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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2289**

Jason Brian Orsburne, petitioner,
Appellant,

vs.

Brent C. Lindgren, Mille Lacs County Sheriff,
Respondent.

**Filed July 30, 2012
Affirmed
Larkin, Judge**

Mille Lacs County District Court
File No. 48-CV-10-2259

Ethan J. Allen, Milaca, Minnesota (for appellant)

Janice Jude, Mille Lacs County Attorney, Milaca, Minnesota; and

Thomas Lopez, Rinke Noonan, St. Cloud, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Johnson, Chief Judge; and Connolly, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges the district court's determination that he is not eligible for a permit to carry a handgun under Minn. Stat. § 624.714 (2010). He argues that the district

court erred in basing its determination on evidence that was not offered and received at the original hearing on his permit application. Because the district court was authorized to reopen the record and receive additional evidence, we affirm.

FACTS

On July 12, 2010, appellant Jason Brian Orsburne applied for a permit to carry a handgun. Under Minnesota law,

a sheriff must issue a permit to an applicant if the person: (1) has training in the safe use of a pistol; (2) is at least 21 years old and a citizen or a permanent resident of the United States; (3) completes an application for a permit; [and] (4) is not prohibited from possessing a firearm [under certain enumerated sections.]

Minn. Stat. § 624.714, subd. 2(b). Respondent, Brent C. Lindgren, the Mille Lacs County Sheriff, denied Orsburne's application on two grounds: (1) a substantial likelihood of danger to Orsburne or the public; and (2) a federal bar prohibiting Orsburne from possessing a firearm. The relevant federal law provides that "[i]t shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm. 18 U.S.C. § 922(g)(9) (2006). The sheriff denied Orsburne's application because Orsburne has a domestic-assault conviction, which qualifies as a crime of domestic violence. *See* 18 U.S.C. § 921(a)(33)(A) (2006) ("the term 'misdemeanor crime of domestic violence' means an offense that (i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the

victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim”).

Orsburne petitioned for reconsideration in the district court. *See* Minn. Stat. § 624.714, subd. 12(a) (“Any person aggrieved by denial or revocation of a permit to carry may appeal by petition to the district court having jurisdiction over the county or municipality where the application was submitted.”). The district court held a hearing and concluded that the sheriff failed to meet his burden to establish that Orsburne is a danger to himself or to the public or that he is banned from possessing a firearm under federal law. *See id.*, subd. 12(b) (“The court must issue its writ of mandamus directing that the permit be issued and order other appropriate relief unless the sheriff establishes by clear and convincing evidence” that the applicant is not eligible to possess a firearm). The district court therefore issued a writ of mandamus ordering the sheriff to issue Orsburne a firearm permit.

Instead of issuing Orsburne a firearm permit, the sheriff moved to alter or amend the district court’s findings under Minn. R. Civ. P. 52.02, or “to open the judgment, take additional testimony, make amended findings of fact . . . and conclusions of law or make new findings and conclusions and direct entry of a new judgment” under Minn. R. Civ. P. 59.01. The district court held a hearing on the sheriff’s motion and informed the parties that it would “keep the record open for two weeks” to allow for the submission of additional evidence to establish that Orsburne has a prior domestic-assault conviction. The sheriff submitted multiple documents to establish that Orsburne has a prior

conviction of domestic assault, including the underlying criminal complaint and guilty-plea petition.

After considering the additional evidence and the parties' written arguments regarding the additional evidence, the district court once again concluded that the sheriff "failed to show by clear and convincing evidence that [Orsburne] should be denied a firearm permit because he would be a danger to himself or others." But the district court also concluded that "the submissions made by [the sheriff] in conjunction with the Motion to Amend contain evidence that demonstrate the requisite federal bar applies." The district court reasoned that the April 13, 1995 complaint underlying the assault for which Orsburne was convicted "contains the requisite domestic component, in that the alleged assault was committed against [A.W.], [Orsburne's] then domestic partner, with whom he had children in common." The district court also reasoned that the associated July 26, 1995 plea petition shows that Orsburne was represented by counsel and knowingly and intelligently waived his right to trial. The district court therefore vacated its original order and writ of mandamus, concluding that the sheriff showed "by clear and convincing evidence that [Orsburne] is disqualified from possessing a firearm." This appeal follows.

DECISION

I.

