, the district court vacated the previous order and denied R.D.S.'s motion for dismissal and expungement, finding that before the order was issued, R.D.S. had revoked the ROP, and therefore he failed to meet all conditions of the plea agreement. R.D.S. did not appeal the court's order.

R.D.S. was later charged with third-degree criminal sexual conduct for having sexual relations with another 15-year-old, C.A.H. By this time, R.D.S. was 20 years old. As a result of this relationship, C.A.H. gave birth to a child. R.D.S. is the acknowledged father. R.D.S. pleaded guilty to third-degree criminal sexual conduct and was ultimately given a stay of imposition of sentence and placed on probation for ten years under various conditions.

On October 28, 2004, R.D.S. petitioned the district court for expungement of the records relating to his 1995 criminal sexual conduct offenses involving T.L.C. The district court denied R.D.S.'s petition. He submitted another expungement petition in

August 2005, which the district court also denied. R.D.S. submitted his fourth petition for expungement of his 1995 record on March 5, 2010. The district court denied the petition on July 13, 2010. This appeal followed.

D E C I S I O N

R.D.S. challenges the district court's denial of his petition for expungement, arguing that the 1995 case was resolved in his favor and that he is entitled to expungement. The state asserts the case was not resolved in R.D.S.'s favor and that the district court properly denied his petition for expungement.

A petition seeking expungement to seal specific records may be filed "if all pending actions or proceedings were resolved in favor of the petitioner." Minn. Stat. § 609A.02, subd. 3 (2010). This court reviews de novo the question of law whether pending actions or proceedings were resolved in a petitioner's favor. *State v. Davisson*, 624 N.W.2d 292, 295 (Minn. App. 2001), *review denied* (Minn. May 15, 2001). "The critical distinction in our analysis of whether the resolution was in favor of the petitioner turns on whether there has been an admission or a finding of guilt." *State v. C.P.H.*, 707 N.W.2d 699, 703 (Minn. App. 2006). "Once this requirement is met, the petitioner has a presumption of expungement that can be overcome only by clear and convincing evidence that the public's interest in having the criminal records available outweighs the petitioner's interest in expungement." *State v. Ambaye*, 616 N.W.2d 256, 258 (Minn. 2000) (citing Minn. Stat. § 609A.03, subd. 5(b) (2010)).

Third-degree criminal sexual conduct charges

The two third-degree criminal sexual conduct charges arising from the 1995 case against R.D.S. were dismissed. This court has held that when the defendant did not plead or admit guilt and the charge against him was not prosecuted, innocence was presumed and the lower court's dismissal of the charge amounted to a determination in his favor. *State v. L.K.*, 359 N.W.2d 305, 307-08 (Minn. App. 1984). R.D.S. did not plead or admit guilt to the two charges of criminal sexual conduct in the third degree, nor were the charges against him prosecuted. Accordingly, their dismissal is a determination in R.D.S.'s favor.

Fifth-degree criminal sexual conduct charge

The ultimate disposition of the fifth-degree criminal sexual conduct charge is less clear. Under the plea agreement, R.D.S. pleaded guilty under oath to fifth-degree criminal sexual conduct, executed a plea petition, waived his trial rights, and admitted a factual basis for the plea, but entered an *Alford* plea as to the element of consent. In exchange, the state agreed to dismiss the case as long as conditions of the plea agreement were met, and agreed to an expungement of the matter from R.D.S.'s record. When R.D.S.'s request for expungement was granted on October 11, 1996, the case was dismissed and expunged from his record. But the district court later vacated that order and denied R.D.S.'s motion for dismissal and expungement.

R.D.S. contends that this matter was resolved in his favor. He argues that the proceeding was a continuance for dismissal because there was no admission of guilt accepted by the court and the court made no finding of guilt. In a continuance for

dismissal, the district court does not make a finding of guilt, and the defendant does not admit guilt. *See* Minn. R. Crim. P. 27.05. At the end of the designated continuance period, if the defendant has met the conditions of the plea agreement, the case is dismissed. *Id.,* subd. 7. In *C.P.H.*, we held that a continuance for dismissal was a resolution in favor of the petitioner, and thus, the petitioner was entitled to expungement of charges against him upon successful completion of conditions. 707 N.W.2d at 706. Importantly, the petitioner in *C.P.H.* never pleaded guilty or admitted guilt and was never tried. *Id*. at 701.