We first address the sheriff's contention that "[t]he Federal bar to the possession of a firearm by [a]ppellant renders this entire proceeding, including the present appeal, moot." *See Farm Bureau Mut. Ins. Co. v. Schwan*, 687 N.W.2d 388, 391 (Minn. App.

2004) (stating that appellate courts must consider mootness because it “is a constitutional prerequisite to the exercise of jurisdiction.” (quotation omitted)). The doctrine of mootness requires appellate courts to “decide only actual controversies and avoid advisory opinions.” *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). If a court cannot grant effective relief, the matter is generally dismissed as moot. *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005).

The sheriff insists that “[u]pon the demonstration of the disqualifying conviction of [d]omestic [a]ssault, the [c]ourt must dismiss the present action. Dismissal must occur because, regardless [of] the conclusion reached in this matter, the Federal prohibition to [a]ppellant being issued a permit remains and the relief sought by [a]ppellant may not be granted.” The sheriff’s argument is unpersuasive because it fails to recognize that the sheriff has the burden to prove that Orsburne is prohibited from possessing a firearm before the sheriff may deny Orsburne a permit. If this court were to conclude that the district court erred in amending its order, this court would reverse the district court’s order—including its amended finding that Orsburne is prohibited from possessing a firearm—in which case, the sheriff’s burden would remain unmet. We therefore conclude that this appeal is not moot.

II.

Orsburne’s main argument on appeal is that “the district court erred in amending its findings with evidence not offered or received at the [original] hearing.” We review a district court’s decision regarding amended findings for an abuse of discretion. *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006);

see Lewis v. Lewis, 572 N.W.2d 313, 315 (Minn. App. 1997) (noting that the purpose of a motion to amend findings is to permit the district court to review its own exercise of discretion), *review denied* (Minn. Feb. 19, 1998).

Orsburne contends that the district court erred in accepting evidence that was not offered or received at the original hearing to amend findings under Minn. R. Civ. P. 52.02. As support, Orsburne argues that the sheriff “made a single motion, which was to ‘alter or amend,’ and cited only Rule 52.02 of the Minnesota Rules of Civil Procedure” and that “the submission of further exhibits was never proper.” Orsburne further argues that the sheriff “did not move for a new trial” and that “even if there had been a motion for a new trial citing ‘newly discovered’ evidence, it would have failed,” because the district court concluded that “reasonable due diligence by the [sheriff’s] counsel would have resulted in production of these records in time for submission at the initial hearing.” *See* Minn. R. Civ. P. 59.01 (stating that a new trial may be granted based on newly discovered material evidence, “which with reasonable diligence could not have been found and produced at trial”).

Orsburne’s contention fails for two reasons. First, it is not supported by the record. Although the introductory paragraph of the sheriff’s motion to alter or amend the judgment cites Minn. R. Civ. P. 52.02, the final paragraph cites Minn. R. Civ. P. 59.01 and states, “In the alternative, and because the matter was previously tried without a jury, [the sheriff] moves the court to open the judgment, take additional testimony, make amended findings of fact . . . and conclusions of law or make new findings and

conclusions and direct entry of a new judgment.” Thus, the sheriff’s motion to amend was based on both rules 52.02 and 59.01.

Moreover, Orsburne does not appreciate that the Minnesota Rules of Civil Procedure and caselaw recognize three distinct forms of relief that are potentially applicable here. First, a party may move for amended findings and judgment solely under rule 52.02, in which case, the district court “must apply the evidence as submitted during the trial of the case. It may neither go outside the record, nor consider new evidence.” *Rathbun v. W.T. Grant Co.*, 300 Minn. 223, 238, 219 N.W.2d 641, 651 (1974). The district court recognized this limitation in its order.

Second, a party may move for a new trial under Minn. R. Civ. P. 59.01. If a new trial is granted, the former trial is completely set aside, along with all of its evidence and proceedings, and the parties are in exactly the same position as if there had been no trial at all. *Patton v. Minneapolis St. Ry. Co.*, 245 Minn. 396, 398, 71 N.W.2d 861, 862 (1955). A district court may not grant a new trial under rule 59.01 unless it finds the existence of one of seven grounds. *See Ginsberg v. Williams*, 270 Minn. 474, 483, 135 N.W.2d 213, 220 (1965) (holding that the district court’s “power to grant a new trial is limited to the grounds enumerated in” rule 59.01). The district court referenced rule 59.01(d), stating that “[the sheriff] does not make any explanation as to why these exhibits could not have been discovered with reasonable diligence as of the original January 26, 2011, hearing, pursuant to Minn. R. Civ. P. 59.01(d).”

Third, and applicable here, when a case has been tried without a jury, a party may file a combined motion under rules 52.02 and 59.01 for amended findings of fact,

conclusions of law, and a new judgment. Although a district court may not consider new evidence in ruling on a motion for amended findings that is based solely on rule 52.02, when a party also moves for a new trial in a case that was tried to the court, the court is permitted to consider new evidence under rule 59.01. *Chin v. Zoet*, 418 N.W.2d 191, 195 n.2 (Minn. App. 1988); see *Albertson v. Albertson*, 243 Minn. 212, 217, 67 N.W.2d 463, 467 (1954) (stating that following a court trial, “the court under Rule 59.01 of Rules of Civil Procedure was authorized to take additional testimony and make amended findings of fact and conclusions of law”). The relevant portion of rule 59.01 states: “On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct entry of a new judgment.”¹

Because the sheriff based his motion to amend the findings and judgment on rules 52.02 and 59.01, the district court was authorized to open the judgment and receive

¹ As explained in Minnesota Practice:

Rule 52.02 permits a motion for amended findings to be combined in the alternative with a motion for a new trial. Both motions require the court to perform similar functions in reviewing the propriety of the original decision. The motion for amended findings restricts the court to consider the evidence submitted during the trial. A motion for a new trial permits the court to take additional testimony and then amend the findings of fact and conclusions of law or make new findings and conclusions and direct the entry of the new judgment. . . . A combined motion provides the court with the opportunity to review the former evidence and consider any new evidence.

² David F. Herr & Roger S. Haydock, *Minnesota Practice* § 52.20 (5th ed. 2011).

additional evidence. And because the district court merely reopened the record and did not grant the full remedy of a trial de novo, it was not necessary for the district court to find the existence of one of the enumerated grounds for a new trial under rule 59.01. *See Albertson*, 243 Minn. at 217, 67 N.W.2d at 467 (distinguishing between (1) reopening the record to take additional testimony and make amended findings and conclusions of law, and (2) granting a new trial).

Orsburne's assignment of error regarding the district court's receipt of additional evidence is limited to his contention that the district court's receipt of additional evidence was wholly unauthorized and in violation of caselaw. Although he asserts that he was not given an adequate opportunity to challenge the additional evidence and was therefore prejudiced, he concedes that he did not ask the district court to hold a hearing at which he could challenge the additional evidence. He merely argued, as he does on appeal, that the district court was unauthorized to receive the evidence. And Orsburne flatly rejected this court's suggestion that a remand for an additional hearing would provide appropriate relief if, in fact, he was prejudiced. Orsburne steadfastly maintains that the district court was not authorized to receive additional evidence. Orsburne is incorrect. *See Minn. R. Civ. P. 59.01; Albertson*, 243 Minn. at 217, 67 N.W.2d at 467; *Chin*, 418 N.W.2d at 195 n.2. The district court did not abuse its discretion in reopening the record and receiving additional evidence when considering the sheriff's combined motion under rules 52.02 and 59.01.

III.

Orsburne argues that even if the additional evidence is considered, the sheriff “did not meet his burden of proof” under the statute and that the district court therefore erred by vacating its writ of mandamus. Orsburne asserts, in a footnote to his brief, that federal law does not prohibit him from possessing a firearm because “the federal courts have determined only the bodily harm, and not the ‘fear’ subsections of state assault or domestic assault statutes, raises the prohibition . . . [and] [w]ith no subdivision [for the conviction offense listed] on [Orsburne’s guilty-plea] petition—and indeed with the purported fact basis—it could never be established beyond a reasonable doubt that [Orsburne pleaded guilty] to what has been Minn. Stat. § 609.224, [s]ubd. 2 (bodily harm) since 1984.” Orsburne essentially argues that although he pleaded guilty to domestic assault, his resulting conviction does not make him ineligible to possess a firearm under federal law.

Orsburne’s argument raises an issue of law regarding the types of convictions that result in a firearm-possession prohibition under federal law. Although Orsburne argued in district court that the additional evidence was insufficient to satisfy the state’s burden of proof, he did not argue that his domestic-assault conviction was of the wrong type, i.e. based on fear and not harm. We therefore do not consider Orsburne’s argument that the supplemented record is insufficient to sustain the district court’s amended findings and order. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that generally, an

appellate court will not consider matters not argued to and considered by the district court).

Affirmed.