The state argues that despite the district court's characterization of the proceeding as a continuance for dismissal in 1995, it was actually a stay of adjudication because R.D.S. entered a guilty plea. In the district court's most recent order, from which R.D.S. now appeals, the court determined that, because R.D.S. pleaded guilty, the proceedings were more akin to a stay of adjudication than a continuance for dismissal.

A stay of adjudication is a procedure whereby the district court does not adjudicate defendant as guilty but imposes conditions of probation, upon a defendant's guilty plea or the fact-finder's determination of guilt. *Id.* at 702. A stay of adjudication is not a resolution in favor of the petitioner, even if the conditions are met and conviction is avoided. *Davisson,* 624 N.W.2d at 295; *City of St. Paul v. Froysland*, 310 Minn. 268, 275-76, 246 N.W.2d 435, 439 (1976) (stating "in favor of" does not encompass situation in which petitioner pleaded guilty and state later dismissed charges).

Therefore, to determine whether a case was resolved in favor of the petitioner under Minn. Stat. § 609A.02, subd. 3, the existence of an admission or finding of guilt is the deciding factor. *C.P.H.*, 707 N.W.2d at 704.

R.D.S. argues there was no admission or finding of guilt because the district court did not accept his plea. But we have held that the district court's deferred acceptance of a valid guilty plea is not tantamount to a defendant not admitting guilt or pleading guilty to a criminal charge only to take advantage of the expungement statute. *State v. J.Y.M.*, 711 N.W.2d 139, 142 (Minn. App. 2006). In *J.Y.M.*, under a plea agreement, after the defendant pleaded guilty, the district court did not accept the plea, and after the defendant satisfied all conditions, the state dismissed the charge. *Id*. at 140-41. This court reversed the district court's expungement order, finding the defendant had admitted guilt and therefore the criminal proceedings were not resolved in his favor. *Id*. at 143.

Similarly, in *State v. A.C.H.*, the defendant pleaded guilty to a theft charge and admitted he committed the crime. 710 N.W.2d 587, 588 (Minn. App. 2006). The district court did not accept the plea, and the charge was ultimately dismissed after the defendant successfully completed a diversion program. *Id.* at 589. This court held that the proceeding was not resolved in favor of the defendant because the circumstances substantially resembled those of a stayed sentence, which is not a resolution in the defendant's favor. *Id*. at 589-90. In concluding that the district court's refusal to accept A.C.H.'s guilty plea was insignificant, this court stated:

> [T]he absence of a court finding or adjudication does nothing to diminish the extent to which respondent made himself subject to the sentencing powers of the court. In the later

> event of any violation of conditions of the stayed acceptance of the plea, the court remained empowered, without any further steps, to adjudicate and sentence in the case. Because these circumstances substantially resemble those when merely the sentence is stayed, we conclude that proceedings were not resolved in respondent's favor.

Id. at 590.

Consequently, the district court's refusal to accept R.D.S.'s guilty plea does not preclude a finding that the matter was not resolved in his favor, even if the case was ultimately dismissed.

R.D.S. also argues that the proceedings were consistently referred to as a continuance for dismissal and therefore they should be treated as such. However, as the district court notes, a procedure's form and substance actually determine entitlement to statutory expungement, not the labels the parties use. *See C.P.H.*, 707 N.W.2d at 702-04.

Because R.D.S. entered a plea of guilty to fifth-degree criminal sexual conduct, even though the court did not accept the plea, the case was not resolved in R.D.S.'s favor. Thus, R.D.S. is not entitled to statutory expungement of the offense from his record.

Interests of public and public safety

Although two of the charges against R.D.S. were resolved in his favor, his expungement petition may still be denied if there is clear and convincing evidence that the public's interest in not expunging his record outweighs the disadvantages to him. *See* Minn. Stat. § 609A.03, subd. 5(b) (providing that criminal records will be sealed unless the state "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").

The supreme court has stated that the benefits of expungement to the petitioner must be weighed against the seriousness of the offense. *Ambaye*, 616 N.W.2d at 258.

In his brief to this court, R.D.S. fails to mention any disadvantages to him of not sealing his record. He argued to the district court that the mere passage of time entitled him to expungement and the public would not be harmed by concealment of his records. The district court disagreed and found "[e]xpungement would clearly disadvantage the public" and that the "passage of time is of little import in sex offender cases, especially where the offender has incurred a subsequent similar conviction." The passage-of-time argument is particularly weak when, during that time, R.D.S. was convicted of third-degree criminal sexual conduct for behavior and circumstances virtually identical to the instant case. R.D.S. has also been convicted of domestic assault since the 1995 case.

"Appellate courts review a district court order granting or denying the expungement of criminal records for an abuse of discretion." *State v. K.M.M.*, 721 N.W.2d 330, 332-33 (Minn. App. 2006). Considering the nature of the charges against R.D.S., his failure to satisfy the conditions of his plea agreement, and his subsequent convictions—one of which is of third-degree criminal sexual conduct—there is clear and convincing evidence that any disadvantages to R.D.S.—which he has failed to articulate—do not outweigh the interests of the public and public safety. The district court did not abuse its discretion in denying R.D.S.'s petition for expungement.

Order vacating expungement

R.D.S. also challenges the district court's refusal to reverse the November 5, 1997 order vacating the expungement. In its most recent order, the district court stated that

because R.D.S. did not appeal the 1997 order, it would "not revisit the correctness of that decision."

This issue is no longer appealable. An appeal of an expungement order must be taken within 60 days of service of notice of filing the order. Minn. Stat. § 609A.03, subd. 9 (2010). Notice of filing the order was issued November 6, 1997. R.D.S. first challenged the order at a hearing before the district court on May 19, 2010 – more than 12 years after the time for appeal had elapsed. An appealable order is final upon expiration of the deadline for appeal, even if wrong. *Dieseth v. Calder Mfg. Co.*, 275 Minn. 365, 370, 147 N.W.2d 100, 103 (1966). R.D.S. failed to timely appeal the November 5, 1997 order and therefore the district court properly declined review.

Motion to enlarge the record, motion to strike

The state brought a motion to supplement the record on appeal to include evidence of R.D.S.'s 1997 conviction for criminal sexual conduct in the third degree. We deferred the motion but granted the state leave to append copies of the complaint and sentencing transcript from the 1997 file. R.D.S. filed a reply brief that included an argument opposing the state's motion to supplement the record. Additionally, R.D.S. moved to strike portions of the state's brief, namely, the state's supplementation of the record on appeal and any references in the state's brief to R.D.S.'s 1997 conviction for third-degree criminal sexual conduct or his domestic-assault conviction.

"The papers filed in the [district] court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01. The general rule is that an appellate court may not base its decision on

matters outside the record on appeal and may not consider matters not produced and received in evidence below. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). "Appellate courts may not consider matters outside the record on appeal and will strike references to such matters from the parties' briefs." *Stageberg v. Stageberg*, 695 N.W.2d 609, 613 (Minn. App. 2005), *review denied* (Minn. July 19, 2005).

Because the materials appended to the state's brief were not produced or received in evidence below, they are outside the record on appeal and were not considered by this court. The state's motion to enlarge the record on appeal is denied, and the portion of R.D.S.'s motion to strike that challenges the state's supplementation of the record is granted.

We decline, however, to strike references in the state's brief to R.D.S.'s 1997 conviction or to his domestic-assault conviction. R.D.S. is required to include in his petition for expungement his record of criminal convictions and his record of criminal charges, regardless of whether the offenses took place before or after the arrest or conviction for which expungement is sought. *See* Minn. Stat. § 609A.03, subd. 2(7), (8) (2010). In compliance with the statute, R.D.S. did in fact list his convictions for third-degree criminal sexual conduct and for domestic assault in each of his petitions for expungement, all of which are properly a part of the record. Further, various other documents in the record refer to the convictions. R.D.S. has not objected to those references.

R.D.S.'s argument that these offenses are not relevant to this appeal is unpersuasive. Requests for expungement may be overcome by clear and convincing

evidence that the public's interest in not expunging a record outweighs the disadvantages to the person seeking expungement. *See* Minn. Stat. § 609A.03, subd. 5(b). Because of the nature of R.D.S.'s offenses, his subsequent convictions are relevant in determining the disadvantages to R.D.S. and the interests of the public and public safety.

References to R.D.S.'s subsequent convictions are properly a part of the record and will not be stricken from the state's brief. As a result, R.D.S.'s motion is granted in part and denied in part.

Affirmed; motion to enlarge the record denied; motion to strike granted in part, denied in part.